

***Brown II*: A Case of Missed Opportunity?**

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When contemplating “desegregation’s children,” one automatically thinks of the failed attempt to desegregate U.S. schools and the effects of that failure on the life opportunities of many of this nation’s young. These children are the direct descendants of the historic *Brown v. Board of Education* cases. The *Brown* legacy, however, extends beyond these obvious and acknowledged heirs and beyond the context of education. For what one sees in *Brown I*¹ and *Brown II*,² these great constitutional landmarks, is a trend that is too often reflected in U.S. jurisprudence and U.S. society; that is, an embrace of lofty principles coupled with a simultaneous inability or unwillingness to undertake the messy work of devising and implementing effective solutions. This Essay examines this aspect of the *Brown* opinions, not in an effort to malign their significance or their import, but in an attempt to demonstrate the difficulty of fixing America’s race problem. Because *Brown II* cannot be understood without reference to *Brown I*, and because neither can be fairly examined separately from the historical context in which each was delivered, I begin with an overview of the social context in which the decisions were rendered. I then turn to some of the implications, specifically of *Brown II*, for the legal struggles that followed and that continue today.

I. Situating *Brown*

The nation into which the *Brown* decisions were delivered was dramatically different, in some cases unimaginably different, from the one in which we find ourselves today. By the mid-1950s, the Reconstruction Era—that brief period immediately following slavery when the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments,³ when Congress passed federal statutes

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

3. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV

like the Civil Rights Act of 1866 and 1870,⁴ when two African Americans were elected to the United States Senate, twenty to the House of Representatives and numerous others to state and local public office,⁵ when Black literacy and land ownership rates dramatically increased⁶—that brief period of time when African Americans were able to improve their lots despite severe adversity was nothing but a distant memory. The U.S. Supreme Court was in part responsible for Reconstruction's end. In the latter part of the nineteenth century, the Court systematically undermined the Reconstruction Amendments in a series of cases, the crowning jewel being *Plessy v. Ferguson*.⁷ In that 1896 decision, the Court determined that a Louisiana statute requiring separate, but supposedly equal, railway cars for Whites and Blacks was constitutional.⁸ In *Plessy's* wake, the states passed hundreds of statutes requiring segregation in almost every area of life, including restaurants, theatres, buses, hotels, swimming pools, voting booths, residences, the workplace, marital relations, water fountains, and schools.⁹ Segregation even extended to death, for hearses could not carry both Black and White bodies and cemeteries were required to have separate graveyards—one for Blacks, another for Whites.¹⁰ In 1949, only fifteen states had no segregation laws in effect.¹¹ Jim Crow racism was entrenched.

[hereinafter Reconstruction Amendments].

4. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866); Civil Rights Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

5. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 241-42 (7th ed. 1994).

6. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 46-47 (5th ed. 2004).

7. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483 (1954); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (interpreting the Fourteenth Amendment to guarantee the privileges and immunities of citizenship only as determined by the federal government and not by the states); *Civil Rights Cases*, 109 U.S. 3 (1883) (using the concept of "state action" to invalidate sections of congressional statute that prohibited private individuals from denying Blacks equal access to places of public accommodations and amusement).

8. 163 U.S. at 552, *overruled by* *Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483 (1954).

9. See Susan Falk, *Jim Crow Legislation Overview*, http://www.jimcrowhistory.org/resources/lessonplans/hs_es_jim_crow_laws.htm (last visited Sept. 11, 2005); FRANKLIN & MOSS, *supra* note 5, at 262; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR RACIAL EQUALITY* 86 (Vintage Books 2004) (1975).

10. Falk, *supra* note 9; For an overview of segregation laws, see generally Ronald L.F. Dasu's *Creating Jim Crow: In-Depth Essay*, <http://www.jimcrowhistory.org/history/creating2.html> (last visited Sept. 11, 2005); see also FRANKLIN & MOSS, *supra* note 5, at 262; BELL, *supra* note 6, at 215-16.

11. See Falk, *supra* note 9.

The law, however, was neither the only nor the primary mechanism used to enforce white supremacy in the decades leading up to *Brown*. Terror and intimidation were a pervasive and constant threat: Hate groups like the Klu Klux Klan flourished,¹² and lynchings, where African Americans were murdered often in carnival-like atmospheres, were prevalent.¹³ Indeed, between 1880 and 1930, an estimated 3,200 African Americans were lynched in the South alone.¹⁴ Race riots were instigated in places like Chicago, Illinois; Wilmington, North Carolina; Tulsa, Oklahoma; and Sherman, Texas.¹⁵ And so called "nigger drives," those organized efforts to remove African Americans from their towns in order to claim their land, were orchestrated.¹⁶

In the middle of the twentieth century, the United States was a nation dripping with racial hatred. Yet, it was in this social context and against this evil that brave individuals like Charles Hamilton Houston, Thurgood Marshall, and the other heroic lawyers of the NAACP chose to act. After decades of litigation and strategizing,¹⁷ this cadre of lawyers brought the five cases involved in the *Brown* decisions.¹⁸

The *Brown* litigation was an aggressive move by the NAACP.

12. See FRANKLIN & MOSS, *supra* note 5, at 249-50.

13. See *id.* at 312-14; see also WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (James Allen ed., 2000) (documenting public celebration of lynchings); RALPH GINZBURG, 100 YEARS OF LYNCHINGS (2nd prtg. 1998) (same); W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 (1993) (same).

14. BRUNDAGE, *supra* note 13, at 8.

15. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 99-100, 108-09 (2004); see also FRANKLIN & MOSS, *supra* note 5, at 313-17.

16. OGLETREE, *supra* note 15, at 99. For additional reading on the backlash against African Americans during and following Reconstruction, see FRANKLIN & MOSS, *supra* note 5, at 247-63 and OGLETREE, *supra* note 15, at 97-110.

17. See OGLETREE, *supra* note 15, at 111-23 (describing on the NAACP's legal efforts leading up to *Brown*). See generally JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

18. Four of these cases (*Brown v. Board of Education*, *Briggs v. Elliott*, *Davis v. County School Board*, and *Gebhart v. Belton*) were consolidated in *Brown I*. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486-87 (1954); OGLETREE, *supra* note 15, at 4-6. The fifth case, *Bolling v. Sharp*, 347 U.S. 483 (1954), was decided the same day as *Brown I*, but under the due process provision of the Fifth Amendment. *Id.* at 500. The Court had to decide *Bolling* on different grounds because the District of Columbia (the governmental actor involved in this case) is not a state. Thus, the Fourteenth Amendment's equal protection guarantee, under which the other four cases were decided, does not apply to it. *Id.* at 498-99.

The litigation forced the Court to address directly the constitutionality of *Plessy's* separate but equal doctrine.¹⁹ The question was squarely put: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"²⁰ In *Brown I*, the Justices unequivocally stated "[w]e believe that it does."²¹

Importantly, this outcome was not preordained. The *Brown* cases were argued twice.²² After oral argument in the 1952-53 term, the Court was reportedly split on the outcome, and the cases were reargued in the 1953-54 term.²³ A key development occurred shortly before the second argument—the death of Chief Justice Vinson, an avid supporter of *Plessy's* separate but equal doctrine.²⁴ With Chief Justice Vinson's demise, an event that reportedly caused Justice Frankfurter to say "[t]his is the first indication I have had that there is a God," California Governor Earl Warren became Chief Justice and the Warren era began.²⁵

The *Brown* opinions are remarkably short.²⁶ They are also unanimous, which several Justices believed to be important given the seriousness of the issue before the Court and given the specter of Southern non-compliance.²⁷ In *Brown I*, decided on May 17, 1954, the Court stressed the importance of education in our democratic society.²⁸ In addition, the Court noted that a good education did not turn merely on whether schools were equal in terms of physical facilities and resources.²⁹ The Court emphasized the importance of "those qualities which are incapable of objective measurement,"³⁰ in other words "intangible considerations," like a

19. See OGLETREE, *supra* note 15, at 8 (noting that until *Brown*, the NAACP's litigation strategy had focused on equalization and had attempted to show that separate facilities generally were not equal). The issue of *Plessy's* legitimacy was raised in *Sweatt v. Painter*, 339 U.S. 629 (1950), but the Court reserved decision on the issue. *Id.* at 636.

20. *Brown I*, 347 U.S. at 493.

21. *Id.*

22. *Id.* at 488.

23. OGLETREE, *supra* note 15, at 8-9.

24. *Id.*

25. *Id.* at 9.

26. *Brown I*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

27. OGLETREE, *supra* note 15, at 8-9.

28. *Brown I*, 347 U.S. at 492-93.

29. *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

30. *Id.* at 493.

student's "ability to study, to engage in discussions and exchange views with other students."³¹ Ultimately, the Court found that "[t]o separate [elementary and high school students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³² It concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."³³

This strike at the heart of the separate but equal doctrine gave the NAACP lawyers and others vested in the fight for racial equality a huge victory. But the Court made a grave error: it punted when it came to the question of a remedy. The Court stated that because the cases consolidated before it were class actions, and due to the "wide applicability" of its decision and the "great variety of local conditions," a remedy would be difficult to formulate.³⁴ Therefore, the Court restored the cases to its docket and scheduled additional arguments on the question of relief, inviting the parties and all of the attorneys general of the states requiring or permitting segregated educational facilities to appear.³⁵ The Court faced two issues on the question of relief: (1) whether the desegregation process should be managed by the Supreme Court or the lower federal courts; and (2) whether to desegregate fast by requiring the immediate desegregation of public schools or slowly with a gradual move toward desegregation.³⁶

If *Brown I* was a cause for celebration, then *Brown II*, delivered on May 31, 1955,³⁷ was cause for despair. In this brief opinion, the Court placed oversight of the desegregation process in the hands of the district courts,³⁸ which in some cases had been the

31. *Id.* (quoting *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641 (1950)).

32. *Id.* at 494.

33. *Id.* at 495.

34. *Id.*

35. *Id.* at 495-96. There are certainly plausible reasons for the Court to punt on the relief issue. By leaving the question of an appropriate remedy to another day, the Court was able to secure unanimous agreement on the key constitutional principle. *Id.* at 493. In addition, the Court may have been legitimately perplexed about an appropriate remedy and desirous of additional guidance and reflection on the matter. These reasons would explain the Court's delay in addressing the relief question. They would not, however, excuse the abdication of responsibility and compromise of principle embodied in *Brown II*.

36. *Id.* at 495 n.13.

37. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

38. *Id.* at 299.

very entities to support segregation.³⁹ The Court reasoned that:

Full implementation of [*Brown I*] may require solution of varied local school problems. . . . [C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.⁴⁰

The Court urged that traditional equitable principles be applied to resolve difficulties in implementation, balancing the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis" with the public interest in a "systematic and effective" transfer.⁴¹

The answer to the second relief issue, the question of timing, was less clear. The Court stated that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them" and indicated its expectation that the defendants would "make a prompt and reasonable start toward full compliance with [*Brown I*]."⁴² It went on to note, however, that additional time might be needed to carry out the ruling and mentioned the administrative difficulties that might arise during the transition.⁴³ The Court ultimately remanded the cases to the district courts with orders to "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."⁴⁴

From the above, it was clear that the Court had rejected the plaintiffs' requests for immediate relief and that it had declined to set a definite time frame for formulating desegregation plans or an end point when segregated schools must cease to exist. But, beyond this, the nation was left to wonder what the Court's use of "all deliberate speed" meant. Thurgood Marshall, the chief architect of the *Brown* litigation, concluded that the phrase was

39. Note, for example, that *Brown I* changed the lower courts' decisions in *Briggs v. Elliot*, 103 F. Supp. 920 (D.S.C. 1952), *Davis v. County School Board*, 103 F. Supp. 337 (D. Va. 1952), *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951), and *Bolling v. Sharpe*. See *Brown I*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

40. *Brown II*, 349 U.S. at 299.

41. *Id.* at 300.

42. *Id.*

43. *Id.* at 300-01.

44. *Id.* at 301.

synonymous with S-L-O-W.⁴⁵ And, Marshall was right. It took at least a decade before any meaningful desegregation of public education occurred, and that progress was quickly dismantled.⁴⁶

Scholars may debate the true impact of *Brown I* and *Brown II* and whether it was the opinions or other social forces already in play which led to the unraveling of the social, political, and legal order built upon Jim Crow racism. Regardless of where one comes out on the causal issue, one thing is clear: the Justices in the *Brown* opinions acted in a tumultuous time on a tumultuous issue, and their rulings fundamentally altered the status of Blacks. As Robert Carter, one of the lead lawyers involved in the cases, has noted, "Blacks were no longer supplicants, seeking, pleading, begging to be treated as full-fledged members of the human race. . . . [After *Brown*, t]hey were entitled to equal treatment as a right under the law."⁴⁷ For this reason, the *Brown* opinions are a truly remarkable achievement.

II. *Brown II* and Decades of Judicial Conservatism

While the Justices are to be commended for their courage in *Brown I*, there are many reasons to be critical of *Brown II*, several of which are chronicled in this symposium and elsewhere. This Part focuses on two issues that were present in *Brown II* and that have recurred in the Supreme Court's race jurisprudence since that time. First is the apparent absence of any real sense of urgency in remedying a diagnosed wrong, especially when the remedy might upset the expectations of Whites. Indeed, one could

45. OGLETREE, *supra* note 15, at 10 (noting that "[w]hen asked to explain his view of 'all deliberate speed,' Thurgood Marshall frequently told anyone who would listen that the term meant S-L-O-W").

46. See GARY ORFIELD, SUSAN E. EATON & THE HARVARD PROJECT ON SCHOOL DESEGREGATION, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996) (chronicling desegregation efforts in the aftermath of *Brown*). For information on the modern trend toward resegregation in public schools, see ERIKA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (2002), available at http://www.civilrightsproject.harvard.edu/research/deseg/reseg_Race_in_American_Public_Schools.pdf.

47. Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968). Carter goes on to note:

Brown's indirect consequences, therefore, have been awesome. It has completely altered the style, the spirit, and the stance of race relations. Yet the pre-existing pattern of white superiority and black subordination remains unchanged . . . Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority.

Id. at 247.

argue that *Brown II* was an unjustifiable compromise of the constitutional rights of African Americans. As Professor Derrick Bell notes, the Warren Court sacrificed the "right of blacks to a desegregated education in favor of a remedy more palatable to whites."⁴⁸ To be sure, in its defense, the Court knew it was dealing with an explosive situation and that it had no real support from the President or from Congress.⁴⁹ Had the Court issued a stronger remedial order, enforcement could have sparked a constitutional crisis the outcome of which would have been unpredictable. Caution, therefore, was arguably not unreasonable.

But what message did the Court send to the African American community by embracing gradualism and deferring to the concerns of Whites? Usually, when the Court finds a constitutional violation, it requires an immediate solution.⁵⁰ When it did not take this course in *Brown II*, did the Court tacitly (and perhaps unconsciously) suggest that the rights of African Americans were less important than the rights of others? Was state-supported racism a less pernicious evil than other constitutional violations? In addition, what message did the Court inadvertently send to those looking to thwart the decision? Could it be, as Professor Bell notes, the Court:

[F]ailed to recognize the depth or nature of the problem, and by attempting to regulate the pace of desegregation so as to convey a show of compassion and understanding of the problem facing the White South, it not only failed to develop a willingness to comply, but instead aroused the hope that resistance to the constitutional imperative would succeed.⁵¹

In short, did the embrace of gradualism embolden efforts against desegregation and contribute to the decades of stalling tactics that effectively undermined real change?

That is the first issue under examination. The second issue arises from the Court's unwillingness to engage the true complexity of the problem before it. In *Brown I*, the Court

48. BELL, *supra* note 6, at 147 (2004) (characterizing the views of Robert L. Carter, one of the lead NAACP lawyers in *Brown*).

49. The Court has no enforcement power and support from the executive and legislative branches was weak. President Eisenhower did not want to support desegregation lest it, among other things, diminish his high approval ratings with southern voters. OGLETREE, *supra* note 15, at 125-26. Opposition in Congress was also considerable. Indeed, ninety percent of southern congressmen signed a "Southern Manifesto" in which they claimed that *Brown* was a "clear abuse of judicial power" and voted to reverse it. *Id.* at 126.

50. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

51. BELL, *supra* note 6, at 147 (summarizing the views of Robert L. Carter); see also OGLETREE, *supra* note 15, at 10 (asserting that *Brown II* "legitimized much of the social upheaval" that followed the *Brown I* decision).

discussed the evil of laws mandating segregated schools and alluded to a healthily integrated society—a society where students of all races could interact freely and could learn and grow from each other with mutual respect and appreciation.⁵² Yet, in *Brown II*, the Court set forth a solution that was limited to desegregation; that is, the elimination of laws requiring separate educational facilities for different races.⁵³ Certainly, desegregation was an important first step. However, the elimination of *de jure* segregation does not automatically lead to integration. If the conditions and mindsets which gave rise to *de jure* segregation remain, then while the law may change, the underlying circumstances may not. And, in the decades following *Brown*, school districts came up with myriad ways to achieve a segregated result without necessarily resorting to legal prohibitions against racially integrated schools.⁵⁴ To forestall these sorts of efforts, a stronger indictment of state-sponsored racism was needed. Yet, it was this very indictment that the Court did not give in *Brown II*.

As I stated earlier, these two themes have surfaced in subsequent Supreme Court decisions. The Court's treatment of affirmative action provides an excellent case study for this point. Despite the existence of stark indicators of continuing racial inequality,⁵⁵ a significant number of Justices have expressed deep skepticism about affirmative action. This skepticism is driven in

52. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954).

53. *Brown v. Bd. of Educ.*, 349 U.S. 294, 360 (1955).

54. For examples of southern resistance, see OGLETREE, *supra* note 15, at 127-31.

55. Poverty rates for Blacks and Hispanics typically exceed the national average. In 2001, 22.7% of Blacks and 21.4% of Hispanics were poor, compared to 11.7% of the total population. By comparison, 9.9% of Whites and 10.2% of Asians and Pacific Islanders lived in poverty in 2001. See BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU 6 fig.3 (Sept. 2001), <http://www.census.gov/prod/2002pubs/p60-219.pdf>. The unemployment rate for African Americans is generally twice that of Whites. See, e.g., *Employment Situation Summary: December 2004*, BUREAU OF LABOR STATISTICS (Jan. 7, 2005), http://www.bls.gov/news.release/archives/empst_01072005.pdf (listing unemployment figures for Blacks and Whites). And, considerable gaps in education and incarceration rates, among other things, persist. See Page M. Harrison & Jennifer C. Karberg, *Prison and Jail Inmates at Midyear 2002*, BUREAU OF JUST. STAT. BULL., April 2003 (noting that "[a]mong males age twenty-five to twenty-nine, 12.9% of blacks were in prison or jail, compared to 4.3% of Hispanics, and about 1.6% of whites"); *The Persisting Racial Gap in College Student Graduation Rates*, J. BLACKS HIGHER ED., Autumn 2004, at 77, 77 (reporting that the college graduation rate for Black students is twenty-one percentage points lower than the rate for White students); Karen MacPherson, *Minority High School Graduation Rate Just 50%*, (Feb. 26, 2004), <http://www.post-gazette.com/pg/04057/277625.stm> (noting that nationwide the high school graduation rate for minority students is about 50%, while that for White students is approximately 75%).

part by the fact that the Court has focused on the concerns of those who are left out by affirmative action rather than the plight of those let in by the programs.

For example, in *Regents of the University of California v. Bakke*,⁵⁶ the Court's first major affirmative action case, five Justices rejected arguments in support of a special admissions program for minority students in part because of the program's impact on Whites.⁵⁷ Four Justices concluded that Title VI's prohibition against the use of race in programs receiving federal funds extended to Whites as well as to people of color.⁵⁸ Thus, to the extent the medical school's affirmative action program excluded Whites, it was unlawful—even if the program's goals were to ensure the inclusion of historically excluded groups and to correct the under-representation of minorities in the medical profession.⁵⁹ Although Justice Powell, the fifth Justice, concluded that race can be used to promote diversity in higher education, he also found the program unlawful. In Powell's view, Whites did not receive a fair opportunity to compete because (1) sixteen of the one hundred available seats were reserved for minority applicants; and (2) applicants in the special admissions program were not compared with those in the regular admissions program.⁶⁰

Seventeen years later, in *Adarand v. Peña*, another landmark affirmative action case, the Court continued to express concern about the effects of racial classifications on Whites.⁶¹ In *Adarand*,

56. 438 U.S. 265 (1978). Alan Bakke, a White male, sued the U.C. Davis Medical School for race discrimination alleging that the Medical School's special admissions program violated his equal protection rights. *Id.* That admissions program was designed to increase the school's number of disadvantaged minority students. *Id.* at 272. Notably, under the special admissions program, minority candidates were evaluated separately from regular candidates for admission, and sixteen out of one hundred seats in the entering class were set aside for individuals within the designated groups. *Id.* at 275. Bakke was upset because he had been rejected while minority students with lower test scores had been admitted. *Id.* at 276-77. Among other things, the Medical School responded by arguing that its admissions program was necessary to counter the effects of societal discrimination and to obtain the educational benefits that flow from a racially diverse student body. *Id.* at 306.

57. *Id.* at 265.

58. *Id.* at 408-21 (Stevens, Burger, Stewart, and Rehnquist, J., concurring in part, dissenting in part). These justices believed that Title VI of the Civil Rights Act of 1964 resolved the issue and saw no need to reach the constitutional question. *Id.* at 408-11. Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d (2000).

59. *Bakke*, 438 U.S. at 412 (Stevens, J., concurring in part, dissenting in part).

60. 438 U.S. at 275, 319-20.

61. 515 U.S. 200 (1995). Certain Justices have focused on the deleterious

the Court held that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classifications subjecting that person to unequal treatment under the strictest judicial scrutiny.”⁶² The ruling meant that any racial classification, regardless of the motive behind the classification, would be subject to the same rigorous review standard.⁶³ The consequences of this holding are twofold:

effects of affirmative action on people of color, usually by pointing to the stigma associated with affirmative action programs. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part, dissenting in part) (asserting that “[t]he majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving); *see also Adarand v. Peña*, 515 U.S. 200, 241 (Thomas, J., concurring in part and concurring in the judgment). This argument, however, appears to be at most of secondary importance in the Court’s rulings and is readily countered by the fact that the immediate beneficiaries of the programs at issue do not raise this concern. Perhaps the beneficiaries recognize that a greater danger of reinforcing stigma and negative stereotypes lies in the discriminatory exclusion of people of color than in their inclusion. As Justice Stevens points out in *Adarand*:

[t]he exclusionary decision rests on the false premise that differences in race, or in the color of a person’s skin, reflect real differences that are relevant to a person’s right to share in the blessings of a free society. . . . The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it.

Adarand, 515 U.S. at 249 (Stevens, J., dissenting). Interestingly, while some Justices comment in passing on the effects of affirmative action on African American self-perception, their concerns about stigma often seem more focused on the way in which Whites view African Americans than the way in which African Americans view themselves. *See, e.g., Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment). This again suggests that some members of the Court are more fixated on the response of Whites to affirmative action programs than on the underlying inequality these programs seek to address.

62. 515 U.S. at 224. In *Adarand*, the Court extended the holding of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), to federally created affirmative action measures. *Croson* involved a city ordinance requiring that 30% of the city’s contracting work go to minority-owned businesses. *Id.* at 477-78. In invalidating the ordinance on constitutional grounds, a majority of the Court held that the same standard of review applied to all racial classifications regardless of the “race of those burdened or benefitted.” *Id.* at 494. That standard, the Court determined, was strict scrutiny. *Id.* at 492-94. This was a death knell because at that time, the Court had never upheld an affirmative action program under strict scrutiny. Indeed, this had led many commentators to conclude that strict scrutiny was “strict in theory, but fatal in fact.” 488 U.S. at 552 (Marshall, J., dissenting); *see also Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980). In addition, the Court held that to justify a remedial affirmative action measure, the entity in question must have engaged in the discrimination to be remedied and the discrimination must be specifically identified. *Croson*, 488 U.S. at 498-506.

63. *Adarand*, 515 U.S. at 226. The Court stated that strict scrutiny is required because:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed,

first, it makes affirmative action programs incredibly difficult to defend; and second, it elevates reverse discrimination claims to the same level as cases alleging discrimination because of racism (i.e., cases in which the actor seeks to subordinate the excluded group).

In its most recent statement on affirmative action, *Grutter v. Bollinger*⁶⁴ and *Gratz v. Bollinger*⁶⁵ (the *Michigan cases*), the Court reiterated its commitment to applying strict scrutiny to all racial classifications.⁶⁶ In the two cases, the Court was asked to determine whether the consideration of race in the admissions policies of the University of Michigan Law School⁶⁷ and the undergraduate College of Literature, Science, and Arts⁶⁸ was lawful. Although the Court upheld the law school's admissions policy in *Grutter* because that policy considered race as one variable among many and because minority applicants were not shielded from competition with White applicants,⁶⁹ the undergraduate admissions policy at issue in *Gratz* failed.⁷⁰ The Court determined that the automatic allocation of twenty points to undergraduate minority applicants unfairly advantaged minorities to the detriment of Whites.⁷¹ Importantly, although the Court in *Grutter* and *Gratz* expanded the acceptable justifications for affirmative action by holding that diversity is a compelling state interest,⁷² review of the opinions suggests that the Court may have been influenced by the fact that diversity in higher education benefits everyone—Whites as well as people of color.⁷³ Thus, unlike in remedial contexts where many Whites believe they bear the brunt of affirmative action programs because they are denied

the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. (quoting *Croson*, 488 U.S. at 493 (plurality opinion of O'Connor, J.)). Oddly enough, this tightening of the standard came in cases where there was not even a suggestion that the programs at issue were anything but benign regarding people of color. See *id.* at 206-07. This again raises the question of what really motivated the change—the impact on people of color, or the impact on Whites?

64. 539 U.S. 306 (2003).

65. 539 U.S. 244 (2003).

66. *Grutter*, 539 U.S. at 326-27.

67. *Id.* at 311.

68. *Gratz*, 539 U.S. at 251-52.

69. *Grutter*, 539 U.S. at 334-35.

70. *Gratz*, 539 U.S. at 269, 275.

71. *Id.* at 271-75.

72. *Grutter*, 539 U.S. at 325; *Gratz*, 539 U.S. at 268. The University did not rely upon remedial justifications for its policies, but rather argued that the policies were necessary to promote diversity. *Grutter*, 539 U.S. at 315-16.

73. *Grutter*, 539 U.S. at 319-20.

positions filled by people of color with no apparent countervailing benefit to Whites as a group,⁷⁴ in the context of diversity, while some White applicants might be denied admission, the perception is that White students as a group (indeed all students) benefit by having students of color admitted. Thus, with diversity, the seeming advantage, or "special" privilege, is not viewed as all in favor of one race to the detriment of another.

What these cases, among others, demonstrate is that instead of being proactive and responding aggressively to racism and its continuing effects on people of color, the Supreme Court has been consumed with the effects of affirmative action on Whites. I am not saying that this concern is irrelevant or that caution is not warranted. Rather, I am suggesting that this concern should not automatically assume primacy, but instead should become part of a forthright discussion of the history of racism in this country and its continuing effects. Such a discussion would illuminate rather than brush aside the wrong of racism. It would examine the problem of inherited advantage and inherited disadvantage. It would explain that there are no true innocents and why we must all participate in (and how we will all benefit from) the end of racial subordination.⁷⁵ It would engage the issues that are so effectively set forth in Lester Thurow's use of the race metaphor in *The Zero-Sum Society*.⁷⁶ Briefly, Thurow asks us to:

Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap.

Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If

74. But see Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1048 (2002) (explaining that the exclusionary effect of race-conscious admission policies on Whites is quite small).

75. Opponents of affirmative action measures often point out that legalized segregation against African Americans ended decades ago and that slavery was abolished well over a century ago. Asserting that they did not discriminate against or enslave anyone, these opponents ask why they should pay for these acts. The argument, in short, is "If there was a wrong, I didn't do it and therefore I shouldn't bear the costs of addressing it." I call this the "Not My Fault" or "I Didn't Do Anything Wrong" syndrome. The difficulty with this reasoning is that it is ahistorical. It views the present with no consideration for how the past has shaped who we are and where we are today.

76. LESTER C. THUROW, *THE ZERO-SUM SOCIETY* 188-89 (1980).

the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever.⁷⁷

To be sure, the hard question is figuring out how to bridge the gap between the runners. Again, Thurow is helpful. He notes:

If a fair race is one where everyone has an equal chance to win, the race is not fair even though it is now run with fair rules. To have a fair race, it is necessary to (1) stop the race and start over, (2) force those who did not have to carry weights to carry them until the race has equalized, or (3) provide extra aid to those who were handicapped in the past until they catch up.

While these are the only three choices, none of them is a consensus choice in a democracy. Stopping the race and starting over would involve a wholesale redistribution of physical and human wealth. This only happens in real revolutions, if ever. This leaves us with the choice of handicapping those who benefitted from the previous handicaps or giving special privileges to those who were previously handicapped. Discrimination against someone unfortunately always means discrimination in favor of someone else. The person gaining from discrimination may not be the discriminator, but she or he will have to pay part of the price of eliminating discrimination. This is true regardless of which technique is chosen to eliminate the current effects of past discrimination.⁷⁸

Instead of directly engaging these complex issues, carefully balancing the interests of everyone involved, and developing a solution that fairly addresses all, the Rehnquist Court, like the Warren Court in *Brown II*, has given priority to the concerns of Whites while continuing to sacrifice the interests of people of color.

This brings us then to the issue of the Court's unwillingness to address the complexity of the problem of racism and to think deeply and creatively about solutions. As I noted earlier, the Court in *Brown I* alluded to an integration ideal: a society in which access to opportunity is not impeded by legally sanctioned segregation. Yet, in *Brown II*, the Court came forth with a very limited solution, one that was insufficient to achieve this ideal. The same holds true in the Court's treatment of affirmative action. The Court embraces the ideal of a nation in which race no longer dictates access to opportunity. However, just as in *Brown II*, the

77. *Id.*

78. *Id.*

Court is willing to adopt only partial or limited means to this end. One sees this in the Court's embrace of formal as opposed to substantive equality principles. It appears the Court's solution to the problem of racism is to invalidate laws, rules, and practices that treat people differently because of race. Everyone—Whites as well as people of color—must be treated the same.⁷⁹ This is reflected in the Court's insistence that affirmative action measures be subject to the same searching standard of review as measures fueled by racial hatred. It is also reflected in the Court's all out embrace of colorblindness. To the extent there are occasional violators of the colorblind principle, the Court is willing to allow a carefully crafted response if intent to discriminate can be proven or if there is some other compelling justification for the differential treatment (i.e., diversity).⁸⁰

What the Court's analysis misses is that to the extent people are situated differently due to discrimination, differential treatment may be necessary to remedy existing inequality. The Court also fails to recognize that discrimination today is increasingly difficult to detect either because discriminatory actors are more sophisticated (and will hide their motives) or because, as Professor Charles Lawrence has noted, their bias may be unconscious.⁸¹ Thus, the Court's requirement of a showing of intent is misguided.

79. Justices Thomas and Scalia are perhaps the most vigorous advocates of this view. Justice Scalia argues:

[G]overnment can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based on race, or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Adarand v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part) (citations omitted); see also *id.* at 241 (Thomas, J., concurring in part) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.").

80. Of course, the fact that educational institutions can consider race in seeking diversity shows that we are not a colorblind society. The only reason race is relevant to diversity is because people of color are differently situated (e.g., have different experiences and are treated differently) because of their race!

81. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (stating that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation").

Instead of looking directly at the complex nature of discrimination and trying to devise effective solutions, the Court has elected to hide behind abstractions. What we have witnessed is an inordinate amount of time spent on determining which level of scrutiny or constitutional review (strict or intermediate) ought to apply to affirmative action programs. To be sure, the majority maintains that strict scrutiny is necessary to differentiate benign from invidious discrimination—to smoke out evil-doers.⁸² But, after 400 years of racism in the United States, do we not know it when we see it? As Justice Stevens argued in *Adarand*, do we not know the difference between a welcome mat and a “No Trespassing” sign?⁸³ Would not this nation be better off trying to do something about the racism we see, rather than being paralyzed by analyses that seem to take us nowhere?

Of course, the critical question is whether the Court still sees racism in 2005. Perhaps it is in this area that the Rehnquist Court differs from the Warren Court. In 1955, it was impossible to hide from the visible, palpable, tangible manifestations of American racism. The signs and evidence were everywhere. Although we are only fifty years removed from that world, it seems that today’s Court thinks that racism no longer exists, or at least it is not the problem that it once was.⁸⁴ This conclusion is supported by the fact that the Court, through its various rulings, has in effect placed an almost impossible burden on plaintiffs to establish the legitimacy of race-conscious measures.⁸⁵ The allocation of this burden is indeed odd given the long history of discrimination in this country and continuing evidence of widespread racial inequality.⁸⁶ On the other hand, its placement makes perfect sense if one believes that racist actors are only an occasional problem

82. See *supra* note 63.

83. *Adarand*, 515 U.S. at 245 (Stevens, J., dissenting).

84. Justice O’Connor’s expectation that there will be no need for affirmative action in twenty-five years also gives witness to the Court’s limited understanding of the resilience and pervasiveness of racism. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

85. The burden arises from the Court’s adoption of strict scrutiny for all racial classifications, its demand for highly individualized findings of discrimination, its rejection of societal discrimination as a basis for affirmative action, and its focus on the effects of remedial measures on Whites. See, e.g., *id.* at 326-27 (holding that racial classifications are subject to strict scrutiny); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (requiring specifically identified incidents of discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (noting that remedying societal discrimination alone is insufficient to justify a racial classification); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978) (expressing concern because Whites could not receive one of sixteen reserved seats).

86. See *supra* note 55.

and that contemporary inequality is the fault of those who fail to lift themselves up by their bootstraps.

III. Looking to the Future

I have argued that in the context of civil rights, today's Court, like the Warren Court in *Brown II*, has failed to engage seriously the perniciousness and intractability of American racism. Instead, it has reached for solutions that are acceptable to a majority of the public. The question is, where do advocates for racial justice go (literally) from here?

In 1993, Professor Gerry Spann expressed doubt about whether the Supreme Court can serve as a guardian of minority rights.⁸⁷ As the analysis set forth in this Essay demonstrates, the Court is a fundamentally conservative institution. It seems that for every progressive step forward in the law, the Court takes the civil rights community two steps back. The states ratified the Reconstruction Amendments⁸⁸ and Congress enacted the civil rights statutes of 1866 and 1870.⁸⁹ The Court gutted both the Amendments and the statutes in the *Slaughter-House Cases*,⁹⁰ the *Civil Rights Cases*,⁹¹ and *Plessy v. Ferguson*.⁹² Although the Court decided *Brown I*, it also decided *Brown II*. Congress passed the Voting Rights Act,⁹³ Title VII of the Civil Rights Act of 1964,⁹⁴ and implemented various affirmative action measures. The Court has systematically undermined them all.

Perhaps civil rights advocates might be better off directing their efforts elsewhere, such as the national legislature. Indeed, in some areas, Congress has expressly reversed the Court's narrow interpretation of various civil rights statutes.⁹⁵ The problem is

87. GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993).

88. *See supra* note 3.

89. *See supra* note 4.

90. 83 U.S. (16 Wall.) 36 (1873).

91. 109 U.S. 3 (1883).

92. 163 U.S. 537 (1896).

93. 42 U.S.C. § 1973 (2000).

94. 42 U.S.C. § 2000e (2000).

95. For example, in the Civil Rights Act of 1991, 105 Stat. 1071 (1991) (codified in scattered sections of 2 U.S.C.), Congress reversed a number of Supreme Court cases that restricted the scope of certain anti-discrimination statutes. *See, e.g., id.* at 1071 (arguably reversing the Supreme Court's restrictive interpretation of disparate impact claims in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); *id.* at 1071-72 (expanding coverage of 42 U.S.C. § 1981 and reversing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)); *id.* at 1074 (redefining mixed motive claims and reversing, in part, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

that if the Court concludes that Congress has exceeded the authority granted it under the Constitution, the Court can invalidate a Congressional statute.⁹⁶ Moreover, legislatures (like courts) can be instruments of oppression.⁹⁷ After all, it was an old state legislative enactment that the Court invalidated in *Lawrence v. Texas*.⁹⁸ And, it was Congress that passed the Patriot Act.⁹⁹

At the end of the day, perhaps no institution is infallible. What ultimately may be needed is a strategy that employs legal and policy arguments directed at all branches of the government. Lest we lose sight of the nature of the problem and the goal being pursued, this strategy must be historically grounded and engage the realities of discrimination in a frank and forthright manner. Also, it must avoid the victim/perpetrator dichotomy that has alienated both the courts and the general public and gotten civil rights advocates nowhere in recent years. In addition, while keeping history front and center, civil rights advocates must somehow engage a population that professes to being tired of talking about race, racism, and things for which it bears no responsibility because "it didn't do anything wrong." Perhaps one way to accomplish the above aims is by showing how all Americans are interconnected and how anti-discrimination efforts, or a norm of equality, ultimately serve everyone's interests. In 1980, Professor Derrick Bell made a similar suggestion in setting

96. See, e.g., *Alabama v. Garrett*, 531 U.S. 356 (2001) (limiting claims that can be brought under the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (limiting the scope of the Age Discrimination in Employment Act); *Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act).

97. The general public has also demonstrated hostility to the rights of others. For example, in 1996, California voters passed Proposition 209, which outlawed affirmative action by state actors in California. See CAL. CONST. art. I, § 31. (prohibiting preferential treatment for anyone based on race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting). For the text of Proposition 209, see <http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm>. In 1992, Colorado voters passed Amendment II, which prohibited the state from protecting persons who were discriminated against because of their homosexuality. See *Romer v. Evans*, 517 U.S. 620 (1996) (finding Amendment II unconstitutional). In the 2004 elections, voters in eleven states passed amendments barring gay marriage. See *Voters Pass All 11 Bans On Gay Marriage*, MSNBC.com, Nov. 3, 2004, <http://www.msnbc.msn.com/id/6383353>.

98. 539 U.S. 558 (2003) (striking down a Texas statute prohibiting certain intimate relations between persons of the same sex).

99. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, 115 Stat. 272 (2001) (allowing for increased surveillance throughout the country).

forth the "principle of interest convergence."¹⁰⁰ He notes:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.¹⁰¹

The strength of this insight is apparent when one considers key moments in the quest for racial equality in this country. For example, it is widely known that on January 1, 1863, Abraham Lincoln issued the Emancipation Proclamation, which abolished slavery in parts of the South.¹⁰² Yet, contrary to popular belief, Lincoln was not motivated solely by a desire to end the moral evil of slavery.¹⁰³ In a letter to Horace Greeley dated August 2, 1862, Lincoln wrote:

My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it; and if I could save it by freeing all the slaves I would do it; and if I could

100. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

101. *Id.*; cf. Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005) (examining the possibilities for coalition politics and mutual cooperation among blacks and other groups).

102. Proclamation No. 17, 12 Stat. 1268 (1863). Importantly, the Proclamation ended slavery only in those states in rebellion against the Union as of January 1, 1863. *Id.* Slavery continued in the loyal border states and in those southern states under Union control.

103. See Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2163 (1996) (summarizing divisions within the Republican Party and noting "[t]he pressing matter for the Republican Party in 1860 was neither the emancipation of the slaves nor the establishment of civil and political rights. Rather, saving the Union and stopping the expansion of slavery were its overwhelming concerns"). Lincoln supported the abolishment of slavery albeit on a gradual basis and with some compensation for slave owners. FRANKLIN & MOSS, *supra* note 5, at 205-09. For more on Lincoln's views, see Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1338-60 (2000).

save it by freeing some and leaving others alone I would also do that.¹⁰⁴

It was because emancipation served to weaken the rebelling states¹⁰⁵ and because it reduced the chance of foreign intervention by the anti-slavery French and British that Lincoln issued the Proclamation.¹⁰⁶ In short, emancipation happened because it served the interests of Blacks in escaping the bonds of slavery *and* the interests of the Republican Party in preserving the Union and securing international respect.¹⁰⁷

A similar convergence of interests led President Truman to sign Executive Order 9981 in 1948, which led to the eventual desegregation of the U.S. Armed Forces.¹⁰⁸ To be sure, Truman was influenced by domestic civil rights organizations that were vigorously advocating for racial equality.¹⁰⁹ But he also faced international pressure to live up to the democratic ideals

104. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 388 (Roy P. Basler ed., 1953) (emphasis omitted).

105. See Taslitz, *supra* note 103, at 1356 (noting Lincoln's conclusion that emancipation was "a 'necessary military measure' [and his hope that] it would encourage slaves to flee, thus depriving the South of a source of its strength").

106. *Id.* (suggesting that the French and British would be inclined to intervene on behalf of the South to the extent that the South could continue to characterize the war as a fight for independence from Northern oppression rather than as a war to maintain the institution of "human bondage")

107. As historians John Hope Franklin and Alfred A. Moss, Jr. note:

If the Emancipation Proclamation was essentially a war measure, it had the desired effect of creating confusion in the South and depriving the Confederacy of much of its valuable labor force. If it was a diplomatic document, it succeeded in rallying to the Northern cause thousands of English and European laborers who were anxious to see workers gain their freedom throughout the world. If it was a humanitarian document, it gave hope to millions of blacks that a better day lay ahead, and it renewed the faith of thousands of crusaders who had fought long to win freedom in America.

FRANKLIN & MOSS, *supra* note 5, at 208.

108. Order No. 9981, 3 C.F.R. 722 (1948). For an overview of efforts to desegregate the military, see generally RICHARD M. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS 1939-1953* (1969).

109. See MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES 1940-1965*, 3-8 (1985) (recounting the efforts of organizations like the NAACP); John L. Newby, II, *The Fight for the Right to Fight and the Forgotten Negro Protest Movement: The History of Executive Order 9981 and Its Effect upon Brown v. Board of Education and Beyond*, 1 TEX. J. C.L. & C.R. 83, 102-05 (2004) (recounting the efforts of A. Philip Randolph and the Committee Against Jim Crow in Military Service and Training). For a chronology of key events leading to the desegregation of the U.S. armed forces, see Raymond H. Geselbracht, *The Truman Administration and the Desegregation of the Armed Forces: A Chronology*, <http://www.trumanlibrary.org/deseg1.htm> (referencing the influence of civil rights organizations on domestic policymakers).

domestically that this country had been espousing abroad.¹¹⁰ In addition, Truman was influenced by the military's need for manpower—a need that was particularly pressing in face of the perceived threat from Communism and the onset of the Cold War.¹¹¹

Finally, a convergence of the interests of Blacks and those of the rest of the country led to *Brown I* in 1954 and the *Grutter* and *Gratz* decisions in 2003. As Professor Bell has noted, by the middle of the twentieth century, African Americans had been challenging school segregation for well over a century. To understand the sudden shift in 1954 away from *Plessy* and towards a commitment to desegregation, Bell argues that one must acknowledge *Brown's* value to those Whites “in policymaking positions [who were] able to see the economic and political advances at home and abroad that would follow abandonment of segregation.”¹¹² These individuals “realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.”¹¹³ Bell notes that *Brown* also “helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples” and “offered much needed reassurance to American Blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home.”¹¹⁴

Notwithstanding the limitations of the Michigan cases, it was this kind of broad-based inclusive strategy that ultimately saved the day for affirmative action in higher education. By arguing that diversity benefits everyone, and not just students of color, the University was able to assemble a powerful coalition in support of its position—a coalition that included traditional civil rights organizations, educational institutions, military generals, and large corporations.¹¹⁵ With so many varied interests invested in

110. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (examining the interplay between democratic ideals, U.S. foreign policy objectives, and desegregation efforts at home).

111. On the need for military efficiency and manpower, see Newby, *supra* note 109, at 106; MacGregor, *supra* note 109, at 3. On the influence of communism, see generally Dudziak, *supra* note 110.

112. Bell, *supra* note 100, at 524.

113. *Id.* at 525.

114. *Id.* at 524.

115. These entities asserted that diversity served their respective interests in various ways. See, e.g., Brief of Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and

the outcome, the Court seemed more receptive to the diversity argument¹¹⁶ and perhaps the larger population was as well.¹¹⁷

In conclusion, moving forward in the quest for racial equality will require sustained activism directed at all branches of the government and at the public at large. It will require no small degree of courage and commitment from this nation's leaders and policymakers—the sort of courage and commitment that resulted in *Brown I*. Avoiding the mistakes of *Brown II*, however, requires more than mere symbolism. As suggested by this Essay, it demands dedication to engaging the difficulties inherent in eradicating racial discrimination as well as openness to exploring and delineating the ways in which racial equality serves not just people of color, but everyone.

02-516) (arguing that a diverse workforce is important to their continued success in the global marketplace); Brief of General Motors Corporation in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241 and 02-516) (maintaining that “racial and ethnic diversity in the senior leadership of the corporate world is crucial to our Nation’s economic prospects”); Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (arguing that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security”).

116. Justice O’Connor, the author of the opinion setting forth the Court’s holding that diversity constitutes a compelling state interest, was influenced by the arguments of this coalition. O’Connor’s articulation of the advantages of a diverse student body demonstrates her belief that diversity benefits not only people of color, but all citizens in our society. She points to four “substantial” benefits of a diverse student body. See *Grutter*, 539 U.S. at 329-32 (explaining that a diverse student body (1) promotes cross-racial understanding, (2) encourages good citizenship, (3) prepares students for an increasingly diverse workforce and society, and (4) creates and legitimates future leaders).

117. For analysis of the limitations of the diversity argument, see Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171 (2005).