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## AN HISTORICAL NOTE ON THE SIGNIFICANCE OF THE STIGMA RATIONALE FOR A CIVIL RIGHTS LANDMARK

TOMIKO BROWN-NAGIN\*

### I. INTRODUCTION

The stigma of segregated schools is the central theme of Chief Justice Earl Warren’s opinion for the Supreme Court in *Brown v. Board of Education*.<sup>1</sup> The *Brown* Court openly acknowledged that its emphasis on stigma was an unconventional approach to reasoning about the meaning of the Equal Protection Clause. Yet, the Court’s turn to external sources was necessary given its determination that the clause’s legislative history was inconclusive on the question at hand—whether Congress meant to outlaw segregation in schools.<sup>2</sup> As the Court explained, “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation.”<sup>3</sup>

Hence, the Court premised its landmark decision on the very contemporary and intangible concept of stigma. Even if segregated schools are equal in terms of physical facilities and other factors, they are “inherently unequal,” the Court decreed, because the fact of separation is “usually interpreted as denoting the inferiority of the negro group [and this] sense of inferiority . . . . has a tendency to [retard] the educational and mental development of Negro children . . . .”<sup>4</sup> Support for the proposition that the stigma created by school segregation denies equal protection of the laws is found in *Brown*’s eleventh

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\* Associate Professor of Law and History, Washington University in St. Louis. J.D., Yale Law School; Ph.D., Duke University. This essay reflects comments that I made at the 2003 Childress Lecture, presented by William Nelson. Thanks are owed to Bill for inviting me to participate in the symposium by joining a panel of historians who discussed *Brown*’s implementation on the local level. Thanks are also owed to fellow panelists, Kevin Kruse and Anders Walker, for a learned and lively conversation about this important subject, and to Daniel Nagin and Chris Bracey for comments on a prior draft of this essay.

1. 347 U.S. 483 (1954).

2. *Id.* at 489-93 (discussing the history of the Fourteenth Amendment and determining that it did not provide a conclusive answer to the question of how equal protection of the laws should apply in the area of public education).

3. *Id.* at 492-93.

4. *Id.* at 494 (internal quotations omitted) (alterations by *Brown* Court).

footnote, which references a number of psychological and sociological studies,<sup>5</sup> among them the much-maligned Kenneth Clark doll study.<sup>6</sup>

The *Brown* Court's failure to articulate an adequate basis in law for its decision has been the subject of debate among constitutional scholars for generations. Constitutional scholars—beginning in the late 1950s with Wechsler,<sup>7</sup> Pollak,<sup>8</sup> and Black,<sup>9</sup> and continuing through the recent efforts of Balkin, Michelman, and Bell<sup>10</sup>—have praised, criticized, and defended the logic and outcome of *Brown*. The emphasis that the Court placed on the intangible harms of segregation has been a focal point of scholars' criticism of the landmark decision. Three types of objections have been raised to the Justices' reasoning about stigma. Some argue that this decidedly non-legal concept was an inappropriate basis for the decision.<sup>11</sup> Even if stigma was a sound basis for finding segregation unconstitutional, others argue that it was improper for the Court to make such a finding.<sup>12</sup> Still others attack the finding itself; these scholars dispute the notion that African-American children were irreparably harmed by segregated schools and argue that *Brown* should be understood as requiring quality schools notwithstanding their racial configuration.<sup>13</sup> Though they differ on the question of whether the Court's

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5. *Id.* at 494 n.11.

6. For criticism of the study, see Joseph A. Baldwin et al., *The Black Self-Hatred Paradigm Revisited*, in BLACK PSYCHOLOGY 141 (Reginald L. Jones ed., 3d ed. 1991) and *The Doll Man and His Critics*, in REMOVING A BADGE OF SLAVERY: THE RECORD OF *BROWN V. BOARD OF EDUCATION* 48-57 (Mark Whitman ed., 1993).

7. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that judicial decisions should be based on reasoned principles rather than merely outcome-oriented, naked expressions of judicial power and claiming that *Brown* and its progeny were not based on such principles).

8. See Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 31-32 (1959) (arguing that the Reconstruction Amendments were designed to fully emancipate blacks and that this principle supports the decision in *Brown*, *Shelley v. Kramer*, and *Smith v. Allwright*).

9. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421-27 (1960) (arguing that the principled basis for *Brown* was to find intentional disadvantaging of blacks contravenes the Fourteenth Amendment's command that blacks not be significantly disadvantaged by the state).

10. See WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001).

11. See, e.g., Wechsler, *supra* note 7, at 31-34.

12. See, e.g., Pollak, *supra* note 8, at 31-32.

13. See, e.g., RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 282-89 (1984) (describing desegregation as a naive educational reform, while noting that social problems in segregated schools undermine black students' academic performance); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (questioning who is the true "client" in school desegregation litigation and arguing educational improvement and "instructional profit" for African-American children should be the long-term goals of

finding that segregation was harmful was accurate or appropriate, all of these works approach *Brown* on the same terms—as doctrine—and then stake out normative positions about the force and soundness of the Court’s legal reasoning.

This essay considers *Brown*’s treatment of stigma from an historical perspective, but it accepts the opinion on its own terms. My purpose is not to recapitulate arguments for or against stigma as an appropriate basis for the decision. Here, I consider the socio-historical context in which the law of *Brown* was created toward the end of exploring a broader question: how the stigma concept relates to African-American ambivalence about *Brown v. Board of Education*.

Although black ambivalence about *Brown* might appear to be a phenomenon of recent vintage—one connected to the “black pride” movement of the late 1960s and 1970s<sup>14</sup> or the multiculturalism movement of the early 1990s<sup>15</sup>—in fact it has deep historical roots. The historical record should be revised to correct received wisdom. The notion that African-Americans across time and place uniformly supported the NAACP’s campaign to integrate the schools is an historical misconception. Episodes of African-American resistance to efforts to implement *Brown* have occurred in various places and at many points in time, though the significance of these incidents typically has been misunderstood. Communities in cities such as Atlanta, Georgia; Detroit, Michigan; San Francisco, California; Boston, Massachusetts; St. Louis, Missouri; Oklahoma City, Oklahoma, and Prince George’s County, Maryland, have witnessed efforts to implement *Brown* that were beset by conflict among

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desegregation campaigns); see also GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, 37-38, 84-87 (1996) (discussing the question of whether segregation was good for African-Americans from a critical perspective); Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 817-34 (1993) (discussing need for alternative educational options that take into account the cultural and social environment of African-Americans and the legal paradoxes arising from the application of the Equal Protection Clause to immersion schools); Kevin Brown, *Revisiting the Supreme Court’s Opinion in Brown v. Board of Education from a Multiculturalist Perspective*, in *BROWN V. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY’S SCHOOLS* (1996) (concluding that, with the termination of mandatory school desegregation, multicultural schools are not in the nation’s future because the Court’s school desegregation opinions have been premised on the notion that segregated schools are not harmful to white students).

14. See Wendy Brown-Scott, *Race Consciousness in Higher Education: Does “Sound Educational Policy” Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1, 48-49 (1994).

15. See generally Kevin Brown, *Revisiting the Supreme Court’s Opinion*, *supra* note 13.

the decision's intended beneficiaries regarding whether or on what terms integration should occur.<sup>16</sup>

This essay brings an historical perspective to bear on such episodes of black ambivalence about the civil rights landmark. In the process I demonstrate that the pre- and post-*Brown* histories of African-American communities can inform discussions about the significance of *Brown*'s focus on stigma in ways that existing constitutional scholarship does not. A consideration of how the NAACP's constituents experienced life before and after *Brown* sheds light on the costs and benefits that plaintiffs associated with the process of implementing *Brown*, as compared with the vicissitudes of life under the regime of de jure segregation. History shows that African-Americans did not all experience Jim Crow in the same way; thus, they did not necessarily share a common view about how to remedy the inequities of segregated school systems. An array of factors internal to African-American communities—matters overlooked by other constitutional scholars—helps to explain why *Brown*'s promise of quality, integrated schools has eluded most of its expected beneficiaries.<sup>17</sup> Such a client-centered examination of *Brown*'s history is a necessary supplement to scholarship that waxes poetic about *Brown*'s redemptive significance in constitutional history without considering

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16. For recent scholarship advancing this thesis, see Tomiko Brown-Nagin, *Class Actions: The Impact of Black and Middle-Class Conservatism on Civil Rights Lawyering in a New South Political Economy*, Atlanta, 1946–1979, at 64–67 (2002) (unpublished Ph.D. dissertation, Duke University) (on file with author) (discussing socio-political factors that resulted in settlement of an Atlanta school desegregation case in a manner that deviated from the NAACP Legal Defense Fund and national NAACP policy of pursuing integrated schools) [hereinafter Brown-Nagin, *Class Actions*] and Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913, 1924–66 (2003) (discussing settlement of an Atlanta school desegregation case on terms that de-emphasized pupil integration) [hereinafter Brown-Nagin, *Race as Identity Caricature*]. See also DANIEL J. MONTI, *A SEMBLANCE OF JUSTICE: ST. LOUIS SCHOOL DESEGREGATION AND ORDER IN URBAN AMERICA* (1985) (discussing school desegregation in St. Louis); Bell, *supra* note 13 (discussing problems in Boston, Detroit, and Atlanta school desegregation cases); James Traub, *Separate and Equal*, ATLANTIC MONTHLY, Sept. 1991, at 24 (discussing school desegregation in Oklahoma City). See also *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980) (noting the conflict between two groups of African-American plaintiffs regarding the remedy, with one group preferring neighborhood schools and a second group preferring a remedy that would result in meaningful pupil integration); *Ho v. San Francisco Unified School Dist.*, 965 F. Supp. 1316 (N.D. Cal. 1997) (discussing Chinese students who alleged that the student assignment plan required by a consent decree in school desegregation action originally brought by African-American students violated their equal protection rights); *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275 (D. Md. 1990) (discussing a biracial group of teachers who challenged involuntary transfers made pursuant to a desegregation plan).

17. See ORFIELD & EATON, *supra* note 13, at 1–5, 16–19 (discussing how the Supreme Court's recent school desegregation decisions foster resegregation and discussing the movement to dismantle desegregation orders during the Reagan Administrations).

the experiences and desires of the communities in which implementing the decision proved most difficult.

Understanding *Brown* in socio-legal context, and more particularly, through the eyes of the putative beneficiaries who were skeptical of the decision's impact on their lives, is especially appropriate now, during *Brown*'s semi-centennial. Two generations of students have experienced the legal system's fits and starts toward compliance with the landmark civil rights norm,<sup>18</sup> ultimately to learn that *Brown*'s command to desegregate schools only applies in narrow circumstances.<sup>19</sup> Now that *Brown*'s doctrinal significance is construed so narrowly,<sup>20</sup> the most meaningful questions to ponder about the landmark case relate to matters external to law, strictly speaking. Foremost among these questions is how school systems deprived of the force of the structural injunction should and can address the educational needs of racial minorities who still suffer from the vestiges of de jure segregation. The history of campaigns to implement *Brown*, especially those that civil rights lawyers lost, shed light on how these needs might be defined and law's proper role in such an endeavor.

## II. *BROWN*'S BENEFICIARIES BEFORE AND AFTER THE LANDMARK DECISION

The project of taking seriously African-American ambivalence about *Brown* requires sustained intellectual engagement with the question of to what, precisely, were blacks reacting when they expressed skepticism of *Brown*, or of the manner in which *Brown* was implemented. Were they opposed to integration as a matter of principle, or did they become skeptical of *Brown*'s desegregation mandate only after it became clear that whites' resistance to integration was unyielding? Were matters external to law more significant factors in African-Americans' ambivalence about *Brown* than developments in the law? Was African-American ambivalence about *Brown* widespread throughout the group or limited to certain elements of the community? And finally, how does the *Brown* Court's finding that segregation was stigmatizing

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18. The period of greatest movement toward compliance occurred from 1968 through the mid-1970s, the era marked by three momentous decisions. See *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430 (1968) (first case in which the Court made clear, among other things, that voluntary, "freedom-of-choice," desegregation plans that did not result in meaningful pupil integration did not meet constitutional requirements); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (condoning expansive remedial measures, including busing, to achieve integrated schools); *Milliken v. Bradley*, 418 U.S. 717 (1974) (ruling that suburban districts are not required to participate in desegregation orders absent proof of their direct and affirmative participation in activities that caused segregation in central cities). For a discussion of the impact of these cases, particularly *Milliken*, see ORFIELD & EATON, *supra* note 13, at 10-13.

19. See ORFIELD & EATON, *supra* note 13, at 53-71.

20. See *id.* at 1-5.

relate to African-Americans' ambivalence about *Brown*? More particularly, to what extent does African-Americans' experience of life under Jim Crow, segregated schools, in particular, support the opinion's emphasis on stigma as the rationale for ordering school desegregation?

Social histories that capture African-American communities in the years before and after *Brown* can illuminate the answers to these questions and provide crucial information about how *Brown*'s beneficiaries experienced the new civil rights norm. Historical explorations of African-American life under de jure segregation are especially important; nevertheless, the tendency among scholars, particularly scholars of the law, is to view the pre-*Brown* period exclusively through the lens of deprivation, as if the Court's stigma rhetoric accurately described the complex reality of human experience during this era.<sup>21</sup> This essay approaches this era open to the possibility that deprivation was not the sole factor shaping the social consciousness of African-Americans living under segregation, notwithstanding the many ways in which Jim Crow circumscribed their life possibilities. This atypical scholarly perspective yields clues about the constituent elements of blacks' political<sup>22</sup> and educational

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21. For instance, Richard Kluger's celebrated book on *Brown* describes life under segregation in terms that suggest that all African-Americans experienced subordination in exactly the same way, and thus were all sure to experience *Brown* as a kind of salvation. Of segregation, he says: "It was nothing short of economic slavery, an unbreakable cycle of poverty and ignorance breeding more poverty and a bit less ignorance, generation upon generation." RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 7 (1975). Similarly, Kluger writes of the African-Americans of Clarendon County, South Carolina:

[W]herever they went and whatever they tried to do with their lives, they were badly disabled, irreparably so for the most part, by the malnourishment that the poverty and meanness of their Clarendon birthright had inflicted upon the shaping years of their childhood. Their minds had not been fertilized half so well as their cotton . . . . Nothing seemed to change.

*Id.* This approach provides a perfect setup for a narrative emphasizing *Brown*'s revolutionary impact on African-American life, notwithstanding evidence inconsistent with this narrative of progress. Nevertheless, Kluger's generalization doubtlessly is accurate when applied to African-Americans living in Clarendon County, South Carolina, and I do not suggest otherwise.

22. Monographs too numerous to count have been devoted to the subject of the political identities of whites, especially southern whites. *See, e.g.*, W.J. CASH, *THE MIND OF THE SOUTH* (1941); V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (The Univ. of Tenn. Press, 1984) (1949). Many works focus on the attempt by African-Americans to gain the right to vote. *See, e.g.*, STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* (1976). Such scholarship, however, which is focused on national politics and the law of voting, misses local variations on the issue of voting rights and does not address the question of how non-electoral dynamics influenced African-American life. More recent scholarship, *see, for example*, MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994), is moving toward a more multi-factored analysis of African-Americans' relationship to politics, even if it continues to be nationally focused.

identities<sup>23</sup> under segregation, and hence, offers insights about the values that influenced plaintiffs' actions during *Brown*'s crucial implementation phase.

#### A. Pre-Brown Atlanta

Because of its unique place in the history of the South and the nation, Atlanta provides an ideal backdrop for exploring questions of the sort raised here. Before *Brown*, when the NAACP's strategy to attain equality in education focused on teacher salary equalization, black Atlantans toed the organization's line regarding public education.<sup>24</sup> The salary equalization campaign fit well with the demographics of Atlanta, which had boasted a significant African-American middle-class since the beginning of the Twentieth Century, one including entrepreneurs, doctors, and lawyers, but most importantly, a large contingent of educators and school administrators.<sup>25</sup> Atlanta was considered the capital of black higher education during the first half of the Twentieth Century; it was home to six educational institutions, including Atlanta University, where W.E.B. DuBois taught for many years, and Morehouse College, the alma mater of Dr. Martin Luther King, Jr.<sup>26</sup> Atlanta's educational preeminence cannot be underestimated when analyzing the path that *Brown*, and the Civil Rights Movement, generally, took in Atlanta. These schools inculcated an ideology that combined W.E.B. DuBois's rights-consciousness with Booker T. Washington's self-help philosophy<sup>27</sup> and produced the leaders that populated Atlanta's African-American middle-class, including its corps of teachers and administrators.

Given this milieu, it comes as no surprise that many of Atlanta's black educators enthusiastically supported the NAACP's teacher salary equalization campaign. In 1943, local attorney and NAACP branch leader Austin Thomas

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23. In using this term educational identity, I mean to suggest questions about African-Americans' perceptions of education (i.e. its value, efficacy, and purpose), their academic abilities, and how they experienced the human actors involved in the educational process under segregation, especially teachers, but administrators as well. For theoretical works that suggest how intellectual identity is created and discuss the public purposes of education, see PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1970) and HENRY A. GIROUX, *SCHOOLING AND THE STRUGGLE FOR PUBLIC LIFE: CRITICAL PEDAGOGY IN THE MODERN AGE* (1988). For social scientific works that explore these themes, see JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* 14-38 (1997). For historical works related to the topic, see JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* (1988).

24. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* *passim* (1994).

25. See JOHN DITTMER, *BLACK GEORGIA IN THE PROGRESSIVE ERA: 1900-1920*, at 59-60, 147 (1980); Brown-Nagin, *Class Actions*, *supra* note 16, at 64-67.

26. See DITTMER, *supra* note 25, at 60.

27. On W.E.B. DuBois's philosophy, see DAVID LEVERING LEWIS, *W.E.B. DUBOIS: BIOGRAPHY OF A RACE* 289 (1993). On Booker T. Washington's philosophy, see LOUIS R. HARLAN, *BOOKER T. WASHINGTON: THE MAKING OF A BLACK LEADER* *passim* (1972).



(A.T. Walden), along with Thurgood Marshall and Edward Dudley of the NAACP Legal Defense Fund (LDF or Inc. Fund), filed a class action challenging unequal teacher pay scales.<sup>28</sup> The suit resulted in the abolition of facially discriminatory pay scales, and ultimately, led to systemic pay increases for many African-American school personnel.<sup>29</sup>

The African-American leadership's support for educational equality during the pre-*Brown* period was not limited to activities that coincided with the interests of its teachers and administrators. Prominent African-Americans also waged campaigns to raise the quality of education offered to the city's black children. Led by the Atlanta Urban League, these leaders commissioned studies that demonstrated gross inequities in the funding of black and white schools.<sup>30</sup> Armed with this data, they then made requests to the board of education to improve and build new elementary and secondary schools for African-American students.<sup>31</sup> These campaigns led to a reduction in the disparate rates at which African-American and white schools were funded.<sup>32</sup> Despite these efforts, however, Atlanta's white schools remained far superior to its black schools leading up to and well after *Brown*.<sup>33</sup>

#### B. *Response to Brown*

Although Atlanta's African-American leadership is fairly characterized as activist on the issue of education during the pre-*Brown* era, an important segment of it—teachers—reacted with ambivalence to the Supreme Court's 1954 decision declaring segregated schools unconstitutional. In the days following the May 17 ruling, the local black daily, the *Atlanta Daily World*, reported that black educators were adopting a "wait-and-see" attitude toward *Brown*,<sup>34</sup> while other leading African-Americans were hailing the decision.<sup>35</sup> One black teachers' organization, the Georgia Teachers and Education Association, categorically refused to endorse *Brown*, despite pressure from Atlanta NAACP branch leaders to do so.<sup>36</sup> Thus, it was clear early on that black educators did not necessarily view school desegregation as beneficial, and African-Americans would not necessarily speak in one voice on the matter.

For its part, the Atlanta branch of the NAACP embarked on a high-profile campaign in praise of *Brown* in the ruling's wake. A.T. Walden announced his

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28. Brown-Nagin, Class Actions, *supra* note 16, at 205-06.

29. *Id.* at 206.

30. *Id.* at 200-04.

31. *See id.* at 198-204.

32. *Id.* at 202.

33. Brown-Nagin, Class Actions, *supra* note 16, at 202-03.

34. *Id.* at 211.

35. *Id.* at 211-12.

36. *Id.* at 211.

belief that “Georgia would obey the law” and promised that the branch would soon move forward with plans to implement *Brown* in the city.<sup>37</sup> At a two-day meeting of regional NAACP officials that was held in Atlanta a few days after the decision in *Brown* was announced, leaders of the local NAACP branch joined in a statement issued by the national NAACP calling for an immediate halt to school segregation and promising that there would be “no compromise” on the issue.<sup>38</sup> The group also issued the “Atlanta Declaration,” which instructed all NAACP branches to petition local school boards to “abolish segregation without delay.”<sup>39</sup> The declaration represented an acceptance of a call to service by the national NAACP, which had passed a resolution on July 3, 1954 stating:

If these rights and opportunities, already sanctioned in law, are to become a reality, the Association and all of its branches must initiate and carry through greatly expanded programs of community action designed to involve the entire membership of the NAACP and influence large circles of citizens beyond our ranks.<sup>40</sup>

Considering the local and national NAACP’s rhetoric acknowledging that *Brown* would only be successfully implemented with community support, it would be reasonable to assume that a great deal of activism took place in Atlanta in the decision’s wake. In fact, nothing much happened to implement *Brown* in the weeks, months, and years following the decision.<sup>41</sup> Compromise and delay characterized the behavior of Atlanta branch officials. Instead of urging speedy compliance with *Brown*, Walden ordered an “exhaustive study” of how desegregation should proceed.<sup>42</sup> Despite the local NAACP branch’s moderate course, white decision makers were unmoved. The Atlanta Board of Education made clear its intention to obstruct compliance with *Brown* in June 1955, when nine black students filed petitions seeking to desegregate Atlanta’s schools.<sup>43</sup> The board responded by passing a resolution ordering the superintendent of schools to “‘study’ . . . the relationship between race and IQ and the ability of blacks to teach whites.”<sup>44</sup>

Still, the Atlanta NAACP branch persisted on its moderate course. The branch’s leadership responded to the board with a request that it issue a “firm statement of policy that the schools would be desegregated,” but to no avail.<sup>45</sup> Nevertheless, Atlanta’s African-American leadership failed to agitate

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37. *Id.* at 212.

38. Brown-Nagin, Class Actions, *supra* note 16, at 212.

39. *Id.*

40. *Id.* at 194.

41. *Id.* at 213.

42. *Id.*

43. Brown-Nagin, Class Actions, *supra* note 16, at 214.

44. *Id.*

45. *Id.* at 214-15.

aggressively for compliance; instead, it continued to seek *Brown*'s implementation by relying on press releases and carefully-worded resolutions.<sup>46</sup> Almost four years passed after *Brown* was decided before the branch filed a class action to implement the decision's desegregation mandate.<sup>47</sup>

### C. *Explaining the Ambivalent Response to Brown*

The obvious question that this historical record raises is why did Atlanta's African-American community proceed in such a slow and restrained manner in response to *Brown*? More particularly, why did the leadership steer such a moderate course *after Brown* was decided when it had been committed to the pursuit of educational equality *before Brown*? Several factors explain the switch in approach, if not commitment, to achieving equal educational opportunity. All of them run counter to the *Brown* Court's assumption that all African-Americans experienced life under segregation as unerringly harmful or viewed themselves as powerless in the face of Jim Crow.

#### 1. Law as A Secondary Route to Equality

The first and most important factor militating against aggressive advocacy for *Brown*'s implementation was the black leadership class's preference for a political, rather than a legal, strategy for achieving equal rights. This political strategy involved a two-pronged approach consisting of bloc voting to influence mayoral elections, together with informal politics—gentlemen's agreements made in back rooms, out of the public eye, with influential white business and civic leaders.<sup>48</sup> This strategy was well-suited to a people whose educational credentials and social class inculcated an identity as the Talented Tenth, the DuBoisian formulation that implied that it was the black elite's duty to adopt a paternalistic ethos toward the less well-heeled elements of the African-American community.<sup>49</sup>

The black leadership's political approach to resolving race-related problems met with some success in the years before, and immediately following, *Brown*. Relying exclusively on bi-racial negotiation, the leaders convinced whites to build a new hospital complex and housing developments for the city's African-American population.<sup>50</sup> Both projects were developed on a segregated basis without objection from the African-American leadership,

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46. *Id.* at 215.

47. *Id.*

48. See Brown-Nagin, Class Actions, *supra* note 16, at 37-99.

49. See *id.* at 65-66; see also LEWIS, *supra* note 27, at 288-89.

50. Brown-Nagin, Class Actions, *supra* note 16, at 80-87.

although their counterparts in other cities chided Atlantans for their failure to challenge Jim Crow.<sup>51</sup>

As a consequence of its preference for incremental, political approaches to civil rights, Atlanta's African-American leadership did not view law as the primary means through which race-related matters could, or should, be resolved. Hence, the Inc. Fund's effort to implement *Brown* in Atlanta was preordained to be an uphill battle, with influential local blacks tending to view the New York-based civil rights lawyers as interlopers, in much the same way as local whites viewed them.

## 2. A Prized Tradition of Separate Education

A second factor shaping the black leadership's ambivalent reaction to *Brown* was an outgrowth of Atlanta's status as the capital of black higher education. As previously noted, many of the men who steered the course of Atlanta's civil rights movement were educated at the city's historically black institutions of higher education.<sup>52</sup> One significant result of this common heritage was that the decision-makers were inclined to have confidence in African-Americans' ability to become well-educated and powerful in social spaces apart from whites.

Even more significantly, the relatively large number of educators and school administrators within the city's black middle class, many of whom also were graduates of the local black colleges,<sup>53</sup> understood that desegregation of the schools was not likely to be in their economic interests.<sup>54</sup> The fears voiced by many African-American teachers across the South that desegregation would take away their livelihoods were well-founded; however, the pattern of discriminatory dismissals of black educators was not a prominent feature of post-*Brown* Atlanta, in part because so little desegregation occurred there over time.<sup>55</sup> Nevertheless, the interests of the teachers and administrators loomed large over the school desegregation case and ultimately proved decisive.

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51. *See id.* at 88-96.

52. *Id.* at 65, 79-80.

53. For an overview of the class structure of Atlanta's African-American community during the relevant period, *see id.* at 67.

54. *See* Tomiko Brown-Nagin, *The Transformation of a Social Movement into Law? The SCLC and NAACP's Campaigns for Civil Rights Reconsidered in Light of the Educational Activism of Septima Clark*, 8 *WOMEN'S HIST. REV.* 81, 105-13 (1999) (discussing financial loss of African-American teachers as a result of the NAACP's campaign to end segregation in education); Scott Baker, *Testing Equality: The National Teacher Examination and the NAACP's Legal Campaign to Equalize Teachers' Salaries in the South, 1936-63*, *HIST. OF EDUC. Q.*, Spring 1995, at 49 (discussing racial discrimination and inequality within educational institutions as a result of salary differentials based on the National Teacher Examination).

55. *See* Brown-Nagin, *Race as Identity Caricature*, *supra* note 16, at 1944-45.

### 3. Insignificant Opposition to Elite Control of Decision-Making

A third factor constraining the pace and nature of Atlanta's response to *Brown* was the lack of a significant challenge to the African-American elite's civil rights strategy—that is, to their allegiance to formal and informal politics, rather than law, as the proper means to achieve racial change. The headquarters of the Student Non-violent Coordinating Committee (SNCC) were located in Atlanta; however, SNCC was unsuccessful in its attempt to alter the leadership's approach to civil rights activism.<sup>56</sup> Similarly, elite control of decision-making in Atlanta prevented Dr. Martin Luther King, Jr.'s Southern Christian Leadership Conference (SCLC) from waging an all-out assault on segregation in the city or interfering with the black leadership's chosen approach to racial justice.<sup>57</sup> Hence, the direct action movement waged by SNCC and SCLC in other cities was not the powerful force for change in Atlanta that it had been in Montgomery, Greensboro, Birmingham, or Memphis during the 1950s and 1960s. Dr. King acknowledged this reality when he commented in 1963: "Something strange and appalling has happened to Atlanta. . . . While boasting of its civic virtue, Atlanta has allowed itself to fall behind almost every major southern city in progress toward desegregation."<sup>58</sup> The consequences of this vacuum were great. As a result, there was no counter-pressure to the moderate course that the city's African-American leadership embraced after *Brown*. Ambivalence toward *Brown* carried the day.

### 4. The Inc. Fund's Strategic Errors

A fourth factor militating in favor of the black leadership's ambivalent response to *Brown* was the Inc. Fund's failure to give sustained attention to Atlanta—a city whose size and stature made it deserving of great consideration. The Inc. Fund's inattention to Atlanta was due in part to the split that occurred between the NAACP and the Legal Defense Fund (LDF) in 1956.<sup>59</sup> As a result of the separation between the two, the lawyers were cut off from the membership of the NAACP, and thus, from a vital source of support

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56. See Brown-Nagin, *Class Actions*, *supra* note 16, at 100-03, 127-63.

57. See ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 176-77 (1987) (discussing domination of the Civil Rights Movement in Atlanta by an older generation of elites).

58. *Id.* at 175.

59. Tomiko Brown-Nagin, *After the Split: Local Branch Decline as Factor in the NAACP Legal Defense Fund's Campaign to Implement Brown v. Board of Education in Atlanta*, in *FROM THE SUPREME COURT TO THE GRASSROOTS* 4-5 (forthcoming, Duke Univ. Press) (on file with author) (arguing that the ineffective local NAACP branch with a distant relationship with the national NAACP and NAACP Legal Defense Fund (LDF) undermined the LDF's school desegregation effort); Brown-Nagin, *Class Actions*, *supra* note 16, at 272.

for the school desegregation campaign.<sup>60</sup> The Inc. Fund was almost completely disengaged from its client base during the crucial period after *Brown* was decided.<sup>61</sup>

The practical result of the Inc. Fund's inattention to Atlanta was that local attorneys handled the school desegregation case until the mid-1960s,<sup>62</sup> and, for all of the foregoing reasons, were not aggressive in their demands to the Atlanta Board of Education and to the courts. Token school desegregation did not occur in Atlanta until 1961, a remarkably late date given Atlanta's reputation as the South's most racially progressive city.<sup>63</sup> When the Inc. Fund finally became involved in the case, it continued on its course of alienation from its clients and was largely unsuccessful in the arguments that its attorneys made before the courts.<sup>64</sup> LDF lawyers Connie Motley and Howard Moore filed numerous motions requesting that the presiding judge quicken the pace of desegregation in the city; however, he rejected their arguments.<sup>65</sup> The Inc. Fund lost on virtually every important issue presented to the district court during the 1960s.<sup>66</sup>

#### E. All-Out African-American Resistance to *Brown*

The Supreme Court's 1971 ruling in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>67</sup> made meaningful school desegregation a mandate in metropolitan areas, such as Atlanta, with a history of de jure segregation. In view of *Swann*, LDF lawyers filed motions asking the district court to impose a remedy that would eliminate some, but not all, of the all-black schools remaining in the city school system.<sup>68</sup> Atlanta's black leadership might have viewed *Swann* as relieving them of the obligation to negotiate with whites regarding the terms of compliance with *Brown*'s mandate, for *Swann* had taken discretion about *whether* to desegregate the schools out of the locals' hands, replacing it with the task of determining *how* it was to be accomplished.

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60. See Brown-Nagin, *After the Split*, *supra* note 59, at 4-5.

61. See Brown-Nagin, *Class Actions*, *supra* note 16, at 267-69.

62. *Id.*

63. *Id.* at 248-50, 269-74.

64. *Id.* at 277-84.

65. *Id.* at 277-83.

66. Brown-Nagin, *Class Actions*, *supra* note 16, at 280-84.

67. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (endorsing non-contiguous zoning plans and busing to achieve racial balance in schools).

68. See Brown-Nagin, *Class Actions*, *supra* note 16, at 293-301. By 1970, during the busing controversy raised in *Calhoun v. Latimer*, African-American students in Atlanta constituted approximately seventy percent of the city schools' student body. See GARY ORFIELD & CAROLE ASKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY* 106-07 (1991). Thus, even under LDF's plan, many segregated schools remained intact. See *id.* at 104-12.

Instead, *Swann* precipitated all-out resistance by influential African-Americans to meaningful school desegregation. The Inc. Fund and the national NAACP were dismayed and embarrassed when the local NAACP president, along with distinguished leaders of Atlanta's African-American community such as Dr. Benjamin Mays, former president of Morehouse College and the newly elected president of the Atlanta Board of Education, rejected busing as a remedy for racial segregation in the public schools except on a voluntary and very limited basis.<sup>69</sup> This group negotiated with local white elites a settlement of the school desegregation case that minimized busing, but created new administrative posts explicitly set aside for African-Americans, including the position of school superintendent.<sup>70</sup>

This settlement—which flatly rejected *Brown's* integration ideal and ignored *Swann*—ultimately was approved by the courts. As a result, Atlanta's school system remained virtually all-black, while other large cities, most obviously, Charlotte, North Carolina, desegregated their schools.<sup>71</sup> Atlanta's schools looked much like they did before *Brown*, and the city's African-American leadership had been instrumental in making them so.<sup>72</sup>

### III. UNMASKING THE STIGMA HALF-TRUTH, BUT AFFIRMING THE HARM OF SEGREGATION

Atlanta's African-American leadership was proud of its accomplishment. It had settled the school desegregation case on terms that produced Atlanta's first African-American superintendent, a feat that put the city at the forefront of the ascendancy of African-American political power in the nation's inner-cities during the 1970s.<sup>73</sup> Soon, the black leadership class could lay claim to the mayoralty, to a majority on the board of education, and to equal power with whites on the city council, which was evenly divided with nine white and nine black members.<sup>74</sup> From their perspective, the settlement of the school

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69. See Brown-Nagin, *Race as Identity Caricature*, *supra* note 16, at 1935-46.

70. *Id.* at 1935-36, 1944-46.

71. See ORFIELD & ASKINAZE, *supra* note 68, at 109-12.

72. Of course white resistance to desegregation also figured prominently in the path that *Brown* took in Atlanta. Resistance came from all quarters of Atlanta society, but most importantly from the board of education and the federal courts. See Brown-Nagin, *Class Actions*, *supra* note 16, at 277-84. At no point did Atlanta's white elite, which had convinced the press of its progressiveness on racial issues, accept meaningful compliance with *Brown*. On Atlanta's reputation as a racially progressive city, see DAVID ANDREW HARMON, *BENEATH THE IMAGE OF THE CIVIL RIGHTS MOVEMENT AND RACE RELATIONS: ATLANTA, GEORGIA, 1946-1981*, at 72-73 (1996) (discussing descriptions of Atlanta as an "oasis of racial tolerance," as a city "ashamed of violent racial prejudice," "different from other southern cities," and as providing "some grounds for hope" about the South).

73. See CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946-1988*, at 106 (1989).

74. *Id.* at 81.

desegregation case on terms that increased black power in the central city instigated a steady string of achievements. Black leaders finally had realized the goal of exerting influence over public policy decisions, a role they had actively sought since the years following World War II.<sup>75</sup>

A sense of social and political agency unites Atlanta's African-American leadership across time, from the years preceding *Brown* to the post-*Brown* period and the era of *Swann*. This belief in black agency was nurtured over time in the city's institutions of higher education, its civic organizations, and its professional circles. Black teachers and administrators exerted a particularly powerful influence over the leadership's intellectual and political identities and, ultimately, over the substantive policies that black agents of change preferred. Black decision-makers identified and seized possibilities for achieving incremental change in race relations under Jim Crow, and then sought to preserve the stature and prosperity that they had achieved in their own social circles even after *Brown* created the possibility of an integrated society. Hence, in Atlanta the predicate for *Brown* and the Inc. Fund's school desegregation campaign—the assumption that segregation, most especially in education, was harmful to all African-Americans—proved to be an overgeneralization.

To assert that the stigma concept was an overgeneralization is not to claim that segregation was harmless to Atlanta's blacks. The city's African-American leadership understood that Jim Crow imposed constraints and oppression in virtually every sector of black life. This understanding was the impetus for the leadership's agitation for more and better schools for African-American students, its drive for competitive teacher salaries, and its insistence on gaining and intelligently using voting rights before *Brown*, as well as its backroom efforts to end state-sanctioned segregation in public accommodations during the 1960s. The leadership's preference for black-controlled de facto segregated schools can be understood as an effort to minimize the harm to African-American students occasioned by white racism or racial insensitivity, even if that preference also inured to the economic benefit of individual black teachers and administrators.<sup>76</sup>

Yet, other blacks—those without a voice in decision-making—rejected the leadership's perspective that racial isolation was benign and refused to abide by its decision to settle the school desegregation case on terms that maintained that isolation. The *Brown* Court's generalization that segregation was stigmatizing in fact *did* apply to many, and probably most, of Atlanta's black schoolchildren, according to a group of black parents from poor and working-

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75. See Brown-Nagin, Class Actions, *supra* note 16, at 45-55 (discussing black leaders' voting rights activism and attempts to exercise political influence).

76. Regarding the issue of self-interest, see Brown-Nagin, *Race as Identity Caricature*, *supra* note 16, at 1944-45.



class neighborhoods that challenged the settlement. These parents' conception of stigmatic harm encompassed and focused on the material effects of school segregation. They argued that their children suffered under segregation; they were relegated to overcrowded and inferior schools that denied their daughters and sons their constitutional right to equal protection of the laws. The poor parents' voices fell on deaf ears, however. The black leadership ignored them and the courts refused to upend the settlement.<sup>77</sup>

#### IV. CONCLUSION

This essay has sketched, in broad strokes, the socio-legal history of the Inc. Fund's campaign to implement *Brown* in Atlanta. It has suggested factors that explain black ambivalence about *Brown* and demonstrated that the stigma rationale embraced by the *Brown* Court was apt for most segments of the African-American community, but incomplete, or even inapt, when applied to the all-important leadership class. The ranks of this "Talented Tenth" included professionals, entrepreneurs, and a large cadre of educators who enjoyed relative prosperity and autonomy despite Jim Crow. The African-American leadership's high self-regard and keen awareness of their privileged social status affected the form of civil rights activism that they preferred (political rather than legal) and the remedy to school segregation that they embraced (a settlement that maximized personal autonomy and self-interest over a plan that maximized pupil integration). The dissonance between the experiences of Atlanta's African-American decision-makers and other members of the African-American community undermined the possibility that structural relief for school segregation would be ordered. It upset a key assumption on which the smooth implementation of *Brown* depended—the premise that African-Americans, as a whole, were unified around the goal of implementing *Brown* because their lives under segregation were bereft of hope and opportunity. While constitutional scholars have emphasized how the rhetoric and logic of *Brown* and the cases following it influenced how the civil rights landmark was implemented on the local level, this essay suggests that social dynamics within the black community also were immensely important factors shaping *Brown*'s implementation. In this way, this synthesis of local *and* national social *and* legal history complicates the conventional view of *Brown*. It enlivens *Brown*'s history by showing that legal precedents alone cannot capture the complexity of the human actors who translated and interpreted *Brown*'s meaning and effect on the local level.

Constitutional scholars and historians, along with civil rights practitioners, have recognized, to some extent, the importance of human agency to legal change. Typically, however, these commentators have focused on whites'

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77. See Brown-Nagin, *Class Actions*, *supra* note 16, at 335-60, 371-77.

agency, more particularly, on whites' intransigence to civil rights norms.<sup>78</sup> Black ambivalence about *Brown* is rarely considered. A significant and unfortunate consequence of the literature's tendency to conceive agency as white resistance is to keep discussions of *Brown* frozen in time, as if it is ever 1954 or 1955, when the forces of virulent racism were arrayed against the heroic individuals fighting for equal education. The period from the late 1960s through the early 1970s, when African-Americans finally achieved a meaningful voice in electoral politics on the local and national levels, is dismissed as a period of decline. This overview of Atlanta's history corrects this oversimplification by making clear that *Brown*'s beneficiaries influenced the path of law as well.

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78. Social scientists, for example, have been consumed with questions such as how and under what circumstances (i.e. under what logic and authority) the law should compel compliance with *Brown*, whether it is possible to counteract political resistance to the norm from the President or Congress, and most recently, what incentives school districts can offer to whites to foster voluntary desegregation. See *supra* notes 7-10; see also AMY STUART WELLS AND ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 74-75 (1997) (discussing monetary incentives to St. Louis and Kansas City, Missouri, to accept black participants in voluntary desegregation programs). For a compelling discussion of *Brown* and white resistance, see, for example, Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

