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THE HARLAN DISSENT: THE ROAD NOT TAKEN—AN AMERICAN TRAGEDY

The Honorable Nathaniel R. Jones[†]

INTRODUCTION

When the Supreme Court decided *Plessy v. Ferguson*¹ in May 1896, eight Justices officially sealed the fate of whatever hope could be drawn from the statutory and constitutional protections that emerged out of the Civil War. For anyone with a profound belief in the goals of equality, liberty, and freedom for all without distinction by race, the *Plessy* majority's refusal to accept Justice John Marshall Harlan's insightful reasoning stands next to the *Dred Scott*² decision as the second most disheartening moment in the Supreme Court's checkered efforts to reconcile these goals with the sad legacies of slavery.

In language laced with a tone of condescension, the majority's decision, authored by Justice Henry Billings Brown, licensed states and other entities to treat blacks as second-class citizens. *Plessy* was the constitutional nadir in a long series of efforts to return black Americans to the status they occupied prior to the Emancipation Proclamation, the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, and the enactments of the various Reconstruction Statutes. It was the sordid success of the efforts following *Plessy* that prompts me to call the rejection of Justice Harlan's dissenting views "an

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1. 163 U.S. 537 (1896).

2. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

American tragedy." This situation is distinguishable from the one that the Swedish social scientist, Gunnar Myrdal, was to describe in his 1944 monumental work, *An American Dilemma*. The American tragedy is what led to the myriad of problems Myrdal identified in *An American Dilemma*.

The harm wrought by *Plessy*'s majority was a tragedy, for it stripped black Americans of the protection that the Constitution and laws had set out to afford them. The divestment of rights was done under a ruse that provided a bogus equality in segregation, suggesting that ex-slaves would somehow become ennobled in their second-class, segregated status. Using the law in such a fashion, in reality, unleashed forces of ignorance, evil, and hate against a group of people long repressed by a system of slavery. It denied to them the tools essential for advancement. In the wake of this situation came waves of violence—physical, economic, and political—waves that washed persistently over virtually all of the nation's institutions, exuding heavy mist containing suffocating gases of racism.

One way to gain a sense of the nakedness and barbarism of this violence is to review the history of lynchings during the first fifty or so years after *Plessy* as documented by Walter White and Roy Wilkins of the NAACP; or in *Lion in the Lobby*,³ a biography of the life of Clarence Mitchell, Jr.; or the 1947 Truman committee report, *To Secure These Rights*.⁴ What I hope to spotlight in this presentation is the magnitude of the economic, political, and social violence that sprang up along the various institutional roads that *Plessy* paved with its separate but equal doctrine. The long term effect of the violence has been described by many, but no one said it more clearly than Roy Wilkins, the distinguished civil rights leader.

In a 1960 speech, Roy Wilkins, then Executive Secretary of the NAACP, discussed the *Plessy* legacy.⁵ Under it, the states gained the de jure power, he declared, to interfere with the full enjoyment of the "blessings of freedom," and vigorously exercised that power to the "nth degree." Wilkins went on to state that:

3. DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL, JR.'S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS* (1990).

4. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* (1947).

5. Roy Wilkins, Address to Cleveland City Club Forum (Apr. 16, 1960), in *THE CRISIS*, June-July 1977, at 259-60.

[The states] instituted and wove into a smothering pattern a thousand different personal humiliations, both public and private, based upon color. Through legal and extra-legal machinery, through unchallenged political power, and through economic sanctions, a code of demeaning conduct was enforced with a cast down on children before they could dream, and eroded manhood after they came of age.⁶

One of these “personal humiliations . . . cast down on children” that Wilkins had in mind was certainly separate and unequal education.

In this regard, Wilkins was in agreement with Frederick Douglass, the fearless abolitionist, who pointed to education as the passageway to freedom for former slaves. Douglass recognized that as long as education was denied to slaves, they were easier to control. He put it this way:

To make a contented slave you must make a thoughtless one, . . . darken his moral and mental vision, and . . . annihilate his power of reason. He must be able to detect no inconsistencies in slavery . . . It must not depend upon mere force; the slave must know no higher law than his master's will.⁷

Likewise, as long as education was withheld from ex-slaves, they could be kept in a state of subjugation.

Thus, a key aspiration of the Reconstruction period was to rectify the denial of educational opportunities for former slaves. To that end, the Freedman's Bureau, established by Congress in 1865 as part of the War Department, set out to create the first systematic educational opportunities for former slaves and their children through the organization of day schools, night schools, and industrial schools. Nevertheless, following the 1877 Hayes-Tilden Compromise, when the federal troops were withdrawn from the defeated Confederate states, those programs and schools became the first victims of the overt restoration of white dominance in the South. *Plessy* was not far behind, with Justice Brown citing to the very condition the Freedman's Bureau was attempting to correct as a justification for constitutionalizing the segregation of blacks and whites. Segregated schools, to the

6. *Id.* at 260.

7. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 133 (1983).

extent black schools were allowed to remain at all, were the direct result of *Plessy* and its tragic aftermath.

Last year, a century after deciding *Plessy* and rejecting Justice Harlan's call for a color-blind Constitution, the Supreme Court once again addressed the constitutionality of statutory attempts to rectify a number of the discriminatory remnants of slavery. In *Adarand Constructors Inc. v. Peña*,⁸ an affirmative action case, the Court ruled that federal race-conscious programs, which Congress had specifically designed to overcome the lingering effects of segregation in education and economic discrimination, must now be evaluated by the same strict scrutiny standard applied to city and state programs that have used invidious practices to subjugate blacks since the era of *Plessy*. Taking this recent *Adarand* opinion, in combination with its voting rights decisions in *Shaw v. Reno*,⁹ *Miller v. Johnson*,¹⁰ and *Shaw v. Hunt*,¹¹ the Supreme Court has once again nullified the dream of Fourteenth Amendment rights, but this time by striking what some fear may possibly be the final blow to remedies. The sad irony of this is that it is done under the very Fourteenth Amendment that Justice Harlan argued was ratified for an opposite purpose. By diluting the strength of these remedies, the Supreme Court has altered the landscape of rights secured by the Fourteenth and Fifteenth Amendments, thereby postponing further the day that America would become truly color-blind.

Comparing the 1896 Supreme Court of *Plessy* with the 1995 Supreme Court of *Adarand*, I am struck by how similar the reasoning appears to be. In each case, the Court was asked to confront the remnants of slavery. In each case, the Court was presented with an opportunity to interpret our Constitution in a manner that would reinforce attempts to undo what laws and customs had created and, in fact, move the country in the direction of Harlan's view of the Constitution's color-blindness. Tragically, in both 1896 and 1995, the Court chose the well-worn path leading not to the full promise of equal protection under law, but rather to the perpetuation of racial inequality—political, legal, and economic.

8. 115 S. Ct. 2097 (1995).

9. 509 U.S. 630 (1993).

10. 115 S. Ct. 2475 (1995).

11. 116 S. Ct. 415 (1995).

But what of Harlan's road not taken? As the famed poet Robert Frost wrote so optimistically, taking the less travelled, possibly more challenging, and certainly more courageous path could have made all the difference. The fork in the road presented by the *Plessy* case in 1896 gave the Court two clear choices: one pointed the nation in the direction of segregation; the other, the road not taken, would have carried the nation in the direction of outlawing state-sanctioned segregation. In *Adarand*, the Supreme Court came upon yet another fork in the road—another set of clear choices. In one direction, the direction chosen by a majority of the Court, was "strict scrutiny"; in the other direction, the road not taken, was Justice Blackmun's 1977 refinement of Harlan's view, that to get beyond race one must first take account of race. Such racial distinctions for remedial purposes, need not, therefore, trigger strict scrutiny.¹²

These two choices—made one-hundred years apart—should give one cause to reflect on the course of our history and the prognosis for our future. Looking back on the struggles our country has endured as a result of slavery and segregation, it is no wonder that many are disturbed that some of the recent civil rights jurisprudence of the Supreme Court in 1996 is perceived to be headed in the direction advanced by the Supreme Court in 1896. There is also concern that the mood of the country in the area of equal treatment under law bears a disturbing resemblance to that in 1896.

I. *PLESSY* AND ITS AFTERMATH

Judges decide cases that implicate the principles of the *Plessy* decision with little or no understanding of the facts or the context of the holding. Perhaps this is an appropriate occasion to elaborate on the case.

In 1890, the Louisiana Legislature passed the Separate Car Act. The Act required carriers on Louisiana's rails to establish "equal but separate accommodations for the white and colored races." An exception was provided for "nurses attending children

12. The outcome in *Adarand* was presaged by the Supreme Court's invoking the standard in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a set-aside case, and *Shaw v. Reno*, 509 U.S. 630 (1993), a voting rights case. Whether in the set-aside cases such as *Adarand* and *Croson*, or school desegregation cases such as *Milliken v. Bradley*, 449 U.S. 870 (1980), it was becoming more clear that even in the 1990s, the natural costs of having refused to take the Harlan road in 1896 were escalating.

of the other race." Rail carriers who failed to segregate their passengers were subject to a twenty-five dollar fine or up to twenty days imprisonment, and passengers who violated the Act risked a twenty-five dollar fine or twenty days in jail.¹³

On the afternoon of June 7, 1892, a fair-skinned black man named Homer Plessy boarded a train and, like Rosa Parks, sat in the white section. When he was told by the conductor to move to the colored section of the train, he refused and was arrested by a detective and hauled into local criminal court.

In the Louisiana state courts, Plessy argued that the law under which he was arrested was void because it violated the Equal Protection Clause of the Fourteenth Amendment. Plessy lost and appealed his case to the United States Supreme Court. In April 1896, Plessy's attorneys, Albion Tourgee with S.F. Phillips and F.D. McKenny, argued the case before the Supreme Court. Plessy argued that because the Louisiana statute discriminated on the basis of race, he had been denied his privileges and immunities of citizenship under the Thirteenth Amendment and right to equal protection under the law provided by the Fourteenth Amendment.

Justice Brown and the Court took only one month to issue a ruling, and as Tourgee had feared, it was not in Plessy's favor. Judge A. Leon Higginbotham described Justice Brown's opinion as the "most wretched decision ever rendered against black people in the past century."¹⁴ Justice Brown began his Fourteenth Amendment analysis by observing:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.¹⁵

Using a simple "reasonable regulation" test, the Court concluded that the Separate Car Act was reasonably calculated to promote "established usages, customs and traditions of the people" and to

13. *Plessy v. Ferguson*, 163 U.S. 537, 540-41 (1896).

14. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1009 (1992).

15. *Plessy*, 163 U.S. at 544.

promote “comfort, and the preservation of the public peace and good order.”¹⁶

The Court insisted that it was fallacious for blacks to argue that segregation inflicted a stigma upon the race. Even though blacks were only thirty years removed from slavery, Justice Brown stated:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.¹⁷

African-Americans were aware that a lone dissenting member of the Court, Justice John Marshall Harlan of Kentucky, made a prediction, which proved self-fulfilling. He warned his colleagues on the Court, and the entire nation, that the *Plessy* decision:

will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case . . . [for] . . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . .

. . . .

. . . The thin disguise of “equal” accommodations . . . will not mislead any one, nor atone for the wrong this day done.¹⁸

True to Justice Harlan's prophecy, whites were not misled. They recognized *Plessy* as a license to manipulate, control, and contain blacks. Behind “the thin disguise of equal accommodation,” whites went to ridiculous lengths. Hospitals, libraries, drinking fountains, and cemeteries were segregated. States hastened to segregate the deaf, mentally retarded, and the blind by color; white nurses were forbidden to treat black males. South Carolina forbade black and white cotton workers to even look out of the same windows. Florida required African-American textbooks to be segregated in warehouses. Atlanta provided “Jim Crow Bibles” for black witnesses in courtrooms. The *Plessy* doctrine was a conduit through which poured the venom of

16. *Id.* at 550.

17. *Id.* at 551.

18. *Id.* at 559, 562 (Harlan, J., dissenting).

racism into every aspect of American life. It infected our social and legal institutions and deeply stained the fabric of American thought. A color-blind society we were not.

The very nature of Plessy's resistance to segregation foreshadowed the legal movement that would occur in this country over the next half century. Homer Plessy did not just happen to sit in the white car that day. He was part of an organized campaign to challenge the Louisiana statute through the courts. Members of the Comité des Citoyen, a political group, and the *Crusader*, a progressive newspaper, joined forces with six black state senators to challenge legal segregation of trains on both interstate and intrastate routes.¹⁹ Before Plessy ever entered the white railroad car, the legal theories for challenging the segregation statutes were already taking form. Although this legal campaign did not produce the intended result, the method employed—the orchestration of a test case intended to force a judgment from the Supreme Court—would serve as the basic tool used to dismantle the barriers of segregation reinforced by the *Plessy* decision.

II. THE ROAD TO *BROWN*

The later effort, led by Charles Hamilton Houston, to dismantle the legal foundation of *Plessy* is one of the remarkable sagas of American history. The systemic segregative corrosion caused by *Plessy* made it virtually impossible for those challenging it to attack every manifestation in every institution. Given the primacy of education, however, as Frederick Douglass noted, Charles Houston and his colleagues fashioned a litigation strategy that targeted segregated education. Contemporaneously with this, however, were forays against housing, zoning, and employment discrimination as well as discrimination in the judicial system and law enforcement. At the heart of this strategy was Justice Harlan's view that the Constitution was meant to be color-blind, the *Plessy* majority to the contrary notwithstanding. Through these efforts, which culminated in *Brown v. Board of Education*²⁰ and the unanimous reversal of *Plessy*'s separate but equal doctrine, the Supreme Court was

19. Keith Weldon Medley, *The Sad Story of How 'Separate But Equal' Was Born*, SMITHSONIAN, Feb. 1994, at 109-111.

20. 347 U.S. 483 (1954).

finally stirred to right the course of the country and to begin the journey towards racial equality under the constitutional terms urged by Justice Harlan fifty-eight years earlier.

Houston led the attack. As Dean of the Howard Law School and Special Counsel to the NAACP, Houston developed a small cadre of brilliant lawyers to lead the fight. Assisted by his protege Justice Thurgood Marshall, Judge William H. Hastie, James Nabrit, Jr., and joined later by Judge Robert L. Carter and others, Houston conceived a strategy to attack the basic rationale employed by the Supreme Court for legalized separate racial treatment. These efforts in the early 1930s and 1940s long pre-date what modern opinion-makers like to describe—erroneously—as the 1960s beginning of the civil rights movement. The pot was boiling long before that period.

Houston's strategy was to attack segregated schools by making it too difficult and expensive to maintain them. The first round of court battles concentrated on the "equal" part of the *Plessy* "separate but equal" equation. Focusing on the graduate and professional school level, where blacks of unquestioned achievement and ability were being denied opportunities to pursue advanced study, the NAACP convinced the Maryland Court of Appeals that providing scholarships for black law students to study out of state did not meet the constitutional standards for equality in legal education.²¹ Further pursuing this strategy led to the Supreme Court cases of *McLaurin v. Oklahoma State of Regents for Higher Education*,²² *Sweatt v. Painter*,²³ and *Sipuel v. Oklahoma State Regents*.²⁴ In

21. *Pearson v. McMurray*, 182 A. 590 (Md. Ct. App. 1936).

22. 339 U.S. 637 (1950). The plaintiff in this case, George McLaurin, was a teacher who had already obtained a masters degree in education. The University of Oklahoma had declined to create separate but equal graduate programs for blacks, and McLaurin sued. Under court order, the University admitted McLaurin, but segregated him in the classroom, library, and cafeteria. See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATION, 1925-1950*, at 127 (1987).

23. In *Sweatt v. Painter*, Herman Sweatt sued to gain admission into the University of Texas Law School. 339 U.S. 629 (1950). Sweatt was a letter carrier who sought admission to law school in order to receive a clerical promotion. Although Sweatt had attended an unaccredited undergraduate school and Thurgood Marshall feared his application would be denied on the basis of qualifications, the University denied his application on the basis of race. See TUSHNET, *supra* note 22, at 125.

After Sweatt filed suit, the trial judge gave the state six months to create a separate law school for black students. The state hired part-time law faculty, rented space across from the capitol building, and made arrangements for students at the black law school to use the law library in the state capitol. The Supreme Court held

McLaurin, the Supreme Court recognized that prohibiting the voluntary "intellectual commingling of students" among different races was a violation of the Fourteenth Amendment. In *Sweatt*, the Court recognized that because the separate facilities lacked intangible aspects of equal education, such as alumni contacts, community standing, tradition, and prestige, they could not be constitutionally maintained.

Once it was recognized that the consequences and impact of the badge of inferiority imposed by official segregation could not simply be measured by tangible criteria, it was simply a matter of time before state-sanctioned segregation and the doctrine of separate but equal would be exposed as the cruel and cynical hoax it truly represented. Once the principle was established, and in view of the inherently intangible aspects of education, it was inevitable that the concept of separate education in the college context, the high school context, and eventually the elementary school context, had to come tumbling down for practical purposes as well as reasons of principle.

The litigation strategy led eventually to the unanimous 1954 decision of *Brown v. Board of Education*, which held that separate but equal was inherently unfair and violative of the Fourteenth Amendment to the United States Constitution.²⁵ In *Brown*, the Supreme Court finally recognized that segregation itself, and not merely unequal facilities, deprived minority children of equal educational opportunities. *Brown*, like *Plessy*, ushered in a new era in American history. Although a case about schools and educational opportunities, *Brown* would lay the framework for desegregating all aspects of American life. Yet, the challenge of implementing *Brown* still lay ahead. The legal battles against public accommodations and job and housing discrimination would be waged later over remedies and their implementation.

that the separate school did not satisfy the state's obligation to provide an equal law education for black students. *Id.*

24. 332 U.S. 631 (1948).

25. 347 U.S. 483 (1954).

III. REMEDIES AND RETRENCHMENT

A. Remedies

For decades after *Brown*, remedies to end discrimination developed on several fronts. The courts fashioned methods for school desegregation in cases such as *Green v. County School Board*,²⁶ *United States v. Hinds County School Board*,²⁷ *Keyes v. School District No. 1*,²⁸ *Bradley v. Milliken*,²⁹ *Columbus Board of Education v. Penick*,³⁰ *Dayton Board of Education v. Brinkman*,³¹ and *Morgan v. Kerrigan*.³² Congress passed the 1964 Civil Rights Act and the 1965 Voting Rights Act, while states and cities along with the federal government, with some judicial prodding, developed and implemented programs to aid minority businesses with set-aside programs.

The use of the equitable powers of the courts came to the forefront in the school desegregation era. The Supreme Court ruled in *Brown II*³³ that school boards were to desegregate school systems "with all deliberate speed" under the supervision of the courts, and later revised that doctrine to overcome delays. Local plans that did not meaningfully and effectively eliminate segregation were invalidated,³⁴ and when local school boards did not act, the Court approved judicially crafted desegregation plans.³⁵ By the 1960s the Court held that *Brown* applied to northern school systems and that these systems must also be desegregated if the segregation was caused by "intentionally segregative school board actions in a meaningful portion of a school system."³⁶ The anatomy of those school desegregation cases showed, as clearly as anything could, the devastating effects of the country's rejection of Justice Harlan's view of the Constitution. Those cases demonstrated how public and private

26. 391 U.S. 430 (1968).

27. 417 F.2d 852 (5th Cir. 1969).

28. 413 U.S. 189 (1973).

29. 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

30. 443 U.S. 449 (1979).

31. 443 U.S. 526 (1979).

32. 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 455 U.S. 1018 (1981).

33. 349 U.S. 294 (1955).

34. *See, e.g.*, *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968).

35. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

36. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

discrimination resulted in what Roy Wilkins described in his 1960 speech: black children robbed of opportunities and dreams.

This injustice continued. For example, in *Milliken v. Bradley*,³⁷ the Court refused to take the bold remedial step of approving cross-district desegregation remedies. Although acknowledging state involvement in creating segregation, the Court struck down a cross-district remedy. The Court thus began its retreat from using equitable powers to implement effective remedies by engaging in sophistry. Writing for the majority, Chief Justice Burger declared: "We conclude that the relief . . . was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit."³⁸ This conclusion was possible once the Court rejected the plaintiff's theory of state control over education in Michigan. It thereby attributed to the local educational administrative units that the state created—school districts—a degree of autonomy theretofore unrecognized, even in Michigan. Soon after, in *Washington v. Davis*,³⁹ the Supreme Court erected another hurdle by requiring proof of discriminatory intent in equal protection challenges. With the advent of the *Washington v. Davis* standard, an increasing number of desegregation plans were struck down.⁴⁰

The 1980s brought a general unwillingness of the courts to maintain supervision of school desegregation plans.⁴¹ In several cases, the courts allowed school boards to abandon desegregation plans even where segregation would continue or re-emerge.⁴² Then, in 1991, the Supreme Court created a test to measure the effectiveness of school desegregation orders that allowed school boards to discontinue desegregation programs despite the persistence of dual school systems. Writing for the Court in *Dowell v. City of Oklahoma*,⁴³ Chief Justice Rehnquist held that a school system could be released from a desegregation order if it

37. 418 U.S. 717 (1974).

38. *Id.* at 752-53.

39. 426 U.S. 229 (1976).

40. See, e.g., *Brennan v. Armstrong*, 433 U.S. 672 (1977); *School Dist. of Omaha v. United States*, 433 U.S. 667 (1977); *United States v. Board of Sch. Comm'rs*, 429 U.S. 1068 (1976); *Austin Independent Sch. Dist. v. United States*, 429 U.S. 990 (1976) (remanded in light of *Washington v. Davis*, 426 U.S. 229 (1976)).

41. See generally DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* §§ 7.6.4 to .5 (1992).

42. See, e.g., *Flax v. Potts*, 864 F.2d 1157 (5th Cir. 1989).

43. 498 U.S. 237 (1991).

had “complied in good faith with the desegregation decree since it was entered, and . . . the vestiges of past discrimination had been eliminated to the extent practicable.”⁴⁴ With *Dowell*, the Supreme Court retreated from a goal of absolute desegregation.⁴⁵ Allowing school boards to comply with a mere good faith standard assures that segregation will not be eliminated “root and branch.” The course taken by the Court instead rewards school districts for successful delaying tactics and, even worse, for allowing segregation to become more pervasive. In this connection, Justice Marshall’s warning in the dissent he authored in *Milliken* proves truly prophetic: “In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.”⁴⁶

Public schools, I suggest, must be the center of any discussion of *Plessy*. Education was, as I have already pointed out, one of the institutions in our society most fiercely and lastingly impacted by the *Plessy* “separate but equal” doctrine. Throughout this presentation I have tried to demonstrate the ways in which the vestiges of that decision penetrated our educational system at all levels. The pervasiveness and the tenaciousness of segregation’s hold on education has been seen in more recent times in the attempts to desegregate urban school districts. Contrary to the claim of northern school officials and others, those schools became segregated in the same way as the southern schools did—through state action. Thus, there was a continuing affirmative duty to eliminate racially identifiable segregated schools “root and branch” and to create “just schools.”

As a judge of the Sixth Circuit Court of Appeals since 1979, I feel compelled to acknowledge that former Sixth Circuit judges have been major players in the drama associated with the road not taken. The authors of both the majority opinion and the dissent in *Plessy* served as Judges on the Cincinnati-based Sixth Circuit Court of Appeals. Justice Henry Billings Brown, the author of *Plessy*, came to the Sixth Circuit from Michigan in 1891 and remained until 1893 when he joined Justice Harlan, who

44. *Id.* at 249-50.

45. That such a result was likely was signalled by the Court’s decision in *Spangler v. Pasadena*, 427 U.S. 424 (1976).

46. *Milliken v. Bradley*, 418 U.S. 717, 814-15 (1974) (Marshall, J., dissenting).

was appointed in 1877. Those two former Sixth Circuit jurists cast votes as Supreme Court Justices that heavily impacted, among other things, public education. When one adds the 1974 opinion of Justice Potter Stewart in major school desegregation cases seeking to undo *Plessy*, the Sixth Circuit contribution to civil rights jurisprudence is made clear.

Sadly, just as Justice Henry Billings Brown and his *Plessy* majority rejected the road charted by Justice Harlan in 1896, Justice Stewart, in *Milliken v. Bradley*, eschewed a road charted by Justice Harlan and refined by Justice Thurgood Marshall. Instead, Justice Stewart, by his crucial fifth vote, ensured that urban school segregation would be made permanent. In a lament, Judge George C. Edwards, Jr., an outstanding Sixth Circuit judge whose opinion had approved the interdistrict remedy, wrote: "The [Stewart] decision . . . imbued school district boundaries in Northern states . . . with a constitutional significance neither federal nor state law had ever accorded them."⁴⁷ A paradox thus existed because the State of Michigan had not hesitated regularly to cross or alter those lines in countless instances for a variety of educational purposes. In the face of this missed opportunity, *Plessy* drew new life and black children were destined to remain racially contained inside of Detroit's school district lines because, in the view of Justice Stewart, the cause of urban segregation of black children was due to "unknown and perhaps unknowable factors."⁴⁸ This was a confounding conclusion, akin to the logic in 1896 that if black people were offended by being segregated, it was not due to the law, but because they chose to put that construction upon it.

B. *Retrenchment*

As the courts and other entities crafted remedial programs to integrate America's schools, Congress and local legislatures acted also to institute programs with the goal of providing blacks and other minorities with opportunities to compete in work and educational settings and to enhance political rights. Another series of cases decided by the Supreme Court has threatened the gains made in these areas. The Supreme Court's adoption of strict scrutiny to evaluate benign racial classifications used in

47. *Bradley v. Milliken*, 519 F.2d 679, 680 (1975) (Edwards, J., concurring).

48. *Milliken v. Bradley*, 418 U.S. 717, 756 (1974) (Stewart, J., concurring).

remedial settings has struck another blow against remedies. Until recently, this “benign” use of race was upheld by the Supreme Court as a constitutionally permissible means to achieve ends such as remediation for past racial discrimination and promotion of diversity in the workplace. With two recent decisions, the benign use of race in remedial plans has been made extremely difficult.

In *Richmond v. J.A. Croson Co.*⁴⁹ and most recently *Adarand Constructors Inc. v. Peña*,⁵⁰ the Supreme Court held that strict scrutiny must now apply to equal protection challenges of minority set-aside programs. None of us needs to be reminded of the adage, “strict in theory, fatal in fact.” Prior to these decisions, government programs that set aside a percentage of business for which principally minority enterprises could compete were measured by the constitutional yardstick of intermediate or heightened scrutiny. When applying intermediate scrutiny, courts were called upon to differentiate between benign and invidious racial classifications. In the intermediate scrutiny analysis, benign race-conscious measures were constitutionally permissible to the extent they served important governmental objectives within the power of the legislature and were substantially related to the achievement of those objectives.⁵¹ Invidious racial classifications remained subject to strict scrutiny. This dual approach for evaluating racial classifications gave courts the ideal framework to achieve the goals of *Brown*. Minorities were both protected from discrimination and afforded equal protection by being granted opportunities to compete that had remained unavailable despite the legal end of segregation.

No one has expressed it better than another son of Kentucky, my esteemed colleague, Judge Pierce Lively, who, like Justice Harlan, is a graduate of Centre College. Writing for the Sixth Circuit in several so-called “reverse discrimination” cases, Judge Lively, in keeping with the Harlan credo, construed remedial plans in a way to carry out the color-blind spirit of the Constitution about which Harlan wrote. For instance, in the *Detroit Police Officers’ Assoc. v. Young*⁵² case in 1979, Judge Lively declared:

49. 488 U.S. 469 (1989).

50. 115 S. Ct. 2097 (1995).

51. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 563 (1990).

52. 608 F.2d 671 (1979).

Bakke and *Weber* make it clear that a case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain, and the official actions complained of must be subjected to the analysis prescribed in *Weber* and the plurality opinion in *Bakke* which we find controlling.⁵³

This approach is intermediate and accomplishes the objective of remedying wrongs that were offshoots of *Plessy* while ensuring that the impact on others would be measured and not invidious. Those who lack an understanding of the impact that *Plessy*-blessed policies and practices had on ex-slaves and their descendants, directly or through institutions influenced by those legally reinforced policies and practices, have become fair game for exploitation. Different techniques of exploitation have been used.

From my days as a civil rights litigator, I witnessed with pain the way in which some groups and individuals used the "race pride" card to dilute the fervor with which blacks should have pressed for implementation of civil rights remedies. Confounding that has been another unfortunate turn of events—members of the public are now viewing these types of remedial measures and affirmative action programs as reverse discrimination and thus as punitive. Many have the sense that qualified whites, especially white men, are losing jobs and school admissions to those they perceive as "unqualified" members of racial and ethnic minorities. They make the claim without any acknowledgement of the realities of the American economy or the history of discrimination that disadvantaged blacks and placed whites in an advantaged position.

53. *Id.* at 697.

We must view these developments relating to resistance to remedies against a background of history. Let us go back briefly to the post-Reconstruction Period. With the elimination of the Freedman's Bureau's programs, blacks were deprived of many opportunities, including that of an education. With this crippling legacy, and with the coming of the post-Civil War industrialization, blacks migrated to the great urban centers without the skills to compete in the new economy. Attempts to gain those requisite skills ran into formidable walls of racial resistance. This was not an experience encountered by the European immigrant. Whatever the nature of the problems they faced, they did not confront the disability of race. Northern employers increasingly looked to Europe for their source of untrained labor. Thus, those immigrants who came did so voluntarily with no tradition of subjugation born of slavery and race. Nor were they the special targets of the law as were the blacks, as evidenced by *Dred Scott*, *Plessy*, and other decisions. And, as the immigrants arrived in those new industrial centers, they often dislodged blacks from the few urban occupations they were able to dominate.

It should be clear that without the handicap of racial prejudice, white immigrants were able to move into the economic mainstream in ways not available to persons of color, for they could leave ghettos and move through doors of opportunities. That was not true of persons whose skin was black and who consistently faced closed doors. In the 1990s we are still witnessing the legacy of this discrimination. When the remedial programs designed to eliminate vestiges of America's racial past were implemented, this naturally called for adjustments by those who had enjoyed the advantage of their status, including descendants of the European immigrants. Not having an historical context for understanding the racial remedies necessitated by the presence of color barriers, they have common cause with those opposed to racial equity on other grounds. They resist remedies as punitive measures rather than as correctives. With the modern day opinion molders projecting such a view and it being legally ratified by a series of court decisions, America's racial divide thus expands.

These notions of reverse discrimination have regrettably found their way into modern Supreme Court jurisprudence. In their

dissenting opinions in *Fullilove v. Klutznick*,⁵⁴ Justices wrote in terms of "racial entitlements" and "special preferences."⁵⁵ In *Metro Broadcasting*, Justices faulted remedial programs for elevating the group rights of minority members above the individual rights of members of the majority.⁵⁶ Lacking in their analysis is the realization that it is membership in a "racial group" and discrimination against that group that prompts the need for remedies.

Complaints today of reverse discrimination mirror those sentiments voiced by the Court in the *Civil Rights Cases*.⁵⁷ A mere fifteen years after the end of slavery, in striking down the Civil Rights Act of 1875, the Court stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.⁵⁸

As in *Plessy*, Justice Harlan was the lone voice of dissent in the *Civil Rights Cases*. Harlan recognized then what several Supreme Court Justices fail to recognize now, that judicial and legislative intervention are necessary for blacks even to attain the "rank of mere citizens." Harlan explained:

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. . . . What the nation, through Congress, has sought to accomplish in reference to that race, is—what has already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more.⁵⁹

Harlan's comments reflect a fundamental understanding that many judges and modern legal commentators will not acknowledge. As President Lyndon Johnson noted in his famous

54. 448 U.S. 448, 532, 545 (1980).

55. *Id.* at 532, 545 (respective dissents of Justices Stewart and Stevens).

56. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting).

57. 109 U.S. 3 (1883).

58. *Id.* at 25.

59. *Id.* at 61 (Harlan, J., dissenting).

Howard University speech, years of institutionalized segregation could not simply be wiped away with the passage of the Civil War Amendments to the Constitution. Harlan's comments in the *Civil Rights Cases* reflect his awareness that courts and legislatures would have to use laws to elevate blacks to the same starting position as whites. Harlan seemed well aware that, for some period of time, corrective legislation would be a necessary tool in leveling the playing field before true equality could exist among the races. Perhaps this explains why I am most disheartened by the Court's recent employment of the great words of Justice Harlan's dissent in *Plessy* to justify the annihilation of race-conscious remedies. Justices Stewart,⁶⁰ O'Connor,⁶¹ and Scalia⁶² have all cited Harlan's theory of a color-blind Constitution as support for the proposition that race-conscious remedies violate the Fourteenth Amendment.

Writing for the Court in *Fullilove*, Chief Justice Burger also seems to have understood the importance in differentiating between the ultimate goal of a color-blind society and the necessity of using race in fashioning appropriate remedies. Justice Burger rejected "the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."⁶³ He expressed the view that failing to use race in the calculus in the remedial setting "would freeze the status quo that is the very target of all desegregation processes."⁶⁴ Similarly, Justice Blackmun, writing in the *Bakke* case, sounded the same truth: "In order to get beyond racism, we must first take account of race. There is no other way."⁶⁵

The current Court's failure to acknowledge this fact has drawn critical commentary. It is naive at best and disingenuous at worst to assert that African-Americans can overcome the barriers of institutionalized segregation without the aid of the institutions that ran the engines of oppression. Commentators on the judiciary are critical of what they see as the American courts

60. *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting).

61. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 546, 607 (1990) (O'Connor, J., dissenting).

62. *Richmond v. J.A. Croson Co.*, 448 U.S. 469, 521 (1989) (Scalia, J., concurring).

63. *Fullilove*, 448 U.S. at 482 (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 18-21 (1971)).

64. *Id.*

65. *University of Cal. Regents v. Bakke*, 438 U.S. 265, 407 (1977) (Blackmun, J., concurring in the judgment in part and dissenting in part).

embarking upon a journey to turn the Fourteenth Amendment, which was conceived of to enable former slaves to move into the mainstream of society, into a means to protect rights of persons who are not really threatened. As Professor Derrick Bell has noted:

Courts obscure this conflict by translating the goal of racial justice into the right to procedural fairness, thus frustrating relief for blacks when the conflict becomes apparent. . . . Courts refuse to face up to the need to weigh white expectations based on a world where subordination of blacks was the norm against the assumptions by blacks that justice requires eliminating these priorities. Instead, courts rely on due process clause conventions and heightened standards of proof to invalidate blacks' group expectations in favor of whites' individual expectations.⁶⁶

A recent example of a court's reliance on these "heightened standards of proof" is the Fifth Circuit's *Hopwood v. State of Texas*⁶⁷ decision. In its decision, a panel of the Fifth Circuit struck down the University of Texas race-based admissions programs on the ground that the school had "presented no compelling justification, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body."⁶⁸ The court concluded that the state could not "discriminate" against one group while trying to remedy past exclusion of another.

Astonishingly, the panel in *Hopwood* rejected principles that were established by the Supreme Court in *Bakke* and that stand today as the law of the land. The court addressed two theories that the State of Texas advanced as compelling state interests justifying the race-based admissions program: the goal to create a diverse student body and the goal of remedying past discrimination in the Texas educational system. The Fifth Circuit handled neither correctly. First, the court concluded that the goal of a diverse student body could never be a compelling state interest. The rationale of creating a diverse student body has been accepted for nearly twenty years. The Fifth Circuit does not

66. Derrick Bell, *Remembrances of Racism Past: Getting Beyond the Civil Rights Decline*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 73, 78-79 (Herbert Hill & James E. Jones, Jr. eds., 1993).

67. 78 F.3d 932 (5th Cir. 1996).

68. *Id.* at 934.

point to a case in which the Supreme Court has held that the goal of achieving diversity can never be a compelling state interest. Until the Supreme Court does so, the well-reasoned opinions of Justice Powell and his colleagues stand firm as the law of the land.

Second, in its discussion of the goal of remedying past segregation, the court refused to accept as a justification the past segregation in the Texas educational system. The court found that the Texas University System was “too expansive” to scrutinize and held that only the specific actions of the law school could be examined. Further, the court concluded that only the state legislature could make findings warranting a remedy. However, the past de jure segregation of the Texas school system was expansive and affected educational opportunities in every arena. To scrutinize only individual educational units rather than school systems deviates from the methods that have consistently been employed to eradicate segregation. Further, holding that only the Texas legislature may make findings necessary to require a remedy disregards a key point from the *Bakke* decision. In his concurring opinion in *Bakke*, Justice Brennan noted: “Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.”⁶⁹ Clearly, the administrators of the University of Texas law school have made findings that the continuing discrimination in the law school is caused by past racial prejudice and discrimination at the University of Texas law school. Undoubtedly, this is a body with competence to act in this area. Again, this demonstrates the Fifth Circuit attempting to overrule the commands of *Bakke* when the Supreme Court has not.

This opinion is proof that the new standards for evaluating remedies borne of *Shaw*, *Croson*, and *Adarand* encourage courts to avoid the crucial question of how our nation came to be a land of opportunity for some and a land of disappointment for others. Therein lies the great American tragedy: a 1996 resuscitation of the 1896 *Plessy* rationale for separate but equal. *Plessy* lives.

69. *University of Cal. Regents v. Bakke*, 438 U.S. 265, 325 (1977) (Brennan, J., concurring in the judgment in part and dissenting in part).

LESSONS FOR OUR PRESENT JOURNEY

As one stands back and views civil rights events occurring within the past century, one notes two bookends. At the 1896 end is the constitutional doctrine of separate but equal pronounced by the Supreme Court in *Plessy v. Ferguson*. That doctrine constitutionalized the use of race to segregate blacks. At the 1996 end we see another constitutional doctrine emerge—strict scrutiny—that prohibits the use of race in attempts to correct the racial contortions resulting from the Court's 1896 holding. This strict scrutiny standard equates remedies with the invidiousness with which race was used to segregate and demean blacks in 1896. The result is to place the remedy on par with the fundamental constitutional violation. Paradoxically, the underlying rationale for this new strict scrutiny standard adopts the sensible logic of Justice Harlan's dissent and applies it to today's remedial efforts just as though Harlan had prevailed a century ago. Within the 1896 and 1996 bookends, we see the long period of struggle including the overthrowing of the segregation laws of *Plessy* by the 1954 *Brown* decision.

Although *Brown* gave us the potential to move beyond the harm occasioned by *Plessy* and to travel in the direction toward equality, the effects of *Plessy v. Ferguson* continue to reverberate throughout our society. Had Justice Harlan won the day, blacks and other racial minorities might be fifty-eight years closer to true equality.

Had it not been for the road taken by the *Plessy* majority, the former slaves and their descendants could have followed the paths pursued by others, such as new European immigrants with their various cultural, linguistic, and educational backgrounds. Whatever encumbrances were associated with their arrival to American shores, their early years were free of the burden of color prejudice that has proven to be such a heavy cross for blacks. Without that legally imposed onus of color prejudice submerging them in stagnant oceans of hatred, their descendants have been able to ascend the ladder of educational and economic success with rapidity. How much of a price this nation has paid in lost talent, no one will ever know. How much suffering people of color have been subjected to because of the stigma the Court in *Plessy* placed upon being black is impossible to calculate. What is certain, however, is that, today, a heavy price is being paid for Justice Harlan's road not taken.