“History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision

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The Supreme Court’s recent decision on voluntary school desegregation¹ can be read at many levels. Doctrinally, the Court adopted a stringent view of narrow tailoring that forbids the use of racial classifications to integrate public schools except as “a last resort,”² even as five Justices agreed that school districts have a compelling interest in “avoiding racial isolation” and in “achiev[ing] a diverse student population.”³ As a practical matter, the Court has made racial integration more difficult for school districts, although the efficacy of the race-conscious strategies left open by Justice Kennedy’s controlling opinion remains to be seen.⁴

Taking a step back, the opinions of the Justices can also be read at the level of symbols and social meanings. As Chief Justice Roberts said, the cases frame a debate over “which side is more faithful to the heritage of Brown.”⁵ Further, the plurality’s bold assertion that “history will be heard”⁶ underscores the significance of Seattle/Louisville not only as a set of rules for future conduct, but also as a rendition of our national experience in striving to overcome segregation. In this brief Essay, my theme will be the tension between legal formalism and fidelity to history and social facts. Although this tension is endemic to the law,⁷ our history teaches that legal

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² Id. at 2792 (Kennedy, J., concurring in part and concurring in the judgment); id. at 2760–61 (majority opinion).
³ Id. at 2797 (Kennedy, J., concurring in part and concurring in the judgment); id. at 2820–24 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting).
⁴ See id. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (generally prohibiting individual racial classifications but allowing race-consciousness in attendance zoning, school siting, resource allocation, and student and teacher recruitment). I discuss this aspect of Justice Kennedy’s opinion and an example of a school assignment plan that likely satisfies it in Part III, Section B infra.
⁵ Id. at 2767 (plurality opinion of Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ.); see also Brown v. Bd. of Educ., 347 U.S. 483 (1954).
⁶ Seattle/Louisville, 127 S. Ct. at 2767; cf. id. at 2798 (Stevens, J., dissenting) (“Compare ante, at 2767 (‘history will be heard’), with Brewer v. Quarterman, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting) (‘It is a familiar adage that history is written by the victors’).”)
formalism (eventually) loses its authority when it strays too far from social reality. Seattle/Louisville comes close to taking us down that troubled path again.

Parts I and II of this Essay take up Chief Justice Roberts’s call for history to be heard. While purporting to claim the legacy of Brown and Justice Harlan’s celebrated dissent in Plessy v. Ferguson, the Roberts plurality actually does the opposite. As Part I shows, modern proponents of colorblindness, including the Roberts plurality, misappropriate Harlan’s dissent when they invoke the phrase “Our Constitution is color-blind.” In Plessy and in his other writings, Harlan’s nuanced views on race cannot be reduced to a simple axiom of colorblindness. Further, as Part II argues, by refusing to acknowledge or attach legal significance to the social meaning of de jure segregation, the Roberts plurality inherits the jurisprudential legacy of the majority opinion in Plessy, not Justice Harlan’s dissent, and hollows out Brown’s primary historical meaning as an authoritative renunciation of racial caste.

Finally, Part III shows that although Justice Kennedy’s separate opinion considers the meaning of segregation in the social context, it nonetheless indulges a stilted formalism by extending the distinction between de jure and de facto segregation to limit voluntary remedial measures. Meanwhile, the distinction Justice Kennedy draws between permissible race-conscious measures and impermissible individual classifications plausibly responds to the social reality of race, but not in the way that he describes.

1. “OUR CONSTITUTION IS COLOR-BLIND”

Second only to Brown, Justice Harlan’s dissent in Plessy enjoys iconic status in our legal culture in the area of race and equal protection. Many conservatives regard Harlan’s dissent with particular fondness because its famous words “Our Constitution is color-blind” provide a thesis statement for the argument that racial classifications have no place in public life. In Seattle/Louisville, the quotation was predictably invoked by the plaintiffs and by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Judge Bea in the Ninth Circuit. However, Harlan’s dissent in Plessy and his

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9 Plessy, 163 U.S. at 552 (Harlan, J., dissenting).
10 Id. at 559 (Harlan, J., dissenting).
12 See Seattle/Louisville, 127 S. Ct. at 2758 n.14 (plurality opinion of Roberts, C.J.); id. at 2782, 2787, 2788 (Thomas, J., concurring); id. at 2791–92 (Kennedy, J., concurring in part and concurring in the judgment); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.2d 1162, 1221 (9th Cir. 2005) (en banc) (Bea, J., dissenting).
broader jurisprudence on race reveal a more complex understanding of the Fourteenth Amendment anchored in a substantive conception of civil rights, not a formal rule of race-neutrality.

As a starting point, let us take a closer look at “Our Constitution is color-blind” by revisiting the passage where it occurs:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved.13

Harlan’s notion of colorblindness is linked to the idea that the Constitution “neither knows nor tolerates classes among citizens.” According to modern conservatives, the designation of racial groups by government—racial classification—creates impermissible “classes among citizens.” But is this what Harlan meant?

It is instructive to consider the semantic parallels between the sentence “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens” and the two sentences preceding it. Although Harlan acknowledges and endorses the social fact of white supremacy, his point is that racial hierarchy has no place in the law. Thus he says that “there is in this country no superior, dominant, ruling class of citizens,” and he then restates the point by saying “There is no caste here.” Given this juxtaposition of the terms “class” and “caste,” the impermissibility of “classes among citizens” asserted in the next sentence is plausibly and quite naturally read to mean the illegitimacy of racial caste.14

Further, the meaning of “Our Constitution is color-blind” is illuminated by Harlan’s parallel use of the visual metaphor. The reference to colorblindness reprises his statement that “in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of

13 Plessy, 163 U.S. at 559 (Harlan, J., dissenting).
14 Although “Our Constitution is color-blind” has been quoted several times by Supreme Court Justices, the quotation virtually never includes the preceding sentence “There is no caste here.” In fact, at one point in his concurring opinion in Seattle/Louisville, Justice Thomas excises Harlan’s reference to “caste” while keeping the surrounding words of the quotation. See 127 S. Ct. at 2787 (Thomas, J., concurring). I have found only one instance where a Justice quoting “Our Constitution is color-blind” included the reference to “caste”: a 1961 opinion by Justice Douglas arguing that states may not enforce segregation at restaurants and lunch counters. See Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Douglas, J., concurring).
In other words, the Constitution does not “see”—it cannot legitimize—the social fact of racial hierarchy. Thus, in context, Harlan’s declaration that “Our Constitution is color-blind” does not clearly state a categorical principle against classification by race. It appears to simply restate the thesis of the preceding two sentences—i.e., the Constitution does not permit government to validate or perpetuate a race-based system of social hierarchy. At the very least, the passage as a whole contains sufficient ambiguity that it cannot confidently be said to endorse colorblindness as we understand the concept today.

The modern reading of “Our Constitution is color-blind” is also belied by Harlan’s other decisions and writings on race. Although he never had occasion to examine race-conscious affirmative action, Harlan made clear that he regarded the Civil War Amendments as a coherent expression of anti-caste, anti-subordination principles to effectuate the newly won freedom and citizenship of black Americans. This theme appears in his Plessy dissent, and it is developed even more forcefully in Harlan’s lengthy dissent in The Civil Rights Cases, the singular opinion in which he apparently took greatest pride. Yet this anti-caste commitment was limited in important ways that reveal the absence of any transcendent devotion to colorblindness in Harlan’s race jurisprudence.

For one thing, Harlan saw the principle of racial equality largely through the lens of national citizenship held in common by blacks and whites. He famously besmirched his otherwise laudable dissent in Plessy by attempting to underscore the injustice of segregation to blacks with the observation that “a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana” cannot.

Further, as Gabriel Chin and Earl Maltz have shown, Harlan’s record in cases involving discrimination against Chinese immi-
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grants was mixed and at times more reactionary than his contemporaries. 23 He joined the majority in Yick Wo v. Hopkins, striking down the discriminatory application of a local ordinance regulating commercial laundries. 24 But he voted to uphold facially race-based immigration policies in the notorious Chinese Exclusion Cases 25 and in Fong Yue Ting v. United States. 26 In United States v. Wong Kim Ark, which upheld birthright citizenship for a Chinese man born to non-citizen parents within the United States, 27 Harlan was the only Justice to join Chief Justice Fuller’s dissent arguing that Congress has “the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens.” 28 Although his votes in the latter cases cohered with his dedication to national power, it is notable that Harlan voted as he did, without qualification, in the face of opinions clearly condemning the racial classifications. 29

Moreover, even in cases involving free blacks, Harlan did not approach the issue of racial discrimination by simply inquiring whether legislation or official conduct was race-conscious. His egalitarianism was not thorough-going or trans-substantive in the way that a rigorous rule of colorblindness would be. Instead, his vision of racial equality was nested within a substantive conception of civil rights. It applied specifically to “those fundamental rights that inhere in a state of freedom” 30 or (largely equivalent in Harlan’s view) “the civil rights which are fundamental in citizenship in a republican government.” 31 It was in this sphere of substantive rights that the denial of equality threatened to perpetuate the system of racial caste, and it was there that Harlan saw the Civil War Amendments as having their normative force.

In The Civil Rights Cases, for example, Harlan undertook a detailed examination of the public’s “legal rights in the accommodations and advantages of public conveyances, inns, and places of public amusements” before

24 118 U.S. 365 (1886); see also Baldwin v. Franks, 120 U.S. 678, 698–701 (1887) (Harlan, J., dissenting) (arguing for the validity of federal legislation criminalizing private conspiracies to deprive persons, including aliens, of their civil rights).
25 130 U.S. 581 (1889).
26 149 U.S. 698 (1893).
27 169 U.S. 649 (1898).
28 Id. at 732 (Fuller, C.J., dissenting).
29 See id. at 693 (majority opinion) (“The [Fourteenth Amendment Citizenship Clause], in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States.”); Fong Yue Ting, 149 U.S. at 737–38 (Brewer, J., dissenting) (arguing that “[t]he expulsion of a race may be within the inherent powers of a despotism” but that our government “has no general power to banish” people “for no crime but that of their race and birthplace”). But cf. Eric Schepard, The Great Dissenter’s Greatest Dissents: The First Justice Harlan, the “Color-Blind” Constitution and the Meaning of His Dissents in the Insular Cases for the War on Terror, 48 AM. J. LEGAL HIST. 119 (2006) (arguing that Harlan’s dissents defending the constitutional rights of persons, including Asians, in U.S. territories demonstrated a commitment to colorblindness).
31 Id. at 56 (emphasis in original).
concluding that Congress had power under the Thirteenth Amendment to prohibit racial discrimination in these venues.\textsuperscript{32} And he characterized the enjoyment of public accommodations free of racial discrimination not as an entailment of equal protection of the laws, but as a fundamental right of national citizenship protected by the citizenship clauses of the Fourteenth Amendment.\textsuperscript{33} Likewise, in \textit{Plessy}, Harlan articulated his anti-caste thesis in the context of a fundamental right to enjoy “the power of locomotion”\textsuperscript{34} as applied to use of a railroad, long regarded at common law as “a public highway” held “in trust for the public.”\textsuperscript{35}

By contrast, Harlan joined a unanimous Court in \textit{Pace v. Alabama} to uphold a state statute punishing adultery and fornication more severely when committed by “any white person and any negro” together than when committed by members of the same race.\textsuperscript{36} The Court’s logic was that blacks and whites who commit the interracial offense are punished equally, as are blacks and whites who commit the intraracial offense.\textsuperscript{37} Harlan’s vote in \textit{Pace}, decided in the same year as \textit{The Civil Rights Cases}, is explainable on the ground that sexual autonomy was not generally regarded then as part of the sphere of fundamental rights.\textsuperscript{38}

In addition, Harlan wrote the unanimous opinion in \textit{Cumming v. Board of Education} upholding a racially separate and unequal scheme of public education.\textsuperscript{39} In that case, the county school board in Augusta, Georgia, maintained segregated schools as required by the state constitution. In 1897, the county had two white high schools but decided to close the only black high school and use the facility to serve 300 black elementary schoolchildren “who were without an opportunity . . . to learn the alphabet and to read and write.”\textsuperscript{40} A group of black parents sued to enjoin the use of local taxes for the unequal system of high schools. In rejecting the claim, Harlan first noted that, because the pleadings did not challenge the requirement of racial segreg-
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gation, “we need not consider that question in this case.” He then observed that the school board’s decision “was in the interest of the greater number of colored children” and, on the record, evinced no hostility or discriminatory purpose toward black children. Further, even if the board had erred, Harlan said, the relief requested would only deprive white children of a high school education without providing such education to black children.

In Cumming, the inference of racial discrimination was particularly strong, since the school board’s decision to close the black high school in order to serve more black elementary schoolchildren was a choice forced by the state requirement of racial segregation and by the board’s implicit refusal to divert resources from white schools to add seats in black schools. But Harlan did not locate education within the sphere of civil rights to which robust norms of racial equality applied. He seemed to treat it as a social service program implicating the broad discretion of state and local authorities to allocate “the burdens and benefits of public taxation,” not as the fundamental right that described half a century later. School administration, as he saw it, was an area of plenary local authority subject only to a requirement of reasonableness, much as the Court in regarded the regulation of public conveyances. As such, the school board’s decision to serve “the greater number of colored children” was a reasonable, even benign, way to manage the public fisc.

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41 Id. at 543.
42 Id. at 544.
43 See id.
44 Id.; cf. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. . . . [Educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).
45 See Cumming, 175 U.S. at 544; see Fiss, supra note 17, at 368 (“The authority of localities to decide how to spend public funds was, in Harlan’s mind, all-embracing . . . .”). This reading is vulnerable to historical evidence that Harlan was “[f]ully aware of the importance of public education in providing equal opportunities to poor whites and blacks” because he campaigned for equal school funding for blacks and whites as a Kentucky gubernatorial candidate in 1875. Kousser, supra note 39, at 38; see also Yarbrough, supra note 17, at 143 (quoting an 1888 letter from Harlan to his son on the importance of education for blacks). In addition, many members of the Republican Congress in the 1870s and 1880s saw education as a fundamental right under a substantive conception of national citizenship exemplified by Harlan’s dissent in The Civil Rights Cases. See Goodwin Liu, Education, Equality, and National Citizenship, 116 YALE L.J. 330, 353–95 (2006). Given these facts, why did Harlan not situate education within the sphere of fundamental rights just as he did with transportation in Plessy?

As one biographer has argued, a plausible explanation is that Harlan, though committed to racial equality, also believed strongly in racial identity as evidenced by his assertions in Plessy that “[e]very true man has pride of race” and that the white race “will continue to be [dominant] for all time if it remains true to its great heritage.” 163 U.S. at 554, 559; see Przybyziewska, supra note 17, at 81–117. Harlan “possibly did not come out clearly against single-race schooling because it was a way to preserve racial identity, not for the racist reason that a separate and unequal system of education would keep blacks down but for the racialist reason that schooling was a far more intimate activity than riding a streetcar and could lead to friendship and marriage.” Id. at 100–01. This racialist logic also explains Harlan’s vote in Pace, see
In sum, Harlan’s approach to racial equality did not focus on the formal or procedural neutrality of government action per se. Instead, it was bottomed on, and limited by, his conception of the substantive rights comprising the essence of civil freedom and equal citizenship. Of course, Harlan’s positions in _Pace_ and _Cumming_ demonstrate his failure to acknowledge the ways in which sexual and educational mores contributed to the racial caste system. His efforts to reconceptualize the sphere of civil rights governed by equality-enhancing norms were imperfect and incomplete. But my main point is that Harlan’s jurisprudence on race exhibited no overarching preoccupation with colorblindness. This much is clear when “Our Constitution is color-blind” is read with the surrounding words in his _Plessy_ dissent and especially when that dissent is read with his other decisions on race. Instead of the modern notion of colorblindness, what emerges from Harlan’s jurisprudence is a significant but partial commitment to eradicating racial caste in the enjoyment of substantive rights essential to equal citizenship.

II. _THE PERILS OF PLESSY_

If anything, the plurality opinion in _Seattle/Louisville_ claims the jurisprudential legacy of the majority opinion in _Plessy_, not Justice Harlan’s dissent. That legacy, as pertinent here, is the radical formalism of constitutional interpretation in the face of contrary social facts. Recall that _Plessy_ dismissed the argument that “the enforced separation of the two races stamps the colored race with a badge of inferiority” with the disingenuous reasoning that “[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” In theory, “separate but equal” is a formula for equality if the social meaning of segregation is ignored. But we do not regard equality of that sort as genuine legal equality precisely because the social meaning of segregation...
cannot be ignored. To do so, as the Court did in *Plessy*, produces a legal absurdity.

Now consider the plurality opinion in *Seattle/Louisville*, which consciously places Joshua McDonald, the white first-grader in Louisville who was denied his first-choice school in 2002, on the same constitutional footing as Linda Brown, the black third-grader in Topeka who was relegated to an all-black school in 1950. As in *Brown*, “[w]hat do the racial classifications . . . here do,” Chief Justice Roberts asks, “if not accord differential treatment on the basis of race?”50 But this equation also ignores obvious social meanings. For Joshua McDonald, his school assignment was an inconvenience and perhaps a significant disappointment. By contrast, Linda Brown’s school assignment was an expression of racial hostility, a public humiliation, and a badge of inferiority not only for her but for all black children. It blinks reality to assert that the nature and magnitude of these harms are equivalent.

Like the Court in *Plessy*, the plurality in *Seattle/Louisville* fails to honestly confront the social meaning of segregation—a failure especially striking given the plurality’s professed fidelity to *Brown*. While proclaiming that “history will be heard,”51 Chief Justice Roberts shows little interest in what *Brown* actually said about the meaning of segregation and why it is unconstitutional.

The plurality begins its treatment of *Brown* by mentioning that “government classification and separation on grounds of race themselves denoted inferiority.”52 But the idea that segregation denoted inferiority nowhere appears in the ensuing discussion, which culminates two paragraphs later in the claim that the violation in *Brown* was that “schoolchildren were told where they could and could not go to school based on the color of their skin.”53 The plurality opinion thus makes a subtle yet consequential shift, from its passing recognition that segregation denoted inferiority to the implicit suggestion that segregation harmed blacks and whites equally. The latter position echoes the state’s argument in *Plessy* that segregation “prescribes a rule applicable alike to white and colored citizens.”54 Justice Harlan refuted this characterization, as Justice Stevens does in *Seattle/Louisville*, by pointing out the obvious.55

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50 *Seattle/Louisville*, 127 S. Ct. at 2767.
51 Id.
52 Id. (citing *Brown*, 347 U.S. at 493–94).
53 Id. at 2768.
55 See id. (“Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary.”); *Seattle/Louisville*, 127 S. Ct. at 2798 (Stevens, J., dissenting) (“The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.”).
Tellingly, the forty-one-page plurality opinion in Seattle/Louisville contains only one quotation from Brown: a paltry sentence fragment: “The impact of segregation is greater when it has the sanction of the law”—that omits the crucial adjacent words locating the illegality of segregation in its detrimental effects on black children.56 This inattention leads the plurality to identify the violation in 1954 as “differential treatment on the basis of race,”57 again implying equal burdens on blacks and whites. But Brown did not speak of the violation that way. The Court nowhere used the term “colorblind” or availed itself of the familiar quotation from Harlan’s dissent in Plessy. Instead, Brown’s most memorable utterance was its recognition that segregation harms black children by “generat[ing] 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.”58 The plurality’s interpretation reduces this plain statement of why segregation is unconstitutional to mere dictum.

Further, the plurality extracts from Brown the simple requirement that school districts “’achieve a system of determining admission to the public schools on a nonracial basis.’”59 This too distorts history. The quotation is not from Brown but from Brown II, and it is stated by the plurality three times60 without any acknowledgment that the Court in later decisions required school districts to do much more than assign children to schools on a nonracial basis to comply with Brown. The plurality’s reading of Brown hearkens back to the discredited 1955 dictum of the three-judge district court in Briggs v. Elliott,61 which helped galvanize resistance to desegregation and

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56 Seattle/Louisville, 127 S. Ct. at 2767 (plurality opinion) (quoting Brown, 347 U.S. at 494 (quoting the federal district court in the Kansas case)). The full quotation reads:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially[ly] integrated school system.”

Brown, 347 U.S. at 494 (quoting the federal district court in the Kansas case).

57 Seattle/Louisville, 127 S. Ct. at 2767 (plurality opinion). The plurality cleverly lifts this phrase from a brief on behalf of the plaintiffs in Brown, although the meaning the plurality assigns to it is clearly not what the Brown lawyers intended. See Adam Liptak, The Same Words, But Differing Views, N.Y. Times, June 29, 2007, at A24.

58 Brown, 347 U.S. at 494.

59 Seattle/Louisville, 127 S. Ct. at 2767 (quoting Brown, 349 U.S. at 300–01) (emphasis in original).

60 See id. at 2767–68.

61 132 F. Supp. 776, 777 (D.S.C. 1955) (“What [Brown] has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This . . . the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.”).
“set a standard for evasiveness by school districts throughout the South.” 62 If the violation in Brown was simply the act of “legally separating children on the basis of race,”63 then why was “admission to the public schools on a nonracial basis” not a sufficient remedy in New Kent County in 1968?64 In Charlotte-Mecklenburg in 1971?65 And in Denver in 1973?66 To acknowledge this history is to recognize that segregation was primarily a problem not of racial classification, but of entrenched racial subordination—as Charles Black put it, “a massive intentional disadvantaging of the Negro race, as such, by state law.”67 The remedial cases in the wake of Brown did not seek to eliminate racial classification; they sought to eliminate the racial caste system in public education “root and branch.”68

In refusing to confront the social meaning of segregation and its harm to black Americans, Plessy and the plurality opinion in Seattle/Louisville are cut from the same jurisprudential cloth. Plessy was anchored in a view of the law as a formal system hermetically sealed from social practices and understandings. Importantly, this view led the Court to deny not only the law’s culpability in fostering racial hierarchy but also the law’s authority to disestablish racial hierarchy. Plessy understood the former to imply the latter and explicitly rejected both:

The argument [that de jure segregation stamps the colored race with a badge of inferiority] assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affini-

63 Seattle/Louisville, 127 S. Ct. at 2767 (plurality opinion).
64 See Green, 391 U.S. at 437 (“[T]he fact that in 1965 the Board opened the doors of the former ‘white’ school to Negro children and of the ‘Negro’ school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.”).
66 See Keyes, 413 U.S. at 214 (authorizing “all-out desegregation,” not mere cessation of discrimination, to remedy intentional segregation).
68 Green, 391 U.S. at 438; see Swann, 402 U.S. at 15. In an illuminating history of how anticlassification values displaced antisubordination values in modern equal protection doctrine, Reva Siegel concludes that “the anticlassification principle was not the ground of the Brown decision, but instead emerged from struggles over the decision’s enforcement.” Reva Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown, 117 HARV. L. REV. 1470, 1547 (2004).
ties, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.\textsuperscript{69}

When the Court went on to say that “[l]egislation is powerless to eradicate racial instincts,”\textsuperscript{70} its meaning was twofold: first, that legislation to alter social relations would be ineffective, and second, that such legislation would be illegitimate.

By imposing a fictive yet impermeable boundary between law and social reality, \textit{Plessy} fashioned both a shield to protect \textit{de jure} segregation and, prophetically, a sword to invalidate legislation to bring the races together. For what is the underlying thesis of the plurality opinion in \textit{Seattle/Louisville} if not a reaffirmation of this untenable view of the law? By all but ignoring what \textit{de jure} segregation meant in social context, the plurality misconceives the nature of the constitutional harm, just as \textit{Plessy} denied it altogether. And by taking a dim view of the law’s role in structuring social relations and social equality, the plurality in \textit{Seattle/Louisville}, like the Court in \textit{Plessy}, withdraws the problem of \textit{de facto} segregation from the domain of public concern and situates it exclusively in the private realm of associational freedom based on “natural affinities” and the “voluntary consent of individuals.”

In these respects, the \textit{Seattle/Louisville} plurality opinion bears the intellectual fingerprints of Herbert Wechsler and his famous article on “neutral principles,”\textsuperscript{71} further revealing the plurality opinion’s likeness to \textit{Plessy}. At bottom, the rationale for constitutional parity between Joshua McDonald and Linda Brown lies in Professor Wechsler’s argument that

assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges \textit{in the same way on any groups or races that may be involved} . . . In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, \textit{he did not suffer more than I} in knowing that we had to go to Union Station to lunch together during the recess.\textsuperscript{72}

Wechsler was led to this view after concluding that the judgment in \textit{Brown} cannot validly rest on judicial inquiry into the legislature’s purpose in enacting segregation or the consequences of segregation for those affected by it.\textsuperscript{73} Remarkably, as authority for this proposition, he said:

\begin{itemize}
\item \textsuperscript{69} Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
\item \textsuperscript{70} Id. (emphasis added).
\item \textsuperscript{72} Id. at 34 (emphases added).
\item \textsuperscript{73} See id. at 33.
\end{itemize}
In the context of a charge that segregation with equal facilities is a denial of equality, is there not a point in Plessy in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it"?74

Contrary to what Professor Wechsler suggests, the lesson of Plessy is that the seduction of "neutral principles" must be tempered by an honest accounting of relevant social facts. The Court in Plessy thought it was acting on neutral principles, and from a certain perspective, it was.75 Its fundamental error was to equate neatness with a jurisprudence of legal formalism isolated from social meaning. Wechsler's argument and, by extension, the plurality opinion in Seattle/Louisville fare no better. As with Joshua McDonald and Linda Brown, whatever mix of guilt, embarrassment, and inconvenience Wechsler experienced on his walk to Union Station bears no resemblance to the humiliation, hostility, and stigma directed at Charlie Houston by Jim Crow. By tracing its intellectual underpinnings to Wechsler's "neutral principles," we see in Chief Justice Roberts's opinion a strand of jurisprudence whose logic still flirts with Plessy and dodges the central meaning of Brown.

III. Realism, Legalism, and Justice Kennedy

So far I have argued that neither Brown nor Harlan's dissent in Plessy supports the principle of colorblindness advanced by the Seattle/Louisville plurality. But it is possible that the principle can be defended on other grounds. For example, one might argue that, although race-conscious measures were necessary to uproot the entrenched system of racial caste in the era of Brown and its progeny, the progress our nation has made toward racial equality and better race relations, however halting and imperfect, now causes the risks of race-conscious policies to outweigh their benefits.76 Further, one might contend that demographic changes over the past thirty years—in particular, the increasing diversity of racial and ethnic groups in our society beyond blacks and whites—have multiplied the risks of racial

74 Id. (quoting Plessy, 163 U.S. at 551) (emphasis in original).
75 Plessy claimed to be neutral in two ways. First, to support its assertion that blacks are themselves to blame for seeing segregation as a badge of inferiority, the Court argued that "the white race . . . would not acquiesce in [the] assumption" of inferiority if blacks were the dominant power in the legislature and enacted similar laws. Plessy, 163 U.S. at 551. Second, distinguishing between civil and political equality on one hand and social equality on the other, the Court said: "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane." Id. at 551–52.
76 Justice O'Connor offered a forward-looking version of this argument when she said that continued progress in the number of minority students with high grades and test scores should make racial preferences in university admissions unnecessary "25 years from now." Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
classification beyond legally manageable limits. Although such arguments have their own weaknesses, they at least have the virtues of transparently engaging the social meaning of race and inviting an assessment of their validity by reference to social experience and reality. This mode of reasoning is preferable to simplistic legal formalisms such as “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

In Seattle/Louisville, this jurisprudential approach splits Justice Kennedy from the Roberts plurality. His separate opinion recognizes the need for legal principle to be responsive to “the real world,” and he appears genuinely troubled by segregation in the public schools. This concern leads him to reject colorblindness and to recognize that school districts have a compelling interest in “avoiding racial isolation” and in “achieving a diverse student population.” At the same time, he limits the pursuit of these goals with two legal distinctions. First, school districts have less latitude to remedy de facto as opposed to de jure segregation. Second, in remedying de facto segregation, districts may use zoning, school site selection, recruitment, and resource allocation in race-conscious ways, but they may not classify individual students by race absent an “extraordinary show-
ing” of necessity. As explained below, the first distinction is an unwarranted retreat to legal formalism, while the second is responsive to social understandings of race and segregation, but not in the way that Justice Kennedy describes.

A. De Jure Versus De Facto

Doctrinal efforts to distinguish school segregation sanctioned by state authority (de jure) from school segregation attributable to demographic forces and private choices (de facto) have been controversial at least since Keyes v. School District No. 1, where Justice Powell criticized the de jure/de facto distinction as a “legalism” detached from “present reality.” Powell’s point was that state complicity is an ineluctable feature of school segregation, and “whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle.” He also argued that it makes no sense to treat school districts that voluntarily end their segregative policies differently from districts that are judicially ordered to do so, since the lingering effects of the policies are often the same. Further, Powell said, minority children are likely to perceive the same pernicious message from segregation, whether it is de jure or de facto.

This realist perspective elaborated by Justice Powell, a former school board member, is not lost on his successor, Justice Kennedy. In Seattle/Louisville, Justice Kennedy observes:

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.
However, Justice Kennedy goes on to explain why the *de jure/de facto* distinction is important: “It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies.”90 Notably, the point is stated as a “concession” because it is an acknowledgment that the *de jure/de facto* distinction, in light of the passage quoted above, does not correspond to a true state of affairs as much as it serves the institutional purpose of keeping judicial power in check.

This purpose is evident in the doctrinal test for granting unitary status to previously *de jure* segregated districts. The test requires a showing that the district has “complied in good faith with the desegregation decree” and has eliminated “the vestiges of past discrimination . . . to the extent practicable.”91 The first element speaks to process, not remedial efficacy. The second speaks to remedial efficacy, but requires elimination of segregation’s vestiges only “to the extent practicable.” The notion of practicability, like the test as a whole, is informed by “the ultimate objective” of “return[ing] school districts to the control of local authorities.”92 As Justice Kennedy recognizes, a desire to restore local autonomy and to avoid “ongoing and never-ending supervision by the courts” largely motivates the doctrinal construction of the *de jure/de facto* distinction.93

What, then, is the rationale for converting a distinction whose primary function is to limit judicial supervision of school districts into a distinction that limits what school districts can do when free of judicial supervision? How can a distinction intended to facilitate local control simultaneously be used to frustrate local control? Justice Kennedy’s answer is that the *de jure/de facto* distinction “serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.”94 But this merely states the doctrine’s result, not its justification. The important question is how accurately the distinction confines racially classificatory remedies to the true scope of *de jure* wrong.

The reality is that there is significant slippage between, on one hand, the doctrinal concept of *de jure* segregation intended to circumscribe the judicial role and, on the other hand, a purely substantive concept—let us call it “DE JURE segregation”—encompassing the true scope of unlawful segregative conduct and its social and educational vestiges.95 By DE JURE segregation...
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...
harm requiring redress at a given time. Just as the nature and extent of a
district’s race-conscious remedial measures should be tailored to the un-
remedied vestiges of de jure segregation during the course of a judicial de-
cree, the nature and extent of such measures likewise should be tailored to
the unremedied vestiges of de jure segregation when pursued as a voluntary
policy.100

B. Permissible Race-Conscious Measures Versus
Impermissible Individual Classifications

Let us suppose, contrary to Justice Kennedy, that the concept of de jure
segregation marks the boundary of a school district’s remedial interests.
Let us further suppose that we are considering race-conscious student as-
signment in a district where no vestiges of de jure segregation remain. In
this genuinely non-remedial context, what should we make of Justice Ken-
nedy’s distinction between individual racial classifications, which carry a
heavy presumption of invalidity, and other race-conscious measures such as
attendance zoning and school siting, which he says are unlikely even to trig-
ger strict scrutiny?101

At a practical level, the distinction seems to elevate form over sub-
stance again, just as earlier distinctions between quotas and plus factors and
between plus factors and point systems arguably did in the context of affirm-
avative action.102 Although the Court has long treated strategies such as zoning
and school siting with the same scrutiny as individual racial classifications
when adjudicating claims of de jure segregation,103 here Justice Kennedy
favors race-conscious strategies whose effects on student assignment, though
possibly substantial, are diffuse, indirect, and difficult to isolate, while disfa-
voring individual racial classifications even if their total effects on student
assignment are minimal. This distinction may encourage strategies that are
“more acceptable to the public,”104 but is there more that can be said in its
defense?

Justice Kennedy’s own explanation is intriguing. To his credit, his ob-
jection to individual racial classification does not misappropriate notions of

100 The Seattle and Louisville districts demonstrated this sort of tailoring in their use of
progressively less robust race-conscious measures over time. See Seattle/Louisville, 127 S. Ct.
at 2802–10 (Breyer, J., dissenting).
101 See id. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).
102 See Gratz v. Bollinger, 539 U.S. 244, 270–73 (2003); Bakke, 438 U.S. at 315–18 (opin-
ion of Powell, J.). But cf. Gratz, 539 U.S. at 295–96 (Souter, J., dissenting) (seeing no differ-
ence between using a point system to consider race and using race as a Bakke-type plus factor);
Bakke, 438 U.S. at 378 (Brennan, J., concurring in the judgment in part and dissenting in part)
(seeing no practical or constitutional difference between quotas and plus factors).
district liable for de jure segregation based on race-conscious attendance zoning, school siting,
school closing, and personnel assignment decisions).
104 Bakke, 438 U.S. at 379 (Brennan, J., concurring in the judgment in part and dissenting in part,
arguing that the use of race as a plus factor should not be constitutionally favored over a
racial quota simply because it is “more acceptable to the public”).
group stigma, inferiority, or inequality at the heart of Brown. Instead, his objection appeals to personal liberty—not the freedom of association that Professor Wechsler worried about, but the freedom of self-definition without undue government coercion. The theme of self-determination runs through Justice Kennedy’s opinion. The problem with individual classification, he says, is that it “tells each student he or she is to be defined by race.”

“To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change.”

“Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.” This last sentence does not invoke the principle of colorblind equality advanced by the Roberts plurality so much as it summons the values of personal autonomy and self-determination from a case like Lawrence v. Texas. Justice Kennedy’s point is that classifying by race is not a matter of passive observation; it is something crude and reductionist that the government “does to you.”

Although there is merit to this concern, its applicability seems questionable in this context. The plaintiffs in Seattle/Louisville did not complain that the mere act of racial classification harmed their self-identity. They complained that they could not attend their first-choice school because of their race. That is a complaint about differential treatment, not about classification itself. Moreover, the idea of self-definition does not justify a near-categorical ban on individual classifications so much as it suggests a requirement that school districts allow students to self-identify by race or, if they wish, not to identify at all. Under a system of self-identification, a racial classi-

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105 Seattle/Louisville, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).
106 Id. at 2797.
107 Id.
108 Cf. Lawrence v. Texas, 539 U.S. 558, 562 (2003) (Kennedy, J.) (“[T]here are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”).
109 See Seattle/Louisville, 127 S. Ct. at 2792 (referring to “crude system of individual racial classifications”); id. at 2796 (“Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.”).
110 Although Plessy was seven-eighths white, the Court held that the terms “white” and “colored” are for each state to define. See Plessy v. Ferguson, 163 U.S. 537, 538, 552 (1896); cf. Seattle/Louisville, 127 S. Ct. at 2796–97 (Kennedy, J., concurring in part and concurring in the judgment) (“When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite?”); Metro Broad., Inc. v. FCC, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting).
111 See Seattle/Louisville, 127 S. Ct. at 2748, 2750.
112 The Seattle plan allowed students to self-identify their race, but if a student chose not to identify his or her race, the district assigned a racial classification based on a visual inspection of the student or parent. See Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1204 n.15 (9th Cir. 2005) (en banc) (Bea, J., dissenting). The latter process does seem problematic, although it is unclear how often it was used.
fication would not be “state-mandated,” and an individual would not be “powerless to change” it.

Apart from concern for individual autonomy, however, there is a sense in which taking race into account at an aggregate instead of individual level seems more consonant with the goal of integrating public schools. One way to see this is to consider a school assignment plan that comports with Justice Kennedy’s legal framework, such as the one in my local community. Like many cities, Berkeley has substantial residential segregation. Whites and Asians tend to live in the eastern hillside, while blacks and Latinos tend to live in the western flatland. For forty years, the Berkeley Unified School District has sought to integrate its elementary schools using a mix of strategies.113 Its current assignment plan divides the district into three attendance zones, each running across the city from east to west in order to capture a racially diverse swath of students from the hills to the flats. Students have priority to attend the schools in their zone, and assignments are made through a lottery structured by parental choice, sibling priority, and diversity considerations.

The lottery process is designed to ensure socioeconomic and racial diversity in each elementary school. To achieve this, the assignment plan divides the district into 445 small neighborhoods, each roughly four to eight city blocks. For each neighborhood, the plan combines three factors—average household income, average level of parental education, and percentage of students of color—into a composite diversity measure. Based on that measure, each small neighborhood falls into one of three diversity categories. The choice-based lottery system strives to produce elementary schools with students from each diversity category in roughly equal proportion within a modest range of flexibility.

Consistent with Justice Kennedy’s prescription, the Berkeley plan does not subject students to “differential treatment based on individual classifications.”114 Instead, school assignments take into account the socioeconomic and racial characteristics of the neighborhood where each student lives. The appeal of this approach lies in its focus on race as a structural feature of the social landscape, not as a personal attribute of an individual student. The element of race-consciousness in the plan responds directly to the social fact of residential segregation. Because race is treated as an aggregate phenomenon, no student is made individually “culpable” for being of a particular race. At an expressive level, the plan speaks to the collective character of

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113 The Berkeley district has only one high school, so integration strategies are relevant only to elementary school assignments. The history of the Berkeley plan and its current parameters, discussed in this paragraph and the next, are thoughtfully detailed on the district’s website at http://www.berkeley.net/index.php?page=student-assignment-plan.

114 Seattle/Louisville, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Thus, if two students of different races live in the same household, they would be treated the same under the plan’s diversity measure. No decision turns on an individual student’s own race.
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the underlying problem that makes an integrative school assignment plan necessary in the first place.

Interestingly, the clunkiness of the options left open by Justice Kennedy may push school districts seeking racial integration to reevaluate their assignment policies in the wholesale, fundamental way that Berkeley has. In *Seattle/Louisville*, the Court criticized the individual racial classifications at issue for merely nibbling at the edges of overall school assignments. A more systemic approach to integrating public schools would likely employ the full range of race-conscious strategies once used to keep schools segregated after *Brown*. Because most racially diverse school districts are residentially segregated, the underlying approach of any vigorous effort to integrate public schools must be more comprehensive than sorting children one by one.

**CONCLUSION**

Law by its nature seeks to impose order on a less-than-orderly world. A degree of slippage between legal doctrine and social reality is an inevitable byproduct of law’s normativity; lines must be drawn somewhere. But the legitimacy of law depends not only on its inner logic and coherence but also on its responsiveness to the actual conditions and historical understandings of the society it governs. Our public schools are still segregated, and they are still unequal. These facts cannot be wished away by formulaic concepts of legal equality. But they can be addressed through imaginative policies within a jurisprudence that acknowledges what four Justices in *Seattle/Louisville* would deny—namely, the past and present ways in which race structures inequality.

115 See id. 2759–60 (majority opinion). Although the Court says “we do not suggest that greater use of race would be preferable,” id. at 2760, Justice Kennedy’s opinion suggests that a race-conscious plan that potentially affects many assignments but does not use individual racial classifications would be permissible, see id. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

116 See *supra* note 103. In *Louisville*, assignments based on individual classifications comprised only a small part of its overall integration plan. The primary element of the plan, unaffected by the Supreme Court’s decision, is a set of carefully drawn, racially integrated attendance zones that structure initial assignments and school choice. See McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 842–43 (W.D. Ky. 2004).