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Brown's Children's Rights Jurisprudence and How It Was Lost

Catherine E. Smith

BROWN'S CHILDREN'S RIGHTS JURISPRUDENCE AND HOW IT WAS LOST

CATHERINE E. SMITH*

ABSTRACT

The first decision in Brown v. Board of Education *is a landmark children's rights case that has been lost. After all, segregated education was not sui generis; free and independent Black children in the United States had always been perceived as a significant threat to White supremacy, just as their subjugation had always been a powerful and effective means to uphold it. In an unprecedented move to address this age-old practice,* Brown I *recognized Black children's right to protect themselves from government exploitation that targeted them because they were Black and young—erecting barriers in their equal path to adulthood—in order to maintain a racial caste system across generations. Regrettably, the Supreme Court relinquished its groundbreaking children's rights precepts by shifting to an exclusive focus on Black and White adults' rights and interests. In* Brown I*'s aftermath, the Court abdicated Black children's rights through an effort to placate White adults' rights in* Brown II*, playing directly into the hands of segregationists. As the Court relinquished Black children's rights, the civil rights movement lost an indispensable weapon in the battle to desegregate K-12 public schools in the short-term as well as the opportunity for doctrinal and theoretical development of a more expansive and coherent children's equal protection jurisprudence in the long-term. Imagine if the Court had retained, nurtured, and developed* Brown I*'s children's equality law precepts.*

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INTRODUCTION

Brown v. Board of Education (*Brown I*)[1] is an iconic civil rights decision; it is also a children's rights case.[2] In the aftermath of the *Brown I* decision, however, the Supreme Court relinquished its groundbreaking children's rights precepts by shifting to an almost exclusive focus on adults' rights and interests. This shift in focus included the Court's decision to cave to White adults' claims of states' and parents' rights in issuing its ruling in the second *Brown v. Board of Education* (*Brown II*)[3] decision. Thus, the Court's abdication of Black children's rights played directly into the hands of segregationists who opposed desegregation in primary and secondary schools to maintain the racial status-quo. After all, free and independent Black children have always been perceived as a significant threat to White supremacy, just as their subjugation has been one of the most powerful and effective means to uphold it.[4]

Brown I, in a Supreme Court first, recognized that Black children possessed their own equal protection rights that specifically took into consideration their exploitation because they were Black and young.[5] This Article argues that *Brown I*'s novel recognition of Black children's rights and the Court's relinquishment of them offer key insights into the role children's rights play in the quest for equal justice under the law—especially when parents lack the political power[6] to protect young people from state action that interferes with their path to adulthood in order to maintain group-based hierarchies in American society.[7]

The Forty-Second Congress designed the Fourteenth Amendment to ensure that "there was to be no 'dominant race' and no 'subordinate and inferior class

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[1] 347 U.S. 483 (1954). The Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954), decided on the same day as *Brown I*, held that segregated schools in the District of Columbia violated the plaintiffs' Fifth Amendment rights. *Id.* at 499-500.

[2] *See* Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 3 ("Another case not generally considered a children's rights case, but one which promised great potential benefits for children, was *Brown v. Board of Education*.").

[3] 349 U.S. 294 (1955).

[4] *See* Brown v. Board *at Fifty: "With an Even Hand,"* LIBR. OF CONG., https://www.loc.gov/exhibits/brown/brown-segregation.html [https://perma.cc/84RC-4V8J] (last visited Dec. 7, 2022) (documenting how Margaret Douglass, a former enslaver in Virginia, was arrested "when authorities discovered that she was teaching 'free colored children'" to read and write); VA. CODE ch. 198, § 32 (1849).

[5] The Fourteenth Amendment provides that all "persons," not just adults, deserve equal protection under the law. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[6] There are also times when parents do not have the political will to protect their children, like in the context of the climate crisis and gun violence in schools.

[7] *See generally* Catherine E. Smith, A Revival: *Brown v. Board of Education*'s Children's Rights Legacy (Sept. 29, 2022) (unpublished manuscript) (on file with author) (arguing that *Brown I* shattered the constitutional silence about the exploitation of Black children to maintain a racial caste system).

of beings.'"[8] Through judicial interpretation, the Amendment has become a wellspring for children's rights; however, children's equal protection law lacks focus, vision, substance, and unifying principles.[9]

Currently, there is no child-specific framework within the classic tiers of scrutiny or outside of it.[10] In other words, the Supreme Court has neither decided if children as a class should be deemed "suspect" or "quasi-suspect" nor explicitly provided an alternative doctrinal route to determine when state action runs afoul of young people's rights.[11]

This lack of theoretical and doctrinal clarity about children's equal protection rights results in courts simply treating young people like adults, knowingly or not. For example, lower federal courts often summarily dismiss children's equal protection claims, finding that classifications on the basis of "age" are

[8] KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 49 (1989). For a discussion of the incoherency of equal protection law writ large, see Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 3 (1977) [hereinafter Karst, *The Supreme Court 1976 Term*] ("It is now commonplace for an opinion of the Court in an equal protection case to be accompanied by an assortment of concurring and dissenting opinions, all staking out different ground. Surely we are near the point of maximum incoherence of equal protection doctrine." (footnote omitted)).

[9] *See* Tanya Washington, *In* Windsor*'s Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1, 36 (2014) ("'Minors, as well as adults, are protected by the Constitution and possess constitutional rights.' However, the scope and substance of those rights are not clearly defined, and are often obscured by parental rights." (footnote omitted) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976))); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1463-64 (2018) ("Children's rights . . . remain relatively limited and qualified despite language in Supreme Court decisions suggesting that children broadly enjoy constitutional rights.").

[10] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny applied in equal protection law). *Clark* extended heightened scrutiny to children of unmarried parents; however, *Clark* is treated in equal protection lore as sui generis. *See id.* Some scholars "viewed the sex and illegitimacy cases as reflecting a special concern with sex and illegitimacy, rather than creating a broadly applicable new equal protection approach." Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 541 (2014).

[11] Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1567-68 ("[C]hildren—the poorest, most vulnerable, and least empowered members of our society—are not a 'suspect class.'"). Some cases seem to have provided an alternative route to heightened scrutiny, though without an explicit acknowledgment or indication that they establish a precedent. *See* Plyler v. Doe, 457 U.S. 202, 208-09 (1982); *id.* at 234 (Blackmun, J., concurring) ("[C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions."); *Clark*, 486 U.S. at 461 (noting discrimination against children for matters beyond their control).

nonsuspect.[12] These cases adopt *sub silento* an exclusively adult-focused precedent from the holding in *Massachusetts Board of Retirement v. Murgia*,[13] a case about a mandatory state-retirement plan challenged by a fifty-year-old police officer.[14] At no point in their analysis do these courts consider that young people's subjective qualities, characteristics, circumstances, or needs may differ from those of older persons and warrant a different analytical approach or outcome.[15]

Even when children face the greatest consequences from government action (or inaction), courts "see" grown people.[16] Take climate change as an example. In the landmark children's rights case *Juliana v. United States*,[17] twenty-one youth sued the federal government for its role in the climate crisis, arguing that the federal government has known for more than fifty years that the earth's climate is changing at a rapid pace, that children are disproportionately impacted by the warming planet and that without a change in climate policy, the planet faces an "environmental apocalypse."[18] Yet, the federal district court dismissed the children's equal protection claims because "age" is not a suspect class.[19]

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[12] *See, e.g.*, United States v. Cohen, 733 F.2d 128, 135 (D.C. Cir. 1984) ("Minors, for example, are not a suspect class."); Williams v. City of Lewiston, 642 F.2d 26, 28 (1st Cir. 1981) ("Minors are not a 'suspect' class; and they can be treated differently from adults consistent with the Constitution.").

[13] 427 U.S. 307 (1976).

[14] *Id.* at 310 (upholding mandatory retirement age under rational basis review); *see Cohen*, 733 F.2d at 135; *Williams*, 642 F.2d at 28; *see also* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071-72 (2015) (finding that in more than one hundred equal protection claims between 1971 and 2014, the Supreme Court invalidated legislation seventeen times under rational basis review).

[15] This approach is in contrast to criminal law cases in which courts take children's differences from adults into the constitutional calculus, sometimes extending children's rights in comparison to adults, especially in the Eighth Amendment context. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory life without parole for children, including those convicted of homicide, violates Eighth Amendment); *id.* at 461-62 ("[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.").

[16] Climate change will affect all children. However, children who are members of marginalized groups living at sea level will bear the brunt sooner and for a longer duration in comparison to adults. *See generally* Expert Report of Catherine Smith, Juliana v. United States (*Juliana I*), 339 F. Supp. 3d 1062 (D. Or. 2018) (No. 6:15-cv-01517) (providing historical and sociological analysis of children's Fourteenth Amendment rights), *rev'd*, (*Juliana II*), 947 F.3d 1159 (9th Cir. 2020).

[17] *Juliana I*, 339 F. Supp. 3d 1062.

[18] *Id.* at 1072; *Juliana II*, 947 F.3d at 1164.

[19] *Juliana I*, 339 F. Supp. 3d at 1103. Treating children like adults also occurs in lower courts' treatment of children's fundamental rights. In *Juliana*, the Ninth Circuit dismissed the plaintiffs' fundamental rights claim despite acknowledging that the United States' government has known for fifty years that "failure to change [its] existing policy may hasten an environmental apocalypse." *Juliana II*, 947 F.3d at 1164, 1175. Instead of stepping in to halt the pending crisis, the Ninth Circuit told the twenty-one youth plaintiffs to vote—even

Further, courts, including the Supreme Court, treat child plaintiffs like adults in cases challenging their unfair treatment in comparison to other children. For example, in *San Antonio Independent School District v. Rodriguez*,[20] school children from low-income families challenged the Texas school-financing scheme as a violation of both their fundamental and equal protection rights.[21] In a 5-4 decision, the Supreme Court rejected the children's equal protection argument, finding that wealth classifications were not suspect and the law was rationally related to a legitimate state purpose.[22] Justice Thurgood Marshall, in a blistering dissent, pointed out how the majority forsook the children who the case was about: "[T]he majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[23] And, the Court did so by treating children in low-income families like they were adults, imputing their parents' financial status to them.[24]

There are rare occasions when courts actually consider children's subjective qualities, characteristics, or circumstances. Yet, they do so solely to *limit* children's rights in comparison to adults' rights, rather than treating children equally or offering them greater protections than those granted to their older comparators.[25] For example, in *Williams v. City of Lewiston*,[26] a seventeen-year-old, who "had been refused support by her stepfather, had a nonworking mother,

though most of them could not exercise the right. *See id.* at 1175 ("[T]he plaintiffs' case must be made to the political branches . . . .").

[20] 411 U.S. 1 (1973).

[21] *Id.* at 4-6, 19-20.

[22] *Id.* at 54-55. The Court also held that the right to an education is not enumerated in the Constitution. *Id.* at 35.

[23] *Id.* at 70-71 (Marshall, J., dissenting).

[24] *Id.* at 11-12 (majority opinion). *But see* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that "it is invidious to discriminate against" children born to unmarried parents for the actions of their parents over which they have no control).

[25] *See* Woodhouse, *supra* note 11, at 1578 ("The traditional understanding of children as incomplete adults or pre-citizens, needing always to be under adult control and lacking the capacity for active engagement and independent thought, has been a formidable barrier to children's rights to participation as members of a democratic society."). *But see Brown I*, 347 U.S. 483, 495 (1954) (holding that Black minors were deprived of equal protection rights under the Fourteenth Amendment because "in the field of public education the doctrine of 'separate but equal' has no place"); *Levy*, 391 U.S. at 72 (holding that "it is invidious to discriminate against" children born to unmarried parents); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) ("Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment."); Plyler v. Doe, 457 U.S. 202, 205, 230 (1982) (holding that Texas violated the Equal Protection Clause of the Fourteenth Amendment when it denied undocumented school-age children free public education otherwise available to children who are U.S. citizens or "legally admitted aliens" because Texas failed to show such denial furthered some substantial state interest).

[26] 642 F.2d 26 (1st Cir. 1981).

and was living with a female friend, doing occasional jobs, and not having a very happy back history,"[27] sought welfare from state programs. She sued the City of Lewiston when she was offered a bus ticket to, and residence in, a shelter forty miles away instead of cash given to those over eighteen.[28] The Court turned to the subjective qualities and characteristics of children to uphold the city's inequitable treatment. Presumably, a shelter serves the state's interest "'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed *men* and citizens.'"[29] The subjective qualities and characteristics of young people are often used to limit their rights not extend them.

The cases above are offered to illustrate that the field of children's equal protection law leaves many questions unanswered.[30] Should courts treat children as adults or factor their unique position as children into the constitutional inquiry? If courts are expected to factor in the unique position of young people, should they do so solely to limit children's rights in comparison to adults' rights? Or are there times that warrant affording children equal or even greater rights than adults?[31] What should be the analytical framework when children as members of groups challenge their different treatment in comparison to other similarly situated children?

As this Article will explain, *Brown I* offers guideposts as a groundbreaking decision that factored into its calculus children's unique position as children.[32]

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[27] *Id.* at 27.

[28] *Id.* at 27-28. One of the signs in the assistance office stated that: "This office is not designed to meet the needs of minors." *Id.* at 27.

[29] *Id.* at 28 (emphasis added) (quoting Ginsberg v. New York, 390 U.S. 629, 640-41 (1968)).

[30] *See* Barbara Bennett Woodhouse, *Children's Rights*, *in* HANDBOOK OF YOUTH AND JUSTICE 377, 383 (Susan O. White ed., 2001) ("[The Fourteenth] amendment, designed to protect former slaves from white tyranny and racial discrimination, has become a rich source of children's rights through the process of judicial interpretation."); Woodhouse, *supra* note 11, at 1578 ("[M]ost of the constitutional rights accorded to children have been rights of protection against state action as opposed to rights of active participation."). A year after *In re Gault*, 387 U.S. 1, 60-64 (1967), in which the Court recognized children's rights in juvenile courts, the Court also held that children born to unmarried parents were "persons" within the equal protection guarantee. *Levy*, 391 U.S. at 70 ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." (footnote omitted)).

[31] For an excellent analysis of the "contradictions in the legal treatment of children," see Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3-14 (1986).

[32] *See* Dailey & Rosenbury, *supra* note 9, at 1535 ("While our framework agrees that the state has a basis for treating children differently than adults given children's unique status as children, we argue that this fact actually heightens equality concerns."). Other fields of law also make accommodations for youth. For example, in state negligence law, so long as the child is not engaged in an "adult activity," courts subjectivize the "reasonable person standard," applying what a reasonable child of like age, intelligence, and experience would

In striking down racially segregated schools as inherently unequal, the Supreme Court considered Black children's subjective qualities, characteristics, and needs as young people.[33] In fact, the Court acknowledged that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[34] *Brown I*'s starting point for dismantling segregation was to offer an unprecedented inclusion of the qualities and characteristics of young people in its constitutional analysis.[35] The Court recognized Black children's right to an equal education that would allow them to access their futures unencumbered by psychological, social, and economic barriers that educational deprivation erects.[36] The Court invoked Black children's rights to equalize their present and future with those of White children, affirmatively intervening to prevent the state from using Black young people to perpetuate "an underclass of future citizens and residents."[37]

Regrettably, the Supreme Court itself relinquished its own children's rights precepts. In the aftermath of *Brown I*, the Court shifted to an adult focus by first using *Brown I* as precedent to expand Black adults' rights, only to cave to segregationists' invocation of White adults' rights in *Brown II*. By ordering district courts and school boards to proceed with desegregation with "all deliberate speed,"[38] the Court delayed desegregation of K-12 public schools indefinitely. As the *Brown* decisions became associated with adults' rights, children's rights faded, robbing the civil rights movement of an indispensable sword and shield to fight racial discrimination in the short- and long-terms.[39]

Part I of this Article reframes *Brown I* as a children's rights case. Unlike modern equal protection cases adjudicating children's claims, the decision did not rotely treat Black children as if they were adults. Instead, the Court took into consideration the special circumstances of Black children qua children, raised concerns for what it believed segregated education would do to their futures, and recognized their right to an equal education and path to adulthood. While the

do under the circumstances. W. PAGE KEETON, DAN D. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 179, 181 (5th ed. 1984).

[33] *Brown I*, 347 U.S. at 493-94 (discussing detrimental effects of segregation on Black students, whose feelings of inferiority impact their ability to learn and deprive them of benefits they would otherwise receive in a racially integrated school system).

[34] *Id.* at 493.

[35] *Id.* at 493-95.

[36] *Id.*

[37] Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring); *see Brown I*, 347 U.S. at 483, 494-95 (holding that segregation creates a feeling of inferiority among Black children and that "segregation is a denial of the equal protection of the laws").

[38] *Brown II*, 349 U.S. 294, 301 (1955).

[39] As Lia Epperson eloquently states, "the promise of *Brown*, so revolutionary at its inception, was frustrated at key intervals by a number of actors. Perhaps the most significant of these was the very institution that gave it life—the Supreme Court." Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. PITT. L. REV. 175, 175 (2005). While Epperson focused on the Court's desegregation orders, the same holds true for the Court's failure to keep children's rights front and center.

breadth and depth of the Court's youth-based inquiry fell short,[40] it laid the groundwork for a nascent children's equal protection law.

Part II explains how *Brown I*'s children's rights focus was immediately lost to adults' rights and interests. Section II.A describes how the Court initially (and laudably) began by extending *Brown I*'s integration mandate beyond primary and secondary public schools, mostly to Black adult plaintiffs. A year later, as Section II.B demonstrates, the Court regrettably used *Brown II* to placate the "massive resistance" driven by southern politicians and White adults claiming both states' and parents' rights. Within ten years, *Brown I*'s children's rights tenets receded as the Court migrated to an almost exclusive focus on adults' rights.[41]

Section II.C shows how the Supreme Court, by abdicating children's rights, played directly into the hands of segregationists who continued their age-old strategy of using Black children to maintain White supremacy. After all, limiting the futures of Black children—as a group—has been one of the most efficient and effective means of creating and maintaining a racial caste system for generations.[42] By 1964, ten years after *Brown I*, America was desegregating

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[40] *See* Randall L. Kennedy, *Ackerman's* Brown, 123 YALE L.J. 3064, 3067 (2014) ("[T]he Chief Justice's description of segregation in *Brown* [*I*] is strikingly wan. It says remarkably little about segregation's origins, ideology, implementation, or aims.").

[41] *See* ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 7 (2003); Charles J. Ogletree Jr., *The Flawed Compromise of 'All Deliberate Speed,'* CHRON. OF HIGHER EDUC. (Apr. 2, 2004), https://www.chronicle.com/article/the-flawed-compromise-of-all-deliberate-speed/ ("At the same time, its decision, though unanimous, contained a critical compromise, which I argue undermined the broad purposes of the campaign to end racial segregation immediately and comprehensively."); Derrick Bell, *The* Brown *Decision: 'A Magnificent Mirage,'* EDUC. WK. (May 19, 2004), https://www.edweek.org/leadership/opinion-the-brown-decision-a-magnificent-mirage/2004/05 ("A year later, the court, in *Brown II*, reacted to the outraged cries of 'never' coming from the South and the absence of support from the executive and legislative branches, and backed away from its earlier commitment. In evident response to the resistance, the court issued a fall-back decision that became a prelude to its refusal to issue orders requiring any meaningful school desegregation for almost 15 years.").

[42] *See* Brown v. Board *at Fifty: "With an Even Hand," supra* note 4; VA. CODE ch. 198, § 32 (1849) ("If a white person assemble with negroes for the purpose of instructing them to read or write, . . . he shall be confined in jail not exceeding six months . . . ."); David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, AM. J. EDUC., Feb. 1986, at 236, 249-50 (discussing the strides Black Americans made post-Civil War, and the whiplash they experienced as White "Redeemers" retook control of states that lost the war and segregated education); Stephen A. Berrey, *Resistance Begins at Home: The Black Family and Lessons in Survival and Subversion in Jim Crow Mississippi*, BLACK WOMEN GENDER & FAMS., Spring 2009, at 65, 76 ("In response to everyday racial dehumanization in Jim Crow Mississippi, the black family served as a source for nurturing[, educating,] and protecting black children."); George Ansalone, *Tracking: A Return to Jim Crow*, 13 RACE GENDER & CLASS 144, 151 (2006) (explaining how tracking, or assigning students in the same grade to different curriculum levels, negatively impacts already disadvantaged students); *School-to-Prison Pipeline*, ACLU, https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline [https://perma.cc/CV6F-WPXQ]

beyond K-12 schools,[43] while still less than 2% of Black children attended White primary and secondary schools in the eleven former confederate states.[44] Lost too were *Brown I*'s nascent children's rights precepts important to the development of the field of children's equality law. Finally, this section then invites the reader to imagine what could have been had children's rights remained a necessary and indispensable component of the Court's rights-based approach.

Part III briefly concludes.

I. *BROWN V. BOARD OF EDUCATION* AS A CHILDREN'S RIGHTS CASE

Brown I is a lost children's rights case.[45] Contrary to modern equal protection cases adjudicating young people's claims, *Brown I* did not treat the young Black plaintiffs as if they were adults; instead, it expressly recognized the special circumstances of Black children, raised concerns for what it believed segregated education would do to limit their present and future in comparison to White children, and intervened to change this social and legal order. This Part breaks down *Brown I*'s basic facts and holding and then turns to an interpretation of *Brown I* and its nascent articulation of Black children's equal protection rights.

A. Brown I*'s Facts and Holding*

In *Brown I*, lawyers for the NAACP argued that Black children were deprived of their Fourteenth Amendment equal protection guarantee because no state-run segregated school system could be legally deemed equal.[46] In each of the *Brown*

(last visited Dec. 7, 2022) (recounting how abusive and ignorant school polices lead to carceral outcomes for disadvantaged, minority students); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 117 (2004) ("To Houston, segregation and inequities in American schools represented the worst symptom of American racism: in addition to denoting that African-Americans were legally an inferior caste, school segregation reinforced and contributed to the perpetuation of that caste system.").

[43] *See infra* note 133 and accompanying text.

[44] *School Desegregation: 1954-1964*, CQ RESEARCHER, https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1964042900 [https://perma.cc/5NUH-A482] (last visited Dec. 7, 2022).

[45] *See* Dailey & Rosenbury, *supra* 9, at 1535 ("*Brown* [*I*] . . . is the seminal case in the history of children's equality rights.").

[46] *Brown I*, 347 U.S. 483, 493 (1954); *see also* Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 350-51 (2019). Of the district courts that produced the cases that combined to be *Brown I*, those in Kansas, South Carolina, and Virginia originally upheld the separate-but-equal doctrine. Brown v. Bd. of Educ., 98 F. Supp. 797, 798 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1954); Briggs v. Elliott, 103 F. Supp. 920, 923 (E.D.S.C. 1952), *rev'd sub nom. Brown I*, 347 U.S. 483 (1954); Davis v. Cnty. Sch. Bd., 103 F. Supp. 337, 340-41 (E.D. Va. 1952), *rev'd sub nom. Brown I*, 347 U.S. 483 (1954). Prior to *Brown I*, the Delaware Supreme Court was alone in holding the Black children attended an

I cases that originated in the lower courts, except Delaware, the trial judges adhered to *Plessy v. Ferguson*'s[47] duplicitous separate-but-equal doctrine.[48] Those judges either found that the separate facilities were insufficiently distinct to warrant court action[49] or that the schools were unequal and the corresponding remedy should be to make them equal, rather than integrating them.[50] In contrast, the Delaware Supreme Court found segregated schools to be unequal in fact and struck segregation down as unconstitutional.[51] In *Brown I*, the question before the Supreme Court was whether "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities."[52] The Court referred to the plaintiffs as "minors of the Negro race, through their legal representatives," and then honed in on the effect of segregation upon them as young and Black.[53]

The Court considered the role of education in "light of its full development and its present place in American life throughout the Nation."[54] Relying on social science showing segregation's psychological effect on Black children, the Court held that "[s]eparate educational facilities are inherently unequal."[55] It explained: "To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[56]

Scholars have highlighted *Brown I*'s significance as a decision that laid the groundwork for greater recognition of young people's rights.[57] Martin Guggenheim identified *Brown I* as one of two cases that does not mention "children's rights" but ranks as a "landmark constitutional law case[] with [a]

"unequal" school and so should be admitted to the White school. Gebhart v. Belton, 91 A.2d 137, 172-73 (Del. 1952), *aff'd sub nom. Brown I*, 347 U.S. 483 (1954).

[47] 163 U.S. 537 (1896), overruled by Brown I, 347 U.S. 483.

[48] *Id.* at 551-53. For a discussion of Plessy and its reach, see Trina Jones, Brown II*: A Case of Missed Opportunity*, 24 LAW & INEQ. 9, 10 (2006) ("In 1949, only fifteen states had no segregation laws in effect.").

[49] *Brown*, 98 F. Supp. at 798 (articulating decision of District Court of Kansas).

[50] *Davis*, 103 F. Supp. at 340-41 (ordering defendant to "remove the inequality" in schools); *Briggs*, 103 F. Supp. at 923 ("[W]e think that plaintiffs are not entitled to a decree enjoining segregation in the schools but that they are entitled to a decree directing defendants promptly to furnish to Negroes within the consolidated district educational facilities and opportunities equal to those furnished white persons.").

[51] *Gebhart*, 91 A.2d at 172-73.

[52] *Brown I*, 347 U.S. at 493.

[53] *Id.* at 487, 493-94.

[54] *Id.* at 492-93.

[55] *Id.* at 495.

[56] *Id.* at 494.

[57] *See* Dailey & Rosenbury, *supra* note 9, at 1535; Woodhouse, *supra* note 11, at 1578 (stating *Brown I* recognized "children's rights to equality of education").

result[] that [is] universally praised by advocates for children."[58] Theresa Glennon and Robert Schwartz declare that "[t]he modern children's rights movement was built on the foundation of [*Brown I*]."[59] Barbara Bennett Woodhouse and Sarah Rebecca Katz remind us that *Brown I* "was a landmark case because of the use of constitutional arguments based on child development theories."[60]

This Article, adding to these scholarly contributions, argues that *Brown I* did not solely view the plaintiffs as Black people; it also considered their youth in its constitutional calculus and introduced an analytical and doctrinal approach unique to a children's equal protection jurisprudence.

B. Brown I*'s Children's Rights Precepts*

Brown I focused on Black children's oppression as the crux of the case. It not only struck down segregated education, it also intervened to stop a pernicious and effective method of maintaining White supremacy—the subjugation of Black children—by recognizing Black children's rights to be free from separate schooling.

The decision maligned school segregation's detrimental psychological injuries to an entire class of children,[61] which has drawn criticism from legal scholars.[62] In addition, however, the *Brown I* Court also acknowledged segregated schools' interference with Black children's social and economic trajectory over the course of life:

> [Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[63]

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[58] Martin Guggenheim, *Maximizing Strategies for Pressuring Adults to Do Right by Children*, 45 ARIZ. L. REV. 765, 766, 778-81 (2003) (suggesting alternative ways of litigating on behalf of children without explicitly raising their rights).

[59] Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1559 (1995). *But see generally* David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351 (2005) (discussing children's rights cases pre-*Brown I*).

[60] Barbara Bennett Woodhouse & Sarah Rebecca Katz, *Martyrs, the Media and the Web: Examining Grassroots Children's Rights Movement Through the Lens of Social Movement Theory*, 5 WHITTIER J. CHILD & FAM. ADVOC. 121, 126-27 (2005).

[61] *Brown I*, 347 U.S. at 494.

[62] For critiques of the social science in *Brown I*, see Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1323-24 (2018).

[63] *Brown I*, 347 U.S. at 493.

By analyzing the subjective qualities and characteristics of young people, the Court held that deprivation of an equal education, "perhaps the most important function of state and local governments,"[64] injured their ability to self-actualize and achieve their full range of psychological, social, and economic possibilities into adulthood unencumbered.[65]

Brown I identified the government's negative impact on Black children's path to adulthood as increasing the chances that they will be "significantly disadvantaged in acquiring knowledge, gaining economic sufficiency, and developing a strong sense of self compared to other children."[66] In fact, the decision "raised doubts as to whether any child denied an educational opportunity, and the tools needed to advance in society that that education opportunity provides, could be successful in life."[67]

As the Court proclaimed, if a state chooses to provide its citizens with an opportunity, it "must be made available to all on equal terms."[68]

Brown I should have been the beginning, not the end, of recognizing the field of children's equal protection law. In reflecting on the Court's choice to center Black children, one is encouraged to imagine what could have been if Black children and their rights had continued to be prioritized. Alas, as the next Part explains, the decision's groundbreaking children's rights ruling would ultimately be overshadowed by the Court's shift to adults' rights.

II. THE COURT'S RETREAT FROM *BROWN I*'S CHILDREN'S RIGHTS PRECEPTS

Within ten years of *Brown I*, the decision's groundbreaking children's rights precepts were lost to a focus on adults' rights. While *Brown I*'s integration mandate was extended beyond grade schools to Black adults and other public facilities, the Court also chose to use *Brown II* to placate White supremacists. In the process, *Brown I*'s children's rights tenets gave way to an almost exclusive focus on adults.

This Part first highlights the ways in which the *Brown I* decision was used to dismantle other systems of segregation and expand Black adults' rights. Then, it describes the "massive resistance" to the *Brown* decisions. Finally, this Part discusses the detrimental effects of the *Brown II* decision and how these effects played directly into the hands of the White-supremacist playbook, which has

[64] *Id.* ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

[65] Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C. DAVIS L. REV. 655, 666 (2014) ("[T]he Brown Court focused on the long-lasting impact racial segregation would have on Black Americans and particularly Black American children.").

[66] Catherine Smith, *Smith, J., Concurring*, *in* WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX MARRIAGE DECISION 151 (Jack Balkin ed., 2020).

[67] *Id.*; *see also Brown I*, 347 U.S. at 493 ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

[68] *Brown I*, 347 U.S. at 493.

historically denied Black children access to an education and equal path to adulthood to maintain a racial caste system. The Court's decision to retreat from Black children's rights greatly stymied both school desegregation efforts and the recognition and judicial development of a coherent children's equality law.

A. *The Court Uses* Brown I *To Expand Black Adults' Rights*

For all the criticisms of *Brown I*'s failure to desegregate public schools, it nonetheless served as the gateway to the universal principle that segregation of "public facilities of any kind" was impermissible.[69]

In short order, the Supreme Court apparently realized what civil rights lawyers already knew, "that desegregated schools could not coexist with segregated local buses, recreational facilities, and . . . lunch counters."[70] NAACP lawyers immediately began the work of maximizing the impact of *Brown I*'s holding before the political and social winds shifted and their window of opportunity closed.[71] Within a week, Robert L. Carter and Thurgood Marshall filed a writ for certiorari in the Supreme Court in *Muir v. Louisville Park Theatrical Association*.[72] Years earlier, the federal district court in the *Muir* case, originally reported under the name *Sweeney v. City of Louisville*,[73] held that *Plessy* dictated that if Louisville was to provide Blacks and Whites separate park facilities, the parks and services provided Blacks must be "substantially equivalent to those furnished in that respect to white persons."[74] In light of *Brown I*, the Supreme Court vacated that judgment and remanded for reconsideration, signaling to the nation that separate-but-equal was no more.[75]

Over a ten-year period, through per curiam opinions, the Court extended *Brown I*'s holding to desegregate state-run graduate and professional schools, accelerating the success of the NAACP's earlier litigation strategy to integrate

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[69] Palmer v. Thompson, 403 U.S. 217, 243 (1971) (White, J., dissenting) ("In a series of opinions [closely following *Brown I*] in time, the Court emphasized the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible . . . .").

[70] Constance Baker Motley, Brown v. Board of Education *and Its Legacy: A Tribute to Justice Thurgood Marshall, the Historical Setting of* Brown *and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 17 (1992) (finding that Court expanded scope of *Brown I*'s decision and brought down segregation in "other areas of American public life").

[71] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 750 (1976) ("The Supreme Court had taken pains to limit the language of *Brown* [*I*] to segregation in public schools only. The less terrain covered by the decision, the better, Chief Justice Warren had believed. But it became almost immediately clear that *Brown* [*I*] had in effect wiped out all forms of state-sanctioned segregation.").

[72] 347 U.S. 971, 971 (1954) (per curiam).

[73] 102 F. Supp. 525 (W.D. Ky. 1951), *aff'd sub nom.* Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953), *vacated*, 347 U.S. 971.

[74] *Id.* at 534 (holding city must provide equal golf and fishing facilities to both races where different areas of city parks were racially segregated).

[75] *Muir*, 347 U.S. at 971.

higher education.[76] The Court also mandated integration of public parks and beaches, public transportation, city golf courses, public restaurants, courthouses, private orphanages, and state-regulated athletic contests.[77] The *per curiam* opinions "clearly contemplated that *Brown* [*I*] was about something more than educational opportunity."[78] Additionally, in a full opinion, the Court further mandated integration in private restaurants on state-owned property.[79] In 1963, the Court again extended integration by prohibiting states from allowing local city officials to direct businesses to enforce segregation.[80] The Court also extended *Brown I*'s holding to the realm of private employment in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*[81] There, Marlon D. Green, a Black man, applied to work as a pilot with Continental Air Lines ("Continental") and was denied.[82] Green filed a complaint with the Colorado Anti-Discrimination Commission, which found that Green had been illegally rejected solely on the basis of race in violation of the Colorado Anti-Discrimination Act of 1957.[83] However, on appeal the Colorado Supreme Court held that Continental was allowed to discriminate because the Anti-

[76] *See, e.g.*, Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 413-14 (1956) (per curiam) (recognizing equal right to be admitted to state law school on same basis as other qualified applicants).

[77] New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958) (per curiam) (upholding equal access to public park facilities); Mayor v. Dawson, 350 U.S. 877, 877 (1955) (per curiam) (prohibiting racial segregation in public bathhouses and beach); Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam) (prohibiting segregation on public buses and public transportation); Holmes v. Atlanta, 350 U.S. 879, 879 (1955) (per curiam) (reversing Fifth Circuit's decision regarding equal access to public golf courses); Turner v. City of Memphis, 369 U.S. 350, 354 (1962) (per curiam) (upholding equal use of public restaurant in municipal airport); Johnson v. Virginia, 373 U.S. 61, 61-62 (1963) (per curiam) (reversing conviction of petitioner and holding that state should not require segregation in courtrooms); Pennsylvania v. Bd. of Dirs., 353 U.S. 230, 230 (1957) (per curiam) (private orphanages); State Athletic Comm'n v. Dorsey, 359 U.S. 533, 533 (1959) (per curiam) (state-regulated athletic contests). *But see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (reversing lower court's decision that denial of multifamily zoning perpetuated racial segregation and therefore violated equal protection due to lack of showing discriminatory intent as motivating factor).

[78] Jack M. Balkin, Brown *as Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 9 (Jack M. Balkin ed., 2001); KLUGER, *supra* note 71, at 750 (noting that scholars raised concerns about Court expanding scope of *Brown I*'s decision).

[79] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 716, 726 (1961) (private restaurants on state-owned property).

[80] Lombard v. Louisiana, 373 U.S. 267, 273-74 (1963) (reversing conviction "under the State's criminal processes" where conviction was based on ordinance prohibiting desegregated service in restaurant in New Orleans).

[81] 372 U.S. 714, 725 (1963).

[82] *Id.* at 716-17 (noting Colorado Anti-Discrimination Commission "found as a fact" that Green was not offered job as pilot because of his race).

[83] *See id.* at 716 (noting the statute prohibited employers from refusing to hire an otherwise qualified candidate on the basis of race or national origin).

Discrimination Act was not applicable to flight personnel of an interstate carrier.[84] The Supreme Court rejected the Colorado Supreme Court's decision by citing its recent decisions, including *Brown I*, that established that "any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[85] The Supreme Court held that the Colorado Anti-Discrimination Act does not impose a constitutionally prohibited burden on interstate commerce.[86]

The Supreme Court mandated integration in almost every sphere and ordered it done "prompt[ly]," in stark contrast to how it treated Black children's rights to an equal education in primary and secondary schools, as explained in the next Section.[87] The Court's extension of *Brown I*'s holding to Black adults was necessary and laudable, however, it allowed its focus on children to recede. The Court then further relinquished *Brown I*'s children's rights precepts in *Brown II* to placate White adults' rights and interests. It was a critical mistake.

B. *The Court Uses* Brown II *To Placate White Adults' Rights*

A year after *Brown I*, the Court issued its opinion in *Brown II* to enforce Black children's right to an integrated education.[88] Its remand order diluted *Brown I*'s impact by directing lower courts to implement desegregation with "all deliberate speed."[89] Shifting further away from Black children's rights advanced in *Brown I*, the Court revealed that it would treat White adults' rights as the priority.[90]

To say that there was fierce White resistance to *Brown I* is an understatement.[91] Southern White politicians resolved to defy the decision and orchestrated a "massive resistance" to school desegregation.[92] An immediate

[84] Colo. Anti-Discrimination Comm'n v. Cont'l Airlines, Inc., 368 P.2d 970, 974-75 (Colo. 1962).

[85] *Colo. Anti-Discrimination Comm'n*, 372 U.S. at 721 & n.7.

[86] *Id.* at 719 (stressing "courts must examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers" instead of applying an encompassing rule to prevent state regulation).

[87] *See* Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 414 (1956) (per curiam); KLUGER, *supra* note 71, at 751.

[88] *Brown II*, 349 U.S. 294, 298 (1955).

[89] *Id.* at 301.

[90] DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 95 (2004).

[91] *The Closing of Prince Edward County's Schools*, VA. MUSEUM OF HIST. & CULTURE, https://virginiahistory.org/learn/historical-book/chapter/closing-prince-edward-countys-schools (last visited Dec. 7, 2022) (describing Virginia shuttering its schools in 1959 instead of allowing them to be integrated).

[92] *The Southern Manifesto and "Massive Resistance" to* Brown, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/9J3A-3TVK] (last visited Dec. 7, 2022) [hereinafter *Massive Resistance*].

shift to prioritize the prejudice-based anxieties of White adults heavily influenced the Supreme Court's concession in *Brown II*.[93] Much of the backlash centered on states' rights and White parents' rights as paramount, trumping Black children's right to an equal education and a path to adulthood free and unencumbered by barriers wrought by racist educational practices.[94] It was a familiar narrative and tactic.

NAACP lawyers were keenly aware of the significance of White parents' ability to control who their children went to school with as a central means of maintaining White supremacy. In discussing the NAACP's early litigation strategy prior to *Brown I*, civil rights lawyers were cognizant of the risks of pursuing a K-12 integration approach. Charles Ogletree explains:

> [Charles Hamilton] Houston knew that segregation suits against graduate and professional schools could lead to victories for the NAACP and create precedents for a future direct attack on segregation without making waves. White opponents to integration were not going to fight the establishment of an in-state black pharmacy school or the admission of a sprinkling of black students to the law school, because their communities and, more especially, their young children would not be affected. Houston correctly anticipated that southern whites would not throw bricks or erect a blockade to protect the racial integrity of a graduate program, as they would to protect their children from the perceived threat of educational integration.[95]

For segregationists, racially segregated K-12 public schools were necessary to control Black children's access to resources and to foster acceptance of a second-class station in life, thereby preserving Jim Crow and its inherent inequities for future generations. To heed *Brown I*'s mandate recognizing Black children's rights to an integrated public education would signal the beginning of the end, so they struck back, and parents' rights served as a reliable and effective cudgel.[96]

Several political leaders became the focal point of this "massive resistance." Senator Harry Byrd of Virginia characterized *Brown I* as "the most serious blow that has yet been struck against the rights of the states in a matter vitally affecting their authority and welfare."[97] He declared, "[i]f we can organize the Southern

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[93] *See* BELL, *supra* note 90, at 95-96.

[94] *Id.* (listing actions by southern states to defy integration, such as violent protests and passing laws to prevent integration).

[95] OGLETREE, *supra* note 42, at 118; *see* Lia Epperson, *Civil Rights Remedies in Higher Education: Jurisprudential Limitations and Lost Moments in Time*, 23 WASH. & LEE J. C.R. & SOC. JUST. 343, 356 (2017) ("By 1950, advocates had amassed enough legal victories and experience in litigating complex constitutional cases to shift strategies, graduating to attacking racial segregation in education squarely, forcefully, and in multiple jurisdictions. It was at this time that the strategy shifted to litigating primary and secondary education cases." (footnote omitted)).

[96] COTTROL ET AL., *supra* note 41, at 213.

[97] *Massive Resistance*, *supra* note 92.

States for massive resistance to this order I think that, in time, the rest of the country will realize that racial integration is not going to be accepted in the South."[98]

Georgia Governor Herman Talmadge issued a public statement reassuring his constituents that "[t]he Georgia Constitution provides for separation of the races" and that segregation "will be upheld."[99] Later that fall, eight of nine candidates running in Georgia's gubernatorial primary campaigned on a segregationist platform.[100] The people of Georgia responded positively to these platforms, electing S. Marvin Griffin as the new governor, who in his inauguration address stated:

> On November 2nd the people of Georgia rededicated themselves to the proposition of no mixed schools in Georgia. . . . I repeat my pledge to the mothers and fathers of Georgia that as long as Marvin Griffin is your Governor there will be no mixing of the races in the classrooms of our schools and colleges in Georgia.[101]

In August 1954, Virginia Governor Thomas Bahnson Stanley formed the Gray commission, a committee dedicated to undermining the Court's decision in *Brown I*.[102] The Gray commission would eventually release the Gray Commission Plan on November 11, 1955, "proposing that local school boards be allowed great discretion in assigning students to schools . . . [and making] a number of other specific proposals that were clearly intended to limit the potential impact of the *Brown* decisions."[103]

In the arguments leading up to *Brown II*, NAACP lawyers requested the Court enjoin schools to desegregate without delay. The lawyers "wasted no time in giving the Court their view of the urgency of ending segregation immediately. In their briefs, they argued it should end 'forthwith' and certainly no later than September 1955."[104] In response to the Court's questions presented in *Brown II* as to whether the Court should decree that Black "children should forthwith be

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[98] *Id.*

[99] Herman Talmadge, *Talmadge Text*, ATLANTA CONST., May 18, 1954, at 3, *reprinted in* 2 RAYMOND M. HYSER & J. CHRIS ARNDT, VOICES OF THE AMERICAN PAST: DOCUMENTS IN U.S. HISTORY 469 (4th ed. 2008).

[100] Gareth D. Pahowka, *Voices of Moderation: Southern Whites Respond to* Brown v. Board of Education, 5 GETTYSBURG HIST. J. 44, 45 (2006).

[101] S. Marvin Griffin, Governor of Ga., Inaugural Address (Jan. 11, 1955), *in* J. SENATE STATE GA. REGULAR SESSION, Jan. 10, 1955, to Feb. 18, 1955, at 19, 25.

[102] *Massive Resistance*, *supra* note 92 (describing Gray commission findings that school attendance should not be mandatory, parents wishing to send children to segregated schools should be given grants for tuition to private schools, and school boards should have authority to assign students to schools).

[103] Earl M. Maltz, *The Triumph of the Southern Man:* Dowell, Shelby County, *and the Jurisprudence of Justice Lewis F. Powell, Jr.*, 14 DUKE J. CONST. L. & PUB. POL'Y 169, 177 (2019).

[104] Charles J. Ogletree, Jr., *The Significance of* Brown, JUDICATURE, Sept.-Oct. 2004, at 66, 70.

admitted to schools of their choice" or "in the exercise of its equity powers, permit an effective gradual adjustment" from the segregated system to a desegregated one, NAACP lawyers were clear: the Court should order desegregation posthaste.[105]

Further, the lawyers argued that should there be a request for delay, the burden would rest on the state "to establish that the requested postponement has judicially cognizable advantages greater than those inherent in the prompt vindication of [Black children's] adjudicated constitutional rights."[106] And, "[w]hen the rights of school children are involved the burden is even greater" due to the serious and irreparable injury that accumulates as each day passes.[107]

The lawyers then argued that "there is an impressive body of evidence which supports the position that gradualism, far from facilitating the process, may actually make it more difficult."[108] Their pleas went unheeded.

A year after *Brown I*, the Court issued *Brown II*, directing the states to implement *Brown I*'s mandate "with all deliberate speed."[109] There was no further assessment of the plight of Black children or the significance of their rights.[110] Despite the urgings of civil rights lawyers, the Court merely remanded the cases to the district courts to "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis."[111] As Derrick Bell explained: "[U]nder the guise of judicial statesmanship, 'the Warren Court sacrificed individual and immediate vindication of the newly discovered right of blacks to a desegregated education in favor of a remedy more palatable to whites.'"[112] In *Brown II*, the Court announced a balancing test with which public and private interests were to be weighed.[113] Neither of those interests appeared to be informed by the subjective qualities, characteristics, or needs of Black young people or focused on a deeper understanding or refinement of their rights.

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[105] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument at 2, *Brown II*, 349 U.S. 294 (1955), 1954 WL 72724, at *2.

[106] *Id.* at 11.

[107] *Id.*

[108] *Id.* at 17.

[109] *Brown II*, 349 U.S. at 301.

[110] OGLETREE, *supra* note 42, at 125; *Brown II*, 349 U.S. at 301.

[111] *Brown II*, 349 U.S. at 302.

[112] BELL, *supra* note 90, at 95 (quoting Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968)); *see also* COTTROL ET AL., *supra* note 41, at 185 ("The justices hoped that the ambiguous timetable would give white southerners an opportunity to adjust to what would be a drastic change in their customs, under the guidance of federal judges in local communities."); Jones, *supra* note 48, at 15 ("It took at least a decade before any meaningful desegregation of public education occurred, and that progress was quickly dismantled.").

[113] *See Brown II*, 349 U.S. at 300.

Brown II, as a judicial order designed to enforce Black children's rights—rights that held such promise in *Brown I*—failed.[114] Lost from the Court's consideration were Black young people's unequal circumstances that resulted from educational segregation, how their rights were critical to level the playing field for them and their communities in the present and future, and an explanation of the benefits that would inure to society by recognizing Black children's rights.[115]

Brown II's omissions foreshadowed what was to come—the disappearance of the Court's groundbreaking movement to develop its children's rights precepts. The Supreme Court would not directly address the constitutional rights of Black children again until 1958, in *Cooper v. Aaron*.[116] And in the ten years following *Brown II*, it would hear only two other K-12 desegregation cases, "routinely refus[ing] to hear cases or curtly affirm[ing] or revers[ing] lower-court decisions."[117]

Further, in granting segregationists time to adjust to desegregation in K-12 schools, the Court's concession did not placate but emboldened.[118] A year after *Brown II*, nineteen U.S. Senators and a majority of confederate-state congressmen published the "Southern Manifesto," staking their claim that both *Brown* decisions were wrongly decided.[119] In addition to contending that the

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[114] *See generally Brown II*, 349 U.S. 294. Justice Marshall acknowledged the inferior treatment of Black children's rights in comparison to other rights in his *Board of Education v. Dowell*, 498 U.S. 237 (1991), dissent. *Id.* at 267 (Marshall, J., dissenting). Criticizing the majority, he explained: "In its concern to spare local school boards the 'Draconian' fate of 'indefinite' 'judicial tutelage,' the majority risks subordination of the constitutional rights of Afro-American children to the interest of school board autonomy." *Id.* at 267 (citation omitted); *see* Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535, 547 (1994).

[115] *See Dowell*, 498 U.S. at 268; *see also Brown II*, 349 U.S. at 298 n.2 (describing requested relief as being for "Negro children [to] forthwith be admitted to schools of their choice"); Brown-Scott, *supra* note 114, at 547 (describing Marshall's dissent in *Dowell*, where Marshall "chided his colleagues" for putting interests of school boards over those of Black children).

[116] 358 U.S. 1, 16 (1958).

[117] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 43-44 (2nd ed. 2008). The "Court spoke strongly" about three cases regarding segregation of elementary and secondary schools after *Brown I*: *Cooper*, *Goss v. Board of Education*, 373 U.S. 683 (1963), and *Griffin v. Prince Edward County*, 377 U.S. 218 (1964). *See id.* at 44-45.

[118] COTTROL ET AL., *supra* note 41, at 185; BELL, *supra* note 90, at 95 ("[T]he Court failed to realize the depth or nature of the problem, and by attempting to regulate the pace of desegregation . . . , it not only failed to develop a willingness to comply, but instead aroused the hope that resistance to the constitutional imperative would succeed.").

[119] 102 CONG. REC. 4460 (1956) (calling *Brown* decisions "unwarranted," and accusing the Court of "substitut[ing] naked power for established law"); *The Southern Manifesto of 1956*, HIST. ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/ [https://perma.cc/B89N-CADD] (last visited Dec. 7, 2022).

decisions undermined states' rights, they argued that "parents should not be deprived by Government of the right to direct the lives and education of their own children."[120] In other words, the rights of White adults to ensure their White children's segregated education superseded Black children's rights to access an equal one.[121]

"Parents" clearly meant "White parents" because it did not matter that Black parents wanted to "direct the lives and education of their own children," by attending schools with the state-provided resources that White children enjoyed. Lawmakers enacted a series of state laws hostile to the *Brown* decisions to stop integration.[122] "State legislatures adopted resolutions of 'nullification' and 'interposition' that declared that the Supreme Court's decisions were without effect."[123]

Criticism of the *Brown* decisions came even from liberal quarters that also centered the rights of White parents.[124] For example, Herbert Wechsler, an advocate for civil rights and a distinguished lawyer, criticized the *Brown* decisions in a lecture he delivered in 1959 as a part of Harvard Law School's Oliver Wendell Holmes Lectures.[125] In his lecture, Wechsler debated whether *Brown I* and *Brown II* were based on "neutral principles."[126] Although he agreed with both *Brown* holdings, Wechsler challenged their reasoning.[127]

In his lecture, Wechsler argued that courts could engage in a "principled appraisal" of legislative actions using methods other than looking at historical understanding of those actions.[128] He believed that courts should "be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[129] From the text and history of the Fourteenth Amendment, Wechsler could glean no neutral principles that would justify the right of Black children to supersede White parents' rights to keep their children from attending schools

[120] 102 CONG. REC. 4460.

[121] *Id.* (arguing that because neither the Constitution nor any amendments mention education, education is not a protected right).

[122] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 781 (6th ed. 2019) (describing efforts of state legislatures to enact laws nullifying *Brown* decisions).

[123] *Id.* at 752.

[124] COTTROL ET AL., *supra* note 41, at 213.

[125] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 519 (1980) (describing Wechsler as "an outstanding lawyer, a frequent advocate for civil rights causes, and a scholar of prestige and influence"). At least one legal scholar responded to Wechsler with a strong rebuke. *See generally* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

[126] Wechsler, *supra* note 125, at 31-35.

[127] *Id.*; *see also* Bell, *supra* note 125, at 519.

[128] Wechsler, *supra* note 125, at 16 (arguing it is judicial branch's duty to review legislative actions and it is constitutional to do so).

[129] *Id.* at 15.

with their Black peers.[130] He concluded that the Court's reasoning in *Brown I* was not based on discrimination, but on the right of association: "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved."[131]

The reaction to the *Brown* decisions consistently prioritized adults' rights, especially and acutely White adults'. Thus, as historian Richard Kluger explained, "[o]nce mandated or approved by the Court, desegregation progressed at a relatively rapid rate and in a relatively peaceable manner in most areas—from the restaurants of Washington to the buses of Montgomery to the ballparks of the Texas League. One area alone was excepted: the schools."[132] As a clear integration mandate took hold outside the K-12 context, White voters continued to support school districts and leaders who defied desegregation of K-12 public schools.[133]

Litigation ensued. One illustrative desegregation case was *Cooper*. There, the Court rejected a school's refusal to desegregate.[134] In the midst of strong political opposition to *Brown I*, a school board in Little Rock, Arkansas, sought postponement of the city's post-*Brown I* desegregation plan.[135] As Little Rock's school board proceeded to comply with the Supreme Court desegregation mandate, other state officials defied the Court. In November 1956, the Arkansas legislature amended the State Constitution to "command the Arkansas General Assembly to oppose" the *Brown* decisions.[136] It also included a provision that "reliev[ed] school children from compulsory attendance at racially mixed schools."[137] On the day that nine Black students were to attend school, the Governor of Arkansas dispatched the Arkansas National Guard to Central High School, blocking the students' admission for three weeks.[138] As a result of this escalation, these children suffered threats of violence by crowds of White

[130] COTTROL ET AL., *supra* note 41, at 213.

[131] Wechsler, *supra* note 125, at 34.

[132] KLUGER, *supra* note 71, at 751.

[133] *See* Vincent James Strickler, Green-*Lighting* Brown*: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 826 (2009) (noting the need for judicial intervention at the University of North Carolina after Black applicants were denied admission following *Brown I*); Donna Ladd, *White Flight in Noxubee County: Why School Integration Never Happened*, MISS. FREE PRESS (Oct. 29, 2021), https://www.mississippifreepress.org/16642/white-flight-in-noxubee-county-why-school-integration-never-happened (detailing White political resistance to school integration as late as 2017 in Noxubee County, Mississippi).

[134] Cooper v. Aaron, 358 U.S. 1, 7 (1958).

[135] *Id.* at 10-11.

[136] EUGENE W. HICKOK & GARY L. MCDOWELL, JUSTICE VS. LAW: COURTS IN AMERICAN SOCIETY 165 (1993).

[137] *Id.*

[138] *Desegregation of Central High School*, ENCYC. OF ARK., https://encyclopediaofarkansas.net/entries/desegregation-of-central-high-school-718/ [https://perma.cc/W5QJ-MC54] (last updated Aug. 17, 2022).

students, and the President of the United States dispatched federal troops to ensure the Little Rock Nine's safety.[139]

In *Cooper*, the school board sought postponement of the desegregation plan because of the "extreme public hostility" to the Black students "engendered largely by the official attitudes of the Governor and the Legislature."[140] The United States District Court for the Eastern District of Arkansas granted the school board's request for relief, the Eighth Circuit Court of Appeals reversed, and the Supreme Court affirmed the Eighth Circuit. The Supreme Court held that "the interpretation of the Fourteenth Amendment enunciated by this Court in the [*Brown I*] case is the supreme law of the land, and [Article] VI of the Constitution makes it of binding effect on the States."[141] The Court's invocation of the authority in implementing *Brown's* mandate could not overcome its own earlier relinquishment of the case's commitment to Black young people.

Whether rooted in a conscious decision or an omission, the Court's abdication of its children's rights precepts in the aftermath of the first *Brown* decision, including retreating in *Brown II*, undermined antisegregation efforts and sacrificed the very group *Brown I* sought to liberate.

C. *Black Children's Rights as Indispensable to Eradicating White Supremacy*

Black children's rights should have been considered an indispensable part of the civil rights movement's efforts to dismantle Jim Crow. It was especially critical to rebuff an age-old strategy of using Black young people as a central means to maintain a racial hierarchy in American society.[142] Imagine if, instead of abdicating those rights in the aftermath of *Brown I*, the Supreme Court had committed to a full-throated and robust children's equality law—one that recognized the centrality of oppressing children to the American project of White domination over Blacks.[143]

1. Black Children's Educational Deprivation as an Age-Old Strategy To Maintain White Supremacy

The educational deprivation of Black children has always been used to maintain a racial hierarchy; segregated schools were no exception. At Jim Crow's peak, "a ritualistic separation of black and white in almost every visible

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[139] *Id.*

[140] *Cooper*, 358 U.S. at 12.

[141] *Id.* at 18.

[142] COTTROL ET AL., *supra* note 41, at 182 ("Some states already had contingency plans in place to support segregated private schools or to end compulsory education altogether."); *see also* OGLETREE, *supra* note 42, at 124-29; Bell, *supra* note 41.

[143] *See generally* Catherine E. Smith, A Revival: *Brown v. Board of Education*'s Children's Rights Legacy (Sept. 29, 2022) (unpublished manuscript) (on file with author).

facet of public life" was prescribed.[144] To the contrary, the *Brown I* decision demanded a fundamental shift:

> The decision posed a direct challenge to the way millions of ordinary white Americans lived their lives. More significantly, *Brown* [*I*] posed a challenge to the values of millions of ordinary white Americans, to their beliefs, their deeply rooted prejudices, their views concerning how proper lives should be lived, and of course the proper places of blacks and whites in America.[145]

Recognizing Black children's rights to an education was imperative to dismantle Jim Crow because the schoolhouse had always been used in America as a quintessential means to suppress Black young people's lived realities and future opportunities.

In the seventeenth century, one of the primary legal strategies implemented by enslavers was the codification of slave codes designed to reinforce racial hierarchies within the colonies by restricting the rights of enslaved persons, including children.[146] These laws effectively prohibited enslaved people from common undertakings like learning to read and write and engaging in a trade.[147]

Northern states provided some opportunities for enslaved children to learn to read and write, but children's ability to engage in these activities was largely dependent on their enslavers' views of the children's intellectual and religious development.[148] In southern states, enslavers were especially vigilant about depriving enslaved children of the opportunity to read and write because it would threaten the racial caste order.[149] "By starving the Black child—denying his natural hunger for learning—slavery sought ultimately to dominate and diminish the Black man."[150] At the same time, southern states were increasingly providing

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[144] COTTROL ET AL., *supra* note 41, at 7. The Jim Crow system was not limited to southern states. In fact, some scholars argue that it began in the North. *See generally* THE STRANGE CAREERS OF JIM CROW NORTH: SEGREGATION AND STRUGGLE OUTSIDE THE SOUTH (Brian Purnell & Jeanne Theoharis with Komozi Woodard eds., 2019).

[145] COTTROL ET AL., *supra* note 41, at 210.

[146] *See* Nakia D. Parker, *Black Codes and Slave Codes*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780190280024/obo-9780190280024-0083.xml [https://perma.cc/2U76-79XA] (last updated Mar. 25, 2020).

[147] *Id.*

[148] *See* LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626-1863, at 57-58 (2003) (using New York as example to explain how enslavers were tasked with providing Black children "with basic skills for survival and incorporation into the community," but this choice to educate was at the will of enslaver).

[149] Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 672 (2000) (suggesting enslavers maintained enslaved persons' inferiority by not teaching them to read).

[150] *Id.* at 673.

education to White children and making it a requirement for social and economic advancement.[151]

The pattern of suppressing Black young people continued in response to the end of slavery. Former enslavers and southern politicians turned to the law of apprenticeships to kidnap, gain, or retain possession of Black children, their labor, and their education.[152] As Mary Niall Mitchell explains:

> Seizing on the most vulnerable members of the former slave population, planters in the U.S. South did the reverse of their counterparts in Jamaica, Cuba, and Brazil: unable to slow the emancipation of adult slaves, they legally bound freedchildren through apprenticeship contracts in an effort to guarantee themselves several more years of [enslaved] labor.[153]

During this time period, a sizable population of Black children were denied access to freedom and an education to maintain the racial order.[154] The records are replete with parents and other family members being met with violence, including severe whippings and maiming, for inquiring about their children in efforts to get them back.[155]

> In a letter petitioning for the freedom of a daughter indentured beyond emancipation, [the mother] Lucy Lee wrote, "God help us, our condition is bettered but little; free ourselves, but deprived of our children, almost the only thing that would make us free and happy. It was on their account that we desired to be free."[156]

As historian Steven Mintz explains, this exploitation of Black children was seeded in White supremacists' fear of a postslavery society:

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[151] *See* George Ansalone, *Tracking: A Return to Jim Crow*, 13 RACE GENDER & CLASS 144, 146-47 (2006) (describing discrepancies in student funding and teaching salaries at White and Black schools).

[152] Woodhouse, *supra* note 149, at 677 ("Racism in both North and South created an overlay of legal and economic disabilities . . . further blurring the lines between free and bond labor."). Young White people worked under long-term agreements which lasted until age twenty-one for boys and until eighteen, or marriage, for girls. *See id.* at 674, 679.

[153] MARY NIALL MITCHELL, RAISING FREEDOM'S CHILD: BLACK CHILDREN AND VISIONS OF THE FUTURE AFTER SLAVERY 145-46 (2008); *see also* STEVEN MINTZ, HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD 113 (2004) ("Former slave owners viewed black children as a potential source of labor and used apprenticeship laws to force them to work without wages."); PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 114 (1998) ("In some jurisdictions, slavery was effectively continued through the device of making black children the wards or apprentices of whites, and the procedure by which this was done . . . did not require parental consent . . . .").

[154] *See* MITCHELL, *supra* note 153, at 144 (describing how bureaucrats favored using bondage contracts in the antebellum south, in part to provide an education for Black children).

[155] DAVIS, *supra* note 153, at 145.

[156] *Id.* ("An Annapolis Union officer reported that every day he was 'visited by some poor woman who has walked perhaps ten or twenty miles to . . . try to procure the release of her children taken forcibly away from her and held to all intents and purposes in slavery.'").

> There was a deep fear among many southern whites that young African Americans, not socialized under slavery, would refuse to accept a subordinate place in society. This led to widespread efforts to enforce subservience in all aspects of their lives, particularly their education.[157]

After the Civil War, most Black Americans lived in rural areas of the South in small towns and farming communities where school funding disparities in the Jim Crow school system were pervasive.[158] Funding and resources for Black schools were so severely restricted by Jim Crow laws that even resources provided by charitable organizations, like the Freedman's Bureau, were "insufficient to adequately run these schools."[159]

Further, Black children's education in school reflected the only jobs open to Black workers at that time.[160] The curricula covered the basic skills Black children were expected to possess for employment in domestic and agricultural positions.[161] In general, classrooms did not have textbooks or blackboards; did not offer courses in science, art, music, literature, or foreign languages; and often indiscriminately corralled Black children into one-room shacks where they were taught basic literacy and the most elementary form of math, often with no distinctions based on age.[162]

The obstacles that Black children faced in attempting to gain an education were enormous. Not only was the demand for cheap labor to operate farms and cotton fields extremely high, but White landowners also had little interest in educating Black children because the landowners feared it would make the children unfit for working on White-owned farms and in White homes.[163] In essence, the skills taught to Black children were specifically designed to fit the needs of the White economy and society.[164] Further, these practices also

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[157] MINTZ, *supra* note 153, at 115.

[158] *See* Peter Irons, *Jim Crow's Schools*, AM. FED'N OF TCHRS. (2004), https://www.aft.org/periodical/american-educator/summer-2004/jim-crows-schools [https://perma.cc/XWJ5-USXX] (last visited Dec. 7, 2022) (highlighting disparity between funds spent on White and Black students in South and noting that ninety percent of Black Americans in 1900 lived in former confederate states).

[159] Ansalone, *supra* note 151, at 146-47.

[160] *See* Irons, *supra* note 158. In 1900, for instance, most Black workers: (1) were sharecroppers or employed on farms; (2) engaged in domestic work for White children; or (3) labored in shops and factories. *Id.*

[161] *See id.*

[162] *See* Ansalone, *supra* note 151, at 146.

[163] *See id.* at 146-47.

[164] *See id.* (explaining Jim Crow schools exclusively taught skills that Black children would need in their restricted job opportunities, and White society refused to invest in any higher level of schooling for them). In sharecropping states like Mississippi, the average Black child spent just about seventy days in school each year, perpetuating the achievement gap between Black and White children. For example, during the 1930s, Alabama and South Carolina expended about $5.00 and $6.00 per year respectively for the education of each Black child despite spending almost eleven times more than those amounts for White children. *Id.*

protected White children and their job prospects by ensuring that they would not have to compete with Black children.

At long last, in 1954 *Brown I* sought to dismantle segregation by including the qualities and characteristics of Black young people into its constitutional calculus and acknowledging, even if indirectly, how they were often used to maintain racial hierarchies. The Court then intervened to clear a pathway for Black youth to access their present and future unencumbered by psychological, social, and economic barriers that segregated education placed in their path.[165] Tragically, the Supreme Court failed to carry *Brown I*'s children's rights project forward.

It is likely that civil rights lawyers' pleas for the Court's immediate action in *Brown II* emanated from their historical knowledge and personal experiences with America's unique brand of racism. But instead of heeding the NAACP lawyers' recommendations and dire warnings, "the Court sent the school desegregation cases back to the federal district courts with directions to desegregate schools 'with all deliberate speed.'"[166] When asked what he thought the Court's words meant, Thurgood Marshall "joked that 'deliberate speed' meant 'S-L-O-W.'"[167]

Soon after *Brown II*, as explained in Section II, the Court would issue per curiam decisions ordering integration in areas outside of K-12 education, like institutions of higher education, explaining that "[a]s this case involves the admission of a Negro to a graduate professional school, there is no reason for delay," offering no explanation for the differential treatment for Black children's education.[168] By delaying enforcement of desegregation in K-12 public schools in *Brown II*, the Court allowed the very harms it recognized to Black children in *Brown I* to continue unfettered and indefinitely. As segregationists and integrationists alike predicted, the reluctance to strictly enforce nationwide segregation in K-12 schools resulted in ineffectual and partial implementation of the *Brown* decisions' original mandate.[169]

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[165] COTTROL ET AL., *supra* note 41, at 179-80 (acknowledging "psychosocial underpinnings of *Brown* [*I*] were readily applicable to other areas").

[166] OGLETREE, *supra* note 42, at 127 (quoting *Brown II*, 349 U.S. 294, 301 (1955)).

[167] CHARLES L. ZELDEN, THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION 93 (2013).

[168] Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 414 (1956) (per curiam). In remanding the case in light of *Brown I*, the Court stated that "we did not imply that decrees involving graduate study present the problems of public elementary and secondary schools." *Id.* at 413. The challenge for higher education, however, was that the Court offered "no such adjudicatory remed[y] . . . until nearly forty years after" the *Brown* decisions. Epperson, *supra* note 95, at 350.

[169] OGLETREE, *supra* note 42, at 128 (highlighting that southern schools were still "almost completely segregated for a full decade after *Brown*" while northern school segregation may have remained in place as late as mid-1970s). In the meantime, segregationists found empathy at all levels of the government. *See id.* ("From the White House to the city councils of the smallest towns, those in power found ways to either subtly defer or defiantly oppose desegregation.").

As Richard Kluger explains:

> Streetcars and eating places and amusement parks were, after all, settings for transients who shared proximity for a limited period of time; schools were something else. There the contact would last for six or eight hours daily; it was from interaction with one another as much as attention devoted to lesson books or lectures that schoolchildren derived the essence of their education. And so it was the schoolhouse that became the arena for the South's fiercest resistance to the desegregation order of the Supreme Court.[170]

The Court's retreat from children's rights sacrificed the very group it sought to liberate: Black children. In the same ten years that desegregation began post-*Brown I* in other spheres—public transportation and facilities, restaurants, and stores—little to no desegregation took place in public schools. Only one-fiftieth of all Black children in the South attended integrated schools.[171] In 1963, only 1.17% of Black students attended schools with White children in the eleven former confederate states.[172] Instead of desegregating, some school districts closed their entire school systems and White parents moved to White areas or enrolled their children in private schools, often using state funds to do so.[173]

Further, the small number of Black children who attended White schools faced significant hurdles and injuries to their well-being, "making it difficult for minority children to integrate themselves fully within the schools."[174] At White schools in the South and North, Black children faced harassment, isolation, and violence at the hands of their peers and teachers.[175] They were also tracked into segregated spaces within White schools based on racial stereotypes and White teachers and administrators' low expectations of their intelligence and capabilities.[176] At the same time, White children were enrolled in accelerated

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[170] KLUGER, *supra* note 71, at 751; *see also* Balkin, *supra* note 78, at 30 ("Southerners were much more upset about racial mixing in elementary and secondary education than in graduate and professional schools. Apparently, it was believed that once people became adults, the appropriate social roles of whites and blacks were clear to them, but young children were particularly impressionable and might get inappropriate ideas if they were integrated with other races.").

[171] OGLETREE, *supra* note 42, at 128.

[172] BELL, *supra* note 90, at 96.

[173] Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for* Brown*?*, 103 MICH. L. REV. 1507, 1519-20 (2005).

[174] *Id.* at 1521; *see* BELL, *supra* note 90, at 112-13.

[175] *See* BELL, *supra* note 90, at 112-13.

[176] *See id.* ("Tracking internalizes the bias and stigma of segregation . . . ."); Onwuachi-Willig, *supra* note 173, at 1522 (asserting teachers' misconceptions that Black children were not capable of achieving in classroom influenced tracking system).

and advanced classes.[177] Black children were "barely tolerated guests in matters of curriculum, teacher selection, and even social activities."[178]

Brown I did not have strong high Court rhetoric or action behind it until 1968, when the Supreme Court unanimously ruled that desegregation "must be comprehensive and immediate."[179] The Supreme Court issued further desegregation decrees in cases such as *Green v. County School Board*[180] and *Swann v. Charlotte-Mecklenburg Board of Education*.[181] The most effective time period for school desegregation occurred between 1970 and 1990.[182] "By the late 1980s, 44 percent of black students attended majority white schools."[183] In the early 1990s, however, resegregation of American schools had begun.[184]

In reality, the Supreme Court's weak position in *Brown II* "would allow decades to pass before full implementation of the original decree."[185] And some would argue that it never reached full implementation.

In addition to the failure to desegregate K-12 schools, the Court's shift to adults' rights also blunted the development of its nascent children's equal protection jurisprudence. The meager development of children's equal protection rights for at least ten years, explains the lack of a uniform and coherent approach to children's claims.

2. Imagining if the Court Had Developed *Brown I*'s Children's Rights Precepts

As noted above, the Court shifted its focus away from Black children's rights to Black and White adults' rights. In doing so, it lost the battle to both

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[177] Onwuachi-Willig, *supra* note 173, at 1522.

[178] BELL, *supra* note 90, at 113. Desegregation also took an incredible toll on the ranks of Black teachers. *See* Onwuachi-Willig, *supra* note 173, at 1521.

[179] GARY ORFIELD & ERICA FRANKENBERG, WITH JONGYEON EE & JOHN KUSCERA, THE C.R. PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 4 (2014).

[180] 391 U.S. 430 (1968).

[181] 402 U.S. 1 (1971); *see* Epperson, *supra* note 95, at 358-59 (explaining that in *Green*, "the Supreme Court outlined a number of factors to consider in determining whether a public school has fulfilled its constitutional duty to desegregate," and in *Swann*, "the Supreme Court further issued a decree to eliminate all vestiges of segregation 'root and branch' from public schools" (quoting *Swann*, 402 U.S. at 15)).

[182] *See* Epperson, *supra* note 95, at 347 n.11.

[183] *Id.* at 362 (noting that between 1964 and 1970, "[t]he percentage of Black students in majority white schools in the South rose from 2 to 33 percent").

[184] *See id.* at 370 ("[I]n the 1990s, a conservative Court led by Chief Justice Rehnquist issued a trilogy of opinions that severely curtailed the circumstances, means, and duration of school desegregation remedies.").

[185] COTTROL ET AL., *supra* note 41, at 184-85.

desegregate public schools and develop a coherent children's equality jurisprudence.[186]

What if in addition to expanding Black adults' rights, the Court had also prioritized and aggressively pressed Black children's rights with a renewed resolve in the face of massive resistance driven by racism? Sure, it may be that even if the Supreme Court had done so, it "would likely have landed minorities in exactly the same position as they are in today."[187] But what if it had not?

Had the Court fully developed and implemented *Brown I*'s children's rights precepts, the country may have seen greater success in K-12 desegregation efforts. Further, it may have developed a more expansive children's equal protection jurisprudence for the long-term, offering a robust and effective framework to children who face relegation to second-class status because of their group membership.

a. *Black Children's Rights, Desegregation, and Modern Inequalities*

Imagine if the post-*Brown I* Court had subsequently developed a children's equal protection rights framework that incorporated a deeper understanding of America's history of educational deprivation of Black children and sought immediate and long-term solutions to prevent it.

Further, in developing a theoretical and doctrinal framework for children, the Court may have considered both the privileges that inured to White children as well as the injuries they suffer from segregated schools. It may have "look[ed] at the flip side of the harm of" discrimination against Black people and tracked the psychic harms to Whites, as described by Angela Onwuachi-Willig.[188] With greater reflection and engagement, the Court could have realized over time that, "just as racial segregation in every aspect of life worked to generate a feeling of inferiority in many black children, such segregation also worked to generate and, in fact, continues to generate a feeling of superiority in white children."[189]

Finally, imagine if the Court had developed a doctrine that afforded Black children a coherent equal protection framework to challenge current unequal educational opportunities and practices, such as the school-to-prison pipeline.[190]

b. *A Broader Children's Equality Jurisprudence*

Imagine if in the aftermath of *Brown I*, the Supreme Court had developed its children's equality doctrine and theory as the landscape over the next forty years

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[186] Strickler, *supra* note 133, at 826 (noting how Supreme Court shifted its focus to other forms of segregation while "it patiently allowed a cumulative process [of desegregation] to unfold in the schools").

[187] Onwuachi-Willig, *supra* note 173, at 1511.

[188] Onwuachi-Willig, *supra* note 46, at 355.

[189] *Id.*

[190] *See* Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from* Cooper v. Aaron *to the "School-to-Prison Pipeline,"* 49 WAKE FOREST L. REV. 687, 697 (2014).

shifted to other children's rights-based movements.[191] Imagine if, consistent with *Brown I*, equal protection law today took into consideration young people's subjective qualities, characteristics, and needs, instead of rotely treating them like adults.

For example, such an approach may have resulted in a different outcome in *San Antonio Independent School District v. Rodriguez*, in which school children in low-income families challenged Texas's school-financing system as a violation of their equal protection guarantee.[192] The Court rejected the children's equal protection claim, finding that wealth classifications were not suspect, and upholding the constitutionality of the school-financing scheme under the most deferential level of review.[193] In stark contrast to its approach in *Brown I*, the *Rodriguez* Court treated children as if they were adults who did or did not possess wealth—despite the reality that no child is born with wealth; children are born or adopted into homes that possess a wide range of financial statuses.[194] Had the Court maintained *Brown I*'s children's rights precepts, it would have factored into its constitutional calculus children who live in poor neighborhoods, their subjective qualities, characteristics, and needs, and then proceeded to raise concerns about what the deprivation of equal per-pupil expenditures would do to their future outcomes and equal path to adulthood.[195] If the Court had

[191] *See* KLUGER, *supra* note 71, at 748 (explaining that *Brown I* meant that "the quest for meaningful equality—equality in fact as well as law—had begun," and that this quest was not limited to a vision of equality for Black people); Neil G. Williams, Brown v. Board of Education *Fifty Years Later: What Makes for Greatness in a Legal Opinion?*, 36 LOY. U. CHI. L.J. 177, 199 (2004) ("*Brown* [*I*] laid the moral and legal foundation of the civil rights laws that provide shelters of equality for people of color in this country, as well as for women, ethnic, and religious minorities, the physically challenged, those over forty, and increasingly, gays and lesbians."). After the *Brown* decisions, racial discrimination was accorded the highest level of scrutiny. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60-61 (1973). It was not until other groups sought similar protections that the Court engaged in a more robust explanation for why some groups would garner a heightened level of review and why others would not. *See id.*

[192] *Rodriguez*, 411 U.S. at 4-6 (summarizing plaintiffs' allegations and lower court's judgment that school funding based on local taxation violated Equal Protection Clause of Fourteenth Amendment). The children also unsuccessfully challenged the policy as violative of their fundamental right to an education. *Id.* at 18.

[193] *Id.* at 28 ("[T]he Texas system does not operate to the peculiar disadvantage of any suspect class."); *id.* at 40 ("[T]his is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights."). The Court opined that "[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

[194] *See id.* at 55.

[195] *Id.* at 28 (revealing that the Court only considered the group "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to

maintained *Brown I*'s precepts, it could have further developed its children's equality framework, establishing when the conditions are ripe for children's claims to warrant greater scrutiny.[196] Had it held steadfast, there might also exist today a framework for LGBTQ youth to turn to; a doctrine and theory that recognized their subjugation as a larger project rooted in exploiting their youth and group membership to uphold heterosexual and gender identity supremacy.[197]

In short, the Court's failure to realize *Brown I*'s potential by abdicating its children's rights precepts may have deprived generations of young people of a legal landscape grounded in a robust children's equality law—this missed opportunity, at minimum, warrants deliberate examination.

Finally, imagine if the Court had developed an understanding of the critical and indispensable role that children's rights play in the pursuit of equality. There are times when parents' rights are inadequate to protect their children.[198] As history demonstrates, even as Black parents gained civil rights, those rights were not enough to protect their children from the multi-faceted and ever-changing White supremacist systems.[199] There are times when children—especially Black children—must engage in their own self-rescue, which requires being imbued

have less taxable wealth than other districts"). *But see supra* Section II.B (delineating *Brown I*'s children's rights precepts).

[196] The Court could have bridged the missing doctrinal gap between *Brown I* and *Plyler*, the landmark decision striking down Texas's refusal to enroll undocumented children in public schools as a violation of their equal protection rights. *See* Plyler v. Doe, 457 U.S. 202, 221-23 (1982).

[197] This anti-LGBTQ project not only targets LGBTQ youth, but it also uses children who are members of same-sex households to perpetuate it by interfering with their association with their LGBTQ parents. *See* Brief of Amici Curiae Scholars of the Constitutional Rights and Interests of Children in Support of Respondents at 10-18, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111), 2017 WL 6997161, at *10-18 (arguing discrimination against LGBTQ parents leads to detrimental impact on children); Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 309 (2010) ("An underdeveloped area of sexual orientation and gender identity scholarship is the legal rights and remedies of those who face discrimination because of their relation to or association with gays and lesbians, including children of same-sex families.").

[198] Troxel v. Granville, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children."); *see* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (offering three reasons why children's rights are not equated with adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2101 (2011).

[199] *See* Dailey & Rosenbury, *supra* note 9, at 1460 ("Contemporary judges, policymakers, and scholars therefore generally embrace parental rights as the appropriate starting point for protecting children's interests."). In fact, in many civil rights struggles, children's rights and interests open a window of opportunity for adults in their larger group, only to see that door closed to children as the focus shifts to adults. *See supra* Section II.A.

with rights.[200] Further, these are likely times when children's rights are not in conflict with their parents'; rather, these rights work in tandem to seek equal justice under the law for an entire class of people.[201]

CONCLUSION

Brown I is a lost children's rights case. Unlike modern equal protection law cases adjudicating children's equal protection claims, the *Brown* Court did not rotely treat Black children challenging segregated educational systems like adults. Instead, the Court considered Black children's subjective qualities, characteristics, and needs and affirmatively intervened to prevent the states from using them to perpetuate "an underclass of future citizens and residents" by depriving them of an equal education. The Court recognized that Black children possess their own rights to a path to adulthood unencumbered by the psychological, social, and economic barriers erected by segregated schooling. In the aftermath of the landmark decision, however, the Supreme Court shifted its focus away from Black children's rights to adults' rights, relinquishing its groundbreaking precepts. A decision that continues to influence the current state of public education and children equality law's doctrinal confusion and incoherency.[202] It is time for *Brown*'s lost children's rights legacy to be revived.

[200] "Children's rights therefore reflect the many ways in which children are not merely lesser adults, but rather are full members of society deserving of rights derived from their special status as children." Dailey & Rosenbury, *supra* note 9, at 1527-28.

[201] Martha Minow argues that "[b]ecause an institution ostensibly devoted to children's best interests could hurt them, the Supreme Court concluded that children need and deserve the kinds of rights against the exercise of state power that adults enjoy." Minow, *supra* note 31, at 11.

[202] *See* Karst, *The Supreme Court 1976 Term*, *supra* note 8, at 3.