MIXED MOTIVES: REGARDING RACE AND RACIAL FORTUITY

SILENT COVENANTS: BROWN v. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM. By Derrick Bell.[1] Oxford University Press. 2004. Pp. 230. Hardback, $25.00, Paper, $14.95.

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I INTRODUCTION

In April 2006, the Nebraska state legislature passed the Learning Community Reorganization Act to improve the faltering educational system in Omaha City.[3] Rejecting a bid to merge majority-white suburban districts with the mostly minority city schools,[4] the legislature instead voted to divide the formerly unified Omaha City School System into three separate and autonomous school districts.[5] The perimeter of each new district would track existing residential attendance zones used to determine enrollment in local high schools under the unified system.[6] As a result, the racial composition of the student body at any one school within Omaha City would likely change little, if at all, under the reconstituted plan. Nearly every school in the city could

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3. 2006 Neb. Laws 1024, §§ 28–41.

4. *See News Hour: Plan for Omaha Schools Raises Segregation Concerns* (PBS television broadcast May 31, 2006), *available at* http://www.pbs.org/newshour/bb/education/jan-june06/omaha_05-31.html [hereinafter *News Hour*].

5. *Id.*; *see also* Megan Tady, *'Re-segregated' Omaha Schools to be Separate, Not Equal*, THE NEW STANDARD, Apr. 21, 2006, http://newstandardnews.net/content/index.cfm/items/3082.

6. 2006 Neb. Laws 1024, § 41; *see also* Scott Bauer, *Omaha Schools Split along Race Lines*, THE BOSTON GLOBE, Apr. 13, 2006, http://www.boston.com/news/nation/articles/2006/04/13/omaha_schools_split_along_race_lines.

very well remain what each had become in 1999 when Omaha discontinued compliance with a judicial desegregation order: predominantly Black, largely Hispanic, or uniformly White.[7]

The NAACP cried "segregation," and filed suit against a plan that it says "violat[es] the bedrock constitutional principle" embodied in *Brown v. Board of Education*[8] by creating racially identifiable school districts.[9] But Ernie Chamber, sponsor of the plan and Nebraska's only Black state senator, quickly pointed out that Omaha schools were already segregated, and that his proposal did nothing more than alter the governing structure of existing schools by creating three new school boards and Superintendent positions.[10] Doing so, Chambers defended, would likely bring about much needed improvements to the city's faltering Black and Latino schools by giving minority communities a governing voice over educational policy.[11]

Senator Chambers will find a sympathetic ally in Derrick Bell, author of *Silent Covenants*, who views the contemporary status of America's schools as evidence that *Brown's* "current relevance is in doubt" (p. 131). Bell spent the better part of his legal career in the 1960s with the NAACP's Legal Defense Fund, seeking to implement *Brown's* landmark ruling that seg-

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7. *See News Hour, supra* note 4. In 1975, the City of Omaha was placed under a court ordered desegregation plan pursuant to a finding that it had previously engaged in unconstitutional segregation. *See* United States v. School Dist., 521 F.2d 530 (8th Cir. 1975). By 1984, the school system had obtained "unitary" status in compliance with the 1975 order. The district court suspended judicial supervision of the school district but ordered that it continue to operate a unitary system. Omaha proceeded to implement the original desegregation plan voluntarily until 1999. *See* Complaint, NAACP v. Heineman, No. 06 Civ. 371 (D. Neb. filed May 16, 2006) [hereinafter Complaint].

8. 347 U.S. 483 (1954).

9. *See* Complaint, *supra* note 7, at 5, para. 14; *see also* Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9, *available at* http://www.nytimes.com/2006/04/15/us/15omaha.html?ei=5090&en=613ee064f4b5fefa&ex=1302753600&partner=rssuserland&emc=rss&pagewanted=all; Kevin Tibbles, *A Return to Racial Segregation in Schools?*, MSNBC.COM, Apr. 19, 2006, http://www.msnbc.msn.com/id/12394410/from/RL.4.

10. *See News Hour, supra* note 4; Tady, *supra* note 5 (quoting Chambers's comment that in Omaha City "you have students sitting in a segregated school in a segregated neighborhood asking if this bill is going to bring about segregation"). The NAACP states in its Complaint that the majority of Omaha's Latino and African American population live in segregated neighborhoods wherein students are assigned to neighborhood schools. Complaint, *supra* note 7, at 7–8, paras. 22, 27, 28.

11. Senator Chambers stated that "[t]he real issue is one of power. We believe that the people whose children attend schools ought to have local control over those schools, a concept very familiar with white people." *News Hour, supra* note 4; *see also* James Wright, *Omaha Plan: Is It Segregation?*, BLACKPRESSUSA.COM, http://www.blackpressusa.com/News/Article.asp?SID=3&Title=National+News&NewsID=8100.

regated schools violate the Equal Protection Clause of the Fourteenth Amendment (pp. 97–106). The task was formidable. White resistance to desegregation was so severe that Bell required the protection of federal marshalls to escort him to and from court. His clients were shot at, their homes firebombed, and he, along with them, slept under armed guard (pp. 99–103). At one point, Bell supervised over 300 desegregation cases simultaneously, pressing what he would later lament as *Brown's* misplaced "integrationist" ideal (p. 105).[12]

Bell now rejects the decision he once nearly died to defend, maintaining in *Silent Covenants* that the Court should have upheld the "separate but equal" standard established in *Plessy v. Ferguson*.[13] According to Professor Bell, the Court in *Brown* changed the constitutional status of segregated schools, but lacked the institutional capacity to address the culture of White supremacy behind those schools (pp. 94–96).[14] Had he been on the Court in 1954, Bell would have conceded the "limits of judicial authority" and cited the "predictable outraged resistance" of Whites as reasons for upholding segregation (p. 21).[15] At the same time, he would have acknowledged the "long-suppressed

12. *See also* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 516 (1976) [hereinafter Bell, *Integration Ideals*].

13. 163 U.S. 537 (1896).

14. Professor Bell's criticism of *Brown* pre-dates *Silent Covenants*. *See, e.g.*, Derrick A. Bell, Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980) (describing political and economic interests as primary motivations for promoting Black equality in *Brown*); Bell, *Integration Ideals*, *supra* note 12 (arguing that civil rights lawyers blindly pursued integration following *Brown* without considering the educational interest of their clients). Subsequent writings reiterate the view taken in *Silent Covenants* that *Brown's* contemporary impact is largely overstated. *See, e.g.*, Derrick A. Bell, *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1053 (2005) ("The *Brown* decision, as far as the law is concerned, is truly dead and beyond resuscitation."); Derrick Bell, *Relearning* Brown*: Applying the Lessons of* Brown *to the Challenges of the Twenty-First Century*, 29 N.Y.U. REV. L. & SOC. CHANGE, 633, 634 (2005) (describing *Brown* as "a magnificent mirage, the legal equivalent of that city on a hill to which all aspire without any serious thought that it will ever be attained"); Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 21 (2004) ("The *Brown* Decision, while never overturned, has become irrelevant.").

15. In 2001, Professor Bell contributed to a compilation of "decisions" written by prominent legal scholars and civil rights activists that reflected how they would have decided *Brown* had they sat on the bench in 1954. The authors were asked to draft their opinions in light of what they perceived to be the contemporary relevance and historical impact of *Brown*. Professor Bell drafted the only dissenting opinion. *See* Derrick A. Bell, *Bell, J., Dissenting, in* WHAT "BROWN V. BOARD OF EDUCATION" SHOULD HAVE SAID, THE NATION'S TOP LEGAL EXERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185–200 (Jack M. Balkin ed., 2001) [hereinafter *Bell, J., Dissenting*]. That dissent is reprinted in *Silent Covenants* (pp. 21–27).

truth" that *Plessy* was seldom enforced, and would have demanded strict compliance with its "separate but equal" standard (pp. 21–24).[16] This approach would have provided legal recourse against substandard segregated schools and spared Black children the emotional agony and physical abuse they experienced from hostile Whites upon being transferred to hostile White schools (p. 112). Moreover, he writes, the approach would have ultimately led to popular support for desegregation as an economic imperative that served the financial interests of Whites by cutting the costs of funding two separate school systems (pp. 24–27).[17]

This Essay reviews the critique articulated against *Brown* in *Silent Covenants*. Part II describes the phenomenon of "racial fortuity" responsible, in Professor Bell's view, for patterns of racial reform and retrenchment following *Brown* and other civil rights milestones. Within that Part, section A examines the political environment leading up to *Brown*, while section B discusses how this likely influenced the Justices deliberations. The discussion shows that *Brown* reflects a primary example of "interest-convergence" that advanced the nation's foreign policy objectives without a sufficiently meaningful commitment to racial equality or educational reform. Section C examines the role of "racial-sacrifice" in *Brown* that arguably preserved public school segregation in practice even after the Court ruled it unconstitutional under law. Part III situates *Brown* within a broader historical context by examining the role of racial fortuity in major events that both pre- and post-date the decision. It explains how the short-term advantages of racial fortuity interfere with long-term progress towards actual racial justice and equality. Part IV explains how racial fortuity not only disadvantages minority interests, but undermines the independent role of the judiciary. It also introduces the concept of "forged fortuity" as an alternative strategy for promoting meaningful racial progress

16. *See also Bell, J., Dissenting, supra* note 15, at 185–93.

17. *See also Bell, J., Dissenting, supra* note 15, at 196–98. *But see* Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. PITT. L. REV. 175, 196 (2005) ("[C]ritiques [from Bell] fail to examine some of the real challenges that were inherent in advocating for educational opportunities for African-American children in an era when our country still sanctioned an apartheid regime in the South."); Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for* Brown?, 103 MICH. L. REV. 1507, 1523–33 (2005) (questioning whether Bell's alternative scenario would have resulted in voluntary desegregation) [hereinafter Onwuachi-Willig, *For Whom Does the Bell Toll?*].

within the existing political framework. Part VI concludes optimistically that a commitment to forged fortuity may ultimately reconceptualize society on more equitable and just terms.

II. RACIAL FORTUITY AND THE QUEST FOR DEMOCRATIC LEGITIMACY IN *BROWN*

Professor Bell's critique of *Brown* takes into account the role of "racial fortuity" in determining the social, economic and political fortunes of Blacks and other racial minorities. He describes the phenomenon of racial fortuity as a two-part formula. First, according to Professor Bell, policymakers throughout history have willingly sacrificed "basic entitlements of freedom and justice" (p. 9) for Blacks in order to resolve economic and political differences among competing groups of Whites (pp. 9, 69). Second, policymakers will recognize and remedy racial injustices only when such action "will benefit the nation's interests without significantly diminishing whites' sense of entitlement" (p. 9).[18] The pace of racial progress is thus dictated by repetitive cycles of "racial sacrifice" and moments of "interest-convergence."

Silent Covenants explains *Brown's* pronouncement against segregated schools and the subsequent difficulty in implementing desegregation as a prime example of racial fortuity in a decision that promoted Black equality to meet a different end. What motivated the outcome in *Brown* and other mid-century civil rights gains, says Professor Bell, was a realization that America could not proclaim the moral superiority of democratic governance over Soviet styled communism while tolerating the South's apartheid regime (pp. 59–68). The outcome in *Brown* was never about integration or better schools, he says. *Brown*, at bottom, was about the Cold War.[19]

A. COLD WAR PRECURSORS TO *BROWN*

The Cold War was the Court's "unacknowledged motivation" in *Brown* (pp. 60–67). In the years preceding the decision,

18. *See also* p. 49; Mary L. Dudziak, Brown *as a Cold War Case*, 91 J. AMER. HIST. 32, 34 (2004), ("[C]ivil rights reform is not a straightforward tale of a struggle for justice, but a complex story that includes self-interest and limited commitments.").

19. The Cold War influence on *Brown* has been the focus of increased scholarly attention in recent years. *See, e.g.*, AZZA SALAMA LAYTON, INTERNATIONAL POLITICS AND CIVIL RIGHTS POLICIES IN THE UNITED STATES, 1941-1960, 115–17 (2000); Kathleen A. Bergin, *Authenticating American Democracy*, 26 PACE L. REV. 397 (2006); Justice Ruth Bader Ginsburg, Brown v. Board of Education *in International Context*, 36 COLUM. HUM. RTS. L. REV. 493 (2004).

communist expansion into Eastern Europe and Asia threatened global stability and the interests of United States' allies abroad.[20] Yet Americans, emotionally drained and financially strapped from hard-fought battles in Europe and Japan, would not support military intervention against the Soviet Union.[21] President Truman thus adopted a strategy of peaceful communist containment, relying on diplomacy and strategic alliances to nudge newly independent post-colonial nations towards a democratic form of government.[22]

Key to the "Truman Doctrine" was the United States' ability to lead by example—to showcase to the world its own commitment to self-governance premised on the principles of fairness, justice and equality.[23] Domestic segregation naturally tarnished America's international reputation, leading to efforts by the state department to convey a positive message about race relations abroad (pp. 60–61). Publications of the United States Information Agency showcased the "tremendous pace" at which democratic societies progressed by juxtaposing the conditions of free Blacks at mid-century to the degradation they experienced under slavery.[24] Broadcasts on Voice of America Radio carried the speeches of Black attachés dispatched to foreign nations by the State Department to speak of their amicable relationships with Whites and the rights available to them in the American South (pp. 60–61).[25] Alongside its efforts to downplay the impact of domestic segregation abroad, the Executive Branch emphasized to White Americans how segregation undermined the nation's standing in the world. Professor Bell describes a statement made by Chester Bowles, ambassador to India, in a 1952 speech at Yale University:

> A year, a month, or even a week in Asia is enough to convince any perceptive American that the colored peoples of Asia and Africa, who total two-thirds of the world's popula-

20. *See* ROGER S. WHITCOMB, THE COLD WAR IN RETROSPECT: THE FORMATIVE YEARS 66–75 (1998); JOHN W. YOUNG, ET AL, INTERNATIONAL RELATIONS SINCE 1945: A GLOBAL HISTORY, 59–60 (2004).

21. *See* DANIEL YERGIN, SHATTERED PEACE, THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE 282–83 (1977).

22. *See* WHITCOMB, *supra* note 20, at 91–99; YOUNG, *supra* note 20, at 68–72.

23. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 12, 26–27 (2002) [hereinafter DUDZIAK, COLD WAR CIVIL RIGHTS].

24. *See id.* at 49–54.

25. *See id.* at 56–57.

> tions, seldom think about the United States without considering the limitation under which our 13 million Negroes are living (p. 64).

The Executive department refused to countenance any criticism of America's racial policies at the international level, however, taking drastic measures to hide America's harsh treatment towards Blacks (pp. 62–64). Paul Robeson, Josephine Baker and Louis Armstrong are just a few of the influential public figures who found themselves subject to federal surveillance after speaking out against domestic segregation to international audiences.[26] At a speech in Paris in 1949, Robeson compared the racial policies of the United States "to that of Hitler and Goebbels," and warned that Blacks would never take up arms for the United States against the Soviet Union.[27] The State Department concluded that Robeson's "frequent criticism of the treatment of blacks in the United States should not be aired in foreign countries" and considered his travel abroad "contrary to the best interests of the United States."[28] The Department rescinded Robeson's passport, which it later offered to re-issue only if Robeson agreed to keep silent.[29] He refused. Baker and Armstrong experienced equally debilitating government harassment.[30]

Anti-communist hysteria prompted the NAACP to distance itself from out-spoken Blacks for fear that the organization itself would be charged with subversive affiliations (p. 63). It also influenced the rhetoric of anti-segregation.[31] In 1950, the NAACP adopted a resolution to "eradicate [communist] infiltration . . . and expel any unit, which . . . comes under Communist or other political control and action."[32] The NAACP adopted this resolution, along with a similar one the following year, to assuage suspicion it had attracted three years earlier when it petitioned the United Nations to investigate racial violence in the South. The NAACP's 1947 "Appeal to the World" condemned domestic ra-

26. *See id.* at 61–77.
27. *See id.* at 62.
28. *Id.*
29. MARTIN DUBERMAN, PAUL ROBESON: A BIOGRAPHY 389 (1995).
30. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 23, at 66–77.
31. Even prior to World War II, the NAACP solicited support from Whites by reminding them that their defense of racial equality would undermine Communist criticism against the Untied States. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 38 (1987) [hereinafter TUSHNET, LEGAL STRATEGY].
32. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 76 (1988) (alterations in original) [hereinafter Dudziak, *Cold War Imperative*].

cial discrimination as "not only indefensible but barbaric," and tagged southern lawmakers, as opposed to the Soviet Union, as the real enemy to Blacks.[33] The U.S. delegation blocked a Soviet proposal to investigate the petition, and Eleanor Roosevelt, then a Board member of the NAACP, threatened to resign her position as a member of the United Nation's delegation if any nation formally considered it (p. 62). A subsequent petition submitted in 1951 by William Patterson, chairperson of the Civil Rights Congress, accused the United States of committing genocide against Blacks "as the result of the consistent, conscious, unified policies of every branch of government."[34] The United Nations again declined to respond, but petitions such as these kept the spotlight on an issue that already captured world-wide attention.

Foreign publications and news bureaus ensured that citizens abroad, as well as governments, understood the hypocrisy of American racism.[35] In 1946, a widely read Soviet publication editorialized that the American South was experiencing a rise in "'terroristic acts against negroes,' including 'the bestial mobbing of four negroes by a band of 20 to 25 whites,'" and "'a crowd of white men [who] tortured a negro war veteran, . . . tore his arms out and set fire to his body.'" It emphasized that "'the murderers, even though they are identified, remain unpunished.'"[36] Particularly damaging to America's global reputation were attacks on Black World War II veterans who attempted to exercise the democratic freedoms they fought for abroad—the right to equal treatment and the right to vote (p. 61). International news coverage of America's horrid treatment towards Blacks was so extensive that in 1949 the American Embassy in Moscow warned that "'the 'Negro question' [was o]ne of the principal Soviet propaganda themes regarding the United States.'"[37]

Persistent outrages involving government officials made it impossible to discount Southern racism as an episodic or regional anomaly that occurred outside the sanction of law. Professor Bell describes how Senator Glen Taylor, Henry Wallace's

33. W.E.B. DuBois, An Appeal to the World (1947), *reprinted in* W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES, 1920-1963, at 202, 202–21 (Philip S. Foner ed., 1970).

34. *See* DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 23, at 64.

35. *See* Dudziak, *Cold War Imperative*, *supra* note 32, at 80–93.

36. *See id.* at 88 (quoting Dispatch No. 355, from Am. Embassy, Moscow, U.S.S.R., to Dep't of State (Aug. 26, 1946)).

37. *See id.* at 89 (quoting Dispatch No. 355, from Am. Embassy, Moscow, U.S.S.R., to Dep't of State (Aug. 26, 1946)) (alteration in original).

vice-presidential running mate, was arrested when he tried to cross the "colored" entrance to a church in Birmingham, Alabama (p. 62). In other instances, White business owners in Washington D.C. refused to service Black diplomats.[38] These occurrences also caught international attention and strained diplomatic relations.

President Truman understood the cost of domestic racism to his global public relations campaign. He thus invoked executive authority to expand the rights of Blacks by desegregating the military and prohibiting discrimination in federal employment (p. 73). Despite his urging, however, Southern segregationists who held key committee positions in Congress blocked broader legislative reform.[39] Absent congressional support or executive authority to act unilaterally, Truman's only alternative avenue of reform rested with the judiciary.[40] In a series of cases prior to *Brown*, he authorized the Justice Department to intervene as amicus and ask the Court to reverse *Plessy* by holding segregation unconstitutional under the Equal Protection Clause.[41] A constitutional pronouncement against segregation would be indispensable to the Cold War effort. It would apply to every region in the country and provide confirmation, at least symbolically, that a nation founded on democratic principles truly recognized no class or caste among its citizens. It is here, Professor Bell explains, that the Cold War objectives of the Executive Branch fortuitously merged with the campaign for racial justice being pursued simultaneously by the NAACP (p. 59).

38. *See id.* at 90–91.

39. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 23, at 82–83.

40. *See* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 192 (2004) (describing Truman's reliance on the judiciary as a means to circumvent legislative obstruction on civil rights issues).

41. In each of these cases, the Justice Department invoked international considerations against segregation. *See* Memorandum for the United States as Amicus Curiae at 12, McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) and Sweatt v. Painter, 339 U.S. 629 (1950) ("If the imprimatur of constitutionality should be put on such a denial of equality, one would expect the foes of democracy to exploit such an action for their own purposes."); Brief for the United States at 61, Henderson v. United States, 339 U.S. 816 (1950) (identifying criticisms that "typify the manner in which racial discrimination in this country is turned against us in the international field"); Brief for the United States as Amicus Curiae at 19–20, Shelley v. Kraemer, 334 U.S. 1 (1948) ("The existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries.").

B. COLD WAR CONVERGENCE IN *BROWN*

The Justices did not discuss the Cold War implications of racial segregation during their judicial conferences on *Brown*.[42] There is strong evidence, however, that their deliberations were at least in part influenced by the impact racial segregation had on the nation's security interests. President Truman authorized the Department of Justice to submit an amicus brief in *Brown* to emphasize this very point.[43] The brief asked the Court to consider the problem of racial discrimination "in the context of the present world struggle between freedom and tyranny."[44] It explained that:

> The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. . . . [T]he undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare (p. 65).[45]

The brief described southern segregation and racial violence as "existing flaws" in the American political system that "jeopardize[d] the effective maintenance of our moral leadership of the free and democratic nations of the world" (pp. 65–66).[46]

International security concerns placed prominently in the briefs of other amicus parties as well, including the American Civil Liberties Union, the American Federation of Teachers, the American Jewish Congress, and the American Veterans Committee.[47] These organizations agreed with the position taken by the Department of Justice and stated expressly by the NAACP in its brief, that "[s]urvival of our country in the present interna-

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42. *See* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 644–69 (Del Dickson ed., 2001) [hereinafter CONFERENCE DISCUSSIONS].

43. Briefs and transcripts of the oral arguments in *Brown I* and *Brown II* are compiled in 49–49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

44. Brief for the United States as Amicus Curiae at 6, Brown v. Board of Educ., 347 U.S. 483 [hereinafter DOJ Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 43, at 116, 121.

45. DOJ Brief at 7, *supra* note 44, *reprinted in* LANDMARK BRIEFS, *supra* note 43, at 122.

46. DOJ Brief at 8, *supra* note 44, *reprinted in* LANDMARK BRIEFS, *supra* note 43, at 123.

47. *See* Bergin, *supra* note 19, at 407–11.

tional situation is inevitably tied to resolution of this domestic issue."[48] Public school segregation itself had been "the subject of much adverse press comment" in those nations the United States was "trying to keep in the democratic camp,"[49] calling into question "how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy."[50]

Other aspects of the record reinforced the primacy of desegregation to the Cold War. At the trial level, Judge Waties Waring, dissenting from a decision that upheld segregated schools in Clarendon County, South Carolina, noted the "clear and important" consequences of racial segregation, "particularly at [a] time when our national leaders are called upon to show to the world that our democracy means what it says and that it is a true democracy and there is no under-cover suppression of the rights of any of our citizens because of the pigmentation of their skins."[51]

In both their personal and professional capacities, the Justices articulated anxiety about the looming Cold War crisis. In a speech to the American Bar Association just one month after *Brown* was decided, Chief Justice Earl Warren stated that American democracy was on trial "at home and abroad," and acknowledged the Court's role in shaping public policy.[52] Justice Douglas traveled to both India and Pakistan in the early 1950s and upon his return wrote about the ideological conflicts present in the Cold War and how domestic racism strained the United States' relationship with those nations.[53] In 1951, Justice Frankfurter took "judicial notice" of ascending "communist doctrines . . . in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country."[54] One year later,

48. Brief for Appellants in Nos. 1, 2 and 4 and for Resp'ts in No. 10 on Reargument at 194, Brown v. Board of Educ., 347 U.S. 483 (1954) [hereinafter NAACP Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 43, at 514, 707; *see also* Bergin, *supra* note 19, at 409.

49. Brief on Behalf of Am. Civil Liberties Union et al. as Amici Curiae at 28, Brown v. Board of Educ., 347 U.S. 483 [hereinafter ACLU Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 43, at 156, 183; *see also* Bergin, *supra* note 19, at 410.

50. DOJ Brief at 8, *supra* note 44, *reprinted in* LANDMARK BRIEFS, *supra* note 43, at 123; *see also* Bergin, *supra* note 19, at 410.

51. Briggs v. Elliott, 98 F. Supp. 529, 548 (E.D.S.C. 1951) (Waring, J., dissenting).

52. *See* DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 23, at 106. Subsequent to *Brown*, Chief Justice Warren recalled the contradictions between America's "egalitarian rhetoric" following World War II and the presence of segregation as a significant influence on the course of racial progress. *See* Ginsburg, *supra* note 19, at 494–95.

53. *See* WILLIAM O. DOUGLAS, BEYOND THE HIGH HIMALAYAS 317, 321–23 (1953); WILLIAM O. DOUGLAS, STRANGE LANDS AND FRIENDLY PEOPLE 296 (1951).

54. Dennis v. United States, 341 U.S. 494, 547 (1951) (Frankfurter, J., concurring).

Justices Reed and Minton acknowledged the "terrifying global conflict" arising out of the Cold War, which for them warranted judicial deference to Executive priorities.[55] These concerns undoubtedly influenced the weight given to the Cold War arguments in *Brown*.

The Cold War is also responsible, at least in part, for the fact that *Brown* was a unanimous opinion. After hearing oral arguments, Justice Stanley Reed maintained his original defense of the "separate but equal" standard announced in *Plessy* and cast a tentative vote favoring the South during an early judicial conference on *Brown*.[56] Justice Reed knew that earlier decisions rejecting segregation in law schools, graduate institutions, and public train-cars expressly declined to repeal the authority of states to segregate other public institutions.[57] He read this precedent as direct authority for upholding segregated public schools.[58] Moreover, unlike many of his colleagues, Reed was a committed segregationist with absolutely no personal investment in pressing the cause of Black equality.[59]

At the same time, Reed's initial commitment to segregation in *Brown* clashed with an overwhelming deference to the Executive Branch, particularly on matters involving international affairs.[60] A growing concern over America's position in the Cold War and the Soviet Union's military dominance is evident in his voting record as well as discussions he had with his law clerk.[61] In fact, Reed is the only Justice known to have investigated on at least two occasions whether other nations permitted racial segregation under their own legal systems.[62] Though Reed never ar-

55. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 668–69 (1952) (Vinson, C.J., & Reed, Minton, JJ., dissenting).

56. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 695–96 (2004) (1976).

57. *See, e.g.*, Henderson v. U.S., 339 U.S. 816 (1950); McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

58. *See* Bergin, *supra* note 19, at 420–22.

59. Though Reed was generally credited with an amiable personality, his position on racial issues earned him a reputation among the Court's law clerks for being "thick headed," "ruthless," and "anti-black." *See* JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 359 (1st ed. 1994) [hereinafter FASSETT, NEW DEAL JUSTICE]; *see also* Bergin, *supra* note 19, at 411–14 (describing Reed's reaction to desegregation decisions and personal interactions with Blacks).

60. *See* Bergin, *supra* note 19, at 432–37.

61. *See id.* at 427–29.

62. *See* John D. Fassett, *Mr. Justice Reed and* Brown v. the Board of Education, THE SUPREME COURT HISTORICAL SOCIETY 1986 YEARBOOK 48 [hereinafter Fassett, *Mr.*

ticulated precisely why he abandoned his dissent,[63] Chief Justice Warren asked him just prior to his a final vote with the majority whether he thought a fractured decision was "really the best thing for the country."[64] Reed also admitted to his clerk that "the attitude of the rest of the world toward segregation is worthy of consideration."[65]

Cold War security concerns that reached a peak at mid-century created a moment of interest-convergence that made *Brown* possible. Prior to 1954, the Court repeatedly rejected requests by the NAACP to over-rule *Plessy*,[66] adopting instead a piecemeal approach that relied on rules of statutory construction and dormant commerce clause principles to end segregation when it interfered with the economics of trade and transportation.[67] Decisions involving the Equal Protection Clause carefully re-affirmed the "separate but equal" doctrine and required desegregation only when Black and White facilities could not be matched.[68] *Brown*, however, was different. Public school desegregation would shake not only the daily habits and routines of 11

Justice Reed], *available at* http://www.supremecourthistory.org/04_library/subs_volumes/04_c18_k.html.

63. Justice Reed explained his vote in *Brown* to Justice Felix Frankfurter by stating only that the considerations favoring segregation "'did not add up to a balance against the Court's opinion,' and that 'the factors looking toward fair treatment for Negroes are more important than the weight of history.'" *See* Bergin, *supra* note 19, at 426 (quoting Fassett, *Mr. Justice Reed*, *supra* note 62, at 63).

64. *See* KLUGER, *supra* note 56, at 702.

65. FASSETT, NEW DEAL JUSTICE, *supra* note 59, at 571–72; Fassett, *Mr. Justice Reed*, *supra* note 62, at 54; *see also* KLUGER, *supra* note 56, at 696.

66. *See* ROBERT J. COTTROL, ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 101–13 (2003) (discussing the legal strategy in pre-*Brown* desegregation cases); *see also* TUSHNET, LEGAL STRATEGY, *supra* note 31, at 126–32.

67. *See, e.g.*, District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953); Henderson v. U.S., 339 U.S. 816 (1950); Morgan v. Virginia, 328 U.S. 373 (1946); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 217–23 (2004). Professor Bell would characterize these decisions as classic examples of interest convergence that provided relief from racial injustice only to the extent it benefited Whites. They permitted transitory interactions to the benefit of White commercial interests, but maintained more significant social barriers, including public school segregation and bans on inter-racial relationships, that preserved the myth of White purity and reality of White privilege. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 7 (1992) ("When whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear—accurately or not—that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows.") [hereinafter BELL, FACES AT THE BOTTOM].

68. *See e.g,* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). On the limits of these cases, see ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 276 (1997).

million Southern school children, but the very foundation of White separatism and superiority upon which the South ordered its society.[69] The Court was not willing to disrupt that order until Cold War security interests came to the fore. From this perspective, *Brown* might register as a loss because it ultimately failed to bring about meaningful racial or educational reform. *Brown* failed to bring about meaningful reform because that was never its goal.

C. RACIAL-SACRIFICE FOLLOWING *BROWN*

The interests that converged in *Brown* resulted in a key ideological advantage to the United States over the Soviet Union at the height of the Cold War.[70] *Brown*'s immediate impact on the racial composition of public schools, however, was negligible. Local, state and federal lawmakers actively subverted *Brown's* constitutional mandate in full view of the Court which for the most part remained on the side-lines until nearly a full decade had passed.[71] Racial fortuity thus came full circle in *Brown,* Professor Bell concludes, as government actors sacrificed the constitutional entitlements and educational rights of Black school children in order to maintain pre-*Brown* levels of segregation (pp. 71–72, 94–95).

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69. Southern Whites feared that integrated schools would inevitably lead to inter-racial friendships and ultimately sexual relationships between Black and White adolescents that would threaten the myth of White racial purity that supported claims to White privilege. The symbolic association between integrated schools and inter-racial sex was violently captured in 1957 when six Birmingham, Alabama Klansmen castrated a Black man after taunting him for "think[ing] nigger kids should go to school with [white] kids." *See* KLARMAN, *supra* note 67, at 424 (alteration in original).

70. The United States Information Agency and world-wide news outlets communicated the outcome of *Brown* to audiences across the globe. *See* Mary L. Dudziak, *The Little Rock Crisis, and Foreign Affairs: Race, Resistance and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1644–45 (1997); Dudziak, *Cold War Imperative*, *supra* note 32, at 112–14.

71. The difficulty in obtaining progress towards desegregation after *Brown* is well documented and analyzed. While some scholars place primary responsibility on the judiciary, others cite the lack of support for the decision from the legislative and executive departments. *Compare* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1600 (2003) ("[C]ourts could have done much more to bring about desegregation, and instead, the judiciary has created substantial obstacles to remedying the legacy of racial segregation in schools."), *with* Gerald N. Rosenberg, *Tilting at Windmills:* Brown II *and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 LAW & INEQ. 31, 45 (2006) ("Because the political support necessary to dismantle the apartheid system was lacking in 1955, it would not have mattered what standard the Court adopted.").

The seeds of racial sacrifice were planted even prior to the announcement of *Brown*, when a number of Justices voiced concern during the Court's judicial conferences for the impact desegregation would have on Whites. No matter how irrational "prosegregation emotion," Justice Jackson wrote, "we can hardly deny the existence of sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism."[72] Justice Reed was even more solicitous, urging the Court to "start with the idea that there is a large and reasonable body of opinion in various states that separation of the races is for the benefit of both."[73] The record suggests that several Justices agreed to strike down segregation on the condition that Chief Justice Warren draft an opinion that did not require immediate implementation from the South.[74]

As such, the Court ruled segregated schools unconstitutional in 1954 but waited a full year before announcing a remedial decree that established the "all deliberate speed" standard of compliance.[75] The decree instructed local school boards to make a "prompt and reasonable start" towards full desegregation,[76] but district courts charged with monitoring compliance were never told when desegregation should begin, when it should end, or what pace of progress to demand in between.[77] They were instead instructed to move cautiously and authorized to interrupt a desegregation plan once it began if circumstances warranted "additional time."[78] The Justices hoped this cooling off period would induce voluntary compliance from the South,[79] but only prolonged delay by relinquishing oversight to "the most recalcitrant judge and the most defiant school board."[80]

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72. *See* KLUGER, *supra* note 56, at 693.
73. *See* CONFERENCE DISCUSSIONS, *supra* note 42, at 649.
74. *See* KLUGER, *supra* note 56, at 698.
75. *See* Brown v. Board of Educ., 349 U.S. 294, 301 (1955).
76. *Id.* at 300.
77. *See id.*
78. *Id.*
79. *See* James E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 49–52 (2006) (citing institutional limitations amid predictable opposition from the South among reasons why the Court adopted the "all deliberate speed" standard).
80. *See* J. W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 55 (1971); *see also* CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 11 (1st ed. 2004) ("Even though the Court's ruling was unanimous, its reluctance to take a more forceful position on ending segregation immediately played into the hands of the integration opponents.").

Immediately after *Brown*, the Court let stand a series of district court judgments that distinguished between "integration" and "desegregation" by recognizing a right of White school children to avoid compulsory integration with Blacks. *Brown*, the lower courts agreed, "does not require integration. It merely forbids discrimination."[81] In did not prevent Whites from keeping themselves apart from Blacks, but only prohibited the government from requiring them to do so. One district judge in Texas reasoned that if Black children experienced a psychological injury "by *not* being allowed to sit in white classes in the school room," as was presumed in *Brown*, then White children necessarily suffered an "inferiority complex" when "required *to* sit in classes with the colored child."[82] The distinction between "desegregation" and "integration" established in these cases led to the proliferation of "freedom of choice" plans, transfer provisions and other measures that maintained actual segregation while purporting to comply with *Brown*.[83]

Judicial inertia on the part of the Supreme Court emboldened White resistance even to nominal desegregation. In 1958, Arkansas governor Orval Faubus dispatched national guard troops to obstruct a district order that permitted nine Black school children to enroll in Little Rock's Central High School (p. 95). A cadré of angry whites stood in for the troops when they were called off, resulting in a melee that required the dispatch of federal guards. The event came to symbolize the South's steadfast opposition to *Brown,* until it was overshadowed by fire-hose and canine attacks on peaceful civil rights demonstrators and the murder of four young Black girls in the bombing of a Birmingham, Alabama Baptist Church.[84] In response to Faubus, the Court affirmed the formal constitutional obligation of states to comply with federal law,[85] but declined to scrutinize the overall lack of progress in the South. Enforcement of *Brown* was so lax that by 1964 just over one percent of Black students in the 11

81. Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

82. Borders v. Rippy, 188 F. Supp. 231, 232 (E.D. Tex. 1960) (emphasis added).

83. *See, e.g.*, Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959); Kelly v. Board of Educ., 270 F.2d 209, 228–29 (6th Cir. 1959); Jackson v. School Bd., 203 F. Supp. 701, 706 (W.D. Va. 1962). Some courts went so far as to uphold outright segregation even after *Brown* based on the supposed psychological instability and intellectual deficiencies of Black school children. *See* Stell v. Savannah Chatham-County Bd. of Educ., 220 F. Supp. 667, 683 (S.D. Ga. 1963).

84. *See* KLARMAN, *supra* note 67, at 430–41.

85. *See* Cooper v. Aaron, 358 U.S. 1, 17–19 (1958).

states of the old confederacy attended school with Whites (p. 96).

Racial fanaticism in response to *Brown* ultimately provided the catalyst for federal legislative intervention. Regional unrest brought a halt to tourism in the South, causing business owners to demand a federal response.[86] So did moderate Whites in the North who, safe on the side-lines up to that point, saw the brutal backlash to *Brown* as a repulsive and dangerous threat to the nation's domestic security. (p. 7).[87] Pressured into action, Congress passed the Civil Rights Act of 1964 to outlaw racial discrimination in employment, housing and public accommodations.[88] Title VI specifically outlawed segregation in federally funded institutions including public schools.[89] In 1965, Congress promised billions in federal school aid under the Elementary and Secondary Education Act,[90] while executive guidelines conditioned funding on proof that local schools in fact improved the racial composition of their student bodies (pp. 96–97).[91]

Federal efforts to buy compliance with *Brown* provided the Court with leverage to wield against resistant school districts (pp. 107–09). In 1968, it abandoned the "all deliberate speed" standard by demanding that school boards "come forward with a plan that promises realistically to work, and promises realistically to work now."[92] It extended district court supervision to student transportation, teacher hiring, facilities construction and other aspects of school operations.[93] Three years later it authorized district courts to establish racial balancing targets, alter attendance zones, and initiate bussing.[94] Segregation was so entrenched in some jurisdictions that "administratively awkward, inconvenient, and even bizarre" remedies might be necessary to eliminate a "dual" school system, the Court said.[95] Thus cooperation between the legislative, executive and judicial departments

86. *See* Rosenberg, *supra* note 71, at 40.
87. *See also* KLARMAN, *supra* note 67, at 441–42.
88. *See* 42 U.S.C. § 2000d (1964).
89. 42 U.S.C. §§ 2000d–2000d-4 (1964).
90. *See* 20 U.S.C. §§ 6301 (1965).
91. *See also* Jeffrey A. Raffel, *History of School Desegregation, in* SCHOOL DESEGREGATION IN THE 21ST CENTURY 17, 25–26 (Rossell et al. eds, 2002); Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 223 (1999) (reviewing GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996).
92. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).
93. *See id.* at 435.
94. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–30 (1971).
95. *See id.* at 28.

increased the percentage of Black students attending White schools exponentially. By 1988, the South had become the most integrated region in the country.[96]

These gains were ultimately short lived, however. Bussing measures and district consolidation schemes used to desegregate urban schools pushed White families further into the suburbs where discriminatory lending and real estate practices kept the neighborhoods, and by default the neighborhood schools, comfortably White (pp. 109–11). Though White flight was, and continues to be, a primary cause of segregation between urban and suburban school districts in large metropolitan regions,[97] interdistrict desegregation remedies are permitted only if Black and White students were forced by law to enroll in different districts, or the racially discriminatory acts of one district formally caused segregation in another.[98] This rationale reflects the "states rights" philosophy of those Justices appointed to the bench after *Brown*, and has been criticized for drawing an artificial distinction between "de jure," or forced racial segregation on the one hand, and "de facto" or supposedly voluntary racial separation on the other.[99] Indeed, apart from race-based school assignments, the decision to locate a school deep within a racially identifiable neighborhood all but guarantees continued educational segregation.[100]

During this same period, the Court, despite the national importance of education cited in *Brown*, declined to recognize it as a "fundamental right," which would have required states to rem-

96. *See* Michal R. Belknap, *The Real Significance of* Brown v. Board of Education: *The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 873 (2004).

97. In 1992, for instance, the Court alluded to the consequences of White flight by noting that "racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50-50 mix." Freeman v. Pitts, 503 U.S. 467, 495 (1992). Even within school districts, "young middle-class white families have successfully been pressuring their school boards to carve out almost entirely separate provinces of education for their children." JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 135 (1st ed. 2005); *see also* Alfred A. Lindseth, *Legal Issues Related to School Funding/Desegregation*, *in* SCHOOL DESEGREGATION IN THE 21ST CENTURY, *supra* note 91, at 41, 46.

98. Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

99. *See id.* at 761–62 (Douglas, J., dissenting).

100. *Id.* at 761 (Douglas, J., dissenting); *see also id.* at 785 (Marshall, J., dissenting) ("Exacerbating the effects of extensive residential segregation between Negroes and whites, the school board consciously drew attendance zones along lines which maximized the segregation of the races in schools as well.").

edy funding disparities between urban and suburban school districts.[101] Additional setbacks continued into the 1990s (pp. 126–29),[102] beginning with the Court's 1991 decision that the Oklahoma City School District might be released from its obligations under a court ordered desegregation plan, before actually integrating a number of heavily segregated schools within the district.[103] Judicial decrees "are not intended to operate in perpetuity,"[104] the Court explained, which meant that a school district earned release from judicial oversight once "good faith" compliance with a court order eliminated segregation "to the extent practicable."[105] School districts are no longer required to eliminate segregation in fact.

The following year, the Court authorized district courts to suspend a desegregation decree in incremental stages before a school district demonstrated full compliance in all other areas of school operations.[106] Together, these concessions all but preclude relief for existing segregation or that which promises to reappear once an order is lifted. When that occurs, plaintiffs can no longer petition a district court for a rehearing, but must initiate an entirely new lawsuit and meet the nearly impossible burden of producing contemporary evidence of racial intent in order to renew judicial oversight (p. 126).[107] Moreover, these decisions acknowledged the connection between educational segregation and segregated housing patterns but declined to compel a remedy for this mutually reinforcing phenomenon.[108]

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101. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

102. The Court's most recent desegregation decisions have been criticized for enabling school districts to return to a state of effective racial segregation. *See, e.g.*, KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 205–22 (2005); PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION 259–88 (2004); Chemerinsky, *supra* note 71, at 1615–19; Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 403–05 (1999).

103. Board of Educ. v. Dowell, 498 U.S. 237, 242–44 (1991).

104. *Id.* at 248.

105. *Id.* at 249–50.

106. Freeman v. Pitts, 503 U.S. 467, 489 (1992).

107. *See also* Fair, *supra* note 102, at 404.

108. *See, e.g.*, *Freeman*, 503 U.S. at 494 ("Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.") (citing Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 31–32 (1971)). This rationale continued to create dissention among the Justices. *See id.* at 514 (Blackmun, J., concurring) (noting how the "placement of new schools and closure of old schools and programs such as magnet classrooms and majority-to-minority . . . transfer policies affect the racial composition of the schools."); *Dowell*, 498 U.S. at 255 (Marshall, J., dissenting) ("The [student reassignment plan] superimposed attendance zones over some residentially segregated areas. As a result, considerable racial imbalance reemerged in 33 of 64 elementary schools in the Oklahoma

Finally, in 1995, the Court ruled that a district court could not force school officials in an urban district to implement educational improvements for the purpose of attracting Whites students from suburban districts.[109] Years of unconstitutional segregation produced stark racial disparities in school enrollment and student performance within Kansas City, Missouri. Because the district itself was predominately Black, however, a judicial order that reshuffled students to different schools within the district would have only reproduced those disparities.[110] The district court thus ordered law makers to initiate salary increases, capital improvements, and curriculum enrichments to improve the educational quality of Kansas City schools with the hopes of encouraging voluntary enrollment from Whites in suburban districts.[111] Not a single White student from surrounding suburban districts was forced to do so under the court's order. Still, the Supreme Court rejected that approach, holding that the very purpose of encouraging enrollment from Whites in suburban districts qualified as an "interdistrict goal" that exceeded the scope of Kansas City's "intradistrict violation."[112]

The history of desegregation litigation presaged the unfortunate reality of continuing school segregation today. A report by the Harvard Civil Rights Project summarizing data from 2001 concluded that public schools were more racially segregated in 2001 than at any time in the previous 30 years.[113] A later report found that, for minority students, effective schools are as rare as integrated ones, with "devastating poverty, limited resources, and various social and health problems" concentrated in over-

City system with student bodies either greater than 90% Afro-American or greater than 90% non-Afro-American.").

109. Missouri v. Jenkins, 515 U.S. 70 (1995).

110. *Id.* at 76.

111. *Id.* at 76–78.

112. *Id.* at 92.

113. *See* Erica Frankenberg, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 6 (The Civil Rights Project, Jan. 2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf. *See also* Gary Orfield & Chungmei Lee, Brown *at 50: King's Dream or* Plessy's *Nightmare* 4 (The Civil Rights Project, Jan. 2004), *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf ("For more than a decade, we have been headed backward toward greater segregation for black students. For Latinos, who have recently become the largest group of minority students, segregation has been steadily increasing ever since the first national data were collected in the late 1960s."). "[A]s of the 2000-2001 school year, white students, on average, attended schools where 80 percent of the student body was white. Minority students were increasingly attending schools that were virtually nonwhite" (p. 127).

whelmingly non-White schools (p. 127).[114] In the few schools that are racially diverse, suspiciously vague tracking criteria and ability grouping reproduce patterns of racial isolation within the classroom (pp. 112–13).[115] For Professor Bell, racial sacrifice played a role in bringing about the unfortunate circumstances that render America's public schools both separate *and* unequal, and consequently unable to demonstrate compliance with *Plessy* much less *Brown*.

III. SITUATING *BROWN* WITHIN A HISTORY OF RACIAL FORTUITY

Silent Covenants places *Brown* on a continuum of events that demonstrate the role of racial fortuity in governmental decision-making (pp. 29–48). This Part examines three events in particular: the abolition of slavery in the North, the Emancipation Proclamation, and the approval of diversity-based admissions programs.[116] The motivations for these events and the set-backs that followed them support Professor Bell's conclusion that the "perceived self-interest by whites rather than the racial injustices suffered by blacks has been the major motivation in racial-remediation policies" (p. 59).

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114. *See also* Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 16 (The Civil Rights Project, Jan. 2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf ("The reality of segregation by race and poverty means that, while the majority of white students attend middle class schools, minority students in racially segregated schools are very likely attending a school of concentrated poverty.").

115. *See also* Mildred Wingfall Robinson, Brown: *Why We Must Remember*, 89 MARQ. L. REV. 53, 54 (2005) ("General tracking, a practice that theoretically allows a match between student ability and level of instruction, still all too often separates children by color[, as do] programs for the gifted, for those with learning challenges, and for those for whom English is a second language.").

116. Professor Bell distinguishes between incidents that reflect "racial sacrifice" and those that concern "interest-convergence," though the combined influence of "racial fortuity" generally is visible in each episode he describes. In addition to the three incidents discussed in this Essay, Professor Bell examines the cyclical patterns of reform and retreat in the Constitution's slavery compromise, universal White male suffrage, the Supreme Court's decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), the Hayes-Tilden Compromise, the Southern Disenfranchisement Compromise, the death penalty, criminal sentencing disparities, unemployment measures and housing patterns (pp. 29–48). *See also* Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 780 (2005) (citing principles of racial fortuity to explain why systemic police brutality against people of color goes unremedied).

A. RACIAL FORTUITY IN NORTHERN EMANCIPATION

Alexis De Tocqueville observed in 1835 that "[s]lavery in the United States [was] destroyed in the interest, not of the Negroes, but of the whites."[117] This early application of racial fortuity was evident in the North as well as the South. Prior to the Revolutionary War, slavery took root in New Jersey, New York and Massachusetts as a means of labor production to support the emerging colonies.[118] Other colonies also experimented with slavery, but regional industrialization and an expanding surplus of White laborers prevented the institution from becoming the economic necessity it was in the agrarian South.[119] The struggle against British tyranny also made it difficult for those Whites who did own slaves to rationalize a claim to ownership in human flesh,[120] a point emphasized in abolitionist literature and speeches.[121] Moreover, White workers campaigned against slavery on the ground that it interfered with their own opportunities for paid labor, while politicians complained that it reduced the colonies' prestige among European nations.[122] These were the primary economic and political conditions that induced abolition in the North prior to the Civil War.

Lawmakers nonetheless delayed freedom for Blacks out of concern for the financial interests of Whites. Professor Bell cites a 1780 Pennsylvania statute that made every child born to a slave an "indentured servant" to their parent's master until the age of 28 (p. 51).[123] Other states required slaves to complete a term of indentured servitude to compensate owners for their "fair market value" (p. 51). New York established a voluntary emancipation scheme, offering slave-owners 500 acres of land in exchange for a slave they surrendered to the Revolutionary Army.[124] Free-

117. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 403 (Gerald E. Bevan trans., 2003).

118. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 3–4 (1961).

119. *See, e.g.*, A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 98 (1978).

120. *See* LITWACK, *supra* note 118, at 8.

121. *See* BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 43–50 (1961).

122. *See* LITWACK, *supra* note 118, at 5–9.

123. *See also* Paul Finkelman, *The Dragon St. George Could Not Slay: Tucker's Plan to End Slavery*, 47 WM. & MARY L. REV. 1213, 1231 (2006) (comparing rationale for gradual emancipation statutes in Pennsylvania, Rhode Island and Connecticut with racial ideology that precluded emancipation in Virginia).

124. *See* HIGGINBOTHAM, *supra* note 119, at 138.

dom in the North was hardly free. Nor did it guarantee Blacks equality with Whites. Most colonies restricted the property, voting, and marriage rights of free Blacks during and after abolition to confirm their subordinate status to Whites.[125]

B. RACIAL FORTUITY IN LINCOLN'S EMANCIPATION

Professor Bell also evaluates the Emancipation Proclamation in terms of racial fortuity (pp. 52–57). Despite a strong personal conviction against slavery, as President, Abraham Lincoln declined to interfere with the institution for fear of provoking further rebellion in the South (p. 53). Lincoln did not view emancipation as a moral imperative, but "'a practical war measure to be decided upon according to the advantages or disadvantages it may offer to the suppression of the rebellion.'"[126] In his famous response to abolitionist Horace Greely, Lincoln defended his ambivalence:

> My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race, I do because I believe it helps to save the Union. I shall do less whenever I shall believe that what I am doing hurts the cause, and I shall do more whenever I shall believe doing more will help the cause (p. 53).

Military necessity ultimately prompted Lincoln to draft the Emancipation Proclamation in 1862. The war "had gone from bad to worse," he later explained, "we had about played our last card, and must change our tactics, or lose the game!"[127] He wagered on "freedom to the slaves in the South for the purpose of hastening the end of the war."[128] It paid off. The measure provided a steady stream of Black reinforcements for Union troops and destabilized the southern agrarian economy by draining it of slave labor (pp. 54–55). It also gave foreign abolitionist governments a reason to withhold political and financial support from the Confederacy (p. 54).[129] These political objectives tipped the

125. *See id.* at 139, 148, 286; LITWACK, *supra* note 118, at 64–152.

126. P. 54 (quoting Irving Dilliard, *The Emancipation Proclamation in the Perspective of Time*, 23 LAW IN TRANSITION 95, 98 (1963)).

127. *See* JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION 31 (1995).

128. *See id.* at 32.

129. *See also* PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN

scales in favor of emancipation long before it could have been sold on the premise of human dignity alone.

C. RACIAL FORTUITY IN AFFIRMATIVE ACTION

The benefits of diversity based affirmative action programs are also fortuitous, says Professor Bell (pp. 138–59). *Grutter v. Bollinger* upheld the admissions program at the University of Michigan Law School, which considered an applicant's race along with other variables in order to promote diversity among the entering class.[130] More than 300 organizations signed amicus briefs in support of the law school, including academics, labor unions, Fortune 500 companies, and retired military and civilian defense officials, arguing that racial diversity constituted a "compelling" government interest (p. 148).[131] A majority of the Court adopted their position that diversity promotes "cross-racial understanding," advances "learning outcomes," and prepares students for an "increasingly diverse workforce and society."[132] It also agreed with the opinion of high ranking officers and civilian military leaders that a "'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'"[133] Diversity-based education programs also open "the path to leadership," it said, which ultimately produced "a set of leaders with legitimacy in the eyes of the citizenry."[134]

This rationale is influenced by the role of racial fortuity. The Court had previously characterized race-based remedies as a "highly suspect tool" even when used to counter the effects of documented discrimination,[135] and rejected the use of race-friendly hiring incentives as a remedy for nation-wide discrimination against minority-owned small businesses.[136] *Grutter* made

147 (1994). *But see* ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 9 (2004) (arguing that Emancipation entailed political disadvantages that Lincoln understood).

130. 539 U.S. 306, 337–39 (2003).

131. *Id.* at 330–31.

132. *Id.* at 330.

133. *Id.* at 331 (quoting Brief for Julius W. Becton, Jr., et al. as Amici Curiae at 5).

134. *Id.* at 332.

135. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

136. *See Croson*, 488 U.S. at 504 (1989) (holding that the national trend of discrimination in the construction industry as identified by Congress did not justify hiring incentives offered by City of Richmond to promote municipal contracting opportunities for minority businesses).

no attempt to identify, much less purge, the systemic influence of such discrimination, says Bell. Instead, it was "[d]iversity in the classroom, the work floor, and the military, not the need to address past and continuing racial barriers" that gained the Court's approval (p. 151).

The plan in *Grutter* not only favored the interests of corporate entities and government elites, it also mitigated any adverse impact on White applicants—a particular concern for Justice O'Connor, who cast the deciding vote and authored the majority opinion.[137] The admissions committee undertook a "highly individualized, holistic review of each applicant's file" to determine whether non-traditional Whites, in addition to racial minorities, might enhance the broad-based diversity of the entering class.[138] O'Connor thought it significant that the law school routinely admitted White candidates with grades and test scores lower than Black, Hispanic and other minority candidates that were rejected.[139] This set the Law School apart from the University of Michigan's undergraduate institution which allocated a fixed number of diversity "bonuses" to every underrepresented minority applicant.[140] O'Connor's vote in *Gratz v. Bollinger* sealed the fate of that program too, which impermissibly made "'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."[141] The whims of racial fortuity thus dictate the constitutionality of affirmative action programs according to their ephemeral value to Whites (p. 159).

IV. RECKONING WITH RACIAL FORTUITY

Silent Covenant compels racial justice advocates to consider the costs of fortuitous progress before conceding its benefits. First, as described by Professor Bell, racial fortuity requires that people of color submit to serious and long-term injustices until intervening factors compel change (pp. 69–72). Second, fortuitous relief is temporary and subject to shifting policy priorities because it ignores the underlying ideological root of racial preju-

137. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 276, 287 (1986) (O'Connor, J., concurring in part and dissenting in part) (warning that race-based remedies for statutory discrimination violation must "not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preferences").

138. *Grutter*, 539 U.S. at 337.

139. *Id.* at 338.

140. *Id.* at 337 (citing Gratz v. Bollinger, 539 U.S. 244 (2003)).

141. *Gratz*, 539 U.S. at 272 (alteration in original).

dice that breeds continuing inequality (pp. 71–72). Moreover, fortuitous progress does not address how lawmakers leverage racial tension in support of policies that undermine the economic interests of poor and working-class Whites, and therefore perpetuate resentment and hostility from those groups towards any measure of reform (p. 79).

These drawbacks to racial fortuity are visible in the three episodes described in Part III. Specifically, Black Africans endured up to a century of enslavement in the North and more than two centuries in the South before utilitarian motive led to emancipation. Lincoln himself spoke eloquently against slavery's brutality[142] but reversed regional emancipation orders issued by Union field commanders in occupied areas of the South (p. 53). He supported gradual abolition, compensation for Whites, and deportment of African descendants more than 200 years after they and their families had been dismantled and dispersed across the American continent.[143] Pragmatic motives also led the Court in *Grutter* to affirm the social, economic, and strategic benefits of integrated schools—the same benefits attributed to desegregation in *Brown*[144]—after previously rejecting race-friendly programs that acknowledged and sought to remedy documented discrimination against people of color.[145]

Fortuitous racial progress under these conditions legitimizes more formidable barriers to opportunity and obscures the role of racial animus or indifference in maintaining those barriers. *Brown* itself promoted equality by pronouncement, Professor Bell states, when it defined "separate" to be "unequal" without once mentioning the pernicious ideological foundation of segregation (p. 196).[146] White lawmakers could simply repeal segrega-

142. *See, e.g.*, GUELZO, *supra* note 129, at 4 ("I hate [slavery] because of the monstrous injustice of slavery itself[,] . . . because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites . . . ."); 8 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1953, 361 (1953) ("Whenever [I] hear any one, arguing for slavery I feel a strong impulse to see it tried on him personally.") (alteration in original) (citation omitted); Dilliard, *supra* note 126, at 96 ("If slavery is not wrong, nothing is wrong. I can not remember when I did not so think and feel." (quoting Letter from Lincoln to A.G. Hodges (Apr. 4, 1864), *in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN 65 (Gettysburg ed. 1905))).

143. *See* PALUDAN, *supra* note 129, at 130–31.

144. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

145. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

146. *See also* Juan F. Perea, *Buscanda América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1426 (2004) ("*Brown* and its subsequent enforcement as integration, without repudiation of the White racism that caused

tion statutes, proclaim the neutrality of government rules, and spin the continuance of economic and political subordination of people of color after *Brown* into proof of racial inferiority.[147] The decision thus legitimized continuing racial oppression in public schools and other institutions that, for the most part, remained separate, unequal, and racially toxic long after *Brown*.

Similarly, emancipation provided much needed relief from the evils of chattel bondage, but it came after two and a half centuries of slavery and did nothing to exorcise the myth of Black inferiority that gave birth to Jim Crow.[148] So, too, *Grutter* is viewed by many as an affirmative action victory despite the near universal reliance on standardized test scores, legacy preferences, and other arbitrary criteria that disadvantage minority applicants to a far greater degree than they could ever hope to benefit under race-based affirmative action.[149] Legal precedent makes it impossible to challenge these deceptively neutral admission criteria without proof of racial "intent."[150] This is true even in the case of standardized tests that statistically fail to predict an applicant's educational competence or likelihood of professional success.[151] Even Justice Thomas, whose dissent in *Grutter* decried the use of "unseemly" admission standards that

segregation, dealt only with the symptom, and not the cause, of racial inequality.").

147. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 717 (1992).

148. *See* CHARLES FRANK ROBINSON, DANGEROUS LIASONS: SEX AND LOVE IN THE SEGREGATED SOUTH 50 (2003) (noting how segregation statutes "symbolized the intention of whites to maintain a racial separateness that supported the notion of white supremacy"); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 11 (3d rev. ed. 1974) (identifying "Anglo-Saxon superiority and innate African inferiority" as "ideological roots" of segregation).

149. *See* D. Marvin Jones, *When "Victory" Masks Retreat: The LSAT, Constitutional Dualism, and the End of Diversity*, 80 ST. JOHN'S L. REV. 15, 20 (2006) (providing statistics to demonstrate that "over-reliance upon the LSAT is the proximate cause of the systemic decline in minority enrollment" in accredited law schools); John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM J.L. & SOC. PROBS. 491, 504 (1993) (showing that more Whites have gained admission to Harvard in previous years pursuant to preferences granted to the children of alumni than the total number of Black, Hispanic, and American Indian students combined).

150. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976) (requiring proof of "invidious discriminatory purpose" before subjecting facially-neutral criteria to constitutional scrutiny).

151. Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 623 (1999) ("Standardized tests measure two things: the ability to take other standardized tests and economic class. We all recognize that they do not tell us whether a person would be a good lawyer."); Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 134–35 (2005) (discussing empirical studies that discount the value of the LSAT).

arbitrarily privilege White applicants, refused to subject race-neutral admissions criteria to constitutional scrutiny.[152]

Finally, until poor and working-class Whites come to understand how lawmakers leverage racial tension to justify indiscriminate economic subordination, they will continue to oppose even temporary and symbolic racial progress despite the many social or political benefits they themselves derive on account of fortuitous reform. Racism, Professor Bell explains, "has been a powerful force fracturing the 'lower classes' and inducing large numbers of them to think, vote, and act in defiance of what might be expected to be their rational economic self-interest" (p. 79). It provides poor and working-class Whites "a consoling sense of superiority and status" over Blacks, Hispanics and other people of color with whom they share economic vulnerability, and in turn leads them to resist racial equality even in symbolic or temporary form.[153]

The Emancipation Proclamation, for example, hastened the end of the Civil War, but its terms applied only to areas "in rebellion against the United States" and therefore beyond the reach of federal law (pp. 54–55).[154] The document itself was legally unenforceable in the confederacy; yet Lincoln's strategic endorsement of freedom for Blacks cost his party significant support among voters (p. 55). News of Lincoln's order prompted riots against the Union draft and an untold number of beatings, burnings and lynchings against Blacks whom Whites blamed for the physical costs and economic hardships of war (pp. 55–56). Emancipation may have saved the Union, but it enraged millions of poor and working-class Whites in both the North and the South who calculated freedom for Blacks in zero-sum terms.

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152. Grutter v. Bollinger, 539 U.S. 306, 368 (2003) (Thomas, J., dissenting) ("The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race."). Justice Thomas predicted that elite educational institutions would abandon legacy preferences and other arbitrary admissions criteria if the Court invalidated the use of race-friendly standards. *Id.* at 368 n.10.

153. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1741–43 (1993) (identifying historically how racial status and privilege "could ameliorate and assist in 'evad[ing] rather than confront[ing] [class] exploitation'" (quoting DAVID ROEDIGER, THE WAGES OF WHITENESS 13 (1991))) (alteration in original).

154. A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 73–74 (1996). Legally recognized freedom for Blacks did not occur until 1865, after the Confederacy surrendered and the Thirteenth Amendment to the Constitution was ratified. *See* U.S. CONST. amend XIII.

Similarly, opposition to desegregation led significant numbers of southern Whites to dismiss the Cold War advantages of *Brown* and demand through protest and violence that federal, state and local law makers undertake to preserve segregated schools.[155] Today, many Whites focus their energy on defeating diversity-based admission programs when they are far more likely to be rejected from a top institution in favor of a less qualified athlete, legacy admit, or child of a wealthy donor than a beneficiary of affirmative action.[156] The dearth of minority students enrolled in elite institutions in itself belies any argument that diversity programs displace Whites to any meaningful degree.[157] Even race-neutral reforms are presumed to confer undeserved benefits to people of color at the expense of Whites. A plan in Texas to automatically admit to the state's colleges and universities every student who graduates at the top ten percent of their high school class has come under fire by a growing number of Whites who claim that the program unjustly rewards minorities in less rigorous high schools (pp. 145–46). This position overlooks how the program benefits poor and working-class Whites, and especially Whites in rural areas, who would not have been admitted to the state's most elite institutions on merit alone.[158] Moreover, financially disadvantaged students of any race will still encounter economic barriers to higher education even if they earn automatic admission to the state's colleges and universities (p. 146).

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155. *See* KLARMAN, *supra* note 67, at 421–24 (discussing beatings, riots and bombings committed by angry Whites committed to forestalling desegregation in the South following *Brown*).

156. The plaintiff in *Grutter* for example was rejected for admission despite numerical test scores and grade point averages that exceeded those of other White students who were admitted. *See* 539 U.S. at 338.

157. The complexity of factors that influence admission mean that the probability for admission of a White applicant would rise 1.5% if affirmative action were eliminated at the most elite institutions. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 36 (1998). An end to diversity-based hiring programs in legal academia would likely have as marginal an impact on White employment opportunities given the low number of professors of color (p. 144).

158. *See* Onwuachi-Willig, *For Whom Does the Bell Toll?*, *supra* note 17, at 1537–38 (noting that the University of Texas at Austin had never enrolled a student from several rural White areas prior to the Ten Percent Plan). Perceived unfairness also drives White opposition to employer-based affirmative action programs, notwithstanding their substantial benefit to Whites. Corporate hiring campaigns to diversify the applicant pool, without a corresponding hiring commitment, do little to counter discriminatory employment practices that disadvantage people of color, but they do increase the total number of White applicants who can compete for opportunities that would have otherwise gone to favored insiders (p. 141).

V. FORGING FORTUITY WITHIN THE CONSTITUTIONAL FRAMEWORK

Silent Covenants is primarily a lesson about the practical limits of racial fortuity. It nonetheless raises a theoretical question not directly addressed in the text, but relevant still to a comprehensive understanding of the relationship between racial fortuity, representative democracy, and judicial authority. Racial fortuity not only undermines the utility of judicial advocacy as a mechanism of racial reform, as Professor Bell recognizes, but conflates political and judicial decision-making in a way that impugns the role of courts, especially the Supreme Court, in the constitutional order.

An independent judiciary is meant to enforce constitutional boundaries against breaches by the political branches—even those sanctioned by the supposed will of the majority.[159] This includes the expedient use of race as a bargaining chip to settle disputes among competing factions of Whites.[160] Those strategies can be said to result from defects in the political process, including formal and informal barriers to voting and other means of democratic participation, which limit the political influence of Blacks and other people of color.[161] Under these circumstances, policy priorities reflect not the reasoned will of the voting majority after accounting for minority concerns, but the self-interest of selectively engaged constituents articulated as a commitment to the racial status-quo.[162] The resulting legislation is precisely what

159. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 570 (1998) (discussing historical understanding of tyranny as "the abuse of power by government—even by representative government acting on the basis of what a majority of its constituents wanted.").

160. The Equal Protection Clause, for instance, carries a structural as well as substantive dimension to the extent it is interpreted to justify heightened judicial review of political policies that target a "suspect class" on account of biases likely to infect the lawmaking process. This proposition derives from the famous "Footnote 4" in United States v. Carolene Products Co. 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

161. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 7–9 (1994) (noting how political majorities have controlled the influence of racial minorities by denying them the right to vote, altering the size and structure of voting districts, and re-allocating decision-making authority among collective lawmaking bodies once minorities assume public office).

162. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 153 (1980) ("'Race prejudice divides groups that have much in common (black and poor whites) and unites groups (white, rich and poor) that have little else in common than their antagonism for the racial minority. [It] provides the 'majority of the whole'

courts are expected to scrutinize through the process of judicial review in order to moderate the tendency towards legislative abuse.[163] Federal judges, unlike lawmakers, operate above the pressures of political passion, free from the coercive influence of public accountability. This political insularity provides courts with the capacity to defer to established principle in a way that legislatures and the executive cannot.[164] The forces of fortuity, however, cede the principles of constitutional decisionmaking to the racial priorities of government, corporate or military interests, thereby impugning the central function of an independent judiciary. Civil rights advocates might find comfort in the immediate outcome of cases like *Brown* and *Grutter,* but a judiciary that elevates politics over principle will be quick to reverse those gains in future case if policy priorities so dictate.

There is, however, an optimistic alternative for generating reform within the existing constitutional framework. In the aftermath of *Brown*, Bell counsels civil rights advocates to rely less on the judiciary "and more on tactics, actions, and even attitudes that challenge the continuing assumptions of white dominance" (p. 9). Though courts might occasionally serve as a defense against political efforts to subordinate people of color, on this score, "defeats are more likely than protection" (p. 189). Bell thus asks reformers to "defy the . . . involuntary sacrifices and interest-convergence determinants" of racial practices by "forging fortuity" at the legislative level (p. 190).

Forged fortuity is meant to circumvent the perils of judicial reform by seeking change democratically in the moments when the interests of people of color align with the interests of Whites (p. 190). Reformers in the 1950s forged fortuity by staging peaceful sit-ins at lunch counters in the segregated South. "The sit-ins taught us that a great many whites would not maintain discriminatory policies if the cost was too high," Bell recalls (p. 190). He also provides the example of William Robert Ming, a black law-

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with that 'common motive to invade the rights of other citizens' that [James] Madison believed improbable in a pluralistic society.'" (quoting Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 315 (1972))); *see also* Brown, *supra* note 159, at 574 ("The government is not majoritarian and does not even come close to enabling pure majority preferences to prevail in the policymaking process.").

163. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (1962) ("[W]hen the pressure for immediate results is strong enough and emotions ride high enough, [lawmakers] will ordinarily prefer to act on expediency rather than . . . follow[] the path of principle . . . .").

164. *See id.* at 25.

yer from Chicago who, in the early 1960s, defended Martin Luther King, Jr. against charges that he violated Alabama's state income tax laws by not reporting donations collected by the Southern Christian Leadership Conference as his own personal income. Rather than portray the charges as retaliation for King's civil rights activities, Ming stacked the jury with White business owners and emphasized the far reaching tax implications of the government's argument to business interests generally. After just four hours of deliberations, the all-White jury acquitted King of the charges (p. 191).

Contemporary examples of forged fortuity are visible in the work of political coalitions. Professor Michelle Allen, for example, appeals to the self-interest of Whites as a way to build broad-based approval for public school integration which she says receives little support when billed as a vehicle for minority access.[165] Professor Sheryll Cashin writes about grass roots organizations that have mobilized "across the artificial lines of race and political jurisdiction" to obtain fair and equitable tax, transportation, housing and education reform.[166] Capitalizing on self-interest may also open government employment opportunities to people of color in traditionally White-dominated fields.[167] The political hegemony of White constituencies simply cannot be sustained in a pluralistic society. America's increasing diversity creates both the need and opportunity to appeal to multi-racial, multi-lingual, multi-faith coalitions.

VI. CONCLUSION

The need to forge fortuity takes into account the unfortunate reality that racial justice is seldom made a government priority for its own sake. The strategy also is not without risk. Much like the judiciary, the legislative and executive position on race "ha[s] swung from unresponsive to hostile" (p. 137). Forged fortuity nonetheless presents the best likelihood for progressive reform in the face of racial resistance from Whites because it compels cooperation from a multitude of diverse constituencies,

165. *See* Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 827–28 (2004).

166. *See* Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 284–87 (2005).

167. *See* Helen Norton, *Stepping Through Grutter's Open Doors: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decision-making*, 78 TEMPLE L. REV. 543, 566–69 (2005).

including some Whites. Perhaps more importantly, forged fortuity might possibly induce the kinds of coveted long-term changes that passive fortuity has made impossible to achieve. Social scientists have shown that orienting diverse groups of individuals towards a common goal can reduce the impact of racial prejudice.[168] Coalition building does just that, and it therefore lays the groundwork for radically reconceptualizing a society where even forged fortuity may no longer be necessary to protect the practical interests and constitutional guarantees of marginalized racial groups. Thus, while Professor Bell submits evidence of racial fortuity to prove the permanence of racism (p. 78),[169] heeding his call to forged fortuity may be the first step in proving him wrong.

168. *See* Epperson, *supra* note 17, at 197–200, quote at 199 (identifying benefits of integration to include "greater toleration of, and appreciation for, members of other racial backgrounds, a greater sense of civic and political engagement, and an increased desire to live and work in multiracial settings as adults"); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781 (1993).

169. *See also* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992) ("Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.") (emphasis omitted); BELL, FACES AT THE BOTTOM, *supra* note 67, at ix ("[R]acism is an integral, permanent, and indestructible component of this society.").