



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 86 | Number 3

Article 6

3-1-2008

John Calmore's America

Robert S. Chang

Catherine E. Smith

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Robert S. Chang & Catherine E. Smith, *John Calmore's America*, 86 N.C. L. REV. 739 (2008).

Available at: <http://scholarship.law.unc.edu/nclr/vol86/iss3/6>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

JOHN CALMORE'S AMERICA*

ROBERT S. CHANG** AND CATHERINE E. SMITH***

In their contribution to this symposium honoring Professor John Calmore, Professors Robert Chang and Catherine Smith analyze the recent school desegregation case, Parents Involved in Community Schools v. Seattle School District No. 1, through the lens of Professor Calmore's work. In particular, they locate this case as part of what Professor Calmore calls the Supreme Court's Racial Project. Understood as a political project that reorganizes and redistributes resources along racial lines, the Supreme Court's Racial Project creates a jurisprudence around race that solidifies the work of the new right and neoconservatives. Borrowing from Calmore's methodology, Professors Chang and Smith clarify the unspoken past in Parents Involved, challenge the paradigmatic present embodied in its plurality opinion, and then envision the uncreated future. In narrating the unspoken past, Professors Chang and Smith focus on Seattle. They examine the way that segregated neighborhoods and schools were created at the national level and in Seattle. In tracing the creation of a segregated Seattle, they pay particular attention to the unique histories of its various racial groups. Though having a greater level of integration than ever before, the Seattle of today nevertheless remains a city where Whites are the most racially isolated group, producing a city with largely segregated schools. In challenging this paradigmatic present, Professors Chang and Smith critique the neoconservative colorblind constitutional doctrine that characterizes segregated housing patterns as private choice in order to shield segregated and unequal educational opportunities from constitutional scrutiny. As they envision the uncreated future, Professors Chang and Smith draw from Professor Calmore's work on coalition building in a

* Copyright © 2008 by Robert S. Chang and Catherine E. Smith.

** Sturm Distinguished Visiting Professor of Law, University of Denver Sturm College of Law; Professor of Law and J. Rex Dibble Fellow, Loyola Law School, Loyola Marymount University.

*** Associate Professor of Law, University of Denver Sturm College of Law.

We would like to thank Professor Charles Daye and the North Carolina Law Review for inviting us to participate in this special issue engaging with the work of Professor John Calmore. We would like to thank Jennifer Holladay for her comments on earlier drafts of this Article and Meg Satrom and Indra Lusero for their research assistance. We would also like to thank Adam Olls and the other editors of the North Carolina Law Review for their excellent editorial assistance.

multiracial, multicultural world. They discuss the challenges that lie in store for people of color and for Whites. For people of color, one challenge is moving beyond the Black-White racial paradigm; for Whites, a primary challenge, one that is often ignored, is overcoming White racial bonding. They argue that Professor Calmore’s methodology—clarifying the unspoken past, critiquing the paradigmatic present, and envisioning the uncreated future—can help us to figure out what must be done to achieve the kind of America that is consistent with its best aspirations, the kind of America that Professor Calmore has worked so hard to achieve.

- INTRODUCTION741
- I. CLARIFYING THE UNSPOKEN PAST: HOW SEATTLE CAME TO
LOOK THE WAY IT DOES744
 - A. *The Creation and Maintenance of Segregated
Neighborhoods and Schools at the National Level*.....745
 - B. *The Creation and Maintenance of Segregated
Neighborhoods and Schools in Seattle*748
- II. CHALLENGING THE PARADIGMATIC PRESENT751
 - A. *The Neoconservative Colorblind Constitution*753
 - 1. Treating Segregated Housing Patterns as
Private Choice.....753
 - 2. Eliminating Race-Conscious Decisions.....756
 - B. *Justice Kennedy—The Swing Vote*758
 - 1. Framing Rights as Defined by Law758
- III. ENVISIONING THE UNCREATED FUTURE.....759
 - A. *Envisioning a Way for People of Color*.....760
 - 1. Moving Beyond the Black-White Paradigm.....760
 - B. *Envisioning a Way for Whites*763
 - 1. Acknowledging Whiteness764
 - 2. Overcoming White Racial Bonding765
- CONCLUSION.....767

*O, let America be America again—
 The land that never has been yet—
 And yet must be—the land where every man is free.
 The land that's mine—the poor man's, Indian's, Negro's, ME—
 Who made America,
 Whose sweat and blood, whose faith and pain,
 Whose hand at the foundry, whose flow in the rain,
 Must bring back our mighty dream again
 O, yes,
 I say it plain,
 America never was America to me,
 And yet, I swear this oath—
 America will be!*¹

INTRODUCTION

On June 28, 2007, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*² struck down the voluntary race-conscious assignment plans of two public school districts. These plans considered the race of students in order to counter residentially segregated housing and to ensure that their schools' hallways reflected the racial diversity of their respective districts.³ In a divided opinion, a majority of the Court held that the race-conscious assignment plans violated the Equal Protection Clause because they were not narrowly tailored to serve a compelling state interest. In striking down the plans, the majority rejected the compelling state interests advanced by the school districts. Student body diversity, the reduction of racial concentration in schools, and offsetting segregated housing patterns so that non-White students would have access to the most desirable schools were not sufficient to justify the use of race.⁴ The plurality opinion, authored by Chief Justice Roberts, turned to the rhetoric of colorblindness to reach its conclusion: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁵

There is a seductive logic to Chief Justice Roberts's tautology. If the goal is indeed to stop discrimination on the basis of race, then, of course, we have to remove what he perceives to be a stain on our constitution that

1. Langston Hughes, *Let America Be America Again*, quoted in John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1139 (2002) (citing JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 395 (1998)).

2. 551 U.S. ___, 127 S. Ct. 2738 (2007).

3. *Id.* at ___, 127 S. Ct. at 2746–50 (Roberts, C.J., plurality opinion).

4. *Id.* at ___, 127 S. Ct. at 2755.

5. *Id.* at ___, 127 S. Ct. at 2768.

equates nearly all intentional different treatment on the basis of race with illegal race discrimination. In this Essay, we endeavor to resist the seductive logic of Chief Justice Roberts and to challenge the outcome in *Parents Involved*. We draw our methodology and our inspiration from the work of John Calmore.

In particular, we offer this Essay to show how *Parents Involved* is part of what John Calmore identified in 1997 as the Supreme Court's Racial Project.⁶ Drawing from Michael Omi and Howard Winant, Professor Calmore describes a racial project as "simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines."⁷ Conceived as a project, this ensures that race is understood to be much more than a description or an identity.⁸ Race is inextricably linked with the distribution of society's resources.⁹ Calmore's denotation of the Supreme Court's Racial Project refers to the evolution of the Supreme Court's race jurisprudence whereby "a majority of the Supreme Court [J]ustices is taking its lead from . . . [the new right and neoconservative] projects and is intentionally solidifying the projects' gains."¹⁰ These new right and neoconservative projects are characterized by conservative egalitarianism whose "racism is state-of-the-art. 'Its picaresque genius lay in developing so brilliantly . . . that [racism has] disappeared except as it [is] 'imagined'

6. John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. 25, 53–56 (1997) [hereinafter Calmore, *Omi's Messy Real World*].

7. John O. Calmore, *Race-Conscious Voting Rights and the New Demography in Multiracing America*, 79 N.C. L. REV. 1253, 1263 n.43 (2001) (citing MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 57 (2d ed. 1994)).

8. Race is understood here to be a social construct. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (discussing the use by Kendall Thomas of the term "race" as a verb to describe how race is socially constructed); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Choice, and Fabrication*, 29 HARV. C.R.-C.L. L. REV. 1 *passim* (1994).

9. Cf. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1709 (1993) (arguing that "whiteness became the basis of racialized privilege—a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in character").

10. Calmore, *Omi's Messy Real World*, *supra* note 6, at 53. The new right project "[u]nderstands racial mobilization as a threat to 'traditional values'; perceives racial meanings and identities as operating 'subtextually'; engages in racial 'coding'; articulates class and gender interests as racial." *Id.* at 40 tbl.1 (quoting HOWARD WINANT, *Where Culture Meets Structure: Race in the 1990s*, in RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS 22, 31 (1994)). The neoconservative project "[d]enies the salience of racial 'difference,' or argues that it is a vestige of the past, when invidious distinctions and practices had not yet been reformed; after the passage of civil rights laws, any collective articulation of racial 'difference' amounts to 'racism in reverse.'" *Id.*

by its subordinated subjects who [continue] to 'suffer' in an unbelievable world—a color blind world of white innocence.' ”¹¹ Calmore's incisive analysis eleven years ago provides a framework that helps us to understand how the addition of Chief Justice John Roberts and Associate Justice Samuel Alito furthers the Supreme Court's Racial Project. The genius of *Parents Involved* lies in the way the plurality represented a remedy to racism and its effects as racist, a ruling that will thwart efforts to equalize educational opportunities for racial minorities and will leave intact the undeserved benefits that Whites have gained from America's racist past and present.

We draw our methodology from John Calmore's seminal article on critical race and fire music.¹² Professor Calmore offers the “fire music” of Archie Shepp as a metaphor for oppositional cultural practice:

In the mid-1960s, Archie Shepp took his “fundamentally critical” tenor saxophone and stepped outside the commercially laden mainstream's musical community of assumptions and voiced his dissent beyond the ways it would be tolerated within the constraints of conventional jazz. Twenty-five or so years later, some legal scholars of color . . . are voicing our dissent from many of law's underlying assumptions.¹³

In challenging law's underlying assumptions, Professor Calmore embraces the notion of “ ‘strong democratic talk,’ which takes the forms of ‘clarifying the unspoken past; challenging the paradigmatic present; and envisioning the uncreated future.’ ”¹⁴ In our Essay, we seek to engage in strong democratic talk. We begin by clarifying the past that is unspoken in *Parents Involved*. We then challenge the paradigmatic present embodied in its plurality opinion. Finally, we envision the uncreated future, the future imagined by Langston Hughes as invoked by Thurgood Marshall and John Calmore.¹⁵

11. Calmore, *Omi's Messy Real World*, *supra* note 6, at 28–29 (quoting John O. Calmore, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1764, 1776 (1993)).

12. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992) [hereinafter Calmore, *Fire Music*].

13. *Id.* at 2137.

14. *Id.* at 2133–34 (quoting BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 178, 194 (1984)).

15. John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1139 (2002).

I. CLARIFYING THE UNSPOKEN PAST: HOW SEATTLE CAME TO LOOK THE WAY IT DOES

In this Part, we look to history to reveal the unspoken past in *Parents Involved*. We focus our attention on Seattle, one of the two cities at issue in this case. Seattle's history is different from that of Louisville, which was part of the segregated South and whose history fits more within traditional Black-White civil rights discourse. Their different histories are reflected in the different ways that the race-conscious assignment plans were implemented in the two cities: Seattle's focused on White/non-White, whereas Louisville's focused on Black/non-Black.¹⁶ Seattle is a community in which Blacks arrived in significant numbers after the arrival of different Asian groups;¹⁷ Louisville had a different history where other minority groups came after Blacks were already there.¹⁸ Despite the recent influx of other minority groups, Louisville remains "largely a black and white city,"¹⁹ though changes in demographics may eventually produce a Louisville that looks more like Seattle. Seattle, a city without the de jure past that Louisville had, presents a different set of challenges and perhaps a stronger claim to White innocence that makes a race-conscious remedy more difficult to justify. The kind of challenges presented by Seattle will become more pressing, even in communities with a de jure past, as we get further, temporally, from that past.

If you look at a map of Seattle that shows households by race, you will see that certain racial groups are concentrated in different parts of Seattle. Though the picture of Seattle today²⁰ is much different than it was in 1920²¹

16. *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2746–50 (detailing both the Seattle and Louisville school assignment programs).

17. See *infra* Part I.B.

18. See *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840 n.6 (W.D. Ky. 2004) (noting the small Latino and Asian population), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738 (2007). The changing demographics of Jefferson County are reflected in the census figures for 2006, 2000, and 1990. See Bureau of the Census, U.S. Dep't of Commerce, State and County Quick Facts, Jefferson County, Kentucky, 2006, <http://quickfacts.census.gov/qfd/states/21/21111.html> (White 76.4%; Black 20.9%; Asian 1.8%; Hispanic 2.6%); Bureau of the Census, U.S. Dep't of Commerce, Fact Sheet, Jefferson County, Kentucky, 2000, <http://factfinder.census.gov/> (in the box at the top of the page entitled "Fast Access to Information" type in "Jefferson County," select "Kentucky" as the state, and click on the "Go" button; click on the gray tab entitled "2000") (White 77.4%; Black 18.9%; Asian 1.4%; Hispanic 1.8%); Bureau of the Census, U.S. Dep't of Commerce, General Population and Housing Characteristics, 1990, Jefferson County, Kentucky, http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&q_r_name=DEC_1990_STF1_D_P1&ds_name=DEC_1990_STF1_&geo_id=05000US21111 (White 81.3%; Black 17.1%; Asian 0.7%; Hispanic 0.7%).

19. Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 278 (2007).

20. See KATE DAVIS, HOUSING SEGREGATION IN SEATTLE 21 map 4 (2005), http://www.seattle.gov/civilrights/documents/housing_seg_in_seattle-2005.pdf.

or in 1960,²² with a higher degree of integration today than in those earlier snapshots, there is still much progress to be made with regard to residential integration. The very conscious race discrimination by public and private entities is not entirely a thing of the past. Nor should the effects of housing discrimination and the resultant neighborhood composition be thought of as limited to the precise moments of discriminatory treatment. Housing discrimination that remains unredressed is an ongoing harm.²³ We begin, though, with a discussion of housing segregation at the national level before turning to the particulars of Seattle.

A. *The Creation and Maintenance of Segregated Neighborhoods and Schools at the National Level*

At the beginning of the twentieth century, Whites and Blacks encountered each other on a casual basis more frequently than they do today.²⁴ The last hundred years, though, have seen an intensification of residential segregation along racial lines.²⁵ In this section, we demonstrate how this increase in segregation did not happen by accident. Instead, as Blacks and other racial minorities demanded equality, and as older, more blatant methods were deemed illegal or faced increased legal scrutiny, Whites created new methods for maintaining racial segregation, one of these being residential segregation. Residential segregation contained within it a cultural meaning whereby White people could gain a psychological wage from the feeling of racial superiority that separate but equal engendered.²⁶

21. See CALVIN F. SCHMID ET AL., *NONWHITE RACES: STATE OF WASHINGTON* (1968) (showing maps of Seattle with dots representing the respective groups and showing their geographic concentration); *id.* at 58 fig.3:18 (“Negro Population, Seattle: 1920”); *id.* at 63 fig.3:21 (“Japanese Population, Seattle: 1920”); *id.* at 65 fig.3:23 (“Chinese Population, Seattle: 1920”).

22. See *id.* at 59 fig.3:19 (“Negro Population, Seattle: 1960”); *id.* at 64 fig.3:22 (“Japanese Population, Seattle: 1960”); *id.* at 66 fig.3:24 (“Chinese Population, Seattle: 1960”).

23. *But cf. Ledbetter v. Goodyear Tire & Rubber Co.*, 551 U.S. ___, 127 S. Ct. 2162 (2007) (holding that a woman cannot sue under Title VII for sex discrimination that resulted in lower pay because the discriminatory treatment is isolated to the past, even though the results of the discrimination persist in her lower salary). For more on the *Ledbetter* decision and the inherent difficulties in recognizing pay discrimination within the 180-day period required by the Civil Rights Act of 1964, see Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 80 (2007) (discussing the difference between a one-time act and an incremental pattern unfolding over time).

24. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 17 (1993) (noting that the level of residential segregation was significantly lower before 1900 than it is now).

25. *Id.* at 17–18.

26. See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935) (arguing that poor Whites put up with class oppression in part because of the elevated social status they had over the truly disadvantaged); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND*

When explicit racial zoning ordinances were found unconstitutional,²⁷ segregation was enforced extralegally through violence and legally through racially restrictive covenants.²⁸ Use of racially restrictive covenants became widespread, especially in large cities.²⁹ Private discrimination through these racially restrictive covenants was encouraged and often required by the government's Federal Housing Authority ("FHA") and Veteran Affairs ("VA") loan insurance programs through the end of 1950.³⁰ The last two years of these discriminatory provisions were in active defiance of the Supreme Court of the United States ruling in 1948 that invalidated the legal enforcement of these provisions.³¹ The use of racially restrictive covenants worked hand in hand with the practices of the Home Owners' Loan Corporation ("HOLC"), which marked neighborhoods by race to determine their credit-worthiness.³² The practice of redlining³³ by

THE MAKING OF THE AMERICAN WORKING CLASS (1991) (discussing the psychological wages of Whiteness that promote White solidarity and undercut class solidarity between Blacks and working-class Whites).

27. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (finding a Louisville racial zoning statute violative of the Fourteenth Amendment).

28. *MASSEY & DENTON*, *supra* note 24, at 41–42. Violence took the form of race riots during the early 1900s to 1920 in a number of northern cities where Blacks were targeted, especially those “living in integrated or predominantly white areas—or even simply traveling through white areas to their own homes.” *Id.* at 34. After 1920, the violence shifted from generalized violence to carefully targeted violence against Black middle-class families who moved out of the ghetto and into White neighborhoods. *Id.* If this failed, the violence escalated into bombings to combat the expansion of the Black ghetto. *Id.* at 35. This was followed by the formation of neighborhood associations who employed not just restrictive covenants but also put economic pressure on real estate agents and businesses to discourage them from dealing with Black clients. *Id.* at 36.

29. *See* Wendell E. Pritchett, *Shelley v. Kraemer: Racial Liberalism and the U.S. Supreme Court*, in *CIVIL RIGHTS STORIES* 5, 8 (Myriam E. Gilles & Risa L. Goluboff eds., 2008) (“[A] significant portion of housing in most northern cities (primarily in middle-income neighborhoods) was subject to such covenants.”).

30. *See* *MASSEY & DENTON*, *supra* note 24, at 188 (discussing FHA and its policy regarding restrictive covenants); *id.* at 53–54 (noting that VA followed FHA policies).

31. *See* *Shelley v. Kraemer*, 334 U.S. 1 (1948). *Shelley*, like *Brown* in the context of school desegregation, provided a very limited remedy. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976) (discussing the limits of the *Brown* ruling). *Shelley* did not outlaw the use of racially restrictive covenants, nor did it forbid private discrimination in home sales; all it prevented was the participation of courts in enforcing the covenants. *Shelley*, 334 U.S. at 23.

32. *GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS* 169 (rev. & expanded ed. 2006).

33. Redlining is subject to different definitions and therefore subject to disagreement on that basis. “Part of the disagreement turns on whether redlining applies to different outcomes between neighborhoods, to different treatment of otherwise similar borrowers, or only to the profit-reducing refusal to lend in certain neighborhoods.” Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 *TEX. L. REV.* 787, 811 (1995). For purposes of our Essay, we include the first two in our definition of redlining with regard to lending.

the government was amplified because private banks used the HOLC ratings in deciding whether to make loans.³⁴ This practice of redlining appears to persist today.³⁵

Further, the government, through its FHA and VA programs, underwrote the purchase of \$120 billion of real estate between 1934 and 1962, with less than two percent going to non-White families.³⁶ These programs facilitated upward class mobility for Whites³⁷ and helped determine the racial composition of neighborhoods, with the result that even in 1993, “[eighty-six percent] of suburban whites still lived in places with a black population below [one percent].”³⁸ In the 1950s, 60s, and 70s, federal and state funds were actively invested in Whiteness by building the infrastructure—such as roads, highways, sewers, water mains—that allowed White flight out of urban centers and into the new, segregated suburbs.³⁹ Simultaneously, urban renewal programs eliminated much of the inner-city housing stock and eroded the tax base through abatements to developers, making housing much more expensive for the racial minorities left behind and leaving their schools underfunded.⁴⁰

The result of public and private action is the production of racialized spaces where school districts that rely on place of residence as the primary or strongest determinant of school assignment necessarily produce schools that are racially segregated. If you couple this with the “coincidence” that the Black and Brown schools are underperforming, you can see how cities and this nation reproduce racial inequality in every generation.⁴¹

34. MASSEY & DENTON, *supra* note 24, at 52.

35. See Swire, *supra* note 33, at 808–14 (discussing the literature debating the current practices in lending and concluding that “an array of empirical evidence supports the conclusion that significant lending discrimination exists today”).

36. LIPSITZ, *supra* note 32, at 6.

37. “Between 1934 and 1969 the percentage of families living in owner-occupied dwellings increased from 44% to 63%.” MASSEY & DENTON, *supra* note 24, at 53.

38. LIPSITZ, *supra* note 32, at 7. The one percent here does not reflect true integration but is likely more reflective of what John Calmore references in his literature as the “Huxtable Family Syndrome.” See John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1445–46 (1997) (borrowing the term from Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 772 (1993), and Robert Ellickson, *Remarks of Robert Ellickson*, in *THE FAIR HOUSING ACT AFTER TWENTY YEARS: A CONFERENCE AT THE YALE LAW SCHOOL* 61, 61 (Robert G. Schwemm ed., 1989)).

39. LIPSITZ, *supra* note 32, at 6.

40. *Id.* at 12–13.

41. See, e.g., CHARLES TILLY, *DURABLE INEQUALITY* 191 (1998) (discussing ways inequality becomes self-reinforcing); Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual? Brown and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181, 1188–92 (discussing the inequality cycle).

B. The Creation and Maintenance of Segregated Neighborhoods and Schools in Seattle

Seattle, as discussed above, is more integrated than it used to be. Nevertheless, the one racial group that remains the most racially isolated is Whites.⁴² So how is it that Whites became so racially isolated? After Native Americans, who were displaced by White settlers, immigrants from Asia constituted the next non-White group that settled in the area. First came the Chinese in the late 1800s, then the Japanese in the early 1900s, and then the Filipinos in the 1920s.⁴³ Each of the Asian immigrant groups faced hostility from Whites,⁴⁴ but the most extreme violence was directed against the Chinese.⁴⁵ In one particularly egregious incident, 350 Chinese persons, nearly all of the Chinese in Seattle, were forcibly removed from Seattle in 1886 and placed in wagons and taken to the dock where they were placed on steamers bound for San Francisco.⁴⁶ This incident left only a handful of Chinese, including “[a] small community of Chinese merchants . . . clustered around Second Avenue and Washington Street,”⁴⁷ which became the core of the Chinese American community until it migrated to King Street in 1910.⁴⁸ The few Chinese who were prosperous enough to leave Chinatown were limited by racially restrictive covenants and were able to move “‘up hill’ to First Hill and Beacon Hill in the 1930s . . . [as] these neighborhoods were the only districts not covered by restrictive covenants.”⁴⁹ This history of violence and ongoing discrimination determined the settlement patterns of the later arrivals from Asia. Japanese immigrants created a “Nihonmachi,” or “Japantown,” on the edge of Seattle’s Chinatown.⁵⁰ This vibrant community was largely

42. Liu, *supra* note 19, at 285.

43. See DOUG CHIN, SEATTLE’S INTERNATIONAL DISTRICT: THE MAKING OF A PAN-ASIAN AMERICAN COMMUNITY 13–15, 25, 45 (2001); see also SCHMID ET AL., *supra* note 21, at 10 tbl.1:1 (“Trends in Population by Racial Categories, Entire United States and Pacific Coast States: 1890 to 1960”).

44. See generally CHIN, *supra* note 43 (discussing various incidents of violence directed against the different Asian immigrant groups).

45. See QUINTARD TAYLOR, THE FORGING OF A BLACK COMMUNITY: SEATTLE’S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA 107 (1994) (noting that while all of Seattle’s Asian groups encountered discrimination by Whites, the Chinese encountered the greatest hostility). The violence in Seattle took place in the “context of regional economic depression, unemployment, and declining wages which escalated tensions between white workers fearful of displacement and capitalists who used Chinese labor to protect their economic interests.” *Id.* at 111.

46. *Id.* at 112.

47. DAVIS, *supra* note 20, at 8.

48. *Id.*

49. TAYLOR, *supra* note 45, at 115–16; see also CHIN, *supra* note 43, at 63 (noting that First Hill, Central Area, and Beacon Hill were the only areas without restrictive covenants).

50. TAYLOR, *supra* note 45, at 116–17.

destroyed by the internment of Japanese Americans during World War II, and although sixty-five to seventy percent of the pre-war Japanese residents eventually returned to Seattle,⁵¹ many located outside Nihonmachi, especially the Nisei, second generation Japanese Americans.⁵² Filipinos established a "New Manila" located near Chinatown and Little Tokyo.⁵³ This multiethnic array of communities formed Seattle's International District, described by one commentator as a Pan-Asian American community.⁵⁴ Though recent decades show greater levels of integration for Asian Americans, much of the Asian American population remains concentrated in the International District and in areas to the south and east of Seattle.⁵⁵ The lowest levels of integration of Asian Americans exist in the northern parts of Seattle, the areas that historically have been and remain the most White.⁵⁶

Blacks came in significant numbers to Seattle between 1940 and 1960,⁵⁷ eventually becoming the largest non-White group in Seattle.⁵⁸ Restrictive covenants and other forms of discrimination, including all those discussed with regard to the national level,⁵⁹ led to their residential concentration in an area of Seattle known as the Central District.⁶⁰ This concentration was not all negative, as seen with the formation of the vibrant ethnic Asian communities in Seattle. And as with Harlem in New York City, African Americans in Seattle created a vibrant community as documented by a leading historian of the West, Quintard Taylor.⁶¹ However, not long after the publication of this history by Professor Taylor in 1994, Professor Henry McGee comments that this community was in such decline such that "the once 'black' community is now more than fifty percent Euro American, and probably as this article is written [in 2007],

51. CHIN, *supra* note 43, at 75.

52. See TAYLOR, *supra* note 45, at 133 ("[T]he Nisei rapidly moved beyond the physical and psychological boundaries of Seattle's prewar Nihonmachi.").

53. *Id.* at 123.

54. CHIN, *supra* note 43, at 10.

55. See Seattle Civil Rights and History Project, Seattle Segregation Maps 1920–2000, http://depts.washington.edu/civilr/segregation_maps.htm (last visited Feb. 15, 2008).

56. *Id.*

57. DAVIS, *supra* note 20, at 12.

58. See SCHMID ET AL., *supra* note 21, at 18 fig.2:1 ("Trends in Nonwhite Racial Groups, Washington: 1870 to 1960").

59. See *supra* Part I.A.

60. Henry W. McGee, Jr., *Seattle's Central District, 1996–2006: Integration or Displacement?*, 39 URB. LAW. 167, 167 (2007) (citing TAYLOR, *supra* note 45). This concentration was so great that seventy-eight percent of Seattle's Black population lived in ten census tracts in the Central District in 1960. See DAVIS, *supra* note 20, at 12.

61. See McGee, *supra* note 60, at 167 (citing TAYLOR, *supra* note 45).

less than thirty percent African American.”⁶² This shift in demographics is largely due to the gentrification of these neighborhoods.⁶³

This gentrification was sped along by bank practices of redlining which prevented many Black homeowners in the Central District from obtaining loans to maintain or improve their property.⁶⁴ As a result, much of the housing stuck in the Central District began to deteriorate.⁶⁵ With the revival of Seattle’s downtown, where many well-paying jobs are held by White professionals, these same White professionals began to desire to live closer to their jobs and social scene.⁶⁶ This led to an increase in property prices in the Central District⁶⁷ and many Black homeowners, who still remained unable to obtain loans to improve their property or who were unable to afford the higher property taxes that came with the increase in property values, accepted the offers to sell their property and moved.⁶⁸ For the most part, however, they did not or were unable to move to the White areas of Seattle in the north;⁶⁹ instead, they moved out of Seattle to the new Black suburbs to the south and east of Seattle.⁷⁰

62. *Id.* at 167–68.

63. *Id.* at 171 (citing Richard Morrill, *Gentrification in Seattle*, 55 CENT. PUGET SOUND REAL ESTATE RES. REP. 81 (2004)).

64. *Id.* at 208–22 (detailing the practice of redlining in Seattle and its effect on the Central District).

65. *Id.* at 169.

66. *Id.* at 170 (discussing the phenomenon taking place in Seattle and other cities where “once-shunned ‘Negro’ areas [have become] populated by the children of the ‘white-flyers,’ who themselves crave the proximity, the convenience, and ‘hip-ness’ of living close to downtown[] where they work and play”).

67. *Id.* at 173 (“For example, in the heart of the Central Area, a 1,270 square-foot single family, one bathroom home, with three spaces for bedrooms, was assessed . . . in 1960 . . . [at] \$5,000, \$190,000 in 2001, \$262,000 in 2003, and \$355,000 in 2005.”).

68. *Id.* at 224.

69. At some level, the ability to buy property in the more expensive, White areas in the north of Seattle might be ascribed to race-neutral reasons as purely economically based.

If, at one time, the FHA placed a lower value on homes in predominantly African-American neighborhoods, then housing values in these neighborhoods will be lowered over time, resulting in more mortgage “redlining.” In short, yesterday’s mortgage “redlining” contributes to today’s mortgage “redlining.” In order to remedy current mortgage and insurance “redlining,” any legal action must stop the current racially discriminatory practices and also address the impact of past racially discriminatory practices.

Victor A. Bolden, *Where Does New York City Go From Here: Chaos or Community*, 23 FORDHAM URB. L.J. 1031, 1038 (1996).

70. *Cf.* McGee, *supra* note 60, at 221 (noting that “African Americans have abandoned the Central District for housing bargains elsewhere”); *id.* at 182 (noting the proportional decline in the Black population in Seattle along with the concomitant proportional increase in the Black populations in Renton and Kent, suburbs to the south and east of Seattle).

Latinas/os are relative newcomers to Seattle.⁷¹ Though they are less residentially segregated than Blacks, there is a “higher concentration[] of Hispanic residents locating in southern King County.”⁷² Furthermore, from 1990 to 2000, “Hispanics have become slightly more segregated from non-Hispanic whites.”⁷³

There is, then, a certain irony with regard to the conclusion that Seattle is more integrated now than it was before. It certainly is true when you look at previously Black neighborhoods in Seattle. It is also true with regard to the greater levels of integration of Asian Americans and Latina/os. But the previously White areas of Seattle still remain largely White.⁷⁴ The result with regard to students in Seattle’s public schools is as follows:

In a school district that is roughly 40% white and 60% nonwhite, two-thirds of the district’s white students lived in the north in 2001–02, while 84% of its black students, 74% of its Asian students, and 65% of its Latino students lived in the south.⁷⁵

This is the Seattle of today.

II. CHALLENGING THE PARADIGMATIC PRESENT

The paradigmatic present in which we find ourselves is one in which the Constitution is assumed to be colorblind, despite the voluminous literature challenging this notion.⁷⁶ The fact that four Supreme Court Justices can, without irony, bury the aspirations of *Brown v. Board of*

71. Compare DAVIS, *supra* note 20, at 30 map 10 (“Percentage Hispanic, 1980”), with *id.* at 31 map 11 (“Percentage Hispanic, 2000”).

72. *Id.* at 22.

73. *Id.* at 24.

74. *See id.* at 25 (discussing exposure indices, concluding: “The only group that is truly isolated is the white population. The average white resident’s neighborhood was 76% white.”).

75. Liu, *supra* note 19, at 287.

76. *See, e.g.,* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 *passim* (1978) (challenging the colorblind focus of antidiscrimination law on the intent of the perpetrator which ignores the victim and the context of societal racial subordination); Neil Gotanda, *A Critique of “Our Constitution Is Colorblind,”* 44 STAN. L. REV. 1, 2–3 (1991) (criticizing the way that “[a] color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans”); Charles R. Lawrence III., *The Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 6 (1995) (“Such an assertion [that our constitution and society are colorblind] can only be believed if we engage in massive denial of what we see and hear every day.”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470–72 (2004) (critiquing the notion that colorblindness would require the complete end to racial classification such that racial data could no longer be collected).

*Education*⁷⁷ in the rhetoric of colorblindness, despite the fact that our schools are more segregated now than in 1970,⁷⁸ demonstrates how paradigmatic this present is and how difficult it will be to combat it when “[t]oday’s racism is state-of-the-art.”⁷⁹

John Calmore’s work mines the depths of colorblind distortions, revisionist history, and formal equality to seek out and reinvigorate the precious values that make a multicultural America what it can be. He consistently reveals how American law preserves “oppressive and exclusionary expressions of racism that are institutional and cultural, structured and systemic, and harmful.”⁸⁰ The plurality opinion in *Parents Involved* embodies these institutional and systemic practices.

What has previously been the core of antiracist social policy and law is now called racist.⁸¹ As the Court fulfills the Supreme Court’s Racial Project,⁸² lost is any sense of the kind of America we want. The goal is articulated as ending discrimination, narrowly defined, on the basis of race; still, the Supreme Court’s Racial Project says nothing about achieving a more just society for all races or providing a remedy for inequality produced by discrimination on the basis of race.⁸³ Instead, both the colorblind ideology embraced by the neoconservative Justices and even the “rights-defined by law”⁸⁴ theory advanced by Justice Kennedy ignore the harms of segregated schools and allow the Equal Protection Clause to perpetuate White supremacy.⁸⁵

77. 347 U.S. 483 (1954).

78. ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 30 (2003), available at <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf>.

79. Calmore, *Omi’s Messy Real World*, *supra* note 6, at 28.

80. *Id.*

81. A dividing point might be achievement of formal equality through the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, and the Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89. See Robert S. Chang, *Critiquing “Race” and Its Uses: Critical Race Theory’s Uncompleted Argument*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87, 95 (Francisco Valdes et al. eds., 2002) (“[A]fter formal equal treatment has been secured, the terrain shifts . . . [so that] [t]oday, in the era of colorblind jurisprudence and the new racialism, social construction must be argued to establish that individuals and institutions have acted in concert to create differences in the material conditions of racial minorities and that this requires or justifies remedies that necessarily entail racially different treatment.”).

82. Calmore, *Omi’s Messy Real World*, *supra* note 6, at 53.

83. See *supra* text accompanying notes 6–11.

84. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, ___, 127 S. Ct. 2738, 2788–97 (2007).

85. “We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (Blackmun, J., concurring in part and dissenting in part).

In this part, we will explain how neoconservative colorblind practices and Justice Kennedy's concurrence subvert the objectives of the Equal Protection Clause and deny students of color equal educational opportunities. We first reveal how the neoconservative Justices divorce race from racism by treating segregated housing patterns as private choice and framing the ultimate purpose of the Equal Protection Clause as eliminating race-conscious decisions. We then turn to Justice Kennedy's opinion, which defines rights by reference to legal rules instead of real world realities.

A. *The Neoconservative Colorblind Constitution*⁸⁶

To achieve racial equality, matters of "race" cannot be treated as distinct from "racism." Yet the colorblind rationales that infuse the *Parents Involved* plurality treat racial social division as completely "divorced from the processes and consequences of racism."⁸⁷ We will focus on two colorblind principles that operate to divorce race from the consequences of racism—treating segregated housing patterns as the result of private choice and eliminating race-consciousness—that define the paradigmatic present.

1. Treating Segregated Housing Patterns as Private Choice

The first colorblind principle that divorces race from racism is the process by which the neoconservatives treat segregated housing patterns as simply private choice. John Calmore uses the term "racialization of space" to describe "the process by which residential location and community are carried and placed on racial identity."⁸⁸ As explained in Part I, this phenomenon permeates most American cities,⁸⁹ including Seattle and Louisville.⁹⁰ Yet, the *Parents Involved* plurality treats segregated housing patterns that lead to racially isolated schools as a result of citizens' "innocent private decisions."⁹¹

86. Much of Professor Calmore's work engaged with the neoconservative trend in the Supreme Court's race jurisprudence. See *supra* notes 6–11 and accompanying text (discussing the neoconservative racial project).

87. John O. Calmore, *Racism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1068 (1998) [hereinafter Calmore, *Racism*].

88. John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1235 (1995) [hereinafter Calmore, *Racialized Space*].

89. *Id.* at 1234–35.

90. Liu, *supra* note 19, at 278.

91. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, ___, 127 S. Ct. 2738, 2769 (2007).

Seattle's paradigmatic present is one in which housing segregation exists but is euphemistically called de facto and relegated to the realm of private choice,⁹² with the unfortunate consequence that the resulting educational segregation lies beyond *Brown's* constitutional reach. Crucial to this understanding is how the story is framed, whether an expansive or narrow temporal framework is chosen, and who the relevant public and private actors are. Charles Lawrence describes at least two different approaches one might take:

Hoffer, an historian, argues that courts should use "humanistic historical reasoning" rather than the categorical historical analysis employed by the Court in *Croson*. Categorical historical analysis seeks to narrow the historical record and context of a case, while humanistic historical reasoning situates cases within a more expansive and wider historical and social context.⁹³

We believe that the Court, especially the plurality, embraces the kind of categorical historical analysis within which the temporal framework is narrow, and the only relevant actor for constitutional law purposes is the Seattle School District. This narrow temporal framework can be contrasted with the broader framework employed by Justice Breyer in his dissent, but even Breyer limits his focus on the actions of the Seattle School District.⁹⁴ Lost in all the opinions are the other actors that made Seattle what it is today.

Too often, the actions of these other actors are swept under the constitutional rug by labeling them acts of societal discrimination, the existence of which the Court can acknowledge and lament but is powerless to redress. Here, John Calmore's scholarship on race and space provides a powerful antidote/prescription to the Court's myopia, reminding us that "residential segregation [is] 'the structural linchpin' of America's racial inequality."⁹⁵ The Court in *Parents Involved* basically acknowledges that Seattle's population is segregated, and that its racially segregated housing

92. See *supra* Part I.B.

93. Lawrence, *supra* note 76, at 7 n.24 (citing Peter Charles Hoffer, "Blind to History": *The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co.*, 23 RUTGERS L.J. 270, 278-79 (1992)).

94. Compare *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2747 (Roberts, C.J., plurality opinion) ("Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation."), with *id.* at ___, 127 S. Ct. at 2802-06 (Breyer, J., dissenting) (discussing in detail the history of segregated education in Seattle since the 1950s and the various attempts, legal and political, to desegregate or to fight desegregation in Seattle).

95. Calmore, *Racism*, *supra* note 87, at 1118 (attributing phraseology to Lawrence Bobo in MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 33 (1995)).

patterns account for much of the segregation that exists in its schools.⁹⁶ What is missing, though, is an account of institutional responsibility that would lead to a finding of constitutional wrong in order to justify a race-conscious school assignment plan.

One reason why this account is missing is because of something that we call the diversity trap. *Regents of the University of California v. Bakke*⁹⁷ and *Grutter v. Bollinger*⁹⁸ allow schools to rely on a diversity rationale to justify affirmative action in the form of race-conscious admissions.⁹⁹ Such a rationale allows them to avoid the difficult and expensive work of documenting their individual schools' acts of racial discrimination. But diversity, though providing a constitutional basis for affirmative action, can also be a trap for this very reason. Schools, rather than engaging in this kind of research and documentation, which would be expensive to document and which would call for a guilty plea of sorts to the charge of racism, will instead opt for the diversity rationale as the constitutional basis for the race-conscious plans. Though it is understandable why institutions might seek to avoid the expense and discomfort over guilt, these justifications cannot be a legitimate basis—in both a moral and legal sense—for avoiding the difficult work of acknowledging the past. Professor Calmore would call this a cop-out.

Instead of, or in addition to, pursuing diversity as a stand-alone rationale, schools should be paying more attention to race-conscious programs as a remedy.¹⁰⁰ Following *Richmond v. J.A. Croson*¹⁰¹ and *Adarand Constructors Inc. v. Peña*¹⁰² (as well as *Grutter* and *Gratz v. Bollinger*¹⁰³), what is the factual predicate that justifies race-based affirmative action or a race-conscious plan for the allocation of students to primary and secondary public schools? We want to emphasize here that we

96. See *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2747 (“It . . . employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part.”).

97. 438 U.S. 265 (1978).

98. 539 U.S. 306 (2003).

99. See *Bakke*, 438 U.S. at 311–12 (finding that the attainment of a diverse student body was a constitutionally permissible goal); *Grutter*, 539 U.S. at 325 (finding same with regard to law school admissions).

100. Cf. Kimberly West-Faulcon, *From Race Preferences to Race Discrimination: Does Proposition 29 Permit Remedial Affirmative Action?* 31 (Oct. 27, 2007) (unpublished manuscript, on file with the North Carolina Law Review) (arguing that selective public universities, in response to a state anti-preference initiative such as California’s Proposition 209, might be under-admitting minority students in violation of federal civil rights laws and proposing that universities can avoid liability by adopting race-based affirmative action admissions programs).

101. 488 U.S. 469 (1989).

102. 515 U.S. 200 (1995).

103. 539 U.S. 244 (2003).

are not talking about a factual predicate in the narrow sense followed by the Court.¹⁰⁴ The Roberts plurality clearly rejected remedying past discrimination as a basis in the case of the Seattle schools.¹⁰⁵ Instead, we are arguing that what is taken for the factual predicate with regard to school desegregation must be broadened to include a consideration of housing segregation. Professor James Ryan observes:

All along the way, the Court never really confronted the primary cause of most school segregation in the country: residential segregation. This is the gaping hole in the Court's desegregation jurisprudence. It has been true for at least forty years that the chief cause of school segregation is residential segregation. The causes of residential segregation are many and tangled, and include economics, preferences, and private discrimination among realtors and individual homeowners. But every level of government—local, state, and federal—has also played an integral and underappreciated role in fostering residential segregation by race, and there has never been a concerted effort by courts or legislatures to remedy past housing discrimination.¹⁰⁶

Our nation's underperforming apartheid schools are located in apartheid neighborhoods—spaces and places that people of color living in poverty do not necessarily choose but find themselves relegated to by virtue of their lack of economic choices. In *Parents Involved*, the Roberts Court made its own choice: protect and promote the private housing choices available to Whites without considering the lack of choice available to others because of present-day housing discrimination.

2. Eliminating Race-Conscious Decisions

In finding the school districts' plans unconstitutional, Chief Justice Roberts quipped, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁰⁷ In *Brown*, the primary objective of the Equal Protection Clause was not simply eliminating race-conscious decisionmaking. The *Brown* Court sought to eliminate race-based government practices that “impl[ie]d inferiority in civil society,

104. Cf. *supra* text accompanying note 92.

105. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, ___, 127 S. Ct. 2738, 2752 (2007).

106. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 140–41 (2007).

107. *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2768; see also *id.* at ___, 127 S. Ct. at 2782 (Thomas, J., concurring) (“My view of the Constitution is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ ” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

lessen[ed] the security of [blacks'] enjoyment of the rights" exercised by Whites.¹⁰⁸

Roberts and his conservative brethren characterize the elimination of race-conscious decisions by government actors as an end in itself.¹⁰⁹ The effect of segregation on public education delineated in *Brown* no longer matters.¹¹⁰ Roberts's plurality opinion gives little weight to the current social science, relied upon by school districts, which describes the negative consequences of segregated educational settings and the positive societal benefits of integrated schools for students of all races and ethnicities.¹¹¹

In focusing solely on the government's use of race to create integrated schools and in deeming such use unconstitutional, Roberts and his cohorts so disconnect race from racism that they never grapple with the institutionalized racism that plagues our nation's schools today. They never address the "separate and unequal" segregated spaces that our schools increasingly are re-becoming.¹¹²

Indeed, in 2003, researchers with Harvard's Civil Rights Project (now at the University of California at Los Angeles) confirmed not only that U.S. schools were resegregating but also that schools were more segregated than they had been in 1970.¹¹³ Their data show the emergence of a substantial number of new "apartheid schools," which now serve one-sixth of the nation's Black students and one in nine Latino students.¹¹⁴ Apartheid schools are home to "enormous poverty, limited resources, and social and health problems,"¹¹⁵ all of which complicate student achievement—the very kind of racialized spaces *Brown* sought to undo.¹¹⁶

108. *Brown v. Bd. of Educ.*, 347 U.S. 483, 491 n.5 (1954) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

109. *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2758 ("Allowing racial balancing as a compelling end in itself would 'effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." (alteration in original) (internal quotation marks omitted) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (O'Connor, J., plurality opinion))); cf. Calmore, *Fire Music*, *supra* note 12, at 2218 (describing the analysis employed by the Supreme Court whereby "racial classification is 'suspect' even if benign or favorable to the traditionally oppressed party").

110. *Brown*, 347 U.S. at 492 ("Our decision cannot turn on merely a comparison of these tangible factors [, such as equalization of buildings and curricula]. We must look instead to the effect of segregation itself on public education.").

111. Brief of 553 Social Scientists as Amici Curiae Supporting Respondents app. at 30, *Parents Involved*, 551 U.S. ___, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915) [hereinafter Brief of 553 Social Scientists], available at www.tolerance.org/images/teach/magazine/31/amicus_parents_v_seattle.pdf.

112. Calmore, *Racialized Space*, *supra* note 88, at 1235.

113. FRANKENBERG ET AL., *supra* note 78, at 30.

114. *Id.* at 5.

115. *Id.*

116. *Id.* at 17.

In a social science brief submitted to the Court in *Parents Involved*, hundreds of the nation's leading researchers concluded that contemporary segregated schools produce unequal educational opportunities for the children who attend them:

Segregated minority schools . . . have more teachers without credentials who teach subjects in which they are not certified, more instability caused by rapid turnover of both students and faculty, more limited academic curriculum, and more exposure to crime and violence in the school's neighborhood. Accordingly, the educational outcomes in segregated schools tend to be lower in terms of scores on achievement tests and high school graduation rates [I]ntegration prevents the educational harms for students enrolled in these schools.¹¹⁷

The brief noted other benefits of integrated schooling as well, including elevated achievement gains for students of color, increased parental involvement in schools, elevated critical thinking skills, increased access for students of color to the social and professional networks historically available only to White youths, and decreased levels of racial prejudice among students who attend integrated schools.¹¹⁸

When the real-world inequalities of segregated schools are re-introduced to the equal protection debate, the neoconservatives' false vision of equality is shattered. By disembodiment race from the process and consequences of racism, the Roberts Court has levied "the Equal Protection Clause [to] perpetuate racial supremacy."¹¹⁹

B. Justice Kennedy—The Swing Vote

1. Framing Rights as Defined by Law

Justice Kennedy recognizes the fallacy of the neoconservatives' view in parts of Chief Justice Roberts's opinion. For example, he finds the plurality opinion to be too dismissive of the government's legitimate interests in ensuring equal opportunity for all races.¹²⁰ He also disagrees

117. Brief of 553 Social Scientists, *supra* note 111, app. at 30.

118. See *id.* app. at 3; see also Jennifer Holladay, *Then and Now*, TEACHING TOLERANCE, Spring 2007, at 5, 6, available at <http://www.tolerance.org/teach/magazine/editorsnote.jsp?is=40> (arguing that one effective way for schools to fulfill their obligation to prepare children for "good citizenship," as defined by the Supreme Court in *Brown*, is to provide a diverse school setting where children can unlearn prejudice and embrace tolerance).

119. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (Blackmun, J., concurring in part and dissenting).

120. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, ___, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Parts of the opinion by the Chief Justice imply an all-too-yielding insistence that race cannot be a factor in

with Roberts's implication that the Equal Protection Clause requires schools to "ignore the problem of *de facto* resegregation" and "accept the status quo of racial isolation in schools."¹²¹ While Kennedy found diversity and remedying past discrimination to be compelling interests, he cast the deciding vote rejecting the voluntary integration plans because the States failed to show how the plans were narrowly tailored. His opinion is celebrated as a victory by civil rights advocates because it offers hope that *Brown* and *Grutter* will live to see another day.¹²² Kennedy's analysis, however, falls into a "rights defined by law" framework that also characterizes our paradigmatic present.

In the post-civil rights era, as John Calmore has explained, "judicial decisions interpreting certain rights develop [and] a body of doctrine emerges that reflects a process of legalization. This process whereby rights are defined by law, however, is substantially isolated from the very needs that generated those rights and the values they envisaged."¹²³ The "process of legalization" consumes Justice Kennedy's analysis as he argues that the compelling interests advanced by the defendant school districts are "distinct" from the interests the Court has previously recognized, namely, "remedying the effects of past intentional discrimination and [] increasing diversity in higher education."¹²⁴ Kennedy offers the school districts two portals of legally recognized salvation, while the harms of segregated education and the benefits of racially integrated schools are lost in the sinkhole of procedural and technical machinations. Lost, too, are the principles and values that promise to make America what it can be.

III. ENVISIONING THE UNCREATED FUTURE

John Calmore rarely doles out critiques without offering solutions and visions of the uncreated future. Even in the face of misguided court rulings, such as *Parents Involved*, he seeks to set the groundwork for a "new grand alliance" in America—an alliance that represents "not exclusion but inclusion; not division but togetherness; not fear and

instances when, in my view, it may be taken into account."); *id.* at 2788 ("My views do not allow me to join the balance of the opinion by the Chief Justice, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause.")

121. *Id.* at ___, 127 S. Ct. at 2791.

122. Press Release, Lawyers' Committee for Civil Rights Under Law, Lawyers' Committee Statement on Supreme Court Decision in K-12 School Diversity Cases (June 29, 2007), http://www.civilrights.org/press_room/press-releases/reports/lawyers-committee-statement.html.

123. Calmore, *Fire Music*, *supra* note 12, at 2215.

124. *Parents Involved*, 551 U.S. at ___, 127 S.Ct. at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

contempt for each other, but courage and respect.”¹²⁵ He consistently reminds us that a “viable multicultural future” will be difficult to attain unless people of color *and* Whites play a role in revealing and reversing racist and oppressive systems that perpetuate inequality.¹²⁶

A. *Envisioning a Way for People of Color*

Calmore urges people of color to resist cooptation into the right-wing racial project that perpetuates racism and ethnocentrism.¹²⁷ There is an implicit assumption that in exchange for upward mobility or “authentic” citizenship, people of color must adopt certain norms and values, including those of “colorblind individualism, meritocracy and universalism.”¹²⁸ Calmore exhorts progressive people of color to reject these assumptions and “to establish the colored solidarity that is necessary to enable non-European outside others to press for a reinterpretation of America’s common ground, shared values and rules of the game.”¹²⁹

1. Moving Beyond the Black-White Paradigm

To find common ground within a multicultural framework, Calmore calls for a movement beyond the Black-White paradigm—the “bipolar conception of race” that frames the discussion in terms of Black and White relationships.¹³⁰ He reiterates that Black-White relations remain important in defining race relations and that American history of Black-White struggles must be at the forefront of remedying past and continuing harms against Blacks.¹³¹ These realities must be kept in mind to avoid “dilut[ing] or obscur[ing] [Black people’s] claims and interests.”¹³²

Still, Calmore, in reliance on the work of Omi and Winant, delineates the pitfalls of the Black-White paradigm in building an inclusive multicultural framework. In an ever-increasingly diverse, post-civil rights era, the Black-White dichotomy is problematic because it oversimplifies race relations and marginalizes social issues affecting Latinos, Asians,

125. Calmore, *Omi’s Messy Real World*, *supra* note 6, at 82 (quoting John D. Maguire, *Perspective on Proposition 209: Resist the Call of the Privileged Class*, L.A. TIMES, Oct. 24, 1996, at B6).

126. *Id.* at 63.

127. *Id.* at 62–63 (cautioning non-Whites seeking to transcend the Black-White paradigm to resist being “converted into token, honorary white people” and to avoid using “socio-economic upward mobility as justification to abandon the leftist racial projects”).

128. *Id.* at 62–63.

129. *Id.* at 61 (citations omitted).

130. *Id.* at 57.

131. *Id.* at 60–62.

132. *Id.* at 61.

Middle Easterners, and other groups.¹³³ Social justice advocates may overlook how manifestations of racism use different racial stereotypes, beliefs, and facts to oppress other races by pigeonholing racist acts against Latinos or Asians into frameworks that challenge the ways in which racism operates against African Americans. Each manifestation of racial discrimination finds its roots in power and oppression but may play out very differently, depending on the social construction of different racial categories and the context in which the discrimination occurs.

In many contexts, a social justice orientation vested in the Black-White paradigm does not capture the ways in which Asians, Pacific Islanders, Latinos, and Middle Easterners have been and are socially constructed—particularly as those constructions label them as permanent foreigners in a post-9/11 era in which the war on terrorism (read: “Middle Easterners are terrorists”) and anti-immigration vitriol are at their peak.¹³⁴

For example, the recent proliferation of anti-immigrant laws do not fit into an American Black-White race relations frame. In July 2006, Hazleton, Pennsylvania, made national headlines as the first municipality to enact ordinances targeting undocumented immigrants.¹³⁵ The ordinances suspended the licenses of businesses employing undocumented workers, made English the city’s official language, and fined landlords who rent to undocumented immigrants.¹³⁶ In the past year approximately one hundred municipalities and eighteen states have enacted similar immigrant-related laws.¹³⁷ These laws, viewed through the lens of America’s Black-White relations, do not fully capture how they impact the “racialization of space” that is unique to the intersection of racism and nativism.¹³⁸ In particular, the limitations the housing laws place on the opportunities of undocumented immigrants elucidate Calmore’s message that a Black-White approach to challenging these practices may not fully address the manner in which Latinos and Asians experience racial discrimination. The

133. *Id.* at 58–59.

134. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1265–67 (1993) (arguing that, traditionally, discussions about race and the law have focused on African Americans to the exclusion of other racial minorities); Juan F. Perea, *The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CAL. L. REV. 1213, 1214–15. (1997) (arguing that the current Black-White binary discourse around race is too limiting).

135. Karla M. McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Employment Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 3 (2007).

136. *Id.* at 3.

137. *Id.* at 6.

138. Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 10 LA RAZA L.J. 309, 315–16 (1998).

laws themselves perpetuate the racial stereotypes of the immigrant as unworthy of living in the same space as “authentic” citizens.¹³⁹ They are then exacerbated by landlords, ill-equipped to assess the impossible task of deciding who is or is not documented, who turn to stereotypes not simply based on race, but also on national identity, national origin, ethnicity, and language.¹⁴⁰ This Black-White analytical model fails to capture how these laws, rooted in racism and nativism, marginalize people of color who speak English as a second language or present themselves as “foreign,” including people of color who are lawful residents and citizens of the United States.¹⁴¹ This is not to say that one form of discrimination, such as refusing to rent to a Black person because of racist stereotypes or a landlords’ refusal to rent to a Latino or Asian because of their fears of illegal immigration status and corresponding stereotypes, is worse or better. However, they take place in different ways and we cannot assume that an approach to alleviate racism against Blacks will also resolve the racist practices against Latinos, Asians, and Middle Easterners, and vice versa.

Further, the Black-White paradigm often facilitates those who exploit immigration as a wedge issue between Blacks and other people of color. For example, the right-wing Federation for American Immigration Reform recruits Blacks by stating, “mass illegal immigration has been the single greatest impediment to black advancement in this country over the past 25 years.”¹⁴² These tactics promote “in-fighting” and deflect attention away from the systemic structures that oppress Blacks, Latinos, Asians, and Middle Easterners.¹⁴³ These tactics leave people of color circling the

139. See HAZLETON, PA., ORDINANCE 2006-18, § 4(a) (Sept. 8, 2006), available at http://www.hazletoncity.org/090806/2006-18%20_illegal%20Immigration%20Relief%20Act.pdf (“It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard for the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.”), declared unconstitutional by *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

140. See McKanders, *supra* note 135, at 4.

141. See generally Perea, *supra* note 134.

142. Brentin Mock, *Smokescreen*, INTELLIGENCE REPORT, Fall 2006, at 19, 20, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=672>.

143. Francisco Valdes, *Afterword: Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1427 (1998) (discussing wedge issues and their uses to incite backlash); Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 516 (book review) (“Binary thinking not only makes it difficult to see the full panoply of race, it can conceal the way the dominant group often affirmatively pits groups against each other, to the disadvantage of both.”); Jennifer Holladay, *White Anti-Racist Activism: A Personal Roadmap*, *The Whiteness Papers*, Center for the Study of White American Culture (2000) (on file with the North Carolina Law Review) (exploring techniques often used to divide people of color).

proverbial wagon of American White middle-class norms, instead of coalescing to reframe those norms.

Creating a new social justice framework beyond the Black-White paradigm, yet inclusive of African Americans' interests, means seeking out shared objectives across groups—or what social psychologists call superordinate goals, “goals which are compelling and highly appealing to members of two or more groups in conflict but which cannot be attained by the resources and energies of the groups separately.”¹⁴⁴ The goals serve to reduce intergroup conflict and permit groups that may be perceived to have different identities or purposes to build consensus and coalitions.¹⁴⁵

Blacks, Latinos, Asians, and Middle Easterners have a common interest in identifying and challenging the ways in which the racialization of space, framed by White values and norms and their respective groups' failures to meet those norms, limits their housing choices and, in turn, educational opportunities.¹⁴⁶ The historical practices and present-day laws and policies of government and private actors serve to maintain the power and privilege of the majority.¹⁴⁷ Identifying superordinate goals of these racial and ethnic groups “do[es] not require sameness or the assimilation of identities, but rather permit[s] group members to retain their group identities and at the same time challenge their shared subjugation.”¹⁴⁸

B. *Envisioning a Way for Whites*

Social justice advocates must also continue to “explore the potential for whites to exercise their power to alter the adverse impacts of racism on people of color and on themselves.”¹⁴⁹ When race is recognized as a social construction, advocates must remember that it also includes the social construction of Whiteness.¹⁵⁰ Whites must unveil the underlying fallacy of colorblind theory by continually demonstrating how they benefit from White privilege and White racial bonding and how these mechanisms serve to marginalize people of color.¹⁵¹

144. Margaret Wetherell, *Group Conflict and the Social Psychology of Racism*, in IDENTITIES, GROUPS AND SOCIAL ISSUES 175, 207 (Margaret Wetherell ed., 1996).

145. Catherine E. Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 401–02 (2007).

146. Calmore, *Omi's Messy Real World*, *supra* note 6, at 64–67.

147. *See supra* Part I.A.

148. Smith, *supra* note 145, at 402.

149. Calmore, *Omi's Messy Real World*, *supra* note 6, at 73.

150. Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1660 (1995) (“Since race is a phenomenon always in formation, then whiteness—like other racial constructions—is subject to contest and change. Whiteness is historically located, malleable, contingent, and capable of being transformed.”).

151. Calmore, *Omi's Messy Real World*, *supra* note 6, at 78 (quoting Christine E. Sleeter, *White Silence, White Solidarity*, in RACE TRAITOR 257, 261 (Noel Ignatiev & John Garvey eds., 1996)).

1. Acknowledging Whiteness

In 1988, Peggy McIntosh pulled White people's racial experiences out of the closet and held up a "knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear and blank checks" for all to see.¹⁵² This "package of unearned assets," used by Whites day in and day out, represented "White privilege."¹⁵³ Although initially skeptical about Whites' roles in challenging racism, as they "held the wrong end of the experiential stick,"¹⁵⁴ Calmore has come to recognize McIntosh's assertion that advocates must think carefully about the roles "white people play in the maintenance of the racial order, and to ask how [whites'] locations in it—and [whites'] complicity with it—are marked by dimensions of [white] privilege and oppression."¹⁵⁵

Despite McIntosh's groundbreaking work, White people today rarely see themselves as race possessors;¹⁵⁶ when asked to list factors that most inform their identities, few reference their Whiteness.¹⁵⁷ The ongoing denial of Whiteness—and White privilege—in the mainstream remains an obstacle to the creation of social justice collaboratives that are inclusive of Whites.

Often when mainstream organizations do attempt to educate the community, there is a backlash. For example, in Justice Thomas's concurrence in *Parents Involved*, he ridiculed the Seattle school district for sending some of its teachers and students to the White Privilege Conference.¹⁵⁸ Yet, programs designed to facilitate White racial awakening are critical to building capacity among Whites to engage in multicultural

152. *Id.* at 74–75 (quoting Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988), reprinted in LESLIE BENDER & DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 22, 23 (1995)).

153. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988), reprinted in LESLIE BENDER & DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 22, 23 (1995)).

154. Calmore, *Omi's Messy Real World*, *supra* note 6, at 77.

155. *Id.* at 76 (quoting Ruth Frankenberg, *Whiteness and Americanness: Examining Constructions of Race, Culture, and Nation in White Women's Life Narratives*, in RACE 62, 75 (Steven Gregory & Roger Sanjek eds., 1994)).

156. PAUL KIVEL, *UPROOTING RACISM: HOW WHITE PEOPLE CAN WORK FOR RACIAL JUSTICE* 10–16 (1996).

157. BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 1–18 (1988).

158. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, ___, 127 S. Ct. 2738, 2787–88 n.30 (2007) (Thomas, J., concurring). See generally White Privilege Conference, www.whiteprivilegeconference.com (last visited Jan. 26, 2008) ("The annual White Privilege Conference (WPC) serves as a yearly opportunity to examine and explore difficult issues related to white privilege, white supremacy and oppression.").

work. Increasingly, progressive educators are incorporating the study of Whiteness in both K–12 and collegiate settings;¹⁵⁹ community groups are also undertaking this work with adult learners.¹⁶⁰ These are important steps in the right direction.

2. Overcoming White Racial Bonding

Calmore also explains that Whites must overcome the myth of colorblindness by acknowledging and revealing that, contrary to the assumptions built into the rhetoric of colorblindness, White people behave in race-conscious ways that “secure and maintain their group position over people of color” and that serve to police other Whites to support their group position.¹⁶¹ In addition to revealing the White privilege exercised by White people, social justice advocates must also map and articulate the ways in which Whites engage in such racial bonding. Social science offers some insights.

Social Identity Theory asserts that members of social groups, in a quest for positive self-esteem, evaluate their own groups more favorably in comparison to other groups.¹⁶² Individuals attain a positive self-image by locating themselves and others like them in the in-group and those who are different in the out-group. In reliance on a host of stereotypes, individuals engaged in social identification attribute more positive qualities and characteristics to in-group members and more negative ones to members of the out-group.¹⁶³ This “in-group favoritism” and “out-group derision”¹⁶⁴ can manifest in seemingly innocuous ways—for example, when an athlete from the United States competes in the Olympics, people across the country root for “their athlete” over athletes from other nations, i.e., “America vs. *Them*.”¹⁶⁵ However, when this same phenomenon occurs along socially constructed racial categories, harmful consequences occur.

159. Charmaine L. Wijeyeshinghe, Pat Griffin & Barbara Love, *Racism Curriculum Design*, in *TEACHING FOR DIVERSITY AND SOCIAL JUSTICE: A SOURCEBOOK* 82, 82–109 (Maurianne Adams, Lee Anne Bell, & Pat Griffin eds., 1997); Barbara Miner & Bob Peterson, *Diversity vs. White Privilege: An Interview with Christine Sleeter*, *RETHINKING SCHOOLS*, Winter 2000/2001, at 4; Jennifer Holladay, *The ABCs of Whiteness and Anti-Racism*, (Sept. 2006), <http://www.tolerance.org/teach/activities/activity.jsp?ar=713>.

160. See The People's Institute for Survival and Beyond, <http://www.pisab.org/our-staff> (last visited Jan. 26, 2008); The Challenging White Supremacy Workshop, <http://www.cwsworkshop.org/about> (last visited Jan. 26, 2008).

161. Calmore, *Omi's Messy Real World*, *supra* note 6, at 79.

162. Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 *RUTGERS L. REV.* 55, 73 (2006).

163. See *id.* at 68–75.

164. *Id.* at 73.

165. Jeff Sapp & Lecia Brooks, *The ABCs of Conflict Resolution: Lesson Five: In-Group Favoritism*, (Oct. 2007), <http://www.tolerance.org/teach/activities/activity.jsp?ar=869&pa=6>.

Whites engaged in racial identification are more loyal to, and persuaded by, other Whites and are more willing to conform to in-group norms. Through this process, racial in-group favoritism and racial out-group derision lead to tangible benefits for Whites and corresponding disadvantages for people of color.¹⁶⁶

White suburban schools, for example, have more funds per student than urban schools that disproportionately serve students of color—in some cases, twice as much.¹⁶⁷ “When this is multiplied by the number of students in a classroom or school, the impact is enormous . . . [giving rise to] tremendous educational advantages [for white students] over students of color.”¹⁶⁸ In Seattle and elsewhere, White people do not want to see these disparities for what they are—manifestations of race and class privilege of Whites as a social group. Explanations based on in-group favoritism and out-group derision are far easier for Whites to stomach—White schools are somehow naturally “superior,” and schools of color are somehow organically “inferior.”¹⁶⁹

Whites must overcome this kind of racial bonding, which allows their “group think”—their collective perceptions and needs—to manifest in ways that usurp the higher calling of a multicultural social order based in equity and justice. Many advocates today call upon Whites to become “anti-racist allies”—people who “identify conditions or situations that advance White privilege or maintain racial or ethnic inequalities and then [] challenge them.”¹⁷⁰ And it is in this new multicultural space where White racial bonding—and its damaging effects—might be undone, as White people learn not just how to name their Whiteness, but also to undo the systemic effects of privilege and its corresponding disadvantages to people of color. As cultural critic bell hooks noted, “For our efforts to end white supremacy to be truly effective, individual struggle to change consciousness must be fundamentally linked to collective effort to transform those structures that reinforce and perpetuate white supremacy.”¹⁷¹

166. For examples of how racial identification operates, see Smith, *supra* note 162, at 79–88.

167. KIVEL, *supra* note 156, at 203.

168. *Id.*

169. See Jennifer Holladay, *Court Decisions: White Supremacy Reigns*, Z MAG., Sept. 2007, at 5 (detailing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738 (2007), which held “school assignment plans unconstitutional saying they unfairly targeted individual white students”).

170. Holladay, *supra* note 143, at 7; see Paul Gorski, So You Think You’re an Anti-Racist?, http://www.edchange.org/multicultural/resources/paradigmshifts_race.html (last visited Oct. 1, 2007) (delineating paradigm shifts necessary for teachers and schools to embrace anti-racism).

171. BELL HOOKS, KILLING RAGE: ENDING RACISM 195 (1995).

CONCLUSION

We find ourselves in a jurisprudential moment where *Brown v. Board of Education* is invoked to limit severely what a school district can do to create integrated educational settings for its students. Inspired by John Calmore's work and employing his methodology, we have sketched our understanding of how we got to this point. As we indicated above, this is high-tech racism at its best or worst, depending on your perspective. To counter what Calmore would describe as this paradigmatic present, we tell a story of the past that somehow fails to find its way into the opinion of the Court or in the concurrences in *Parents Involved*. By engaging in strong democratic talk, we seek in this Essay to win the battleground that is the past, which is really a struggle over what America is and what it is to be. If we follow the course set in *Parents Involved*, we fear that the America dreamed of by Langston Hughes will recede ever further into the distance. Thurgood Marshall and John Calmore, by invoking the Langston Hughes poem,¹⁷² swore with Hughes the oath of working to achieve an America where one's freedom in all aspects of life is not constrained by one's race. Let us join him in his work.

172. See *supra* note 1 and accompanying text.

