I. INTRODUCTION

“The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law,” declared Justice Harlan in his ringing dissent to Plessy v. Ferguson.\footnote{1} Yet in 1896, his vision of a “colorblind” America was marred by centuries of racism and prejudice.\footnote{2} Similarly, despite lofty ideals, the Supreme Court’s historical treatment of African Americans in the United States stands in sharp contrast to the declaration that all are created equal.\footnote{3} “Other racial injustices in this nation’s history are grave, but are different in part because the injuries were less fundamentally legal in nature.”\footnote{4} Nevertheless, the Court in Brown v. Board of Education “did what, until 1954, neither the presidents nor the Congress could or would do” by abolishing government-imposed racial segregation.\footnote{5} Today, the Court continues to struggle with this mandate as demographic and economic factors contribute to the resegregation of neighborhoods and schools.\footnote{6}

Professor Lynette L. Danley’s The Diary of M.A.D. Black Mama: The Blessings of Reality,\footnote{7} gives a vivid illustration of how racism and the law continue to impact America. This paper will introduce Professor Danley’s monologue by

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\footnote{1 163 U.S. 537, 560 (1896).}
\footnote{4 Gabriel Chin & Randy Wagner, The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty, 43 HARV. C.R.-C.L. L. REV. 65, 122 (2008).}
\footnote{5 Gyebi, supra note 2, at 51.}
\footnote{6 See John Powell, The Tensions Between Integration and School Reform, 28 HASTINGS CONST. L.Q. 655, 682–83 (2001).}
providing a brief overview of the major Supreme Court decisions that have taken America from slavery and segregation to integration. It will also explore the sharply divided Court decisions that have allowed modern de facto resegregation to occur. However, a comprehensive discussion of the dozens of landmark “race” cases and their accompanying historical contexts is beyond the scope of this paper. Additionally, while many minority groups have been disadvantaged by the legal system, this paper will only address the plight of African Americans. Rather than presenting a voluminous historical account, this paper tells the story of racism in American law through a few critical Supreme Court cases that have shaped societal views of race and equality in America.

II. SLAVERY: DRED SCOTT V. SANFORD

Slavery in America began with the English colonists of Virginia in 1607 and lasted over 350 years until it was prohibited by the Thirteenth Amendment to the Constitution in 1865. The promise of equality originated with Thomas Jefferson’s declaration that “all men are created equal.” Subsequent constitutional text, however, “diluted Jefferson's words.” At the Constitutional Convention, the word “slavery” was carefully avoided by the drafters, while a series of compromises permitted the continued importation of slaves, required the return of fugitive slaves, and counted slaves as three-fifths of a person for legislative purposes. As Governor Morris accurately foreshadowed, slavery in America became the “curse of heaven.”

The 1856 case of Dred Scott v. Sanford symbolizes the rampant racism of its era. Scott was a Missouri slave who accompanied his master to Illinois where slavery did not exist, and later to Minnesota where slavery was prohibited by the Missouri Compromise. Scott claimed that by residing in a free territory he himself was free under the Missouri Compromise. In a similar case, Rachel v. Walker, a slave owner forfeited ownership of a slave that he brought into the

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10 Id. at 422.
11 Id. at 394.
Northwest Territory.\textsuperscript{15} Although Scott won in the district court, Sanford prevailed at the appellate level, and the case ultimately arrived in the Supreme Court.\textsuperscript{16}

In the majority opinion, Chief Justice Roger B. Taney declared that Scott was not a citizen and therefore did not have standing to bring a claim in U.S. court.\textsuperscript{17} Taney “attempted to ground his pro-slavery opinion upon a lengthy historical discourse,”\textsuperscript{18} noting that the Framers “considered [African Americans] as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority.”\textsuperscript{19} Even though Taney ruled the Court lacked jurisdiction, he went on to hold that Scott was not a free man and that the Missouri Compromise was an unconstitutional overextension of Congresses’ power.\textsuperscript{20} Ironically, it was Taney himself who overreached in unwisely deciding an issue not properly presented before the Court and by attempting to wrest a divisive issue from the political process.\textsuperscript{21} Ultimately, this decision “substituted his views of racial superiority for the congressional decision to end slavery in territories of the United States.”\textsuperscript{22}

While Taney believed this case would settle the slavery question, it actually further divided Southern slaveholders and Northern abolitionists.\textsuperscript{23} The prospect of the unregulated expansion of slavery into western territories increased opposition in the North, while the legal weight of \textit{Dred Scott} led to heightened demands by the South.\textsuperscript{24} As a result, the question of slavery was decided not by the Supreme Court, but by the deaths of hundreds of thousands of Americans during the Civil War.\textsuperscript{25} Abraham Lincoln observed that the United States would have to pay a high price “until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword.”\textsuperscript{26} Ultimately, the Court’s decision in \textit{Dred Scott} exacerbated racial tensions during a critical period, and allowed racial prejudice to overshadow justice.

\textsuperscript{15} 4 Mo. 350, 354 (1836); see also David Konig, \textit{The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits}, 75 UMKC L. REV. 53, 74–75 (2006).

\textsuperscript{16} \textit{Dred Scott}, 60 U.S. at 394.

\textsuperscript{17} \textit{Id.} at 395.


\textsuperscript{19} \textit{Dred Scott}, 60 U.S. 393, 404–05 (1856).

\textsuperscript{20} \textit{Id.} at 519–520.

\textsuperscript{21} See Konig, supra note 15, at 55.

\textsuperscript{22} Rich, supra note 9, at 422.


\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} RONALD WHITE, \textit{LINCOLN’S GREATEST SPEECH: THE SECOND INAUGURAL} 151 (2002).
III. SEPARATE BUT EQUAL: PLESSY v. FERGUSON

Following the Civil War, the Reconstruction Congress amended the Constitution “not only to abolish slavery, but also to eradicate the racist ideology that Chief Justice Taney relied upon and to offer the victims of past discrimination new constitutional protection.” The Emancipation Proclamation of 1863, followed by the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, officially abolished slavery in America, granted citizenship to former slaves, and secured voting rights for members of all races. During this period, “Republicans controlled Southern politics [and] blacks enjoyed extensive political power.” Nevertheless, it was only a few years until the promise of equality was broken. The Compromise of 1877 gave Republicans the presidency, but as a result they traded the power to enforce racial equality in the southern states.

Over the next thirty years, Southern states passed legislation targeting the suffrage rights of African Americans. Disenfranchisement of Black Americans became widespread with “black codes,” voting requirements (including educational requirements, character requirements, and grandfather clauses), and coercion by the Ku Klux Klan. Even the Court “abandoned its resolve to protect former slaves from a domineering majority.” In the wake of the 1873 Colfax Massacre, in which hundreds of African American militia men were killed in an election battle, the Court determined that Congress was powerless to stop violence in state or local elections. In 1883, the Court limited government authority to remedy private acts of racial discrimination and upheld legislation imposing criminal penalties for interracial marriage.

29 Chin & Wagner, *supra* note 4, at 82.
31 See id; see also Vincent DeSantis, *Rutherford B. Hayes and the Removal of Federal Troops at the End of Reconstruction, in Region, Race, and Reconstruction* 417, 417–50 (Morgan Kousser & James McPherson eds., 1982) (noting that this was an unwritten compromise resolving the highly controversial 1876 U.S. Presidential election. Republican Rutherford B. Hayes assumed the presidency over his democratic rival, however the deal required Hayes to remove Federal troops from formerly Confederate States. As a result, the era of Reconstruction ended and white supremacy spread in the South.).
33 See id. at 91.
34 Rich, *supra* note 9, at 426.
35 See Chin & Wagner, *supra* note 4, at 118 (noting that this case “almost immediately affected the course of political events by encouraging political terror”).
In a most notable 1896 case, *Plessy v. Ferguson*, the Court upheld racial segregation on Louisiana railway cars. Justice Henry Billings Brown spoke for the majority in declaring that the segregation law was a reasonable “police” measure. Dissenting, Justice John Harlan denounced the racism of the majority, stating that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” This “separate-but-equal” precedent justified racial discrimination in countless other contexts. For example, three years later, a unanimous court allowed the diversion of funds from African American schools, holding that “education of people in schools maintained by state taxation is a matter belonging to the respective states.” Nearly a century later, “Linda Brown had to walk a mile in order to attend the Monroe School when she lived just three and a half blocks from the Sumner School, a school for white children.” *Plessy* illustrates a slide from the promise of racial equality following the Civil War towards earlier notions of legally-recognized inferiority. During this period, “the vestiges of *Dred Scott* remained in countless ways, some covertly, in the minds and actions of public actors, and some not so covertly, in the minds and actions of private actors.”

IV. INTEGRATION: *BROWN v. BOARD OF EDUCATION*

The 1954 case *Brown v. Board of Education* consolidated four public school segregation cases. Under Chief Justice Earl Warren, the Court unanimously rejected the fundamental idea that separate schools could in fact be equal. “To separate [African American children] 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.” This psychological stigma deprived African American students of an equal education and created inherent inequality. Despite intense resistance, Chief Justice Warren was an activist who “understood the difference between law and justice, and chose to do justice.”

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37 163 U.S. 537, 547 (1896).
38 See id.; see also Gyebi, supra note 2, at 68.
39 *Plessy*, 163 U.S. at 559; see also Gyebi, supra note 2, at 32–33.
40 Chin & Wagner, supra note 4, at 112.
41 Rich, supra note 9, at 427.
42 Id. at 429.
43 Lassiter, supra note 12, at 412.
45 Rich, supra note 9, at 430.
46 *Brown*, 347 U.S. at 494; see also Lively, supra note 18, at 32.
47 See Powell, supra note 6, at 665.
48 Gyebi, supra note 2, at 39.
Recognizing the challenge that desegregation would pose, the Court placed the implementation of integration “in the hands of district courts, merely mandating that desegregation be done ‘with all deliberate speed’ . . . [and] subsequently refused to hear desegregation cases for eight years.” \(^{49}\) Desegregation was a lengthy and difficult process as “the reactions of certain public officials to the Brown decision were openly defiant.” \(^{50}\) However, the Court was undeterred, and in the 1958 case of \textit{Cooper v. Aaron}, it spoke out against Southern resistance to desegregation. \(^{51}\) A decade after \textit{Brown}, the Civil Rights Act of 1964 solidified the Court’s ruling by “remov[ing] barriers to equal access to public accommodations, public education, public facilities, and employment.” \(^{52}\) After centuries of reflecting societal prejudices that had undermined the concept of equality, the \textit{Brown} Court took a monumental step forward by leading the way towards a more integrated America.

V. MODERN SEGREGATION: FROM \textit{MILLIKEN V. BRADLEY} TO PARENTS INVOLVED IN \textit{COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1}

“\textit{Brown} represented a new promise and a broad commitment to tear down the façade and to produce genuine equality for all persons living in the United States.” \(^{53}\) Nevertheless, the Court continued to struggle with the mandate of \textit{Brown}: “[w]as it to end segregation forcefully, or to force integration?” \(^{54}\) While segregation was prohibited, “coercive government steps to accomplish integration such as busing, magnet schools, and other inter-school-district remedies” were not required. \(^{55}\) Recent decisions reveal that the Court “seems to have retreated from a vigorous enforcement of racial integration in public schools.” \(^{56}\)

A critical distinction exists in remedying legally enforced \textit{de jure} segregation, as compared to \textit{de facto} segregation which occurs for other reasons. \(^{57}\) This difference was addressed by the Court in the 1974 case of \textit{Milliken v. Bradley}. \(^{58}\) In a five-four decision, the Court struck down the district court’s integration order ruling that “cross-district desegregation measures could not be ordered unless it was shown that intentional racially discriminatory acts of either the state or local officials were a substantial cause of the interdistrict segregation.” \(^{59}\) Furthermore, in

\(^{49}\) Powell, \textit{supra} note 6, at 665.
\(^{50}\) Gyebi, \textit{supra} note 2, at 42.
\(^{51}\) 358 U.S. 1, 5–7 (1958).
\(^{52}\) Gyebi, \textit{supra} note 2, at 50.
\(^{53}\) Gyebi, \textit{supra} note 2, at 50; \textit{see also} Rich, \textit{supra} note 8, at 431.
\(^{54}\) See Rich, \textit{supra} note 8, at 431.
\(^{55}\) Lassiter, \textit{supra} note 11, at 413.
\(^{56}\) Gyebi, \textit{supra} note 2, at 50.
\(^{57}\) See Powell, \textit{supra} note 6, at 667–69.
\(^{59}\) Powell, \textit{supra} note 6, at 668.
the 1976 case of *Pasadena City Board of Education v. Spangler*, the Court found that desegregation duties carried time limitations that expired once a racially neutral attendance pattern was implemented.\(^60\) Similarly, the 1991 case of *Oklahoma City School Board v. Dowell* established that as soon as a school district “achieves unitary status,” it is released from court-ordered desegregation requirements in spite of any de facto segregation that may result.\(^61\) “Even though the end of busing after the Dowell decision led to a quick resegregation of elementary schools in Oklahoma City, there will be no remedy for this segregation.”\(^62\)

As a result, “[b]etween 1980 and 1997, the number of African American students who attended majority white schools declined from 37.1% to 31.2%.”\(^63\) Additionally, “Latino students attending majority white school declined from 45.2% to 25.2% between 1968 and 1997.”\(^64\) Much of this decline comes from a failure to address the role race plays in issues such as economic prosperity and housing.\(^65\) For example, cities such as “New York, Los Angeles, and Chicago have schools that have at least 85% students of color.”\(^66\)

Under the foregoing trends, *Parents Involved in Community Schools v. Seattle School District No. 1* (“*Seattle Schools*”) came before the Court in 2007, and a sharply divided opinion struck down the plans that two school districts had voluntarily undertaken to “distribute minority and white students more evenly among their schools.”\(^67\) Chief Justice Roberts’ plurality opinion explained that race could be used only to remedy the effects of intentional discrimination in the past or to achieve a compelling state interest.\(^68\) Previously, in *Grutter v. Bollinger*, the Court recognized diversity as a compelling interest in higher education.\(^69\) However, Chief Justice Roberts felt the case at hand more closely resembled *Gratz v. Bollinger* in which the Court struck down a program using race as the sole factor.\(^70\)

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\(^{61}\) 498 U.S. 237, 248 (1991); see also Powell, *supra* note 6, at 668–69.

\(^{62}\) Powell, *supra* note 6, at 668–69.

\(^{63}\) *Id.* at 682–83.

\(^{64}\) *Id.*

\(^{65}\) See *id.*

\(^{66}\) *Id.*


\(^{68}\) *Seattle Schools*, 127 S. Ct. at 2753–54.


\(^{70}\) 539 U.S. 244, 275 (2003).
A concurring opinion by Justice Kennedy placed more value on the district’s diversity goal, but concluded that this could have been achieved through a more narrowly tailored plan that took into account more factors than just race. In contrast, Justices Stevens and Breyer both argued that the Court had strayed from Brown. As scholars have noted, it seems paradoxical that the Court:

[Can on one day require a school district to take drastic measures, including busing students across a giant school district to increase racial integration in schools, and then prohibit school districts from taking even the mildest measures, such as using race as a tie-breaker in making student assignments, on the next.]

From this viewpoint, the distinction between de jure and de facto segregation demonstrates the “dangers of parsing individual rights too finely at the expense of maintaining stability in legal structure and process.” Brown reflects the modern high water mark for the promise of integration in America. However, its legal support has waned just as Reconstruction-era ideals did a century earlier. The Court’s decision in Seattle Schools is a “constitutional pivot point” in the desegregation battle, after which diversity in grade schools is no longer a compelling government interest and cannot be readily implemented. One must only imagine a hypothetical classroom of clones who look, think, and act alike (and what they would think about those not like themselves), to recognize the importance of diversity in education. Ironically, this distinction is recognized in higher education, but not during grade school when the world views of children are most significantly shaped.

Under modern law, once past de jure discrimination has been undone, future de facto discrimination is allowed to continue. While modern segregation is more subtle than the legally-enforced racism of Plessy, current economic and demographic factors have created largely the same result. Rather than sending minority students to schools of lesser quality, we send poorer students, most of who belong to minority groups, to these schools. By doing so, we prevent the very types of associations that would ultimately create economic, social, and legal equality in America.

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71 Seattle Schools, 127 S. Ct. at 2744.
72 Id. at 2797–2801.
74 Fischbach & Cacace, supra note 68, at 538.
75 Id. at 494.
VI. CONCLUSION

The effects of slavery, racism, and the struggle for civil rights continue to shape both our law and society. While Brown was not a “panacea for all of our racial problems,” it has helped to push America beyond the government-mandated racial discrimination of Dred Scott and Plessy. Although de jure segregation has been largely eliminated, the Court now faces the responsibility of dealing with de facto discrimination issues. However, today’s sharply divided Court has failed to recognize diversity as a compelling interest in grade school education despite the fact that schools have become increasingly resegregated. As our history reveals, the Supreme Court has tremendous power to either divide or unify America on fundamental questions of equality and race.

76 See Gyebi, supra note 2, at 51–52.
77 Id. at 51.
78 See Gyebi, supra note 2, at 47–51.