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Common Interests and Integration

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COMMON INTERESTS AND INTEGRATION

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On this occasion of the 50th anniversary of *Cooper v. Aaron*,[1] David Strauss has eloquently called upon us to consider how a piece of history—and not even very ancient history at that—can come to serve as authority for a principle that is irreconcilable with the historical events that defined it. The meaning, importance, and historical role of *Brown v. Board of Education*[2] and its successor, *Cooper v. Aaron*, in our nation's history now appear to be a matter of art, not nature. But the artist has an obligation to defend an interpretation of a subject as important as our nation's commitment to equality, and Professor Strauss has done just that. He positions us to embrace an understanding along the trajectory toward racial equality to which *Brown* itself was committed, as were the legal and social cultures that made *Brown* their icon.

This Essay takes a closer look at one of the implications of Professor Strauss's strong defense of *Brown* in the face of a modern tug-o'-war over its legacy. The dispute centers around whether *Brown* should be understood to condemn all government considerations of race, as some modern readers claim,[3] or whether the heart of the *Brown* holding was a rejection of racial classifications that contribute to societal inequality, as others, including Professor Strauss, maintain.[4] In this Essay, I consider whether the *Brown* Court, and before it, the lawyers who framed the question in *Brown*, were right to speak so absolutely and forcefully about racial separation itself, rather than insisting, more contextually, that separate public facilities be required to provide equality of resources. In hindsight, we now have come to see that the framers of the separate-is-inherently-unequal principle unwittingly laid the

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1. 358 U.S. 1 (1958).

2. 347 U.S. 483 (1954).

3. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1470 (2004) ("Today, many understand *Brown* to have ended the era of segregation in America by declaring the constitutional principle that government may not classify on the basis of race.").

4. *See id.* at 1547.

groundwork for the later claim, seen most recently in *Parents Involved in Community Schools v. Seattle School District No. 1*,[5] that the Constitution requires color blindness.[6] Did they make a mistake?

At the outset, it is worth considering why the Supreme Court might have spoken as it did in *Brown*, using broad, abstract terms that perhaps invite dissociation from the factual context from which they arose. The first thing to remember is that, despite its status as an ostensibly co-equal branch of government, the Supreme Court is extremely limited in the weapons it has to lend authority to its decisions. Effectively, it has only two. First, it has the personae of its nine individual Justices—their personal endorsement of the positions they take. Second, it has the words they choose to declare and defend their decisions.

In *Brown*, the Justices were keenly aware that they needed every bit of ammunition they had, if they were going to call an end to segregation in public school. Historians have documented how some members of the Court, under Chief Justice Earl Warren, labored to achieve unanimity in its decision in *Brown*, to be authored by the Chief Justice and joined by all eight Associate Justices.[7] It was not at all a foregone conclusion that all nine Justices could bring themselves to cast such a controversial vote.[8] As Professor Strauss has described, all of the Justices probably abhorred the practice of segregation and its attendant inequalities, but it was quite another matter to go on record as holding that the Supreme Court of the United States had the legitimate authority to strike down the practice as a violation of the Equal Protection Clause.[9] The Chief Justice recognized the need for mustering as much authority as possible and employed his considerable leadership skills to draw the Justices to a unanimous decision.[10] In this way they deliberately used their personae in the grandest flourish they knew.

When it came to writing the opinion, Chief Justice Warren also took the path of maximal impact. Invoking the force of principle, he chose broad,

5. 551 U.S. ___, 127 S. Ct. 2738 (2007).

6. *Id.* at 2756 n. 14 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)); *id.* at 2768 (Thomas, J., concurring) ("Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by segregationists in *Brown v. Board of Education* . . . ."); *see* William J. Rich, Brown, *Dominance, and Diversity*, 43 WASHBURN L.J. 311, 324 (2004).

7. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 204 (1994) (describing Justice Frankfurter's efforts to promote unanimity) [hereinafter TUSHNET].

8. *Id*. at 209–10 (describing Justice Douglas's perception after the conference that there was only a bare majority to hold segregation unconstitutional).

9. *See generally* David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065 (2008).

10. *See* TUSHNET, *supra* note 7, at 210–11.

ringing declarations rather than incremental, narrow statements to resolve Linda Brown's case. Rejecting the idea that the constitutional question could turn on the "tangible" factors affecting the quality of education, the Court relied, instead, on "the effect of segregation itself on public education."[11] It found, of course, that "[s]eparate educational facilities are inherently unequal."[12] There was perhaps a bit of an incongruence between this seemingly theoretical, abstract declaration and the evidence that the Court mustered to support it, which was an empirical link between the practice of segregation in the schools of the time and a resulting appearance and fact of inequality.[13]

When it came to application of this principle in the subsequent litigation in Little Rock, the Court faced a direct attack on its authority.[14] The opposition forces were not limiting themselves to the traditional weapons of challenge to a court's authority: words and argument. They were also raising the specter of physical violence.[15] The Court needed its strongest possible defense. But what would that mean for the least dangerous branch? The President could call in the 101st Airborne—and he did.[16] The Governor could call out the National Guard—and he did.[17] But what did the Court have to defend its holding and the rule of law? A few rather doughy marshals guarding the entrance to the Supreme Court building in Washington, D.C. would not be much help.

So the Court had to do one better than what it did in *Brown*. Not only would the opinion in *Cooper v. Aaron* also be unanimous, providing a supportive vote from each of the nine Justices in favor of the author's opinion, as in *Brown*,[18] but the *Cooper* opinion would also be jointly *authored* by all nine Justices[19]—not signed by one and joined by the other eight—laying the credibility of all nine Justices on the line for every word in the opinion in a very personal and direct way. This was the first and only time in the history of the Court that the Justices made this gesture of solidarity.

In addition to maximizing the force of their personae in this way, the Justices also chose their words for the opinion in *Cooper* in a way that maximized their effect, surpassing even *Brown*. While many thought that *Brown* itself had stretched the Court's authority to (or for some, even beyond)

11. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

12. *Id*. at 494.

13. *See id*. at n.11 (citing evidence that separation of children by race generated feelings of inferiority in the minority race).

14. *See* Cooper v. Aaron, 358 U.S. 1, 4 (1958).

15. *Id.* at 13.

16. *Id.* at 12.

17. *Id.*

18. *Brown*, 347 U.S. at 466.

19. *Cooper*, 358 U.S. at 4.

its limits,[20] *Cooper* needed more. So here, not only did the Court offer its contested interpretation of the Constitution, but it went so far as to claim for its interpretation the status of the Constitution itself as "the supreme law of the land."[21] Thus, the Justices employed the weapon of language to conscript the power of the Constitution in support of their ruling. Ending the opinion with a further stroke of almost ecclesiastical grandiosity, the joint opinion declared, "Our constitutional ideal of equal justice under law is thus made a living truth."[22]

These semantic indulgences have cost the Court. They have led critics to cry out against judicial supremacy,[23] and have led subsequent interpreters, including the Roberts Court in *Parents Involved*, to pluck some of the abstract language out of its 1950s context to support a claim that the Constitution forbids any government consciousness of race, regardless of its relationship to equality.[24] Perhaps if the Warren Court had foreseen the future, it would have been a bit more restrained in using its two rather meager weapons against the violent stand being taken against desegregation.

If the Court had foreseen the future, it might have said in *Brown*, not that separate facilities are "inherently unequal," but something more lawyerly, like "forced separation with the purpose and effect of maintaining racial hierarchy and perpetuating gross disparities in power, opportunity and resources, is unequal." Not so ringing, but more accurately reflective of what the Court was clearly saying in *Brown*.

If the Court had foreseen the future, it might have said in *Cooper*, not that its holdings are the supreme law of the land, but something more precise, like "traditional adherence to the rule of law requires that outsiders refrain from intentionally interfering with a party's compliance with a valid court order." Not so powerful, but less vulnerable to accusations of overreaching.

But we have to remember that it was not a time for toned-down rhetoric. There was rioting in the streets. There were children whose lives were threatened as they tried to go to school in compliance with a federal court order. There were claims of entitlement to violate the law. The Court called a special session in September, before the start of the new Term, to address the

20. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 67 (1982); JED RUBENFELD, REVOLUTION BY JUDICIARY 159 (2005).

21. *Cooper*, 358 U.S. at 18.

22. *Id*. at 20.

23. *See, e.g.*, WALLACE MENDELSON, SUPREME COURT STATECRAFT: THE RULE OF LAW *AND* MEN 156–57 (1985).

24. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. __, 127 S. Ct. 2738, 2767–68 (2007).

crisis in Little Rock.[25] And so emerged the statements of high constitutional principle that, half a century later, have come back to haunt us.

The irony of what has happened to the legacy of *Brown* is breathtaking. Perhaps most poignant of all, under the current view of equal protection espoused by the Supreme Court, it now seems to be the case that state and federal governments are constitutionally free to do whatever they think prudent, to help virtually any other group—farmers, athletes, oil companies—to better its lot in society. The one group that elected representatives are constitutionally precluded from explicitly helping is the one group whose continuing, disproportionately high representation in the lower echelons of society can be traced directly to treatment they received because of the color of their skin. That twisted understanding of the Constitution's promise of equality is a far cry from the courageous principle espoused in *Brown* and *Cooper*.

Let us be clear. Fifty years later, school integration is still an elusive ideal, and poverty is still undeniably linked to race. Yet the Supreme Court tells us that the principal lasting contribution of the landmark equal-protection decree of *Brown* is a requirement that government institutions leave all deplorable racial disparities as they find them.

In the face of this stunning characterization of the legacy of *Brown*, some have begun to question the broadside attack on the segregation laws that the NAACP devised and that the Supreme Court accepted in *Brown*.[26] Seeing the disappointing failure of *Brown*'s legacy to achieve its objective of school integration, much less full equality, many have suggested that we might have been better off if the Court had simply reaffirmed the "separate but equal" doctrine and directed its power toward requiring the states to bring the poorer schools into greater parity with the more affluent schools.[27]

I would like to suggest that this repudiation of *Brown* is not the right response to the perversion of its legacy, for one short reason and one longer reason. The short one is that the revisionist interpretation of *Brown* is just demonstrably wrong, for all the reasons Professor Strauss has identified and more. It is hard to imagine why, for example, the Court would have reached out and exposed itself to ridicule for citing to the controversial "doll studies" to support the proposition that segregation as practiced at the time leads to

25. *Cooper*, 358 U.S. at 14; *see also Little Rock School District Central High School Desegregation Timeline: 1958*, http://lrsdorg.nexpoint.net/TempPics/history/deseg58.pdf.

26. PETER F. LAU, FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY 369 (2004).

27. *Id.* at 370–74; *see also* Gary Orfield and Chungmei Lee, Brown *at 50: King's Dream or* Plessy*'s Nightmare?*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY (2004), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/b8/82.pdf.

feelings of inferiority[28] if it could simply have said that any use of race is unconstitutional. How much simpler and less controversial it would have been, both within the Court and outside it, to have avoided the dicey empirical link between segregation and inequality that gave rise to so much criticism of the Court's legitimacy? What the Court felt it had to defend, however, was how the use of race in the setting of *Brown* created the type of inequality that the Constitution forbids. That core question, inexplicably, has now been eliminated from the analysis.

If the current hijackers of *Brown* are willing to defy common sense, constitutional text, original meaning and history so flagrantly to claim *Brown* in support of their preferred social policy of race neutrality, then it is hard to see how anything the Court could have done differently in 1954 would be immune to the same misuse. Even if the NAACP had taken what seemed the less radical approach to *Brown*, and the Court had resolved the case by launching a nationwide case-by-case examination of the equality of individual schools, there is no reason to believe we would be any closer to the goal of equality than we are today.

This is precisely the issue that faced the NAACP Legal Defense Fund as its lawyers prepared to bring and argue the issue of school segregation, and it leads to the second, longer, reason I suggest we should not second-guess the *Brown* approach. In the months leading up to the oral argument in *Brown v. Board*, there was a difference of opinion within the NAACP Legal Defense Fund about what position it should take in *Brown*—should it ask the Supreme Court to overrule *Plessy v. Ferguson* or should it take the more cautious approach of arguing simply that Linda Brown's education was not equal based on the facts in Topeka?[29]

Thurgood Marshall, the lead attorney for the Legal Defense Fund, prevailed internally in advocating the more aggressive approach, as his petition asking the Supreme Court to take the *Brown* case demonstrated. That brief declared,

> Segregation as practiced in America has been "universally understood" to impose on Negroes this badge of inferiority, and the contrary dictum in *Plessy v. Ferguson* can no longer stand in the face of the wealth of evidence flatly contradicting it.[30]

This statement underscores the correctness of Professor Strauss's argument regarding what the Supreme Court in *Brown* understood the issue to be in the

28. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

29. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 7 (2001); *see generally* RICHARD KLUGER, SIMPLE JUSTICE 536–39 (1975) (discussing Thurgood Marshall's consultations and brainstorming prior to asking the Court to prohibit segregation).

30. KLUGER, *supra* note 29, at 540.

case—whether the reality of segregation, as practiced in 1950s America, could reasonably stand alongside any meaningful conception of equality.[31]

In light of subsequent developments, it may be tempting to say that Marshall made the wrong strategic choice. Perhaps all of the troubling implications of the so-called "color-blind" approach to racial justice as we see them played out in the recent cases, culminating in the *Parents Involved* case in Seattle, could perhaps have been avoided if the Supreme Court had simply put some teeth into the "equal" component of "separate but equal," rather than targeting solely the separation by race as the focus of its condemnation. Perhaps the Court might have made clear that it is not the use of race, or distinctions based on race, but rather any resulting inequality, that the Constitution forbids, if the argument had been pitched the other way. That would have paved the way for remedial uses of race that do not exacerbate racial subordination, but rather seek to ameliorate it.

Many years after the argument in *Brown*, I was fortunate enough to have occasion to ask Thurgood Marshall, by then a Supreme Court Justice himself, about this important strategy choice that he had made as a litigant before the Court. I half-expected a flowery, dewy-eyed answer intoning the principle of equality, the expressive value of the law resounding throughout the land, or some such idealistic abstraction about his decision to urge the overruling of *Plessy*. But I should have known Justice Marshall better than that. In his truly inimitable, earthy style, with a gravelly voice revealing deep conviction underneath, this is what he said:

> You can't have decent education without money. Who had the money? The white folks. No way were they ever going to give it to the Negroes, no matter what a court told them to do. There are just too many ways around that kind of order, to make the schools "equal." The only way to get the white folks to give *us* decent schools was to make it be *their* schools too.[32]

This pragmatic and commonsense insight, so typical of Justice Marshall, reflects understated intellectual sophistication, also typical of him.

What Justice Marshall had described was the idea of tying the interests of those without political power to those who possess it, in order to enhance the quality of the outcome of social policy for all. This is an idea that is older than the Constitution itself. Even before the Revolutionary War, the lack of universal suffrage in England was typically justified on the notion of virtual representation—the idea that common interests would permit those who did have a vote to protect the interests of those who did not.[33] As long as the

31. Strauss, *supra* note 9, at 1070.

32. Personal communication with Justice Thurgood Marshall, in Washington, D.C. (1985).

33. *See* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 175 (1967). I have raised this point in an earlier essay, Rebecca L. Brown, *A Commentary: Calming* Brown*'s Critics, Still Queasy After All These Years*, 70 PEABODY J. EDUC. 33, 36 (2004).

represented and unrepresented shared a common interest, the self-interest of the voters would protect the interest of the non-voters. This idea was considered one of the most important protectors of liberty under British constitutionalism.[34]

A version of the idea survived in the American constitutional system of representation, described by James Madison as the "communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny."[35] Scholarly literature, particularly the seminal work of John Hart Ely, demonstrates that linking the interests of representatives, along with the majorities that support them, to the interests of political minorities, is necessary to preserve both equality and liberty.[36] Our national mantra, to the effect that no one is above the law, reflects a deep commitment to the principle that those charged with making and enforcing the laws will do a better job of it if they know that they and their friends are subject to those same laws along with everyone else. Similarly, the Thurgood Marshall idea goes, those who have the power and resources to fund and design public education will do a better job if they know that their own children will attend the schools they are shaping.[37]

Thus, the NAACP's decision to seek to overrule *Plessy*, rather than asking the Court to apply the separate-but-equal doctrine to public education in a more meaningful way, was profoundly consistent with constitutional tradition and commitment, even echoing the Constitution's treatment of democratic representation itself. It sought to bridge the seemingly insurmountable we-they divide of racial prejudice by means of a structural device that harnesses the power of self-interest in the service of the common good. Once we are all in the same boat, so to speak, common incentives prevail and equality follows. If we allow ourselves to be divided among different boats, the structural incentive for equality disappears.

This justification for the integration of schools is not often heard in the public discourse regarding affirmative action, but it has profound relevance to the race issues still facing today's public schools. It is clear that one of the concerns that lead districts like Seattle to take race into account is a worry about the increase of de facto segregation in housing and the discrepancies that

34. *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1513 (2002) (elaborating this argument).

35. THE FEDERALIST NO. 57, at 291 (James Madison) (Gary Wills ed., 1982).

36. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (setting forth a "representation-reinforcing theory of judicial review").

37. *See supra* note 32 and accompanying text.

such segregation can create with regard to the resources available to the public schools.[38]

Although the separation by race in schools may no longer be mandated by state law, the resource discrepancy that arises from the increasingly segregated housing patterns in many modern cities goes to the very heart of what *Brown* was about.[39] The disparity of resources undermines the institutional promises of our democracy and stifles hope for true equality in educational opportunity. Justice Marshall would have laughed out loud at the hypothesis that a hands-off approach to resegregation in the allocation of state resources could lay any plausible claim to government color blindness. When the problem is viewed this way, as Professor Strauss implies, it is surprising that programs like those struck down last term in Seattle and Louisville are not constitutionally *required* by an honest reading of *Brown*, let alone permitted by it when the districts seek to employ them on a voluntary basis.

Notice that this understanding of integration sees it not as an end, but as a means—a means employing the basic principles of democracy and common good to achieve better outcomes for all. It is an instrumental view of racial integration. Importantly, a common defense of affirmative action today, including the majority opinion in *Grutter v. Bollinger*,[40] upholding a plan designed to increase racial diversity in the Michigan Law School, argues that integration is an end: Education is better for all if it exposes students to people of different races and backgrounds.[41] That is a modern argument, made possible, I think, by the strides of progress we have made in the aftermath of *Brown*. It is hard to imagine that anyone in 1954 could effectively have argued that it was better for children to learn side-by-side with those of different races. Indeed, it was abhorrence of that very image that fueled much of the violent protest against school desegregation. But having been told for half a century that we must be in the same boat, we have experienced an ameliorative effect on the we-they divide.

There is a rightness about the integration model that speaks to who we are as a nation in a way that separate-but-equal never could. Our Constitution is a document filled with devices that seek to channel self-interest toward the common good. The Framers recognized that allowing different groups to divide into factions leads to loss of liberty for all, while requiring cooperation among them offers hope for both equality and liberty. This is the insight that Thurgood Marshall propounded when he asked the Supreme Court to overrule

38. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738, 2791 (2007).

39. *See id.* at 2801–02, app. A (Breyer, J., dissenting).

40. 539 U.S. 306 (2003).

41. *Id.* at 330.

the separate-but-equal doctrine, and this is the insight that the Supreme Court internalized when it invalidated the divisive practice of school segregation.

Notwithstanding many continuing disappointments, this gives us something to celebrate in the 50th anniversaries of *Brown* and *Cooper*. The courageous refusal of the Court to ignore the real-world effects of segregation, and of the NAACP lawyers to allow them to do so, left us with at least the continued aspiration to the possibility of a self-perpetuating equality. The courts would be used to wedge us all into the same boat, on the hope that the quality of the ride would then take care of itself. The decree of *Brown*, for all its absoluteness and susceptibility to mischaracterization, built its edifice of racial integration upon a foundation as old as the ideas underlying our Constitution, including the conviction that, for democracy to succeed, we must sink or swim together.