ESSAY

THE LAW OF NARROW TAILORING

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In 1954 the Supreme Court, then led by Earl Warren, declared that segregated education constituted a denial of equal protection. In so doing, the Court set in motion the Second Reconstruction, and, over the next two decades, infused it with energy and vision. As part of this endeavor, the Court affirmed sweeping decrees requiring the desegregation of public schools and other state institutions, protected activists in the Civil Rights Movement, and facilitated the participation of the political branches in the process of eradicating the nation's racial caste structure.

By the mid-1970s, and continuing for almost fifty years, the Court changed its stance toward reconstruction. It did not openly repudiate *Brown v. Board of Education*, but rather sought to limit that ruling and to deprive it of any generative meaning. To pursue this policy, a number of Justices whose votes were essential to the formation of a majority decided to set aside a measure designed to eradicate caste on the ground that it was not narrowly tailored. This occurred in cases that proved to be inflection points in the history of the Second Reconstruction and as a result their position endowed the law of narrow tailoring with a special prominence and significance.

One branch of the law of narrow tailoring regulates the scope of judicial remedies. It requires that injunctions be confined to protecting against specific and clearly defined wrongs. Another governs the interpretation and application of the Equal Protection Clause. It requires that any law employing a racial classification—even one that seeks to ameliorate the position of the underclass—be narrowly tailored to serve a compelling public purpose.

Stated in these terms, the law of narrow tailoring has a technical, largely instrumental character—insisting on a tight relationship between means and ends. In truth, however, on decisive occasions that occurred in the era that began in the 1970s the narrow tailoring requirement was turned into a

general oppositional strategy to limit the reach of *Brown v. Board of Education* and the reform of American society that it decreed. As such, it was infused with contested political or moral notions that are, as far as I can tell, not rooted in the Constitution and that are, in any event, at odds with the overarching purpose of the Civil War Amendments. In the end, we are left to wonder whether the law of narrow tailoring might be reformulated in a way that confines the narrow tailoring requirement to its original and more salutary purpose and avoids these abuses.

THE SCOPE OF REMEDIES

In 1968 Richard Nixon, a Republican, was elected president on the basis of a campaign that was in part based on an attack on the Warren Court and the civil rights revolution that it sparked. During his time in the White House, President Nixon placed four Justices on the Supreme Court—a new Chief Justice, Warren Burger, and three Associate Justices, Harry Blackmun, William Rehnquist, and Lewis Powell. Although Blackmun increasingly sided with the liberal wing on Court, he began his career in a very different way, readily lending his support to the other Nixon appointees. Sometimes these appointees were also able to garner support from some of the holdovers from the Warren Court.

The newly established governing coalition of the Court appeared resolved to curb the ambitious injunctions that first appeared in the 1960s school desegregation cases but had, by the early 1970s, been issued in a wide variety of other cases concerning prisons, police departments, institutions for the disabled, and public housing authorities. With this purpose in mind, those now in power declared that all injunctions had to be tailored to fit the violation they sought to remedy. Although the word "narrowly" was sometimes absent from this formulation of the tailoring principle, it was in fact implied, as all the world understood.

Like many of the maxims of equity, this particular rule governing the issuance of injunctions has a tautological quality. An injunction is a judicial remedy that is, almost by definition, designed to prevent a violation of law from occurring or recurring, or to eradicate the effects of a violation that has already occurred. Of necessity, therefore, an injunction must be addressed to, or fit, the violation of law. Building on this elementary understanding, the narrow tailoring principle required that the fit be tight, and in this form was turned into an instrument for setting aside decrees. These rulings seemed, however, to contradict another near tautology of equity

jurisprudence—one that requires injunctions to be broad and effective. The remedy must be as deep and as broad as the wrong.

Faced with this conflict between the maxims of equity—one requiring a tight fit between the violation and the remedy, and the other requiring a broad and effective remedy—judges were put to the task of defining the wrong or legal violations with care and precision. After all, it is the wrong that would ultimately determine the scope and terms of the injunction. As a result, what at first appeared to be a conflict within equity jurisprudence concerning the appropriate scope of remedies turned out, on reflection, to be a disagreement over substance: the nature of the violation that was to serve as the predicate for the issuance of the injunction.

The importance of the substantive definition of the violation of law and the emptiness of the narrow tailoring requirement—or for that matter even its opposite, requiring a remedy to be broad and effective—became clear in two landmark civil rights cases of the mid 1970s: *Milliken v. Bradley*,[1] handed down in July 1974, and *Hills v. Gautreaux*,[2] handed down in April 1976, almost two years later. Both addressed the permissibility of imposing a remedy for civil rights violations that had occurred in two different cities: Chicago and Detroit. Both involved the familiar, though conflicting, principles of equity governing the scope of injunctions. In each, the Court came out differently.

Gautreaux arose from the practice of the Chicago Housing Authority, acting in deference to objections from aldermen representing predominantly white neighborhoods, which located public housing projects only in predominantly Black neighborhoods. The aldermen assumed that in all likelihood these housing units would primarily be utilized by Blacks. Although the violation was in one sense narrow, the remedy in dispute was broad. It sought to reach the United States Secretary of Housing and Urban Development. The proposed decree required the Secretary to issue vouchers to Black families then living in Chicago public housing that would enable these families to move to white, presumably more upscale communities in the suburbs surrounding the city.

Writing for the Court, Justice Potter Stewart accepted the finding by the courts below that the Chicago Housing Authority had discriminated on the basis of race. The accusation against the federal Secretary of Housing and Urban Development was, however, more limited. The Secretary was only accused of unlawfully supplying the Chicago Housing Authority with the

1 418 U.S. 717 (1974).

2 425 U.S. 284 (1976).

funds to construct housing projects on the sites the Authority had chosen, presumably understanding the racial dynamics underlying those choices. The Secretary did not himself discriminate on the basis of race, he only acquiesced in the discrimination by the local authorities. Yet in the eyes of the Court, this acquiescence violated the Constitution and Title VI of the Civil Rights Act of 1964, and it was on the basis of this finding that an injunction was allowed that embraced both the city and its surrounding suburbs.

Appointed to the Supreme Court by Dwight Eisenhower in 1958, Stewart was never a leader on the bench, although, he soon joined the principal decisions that gave the Warren Court its distinctive identity. Moreover, as the 1960s and early 1970s wore on, Justice Stewart maintained a similar profile, signing on to decisions appearing to advance the implementation of *Brown v. Board of Education*. For instance, Stewart joined the Court's 1971 ruling in the *Charlotte-Mecklenburg* case, upholding a far-reaching judicial decree that was aimed at eradicating the vestiges of the dual school system and that imposed a duty on the lower federal courts to achieve, consistent with practical considerations, "the greatest possible degree of actual desegregation."[3]

In 1972, Justice Stewart, writing for the Court in a case in which a city divided a school district into two, declared that the effect of a city's action, not that the city's motivation for so acting, constituted the proper criterion through which to evaluate compliance with a desegregation order. With that rule in mind, he thwarted the city's effort to carve out a separate, predominantly white school district from the larger community on the ground that it would impede desegregation.[4] Similarly, in 1973, Justice Stewart joined a majority opinion that required the desegregation of the Denver, Colorado schools.[5] Although that school district had never been operated on a dual basis, the school board had, with an eye toward maintaining racial segregation, manipulated student attendance zones in a significant portion of the district. The majority that he joined, assembled by Justice William Brennan, viewed this act as an adequate basis for entering the same kind of broad decree that it had entered in the *Charlotte-Mecklenburg* case. Here, Brennan described it as "all-out desegregation."[6]

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3 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

4 Wright v. City of Emporia, 407 U.S. 451 (1972).

5 Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

6 *Id.* at 214.

The very next year, however, Justice Stewart reversed course when, in July 1974, the Court handed down its ruling in the Detroit school desegregation case.[7] He then broke from Brennan, Marshall, Douglas, and White—all of whom dissented in that case—and provided the crucial fifth vote for the four Nixon appointees—Burger, Blackmun, Rehnquist, and Powell—in barring a metropolitan remedy—a desegregation plan that embraced the city and suburban schools (the Detroit metropolitan area). Although Stewart concurred in the judgment of the Court, he refused to join the opinion written by Chief Justice Burger. Instead, he wrote a separate concurrence and in that opinion invoked the authority of what he called "equity jurisdiction"[8] and the narrow tailoring requirement. As Stewart reasoned, because the violations had occurred within Detroit, the remedy must be confined to Detroit.

As with *Gautreaux*, *Milliken v. Bradley* reached the Supreme Court before the lower courts had settled on the metropolitan remedy. In *Gautreaux*, the Supreme Court allowed the lower courts to formulate the appropriate remedy, though it explicitly contemplated and legitimated the entry of a decree against the Secretary of Housing and Urban Development that, in effect, reached beyond the bounds of the city of Chicago. Under that order, vouchers were to be issued to public housing residents then living in Chicago so that they could move to the surrounding suburbs. The majority did not take the same stance in *Milliken v. Bradley*. On the contrary, the majority in *Milliken* prevented the entry of any remedial order that would have embraced the surrounding, predominantly white, suburban school districts.

In order to highlight this contrast with *Gautreaux*, imagine that in *Milliken* the parties had sought an injunction requiring the State of Michigan to redraw the school districts covering the larger Detroit metropolitan area, suburbs included, in such a way as to facilitate "all-out desegregation" (to use the formula of the Denver case) or "the greatest possible degree of actual desegregation" (to use the formula of the *Charlotte-Mecklenburg* case). The State of Michigan—already a party to the suit, represented by the Governor William Milliken—was fully vested with the authority to draw school district boundaries and was under no obligation under state law to confine those boundaries to the various political subdivisions of the State. In fact, the boundaries of school districts and political subdivisions often diverged. In drawing the boundaries of school districts, the State normally considered a

7 Milliken v. Bradley, 418 U.S. 717 (1974).

8 *Id.* at 753 (Stewart, J., concurring).

whole host of factors, some concerning the distribution of school-aged children, others concerning financial considerations, and still others concerning the bounds of the various communities. Under the proposed decree, these considerations remain germane, but would have to be adjusted or modified to reflect the federal constitutional imperative of racial integration.

Consistent with well-established practice in school desegregation cases, the State of Michigan would in the first instance be given an opportunity to put forth a plan that would fulfill its constitutional obligation. Specifically, the plan would identify the geographic boundaries of the new proposed school districts consistent with the aim of achieving, in the terms of *Charlotte-Mecklenburg*, "the greatest possible degree of actual desegregation." As appellate courts often do, the Supreme Court could also set the parameters of the desegregation plan Michigan was to formulate and submit in the first instance to the district court. Specifically, the Supreme Court could require that the new districts be as geographically compact as possible, so as to minimize transportation to and from schools, which, in any event, should be no more than thirty minutes. The Court could also specifically require that the plan allow persons living within each school district to elect a school board to govern the district, and further provide that these boards be vested with the same power as local school boards now possess over curriculum, personnel, budget, and the construction of new schools.

Once the required plan was submitted by the State to the district court, that court would then hold a hearing to determine its adequacy. At this proceeding, all parties potentially affected by the proposal, including representatives of the old districts and various political subdivisions of the metropolitan area, would be allowed to participate. In the end, the district court would have to decide whether the plan is an effective and appropriately tailored instrument for eradicating the constitutional violation—the segregated pattern of student attendance in the Detroit metropolitan area.

Assuming the Supreme Court's ruling in *Milliken* barred the entry of such a decree, the question naturally arose in *Gautreaux* whether an analogous metropolitan remedy against the Secretary of Housing and Urban Development, this time to hold him accountable for his complicity in the wrongs that had occurred in Chicago, was permissible. Presenting the case for the Secretary at oral argument, Robert Bork, then Solicitor General, relied on *Milliken v. Bradley*, insisting that the metropolitan remedy sought in

Gautreaux against the Secretary, "no matter how gently it's gone about," would offend the value of "local autonomy" protected by *Milliken*.[9]

It is unusual for a Justice to quote in the body of an opinion a statement made by the Solicitor General in the heat of argument. In this instance, the literary device was used not as a gesture of respect. It seemed instead to have been deployed either to correct a widespread misapprehension or possibly to add emphasis to the point the Justice wished to make, for in the end, Stewart repudiated Bork's reading of *Milliken* and denied that *Milliken* was predicated on a desire to protect the value of local autonomy. In saying this, Justice Stewart spoke with special authority for he was the Court's crucial fifth vote responsible for the ruling in *Milliken*.

Admittedly, the other four who constituted the *Milliken* majority were represented by the Chief Justice's opinion—properly characterized as a plurality opinion—that emphasized the importance of local control in the field of education. Yet a metropolitan remedy along the lines I indicated—but that was precluded by the majority in *Milliken* consisting of Stewart, Burger, Blackmun, Powell, and Rehnquist—would leave the governance of the public schools in the hands of locally elected school boards. Under the decree I imagined local autonomy would not have been threatened, only reconfigured. Localism would have been given a new face. Earlier the State of Michigan had drawn the boundaries of the school districts, and now the State was being asked to redraw them in a way that served a supervening and commanding federal constitutional purpose—"to achieve the greatest possible degree of actual desegregation."

In an attempt to differentiate the metropolitan remedy contemplated in these two cases—*Milliken v. Bradley* and *Gautreaux*—Stewart pointed to the different impact each would have had on existing units of local government. In *Gautreaux*, recipients of housing vouchers provided by the Secretary of Housing and Urban Development would have been able to move to a new town. The metropolitan remedy in *Milliken v. Bradley*, however, would have required a measure of government reorganization: redrawing the boundaries of the school districts covering the Detroit metropolitan area. Granted, this is a difference, and yet it is difficult to understand the significance of that difference. That is why the three *Milliken* dissenters who were still on the Court in 1976—Brennan, Marshall, and White (the fourth, Douglas, had already stepped down)—found it necessary to write a separate concurrence in *Gautreaux*. Although they joined Stewart's opinion, as did all the other

9 *Gautreaux*, 425 U.S. at 300–01.

Justices, they also indicated that they adhered to the views they had expressed in *Milliken v. Bradley*. The existing school district boundaries were once drawn by the State of Michigan and the State retained ample power to redraw them. For them, the existing boundaries possessed no sanctity. Nor can we find in the grab-bag of equity jurisprudence any principle that would attribute significance to Stewart's distinction. As Justice Stewart fully recognized in *Gautreaux*, although one principle requires that remedies be narrowly tailored, another requires that they be broad and effective.

In truth, the difference between Stewart's position in *Gautreaux* and his position in *Milliken* is best explained by his understanding of the constitutional wrong, not these warring tautologies drawn from equity jurisprudence. The *Gautreaux* Court deemed the Secretary of Housing and Urban Development complicit in the unconstitutional practice of situating public housing projects most likely to be used by Blacks in neighborhoods that were already Black or quickly becoming Black. Stewart conceived of the underlying violation by the Chicago Housing Authority in near-atomistic terms and then approved of a broad, ambitious remedy. He thus allowed—and here he spoke for a unanimous Court—the metropolitan remedy in *Gautreaux* on the theory that it was an appropriate, though strikingly ambitious, instrument for correcting that clear violation of equal protection by the Chicago Housing Authority. It provided a portion of the Black community required to live in these racially segregated housing projects with an opportunity to enhance their chance for upward mobility by moving to predominantly white, presumably upscale suburban communities.[10] Although the Chicago Housing Authority was charged and found guilty of perpetuating segregation based on race, the Secretary merely agreed to fund the housing projects and the Chicago Housing Authority's segregative action.

The *Milliken* violation was harder to pin down. It was not feasible to accuse the State of Michigan of intentionally drawing the existing school district boundaries on the basis of race—white children in one district, Black children in another. Its failure was essentially the failure of inaction: failure to redraw the district lines in a way that might account for shifting residential patterns and provide for integrated public education in the Detroit metropolitan area. As Justice Marshall aptly and passionately complained in dissent in *Milliken*, with an authority that only he possessed, this inaction prevented children from learning together, and then he added, ". . . unless

10 *See generally* OWEN FISS, A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM (2003).

our children begin to learn together, there is little hope that our people will ever learn to live together."[11]

In *Milliken* Stewart denied that the Constitution obligated the State to make these adjustments, even though the consequence was entirely foreseeable and avoidable: an increasingly all-Black school district for the city of Detroit, surrounded by predominantly white suburban school districts. For him, the mere fact of different racial compositions in contiguous districts did not itself imply or constitute a violation of the Equal Protection Clause. Admittedly, rigid adherence to the existing boundaries may have facilitated or enabled white flight from the city. But Stewart did not demand that Michigan correct it. For Stewart, a decree requiring such corrective action would be justifiable where the State of Michigan had "imposed, fostered, or encouraged" the demographic pattern of segregation in the public schools of the metropolitan area.[12] He searched for a wrong by the State of Michigan that had the same atomistic quality as the wrong he later found to have been committed by the Chicago Housing Authority in *Gautreaux*.

The Detroit school board is an instrumentality of the State of Michigan. As such, the State can presumably be held accountable for the school board's wrongdoing within the Detroit school district. According to Justice Stewart, this wrongdoing of the Detroit board consisted of the "improper use of zoning and attendance patterns, optional-attendance areas, and building and site selection."[13] By acquiescing in or failing to correct the local board's segregative actions, the State, much like the Secretary of Housing and Urban Development in *Gautreaux*, could have been deemed complicit in the wrongdoing within the Detroit school district. On this theory, the Court could have required the State of Michigan to stop those transgressions and even more, to take action that would eradicate the effects of such transgressions. But what, one may ask, are the consequences of these transgressions?

One year earlier, the Court, with the unqualified support of Stewart, held that similarly improper acts of segregation in part of the Denver school district warranted an order requiring "all-out desegregation" of the entire district. Writing for the Denver majority, Justice Brennan reasoned that going forward the improper segregative acts of the past cast doubt upon the integrity of the board's stated policy of assigning students to schools based on

11 *Milliken*, 418 U.S. at 783 (Marshall, J., dissenting).

12 *Id.* at 758 (Stewart, J., concurring).

13 *Id.* at 753 (Stewart, J., concurring).

their geographic proximity to a school. These past segregative acts also might well have had, Brennan reasoned, an effect on residential patterns throughout the school district. The causal assumptions upon which Brennan's theory rested were a bit of a stretch; in all likelihood the segregated residential patterns of Denver were attributable to a large complex of factors, many of which were unrelated to the past segregative acts of the school board. In the Denver case, Stewart was prepared to indulge them. He was not, however, similarly inclined in the Detroit case, where he broke from Brennan and the other three carry overs from the Warren Court—William Douglas, Thurgood Marshall, and Byron White.

In *Milliken*, Stewart justified his refusal to embrace the causal assumptions underlying the Denver decision because of one pivotal difference: *Milliken* dealt not with racially segregated neighborhoods within a single city, but an increasingly Black city surrounded by white suburbs. In a footnote specifically addressed to "My Brother Marshall," Stewart insisted that "segregative acts within the city alone cannot be presumed—and no factual showing was made that they do produce—an increase in the number of Negro students in the city as a whole."[14] He then continued:

> It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or the cumulation of private acts of racial fears—that accounts for the "growing core of Negro schools," a "core" that has grown to include virtually the entire city.[15]

Marshall and the others who followed him in dissent did not deny the multitude of causal factors that account for the shifting demographic pattern of the Detroit metropolitan area. The *Milliken* dissenters instead focused on student attendance patterns of the public schools, and were prepared to attribute a significant measure of responsibility to the State of Michigan for those patterns—Blacks in one set of schools (the city), whites in another (the suburbs). The responsibility of the State for these racial attendance patterns arose in part from the housing policies of various government agencies and other instrumentalities of the State of Michigan.[16] More generally, the responsibility of the State could be attributed to its decision, in the face of shifting residential patterns, to make the boundaries of the Detroit school district coterminous with the city of Detroit and then to adhere to that

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14 *Id.* at 756 n.2 (emphasis omitted).

15 *Id.*

16 *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

decision knowing full well what would be the consequence of that decision—racially segregated schools in the metropolitan area taken as a whole.[17] Going further, one could say, as Thurgood Marshall and other dissenters well understood, that by rigidly adhering to the decision to make the boundaries of the Detroit school district coterminous with the boundaries of the municipality, the State endowed those families that had the necessary economic resources—disproportionately whites—with the power to avoid going to predominantly Black, inner-city schools. They only had to move to one of the many suburbs surrounding the city.

Milliken v. Bradley was no ordinary decision. It confined *Brown v. Board of Education* to a rule condemning segregated patterns of student attendance produced by racial assignments and it thus became a turning point in the history of school desegregation.[18] It constitutionalized the difference between de jure and so-called de facto segregation. It also greatly enhanced the saliency of the tailoring principle and at the same time revealed the vacuity of that principle. One of the Justices who was essential to the majority—Potter Stewart—filed a separate concurrence that focused on the tailoring principle and maintained that this principle was the basis of his decision. On closer inspection, however, it appears that his decision turned not on the instrumental character of the remedy being sought—is it narrow enough?—but rather on a theory—advanced in a couple of sentences in one footnote—of urban development, the meaning of equal protection, and the role of the judiciary in American society. Stewart refused to treat the demographic pattern of student attendance—Black students in one set of schools, whites in another—as a constitutional wrong.

THE WORKINGS OF STRICT SCRUTINY

In 1975 William Douglas stepped down from the Court. He had dissented in *Milliken v. Bradley* in a way that repudiated the purported distinction between de facto and de jure school segregation, and emphasized the responsibility of the State for entirely foreseeable and avoidable consequences of its districting decisions on the racial pattern of student attendance. The year before, Douglas had taken a similar position in a

17 In the 1973 Denver case, Justice Powell acknowledged the responsibility of the local school boards for the segregated attendance patterns in the district for this very reason. *Keyes*, 413 U.S. at 241 (1973) (Powell, J., concurring). A year later, in the Detroit case, he quietly abandoned that position and without comment joined the Chief Justice's opinion.

18 *See generally* Myron Orfield, Milliken, Meredith, *and Metropolitan Segregation*, 62 U.C.L.A. L. Rev. 364 (2015).

separate concurrence in the Denver case, though he also joined Brennan's opinion for the Court. At the time of Justice Douglas's retirement, Gerald Ford, Nixon's vice president—and before that the leader of the Republican minority in the House of Representatives—was in the White House. Guided by Edward Levi, once the President of the University of Chicago, now Attorney General, Ford filled Douglas's seat with John Paul Stevens, a Republican who was then sitting on the Seventh Circuit. Stevens did not participate in *Gautreaux*.

The personnel changes on the Supreme Court during the 1970s were, to some degree, reflected in the outcome of *Milliken v. Bradley*, since all the Nixon appointees voted against allowing a metropolitan school desegregation remedy. The setback to the course of racial equality represented by that decision was soon reinforced and amplified by two decisions in 1976, not *Gautreaux*, which, in retrospect seemed like a miracle, but rather *Washington v. Davis* and *Rizzo v. Goode*. The first downgraded the disparate impact doctrine governing employment discrimination cases from a constitutional to a statutory rule.[19] The other set aside a structural injunction aimed at protecting Blacks from abuses by the then-notorious Philadelphia Police Department.[20]

From 1974 onward, the Court was dominated by a group of Justices who were appointed by President Nixon, though, as already noted, one, Harry Blackmun, soon strayed and primarily aligned himself with Brennan and Marshall. The new conservative-leaning phalanx, however, was able to form alliances with more moderate and accommodating holdovers from the Warren Court, namely Potter Stewart and Byron White. Stewart provided the fifth vote in *Milliken*. Justice White wrote the majority opinion in *Washington v. Davis* and Stewart joined the essential sections of that opinion. Both joined Justice Rehnquist's opinion in *Rizzo v. Goode*.

Starting in the 1980s and continuing well into the twenty-first century, this more conservative wing of the Court was supplemented by the appointees of Presidents Ronald Reagan (1980-1986), George H. W. Bush (1986-1992), George W. Bush (2000-2008), and more recently Donald Trump (2016-2020). Of course, a number of these individuals who were appointed by Republican presidents went the way of Harry Blackmun. John Paul Stevens, for example, often sided with the liberal bloc, especially in the later years of his tenure. So did David Souter, who had been appointed by

19 Washington v. Davis, 426 U.S. 229 (1976); *see* Owen Fiss, *The Accumulation of Disadvantages*, 106 CAL. L. REV. 1945 (2018).

20 Rizzo v. Goode, 423 U.S. 362 (1976); *see* Owen Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1154-61 (1977).

the first President Bush. In the election of 1976, Jimmy Carter, a Democrat, beat Gerald Ford, but, through a quirk of history, no vacancies occurred during his presidency. Later, two Democratic Presidents, Bill Clinton (1992-2000) and Barack Obama (2008-2016), made a number of appointments to the Supreme Court as well. These appointments were not, however, able to alter the fundamental shift in the Court's civil rights jurisprudence and to restore it to the point where it had been before the mid-1970s.

Even after the personnel change on the Court that occurred in the 1970s, the great civil rights acts of the 1960s remained on the books. They were enforced by lawsuits brought by personal victims, and now and then by litigation initiated by the Department of Justice. These statutes were supplemented by a number of enactments, principally the 1982 Amendments of the Voting Rights Act of 1965,[21] the Civil Rights Restoration Act of 1987,[22] and the Civil Rights Act of 1991,[23] all of which were enacted when Democrats controlled Congress. These measures did not, however, add significant dimensions to the Second Reconstruction or revitalize it in any meaningful sense. They sought only to correct the allegedly errant ways of the Republican-dominated Supreme Court on those occasions when Congress took issue with the Court's interpretation of the great civil rights acts of the 1960s and the doctrines to which those statutes gave rise. Notably, no statute was passed by Congress to transcend or modify the effect of the Court's decision in *Milliken v. Bradley*—to impose a higher standard on school boards than the Court construed the Constitution to impose.

In truth, the momentum of the Second Reconstruction during the phase of the Supreme Court's history that began in the mid-1970s was primarily maintained by state and local governments, and by various institutions of civil society, including the leading universities of the nation. Legally enforceable obligations to further racial justice had virtually been reduced to naught, certainly in the field of public education, and as a result the primary constitutional question facing the Supreme Court during the epoch that began in the mid-1970s was, and continues to be, one of permission: does the Equal Protection Clause allow the reconstructive measures that these institutions adopted?

In resolving this question, the Supreme Court has generally been guided by a legal test or heuristic—strict scrutiny. This test has been treated as more than an evidentiary rule calling for a searching, hard-nosed factual inquiry

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21 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

22 Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

23 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1070 (1991)

to determine whether the particular measure before the Court benefited rather than disadvantaged Blacks. Rather, it has been used to determine whether a contested reconstructive measure—even if it can be assumed to improve the status of Blacks—is consistent with equal protection. Strict scrutiny has been used as a substantive, rather than evidentiary, test and as such required that the measure in question serve a compelling public purpose and be narrowly tailored to achieve that purpose. In this way, the narrow tailoring requirement found a new home. It became a component of strict scrutiny and turned out to be a favorite of Justice Anthony Kennedy.

Kennedy was appointed to the Court by President Reagan in February 1988 and, over the next thirty years on the bench, he invoked the narrow tailoring component of strict scrutiny in a wide variety of cases, including affirmative action[24] and electoral districting.[25] It allowed him to navigate between the warring factions that divided his colleagues and enabled him to appear as a centrist or moderate.[26] To me, however, Kennedy's most revealing application of the narrow tailoring requirement occurred in the 2007 *Parents Involved* case,[27] where he cast the decisive fifth vote to invalidate the modest desegregation plans that had been adopted by the Seattle and Louisville school districts. An examination of that ruling, and in particular Justice Kennedy's separate concurring opinion, will reveal the circumstances that gave narrow tailoring such great prominence in recent decades and how the Justice transformed it into a platform for advancing his own moralistic meanderings.

By the time *Parents Involved* reached the Supreme Court, *Brown v. Board of Education* had been thoroughly ravaged. After *Milliken v. Bradley*, it was no longer thought affirmatively to compel integration. Rather, it was viewed as a narrow prohibition on the use of race to segregate students. As a purely technical matter, *Milliken v. Bradley* addressed only the issue of metropolitan desegregation, but it was almost immediately understood to extend much further, defining the obligation of school boards acting within the bounds of their own districts.[28] In legal terms, de jure segregation was unconstitutional

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24 *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013); Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

25 *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

26 *See, e.g.*, Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

27 Parents Involved v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

28 On July 26, 1974, only days after *Milliken* was handed down, Judge Jack Weinstein, then managing the famous desegregation case concerning the Coney Island area of New York City, acknowledged

and had to be stopped. Yet no such obligation was imposed on so-called de facto segregation—the racially segregated demographic pattern resulting from the assignment of students to schools in their neighborhoods in a district where the residential patterns are racially segregated.

Even after *Milliken v. Bradley*, the rulings in the Charlotte-Mecklenburg and Denver cases remained on the books. These two rulings condemned segregated patterns of student attendance resulting from a confluence of neighborhood school policies and residential segregation. One required, as we saw, "the greatest possible degree of actual desegregation," the other called for "all-out desegregation." These decisions assumed, however, that the segregated patterns of student attendance were vestiges of past racial assignments—the various schools were either endowed by the racial assignments with a racial identity or neighborhoods were formed by those assignments so as to create segregated residential patterns. But as time wore on, it became increasingly difficult, almost impossible, to view the demographic student attendance patterns—white students in one set of schools, Black students in another—as primarily a vestige of earlier, long-prohibited racial assignments. The causal assumptions underlying such a characterization simply became untenable. As a result, by the 1990s, *Brown* was no longer seen as a vital source of a legally enforceable obligation to integrate public schools or, to use the *Charlotte-Mecklenburg* formula, to create "the greatest possible degree of actual desegregation."

Although *Milliken* and the decisions that followed in its wake diluted the force of *Brown*, they did not define the entire field of action for local school boards. These decisions determined what was required, not what was permissible. Local school boards were still free to try, as a matter of policy, to take steps that would avoid or at least minimize racially segregated patterns of student attendance. As with any policy decision, local school boards were hemmed in by practical necessities and the vicissitudes of politics. Nonetheless, some, like those in Seattle and Louisville, forged ahead, doing what they could to integrate their schools.

As a general matter, the Seattle and Louisville school boards assigned students to schools on the basis of their residence. Given the racial character of these cities' residential patterns, it was no surprise that the neighborhood school assignment policy produced racially segregated patterns of student attendance. That in turn led these two school boards to institute a transfer

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the great significance of that decision for the law of school desegregation. Hart v. Cmty. Sch. Bd., 383 F. Supp. 769 (E.D.N.Y. 1974).

program—the point of contention in *Parents Involved*—that might, to a modest degree, enhance the possibility of racial integration. Under this program white students would be given a priority in transferring to predominantly Black schools and Black students would be given a priority in transferring to predominantly white schools.

Under the terms of this transfer program, the right to transfer depended on the availability of space in the receiving school. If the number of students applying for those openings exceeded the number of available seats, priority was given first to applicants with a sibling in the receiving school; then to applicants who lived closest to the receiving school; and finally to those applicants who would be considered a racial minority in the receiving school. Application of this third transfer criterion required knowledge of the applicant's race and the receiving school's racial composition. Since this information was used to allocate a scarce opportunity, the prevailing Supreme Court doctrine required assessment under strict scrutiny.

Chief Justice Roberts announced the Court's decision invalidating the Seattle/Louisville transfer program. Only three other Justices—Antonin Scalia, Clarence Thomas, and Samuel Alito—joined the opinion Roberts filed to support the Court's ruling. In this opinion, the Chief Justice first addressed whether the transfer program served a compelling public purpose. In so doing, he came to a remarkable conclusion: forget whether school integration is compelling, it is not even legitimate. In expressing that view, Roberts employed a literary device unworthy of a Chief Justice of the United States. Instead of speaking of integration or "actual desegregation," he referred to "racial balance."[29] This term had been employed in the 1960s and 1970s, mostly in political circles, by the critics of *Brown v. Board of Education*, who sought to confine that decision to its narrowest possible compass and reduce it to a ban on racial assignments. As those critics proclaimed, *Brown* prohibited segregation but did not require integration.

Justice Kennedy saw through Chief Justice Roberts's rhetorical strategy. In a separate concurrence, Kennedy openly spoke of integration and "racial isolation," a term first introduced by the United States Commission on Civil Rights in the mid-1960s during the debates over the legality of de facto segregation.[30] The opening of Kennedy's opinion was remarkably bold: he declared that the Chief Justice was "profoundly mistaken" in his belief that school integration is not even a legitimate, let alone compelling, public

29 *Parents Involved*, 551 U.S. at 726.

30 1 U.S. COMM'N ON CIV. RTS., RACIAL ISOLATION IN THE PUBLIC SCHOOLS at v (1967).

purpose.[31] This enabled Justice Kennedy to frame his application of strict scrutiny as it should have been framed—by openly acknowledging the importance, indeed the urgency, of Black and white students attending school together and the constitutional source of his belief. As he put it in the closing movement of his opinion: "This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."[32]

Given this belief, Kennedy felt the need to address the distinction between de facto and de jure segregation. Although he endorsed that distinction, his reason for doing so did not in any way undermine his conviction that school integration or the elimination of racial isolation is a compelling public purpose. Kennedy acknowledged that segregation produced by racial assignments and segregation produced by a neighborhood school plan in districts with racially segregated neighborhoods affect the lives of children attending these schools in nearly identical ways. Yet he feared that condemning de facto segregation as a constitutional matter—and thus abolishing the legal distinction between it and de jure segregation—would, in effect, put the judiciary at the forefront of a massive reconstructive endeavor: making certain that we have not white schools, not Black schools, but just schools. Such an enlargement of judicial authority would, Kennedy concluded, offend his understanding of the judiciary's proper role in a democracy or, put differently, violate Separation of Powers principles.

In the end, Justice Kennedy refused to condemn school segregation taken as a demographic pattern as violative of the Equal Protection Clause. He was prepared, however, to recognize integration, or the eradication of de facto segregation and racial isolation (to use the legalistic circumlocutions), as a legitimate, indeed compelling, purpose. What's more, he seemed to welcome remedial action to further that purpose by the more political branches of government, local and federal. Everything turned on the means chosen.

In his *Parents Involved* concurrence, Kennedy specifically endorsed the right of the school board to adjust geographic attendance zones in such a way as to increase racial integration.[33] He also explicitly approved of the practice of locating new schools at sites that would serve the same end. In these instances, the school boards would be very much aware of the impact that

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31 *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring).

32 *Id.* at 797 (Kennedy, J., concurring).

33 *Id.* at 787-88 (Kennedy, J., concurring).

their decisions would have on the racial make-up of the student body—choices would be made based on the racial composition of the district's various neighborhoods. In this way, race would be used, but not as a criterion for allocating a scarce opportunity to one individual as opposed to another. These integrative strategies would not entail racial classifications as that term is ordinarily understood. Accordingly, Kennedy found these particular methods of achieving integration entirely unobjectionable, not even subject to strict scrutiny. He rejected the notion that the state must be colorblind or that any measure predicated on an assessment of its impact on racial groups is especially suspicious.

On the other hand, Justice Kennedy put the Seattle/Louisville transfer program at issue in *Parents Involved* in another category. Because it classified individuals on the basis of race and then allocated scarce opportunities in accordance with these classifications, it should be subject, he felt, to strict scrutiny. As such, the transfer program could only be upheld if it was narrowly tailored and, in the end, Kennedy concluded that, because it employed racial classifications, it failed to satisfy the narrow tailoring component of strict scrutiny. The transfer program gave a Black applicant priority over a white applicant when both sought to transfer to a predominantly white school or gave a white applicant priority over a Black applicant when both sought to transfer to a predominantly Black school. For this reason, Kennedy provided the decisive fifth vote against the transfer program, effectively invalidating it as a matter of law.

Justice Kennedy thus used the presence of a racial classification in the Seattle/Louisville transfer program for two distinct purposes: first, to trigger strict scrutiny and second, to invalidate the program on the grounds that it was not narrowly tailored. In a number of instances, Kennedy justified on largely pragmatic grounds the rule making the presence of racial classifications into a trigger for strict scrutiny: racial classifications enhanced divisiveness and therefore, according to Kennedy, any measure that employed them, even if it improves the status of Blacks, should be strictly scrutinized.[34] In *Parents Involved*, Kennedy went one step further and relied a moral objection to racial classifications as the ground for invalidating the Seattle/Louisville transfer program under the narrow tailoring component of strict scrutiny. As he there put it, the use of race in the Seattle/Louisville transfer program reduces individual applicants to "racial chits valued and

34 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). *See also* Siegel, *supra* note 26.

traded according to one school's supply and another's demand."[35] Such "race typing" of individuals by a state agency was, Kennedy concluded in the decisive turn of his *Parent's Involved* analysis, "inconsistent with the dignity of individuals in our society."[36]

The language Justice Kennedy used to describe the workings of the Seattle/Louisville transfer program—"race typing," reducing individuals to "racial chits," and having school authorities abide by a strange law of "supply" and "demand"—is indeed captivating. Yet it seems exaggerated. Identifying an individual's race as white or Black is sometimes challenging, especially in modern times, as the rate of marriage between whites and Blacks increases. But categorizing individuals on the basis of their race is a common practice of school administrators and often occurs in government surveys like the United States Census. Justice Kennedy has never insisted on colorblindness in an epistemological sense.

Admittedly, practical consequences flow from the racial classifications called for by the contested transfer program, but they hardly reduce applicants who wish to transfer to "racial chits," no more than the feature of the transfer program that creates a preference for those applicants who have a sibling in the receiving school reduces the individuals subject to that rule to "chits" of another variety. No one would be demeaned by using race as an allocative criterion in administering the transfer program. It would be well understood that school authorities are simply gathering information necessary to enhance the integrated character of the educational program they offered. In so doing, they would not be responding to a watered-down version of the law of supply and demand that ordinarily governs economic transactions; they would only be passing over those applicants whose transfer would not further the goal of promoting racial integration in their schools.

Four Justices dissented. Two—Ruth Bader Ginsburg and Stephen Breyer—were appointed to the Court by a Democrat, Bill Clinton. A third—David Souter—owed his appointment to a Republican president, George W. H. Bush. The fourth—John Paul Stevens—had been appointed by yet another Republican president, Gerald Ford. Breyer's opinion, which the other three Justices joined, became the principal dissent. Surprisingly, Breyer did not express, in any clear and obvious way, qualms about Kennedy's morally charged description of the Seattle/Louisville transfer program. In fact, Breyer seemed to concede that denying transfer

35 *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring).

36 *Id.* at 797.

applications on the basis of race in the way Seattle and Louisville contemplated would inflict a harm on society and perhaps on the individuals who might have applied for a transfer—he called it a "cost."[37]

In the end, Breyer concluded that this harm was dwarfed by the harms that the school authorities were trying to counter by increasing the integrated character of the education they offered. Although Breyer's dissent is exceedingly long (nearly eighty pages), his discussion of Justice Kennedy's objection to the Seattle/Louisville transfer program essentially consists of two sentences (interrupted only by a page reference to the nub of Kennedy's discussion): "This is not to deny that there is a cost in applying 'a state-mandated racial label.' But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and the 80 years of legal racial segregation."[38] The reader is left to draw his or her own conclusion about the balance of costs and benefits.

In couching his response to Kennedy in these terms, Breyer seems to have ignored the fact that Kennedy was not making a general ethical claim about the balance of costs and benefits. Rather, Kennedy was pinning his dignity-based objection to the transfer program on the narrow tailoring requirement, which is governed by a distinctive internal logic. In the context of strict scrutiny, narrow tailoring does no more than restrict the means used to achieve a compelling public purpose; it demands that the means chosen by the government be necessary to the attainment of the compelling public purpose. Faithful to the instrumental logic of narrow tailoring, and almost in conversation with Breyer's reminder about the burden of our history and the urgent need for school integration, Kennedy added: "Even so, measures other than differential treatment based on racial typing of individuals must first be exhausted."[39] As it turned out, Kennedy's objection to so-called racial typing was only an exhaustion requirement—avoid it if you can; try something else first.

This downward adjustment to the rigor of Kennedy's objection to the Seattle/Louisville transfer program made that objection more palatable. Yet it exposed a fault line that ran throughout Kennedy's entire approach—his decision to attach to the narrow tailoring requirement an objection to the transfer program that was based on a proper regard for human dignity. For one thing, it is difficult to understand how such a dignitary-based objection could ever be defeated or even ignored simply because the contested state

37 *Id.* at 812 (Breyer, J., dissenting).

38 *Id.* at 867 (citation omitted).

39 *Id.* at 798 (Kennedy, J., concurring).

measure is deemed instrumentally necessary to the attainment of a compelling public purpose. Typically, respect for human dignity calls for more absolute constraints, as we can see in the case of torture. Torture is almost universally proscribed on the ground that it is an offense to human dignity and as a result, it is not allowed even when it turns out that torture is the only way of obtaining information needed to avoid a greater harm, such as the killing of another, or even the killing of a number of people.[40] I would therefore say that appending the dignitary-based objection to the narrow tailoring requirement, in effect, debases what we might expect from an ethical or even a constitutional rule founded on a respect for human dignity. Even more, it compromises the integrity of the narrow tailoring requirement.

The narrow tailoring requirement constitutes the instrumental component of strict scrutiny. It calls for an exercise of means-end rationality and a judgment of whether the means chosen by the state to pursue a public purpose is as exacting as it could be. Granted, the insistence on a tight fit between means and ends is grounded in an overarching moral purpose: to minimize the infringement of the underlying constitutional norms. Respect for narrow tailoring might, in that way, enlarge the enjoyment of equal protection. Yet narrow tailoring is not the domain in which independent normative judgments are to be made. Indeed, I would say that such judgments are extraneous to narrow tailoring. These judgments are to be made by the exercise of substantive rationality, in which reason is used to examine the desirability and importance of the ends that might be pursued by the state.

The internal logic and structure of the narrow tailoring requirement might be best illustrated by an example outside the school desegregation context.[41] Imagine that two police officers are killed in a drive-by shooting while they are sitting in their patrol car. The mayor and the police chief, indeed the entire force, are outraged, determined to apprehend the perpetrators of this crime. A witness to the shooting describes the killers as two young Black men. In response to this information the police chief launches a massive manhunt in the city's predominantly Black neighborhood. Young Black men are picked up on the streets, detained for questioning, and their alibis are checked. Without prior notice and at all hours of the day, squads of police officers demand entry into apartments in

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40 *See generally* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015).

41 The example is drawn loosely from the famous Fourth Circuit decision in *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966).

the Black neighborhood, searching for the killers. Members of the Black community then bring suit to stop this aggressive manhunt and the dragnet search that it entailed. Finally, let us also assume that the lawsuit alleges that such police action constitutes a violation of the Equal Protection Clause.

In our hypothetical scenario, the police used race in a pronounced way: to define targets of the manhunt. Accordingly, both the decision that launched the search and the directive governing its implementation would be closely scrutinized. In applying the strict scrutiny test, the court must first exercise substantive rationality. It must assess the permissibility or worthiness of the purpose underlying the police chief's decision to so deploy his force in the way he did. Presumably, the court would deem this purpose—to ensure the safety of the police and the community in general—compelling. The question would then arise as to whether the means the police adopted—the race-based manhunt and dragnet—to achieve this compelling public purpose is narrowly tailored. Are there other techniques or strategies that might have been used to locate the killers that would have been less grossly offensive to equal protection? Track the car. Check the surveillance cameras. Search for neighbors in the vicinity who might have seen the killing. Offer high rewards for information leading to the arrest and conviction of the killers.

In this example, the narrow tailoring requirement safeguards the values protected by the Equal Protection Clause. It requires the state to avoid those practices that perpetuate the subjugation of the Black community. Other constitutional norms—for example, the Fourth Amendment prohibition against unreasonable searches and seizures—might also be offended by the manhunt and dragnet search. Those additional provisions might be invoked, either by the parties or the court itself, and co-joined with the equal protection claim and if so, these provisions might act as independent, alternative sources of values that the court might seek to vindicate. Under no circumstances, however, should the values protected by these alternative constitutional provisions, such as the Fourth Amendment, be smuggled into the court's equal protection analysis though an application of the narrow tailoring component of strict scrutiny.

Similarly, even if Justice Kennedy was right in objecting to the Seattle/Louisville transfer program on the ground that it offends human dignity, such a judgment—most certainly an exercise of substantive rationality—should not be smuggled into his equal protection analysis through the application of the narrow tailoring requirement. This, mind you, is not a plea for analytic clarity for the sake of analytic clarity. Much

more is at stake. Kennedy's use of the narrow tailoring requirement as a platform for moralizing obscured, possibly even masked, the true nature of his judgment. It allowed him to present a deeply normative judgment as though it were only an instrumental, highly technical one about the relationship between means and ends. Using the narrow tailoring requirement in this way also relieved Kennedy of his responsibility to locate, with some precision, the constitutional provision or provisions that guarantee the protection of human dignity, which turns out to be the true source of his decision to strike down the Seattle/Louisville transfer program.

Some countries have included a prohibition against governmental action that offends human dignity in their constitutions. The German Constitution contains such a provision. The United States Constitution does not. In the face of this lacunae, some jurists have insisted that a respect for human dignity is implicit within the American Constitution; it is as a foundational value that pervades each and every provision, especially the Bill of Rights and Civil War Amendments, and should therefore guide their interpretation.[42] There is much to this view. Not so much, however, when it is used to turn the Equal Protection Clause into a rule that prevents school authorities from desegregating their schools as fully as they might. Such rule ignores the offense to human dignity arguably arising from the maintenance of racially segregated schools and the perpetuation of the caste structure attributable to such a practice. It also prevents local school authorities from taking action that appears to further the central purpose of the Equal Protection Clause and for that very reason deemed to serve a compelling public purpose. Kennedy's well-known fascination with dignity had always seemed admirable to me, especially when used to protect marginalized groups, but in this instance it seems to have gotten completely out of hand.

This criticism of Justice Kennedy's stance in *Parents Involved* is largely premised on the view, based on the historical record, that the overarching purpose of the Equal Protection Clause is to prevent the state from taking any action that would aggravate, or even perpetuate, the havoc wreaked upon the Black community by the centuries-old institution of slavery.[43] Of course, some of the Justices responsible for the *Parents Involved* ruling might

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42 William J. Brennan, Jr., Associate Justice, Supreme Court of the U.S., Text and Teaching Symposium at Georgetown University: The Constitution of the United States: Contemporary Ratification (Oct. 12, 1985) (describing the U.S. Constitution as a "sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law"); Dieter Grimm, *Freedom of Speech and Human Dignity*, *in* OXFORD HANDBOOK OF FREEDOM OF SPEECH 106 (Adrienne Stone & Frederick Schauer eds., 2021).

43 *See* Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

dispute this understanding of the Equal Protection Clause's basic purpose. I take that to be the necessary implication of the now-famous quip with which Chief Justice Roberts concluded his opinion: the only way to end discrimination is to stop discriminating.[44] I further assume that the three Justices who joined the Chief Justice's opinion—Scalia, Thomas, and Alito—shared in this sentiment. For them, the overarching purpose of the Equal Protection Clause is to prevent discrimination based on race: a process as opposed to the unfortunate consequence—the subordination of Blacks—that might possibly result from that process.

The four Justices who dissented in that case seemed to be of an entirely different mind. Reflecting their understanding of the overarching purpose of the Equal Protection Clause, they, unlike Kennedy, even doubted the appropriateness of judging the Seattle/Louisville transfer program under strict scrutiny. Nevertheless, I would venture to say that Justice Kennedy embraced their understanding of the overarching purpose of the Equal Protection Clause. He parted company with them, however, when he insisted upon what might be called the blanket version of strict scrutiny. Under this version, strict scrutiny is triggered whenever the state uses a racial classification, even if that measure would improve the position of Blacks in American society. Yet this difference was not based on a denial of the central meaning of the Equal Protection Clause—to guard against the institution and maintenance of caste. Rather, it was based on a contestable, pragmatic judgement—that the use of racial classifications, even when they improve the status of the underclass, will be divisive, cause racial strife, and put off the day when race would no longer matter.

Kennedy more nearly approached the position of the dissenters in *Parents Involved* when he repudiated colorblindness as a legal requirement and acknowledged that from the victims' perspective, the harm attributable to de facto and de jure segregation is pretty much the same. He approved of the modification of attendance zones and the construction of new schools as ways to eradicate segregated patterns of student attendance. He deemed integration a compelling public purpose for the purpose of applying the strict scrutiny test. He also paid tribute to *Brown v. Board of Education* when he spoke movingly of the nation's commitment to become an integrated society that provided equal educational opportunities to all its children.

These features of Justice Kennedy's *Parents Involved* concurrence reveal the ground he shared with Breyer who dissented and in truth abound to

44 *Parents Involved*, 551 U.S. at 748.

Kennedy's credit. Kennedy stumbled, however, when he turned his often-expressed distaste for racial classifications into an offense to human dignity; he compounded that error by presenting this objection to the Seattle/Louisville transfer program as a transgression of the narrow tailoring requirement; and he then, most unfortunately, used this breach of the narrow tailoring requirement to strike down the modest efforts of Seattle and Louisville to desegregate their schools. Kennedy turned dignity into a limit on equality and most perversely did so in the name of the Equal Protection Clause, which, in truth, was adopted to safeguard the freedom and dignity of the newly freed slaves.

THE FUTURE OF NARROW TAILORING

For a half century now, the Supreme Court has been moving backwards on civil rights. In the mid-1970s, when it handed down *Milliken v. Bradley* and placed decisive limits on *Brown v. Board of Education*, the Court renounced its leadership of the Second Reconstruction and the process of dismantling American society's caste structure. Then, when a good number of political and civil institutions attempted to fill this void, seeking to advance the aims of the Second Reconstruction on their own, a newly reconstituted Court—first led by Warren Burger, then by William Rehnquist, and now John Roberts—began policing their civil rights policies. On some occasions—most notably, the 2007 *Parents Involved* decision—the Court went so far as to obstruct voluntary school integration. Even Justice Stevens, so uniquely positioned to understand the Court's volte face, ended his *Parents Involved* dissent on a haunting note: "It is my firm conviction that no Member of the Court I joined in 1975 would have agreed with today's decision."[45]

In charting this new, arguably reactionary course, the majority that prevailed encountered strong and passionate protests from their colleagues. Both *Milliken v. Bradley* and *Parents Involved* were 5 to 4 decisions. In both cases, moreover, one of the five-person majority wrote a separate opinion to explain his vote; in *Milliken* it was Potter Stewart and in *Parents Involved* it was Anthony Kennedy. Apparently, they had listened to the dissenters and had felt, much like an undertow, the pull of their words. Even more remarkably, both Justices relied on the narrow tailoring requirement, thereby giving great prominence to a previously obscure branch of the law. While Stewart found the narrow tailoring requirement in equity jurisprudence, Kennedy saw it as a component of strict scrutiny.

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45 *Id.* at 803 (Stevens, J., dissenting).

This reliance on the narrow tailoring requirement endowed Stewart's and Kennedy's positions on school desegregation with a measured, temperate quality. It seemed as though their votes were compelled by a purely technical concern—the fit between means and ends was not as close as it could have been. Upon closer examination, however, we see that this impression was an illusion. In each case, these Justices used the law of narrow tailoring to mask deeper, broader, and more contentious grounds of decision.

What divided Stewart from those who dissented in *Milliken* (Marshall, Brennan, Douglas, and White) was not a technical issue concerning the scope of equitable remedies. Rather, it was a disagreement about the meaning of equal protection when the segregated pattern of student attendance spanned contiguous school districts, a disagreement about Michigan's responsibility to redraw school district boundaries so as to end that segregation, and even a disagreement about the role of the federal judiciary in American society. Stewart made a pass at some of these issues, but only in a few sentences of a footnote that he addressed, touchingly, to Thurgood Marshall.

Similarly, what divided Kennedy from those who dissented in *Parents Involved* (Breyer, Ginsburg, Souter, and Stevens) was not a disagreement about whether the Seattle/Louisville transfer plan adequately fit the end it was supposed to serve—integration. Obviously, it did. Rather, the division arose from a disagreement about whether the use of racial classifications in a program designed to integrate public schools offends human dignity and if so, whether the Constitution should be construed to prevent such an alleged offense when doing so would preclude state agencies from instituting a program that itself responds to concerns of human dignity and furthers the overarching purpose of the Equal Protection Clause—to guard against the maintenance and perpetuation of a caste system.

The narrow tailoring requirement cannot resolve issues so profound and far-reaching as these. The version of the narrow tailoring requirement that arises from equity jurisprudence and the rules regarding the scope of injunctions can safely be abandoned altogether; its practical effect is canceled by another requirement of equity that mandates broad and effective remedies. Every judge understands the importance of defining the violation of law with clarity and precision, for an injunction is nothing more than a legal instrument for preventing a violation of law from occurring or recurring, or to eradicate the effects of a violation of law that had already occurred. When the violation or its effect is broad, the injunction must be broad. When the violation is attributable to institutional failures, the internal

structure of the institution will have to be reformed in order to protect the violation from recurring.

The situation with the narrow tailoring requirement, drawn from strict scrutiny, is more complicated. Narrow tailoring makes sense as a component of strict scrutiny when state action appears to threaten equal protection values, as it did in the police-dragnet hypothetical, in order to achieve some compelling public purpose such as public safety—important but not directly linked to the central meaning of the Equal Protection Clause. Instead, the contested action in such a case will be defended on the ground that it is an excusable violation of that provision of the Constitution. In that instance, the narrow tailoring requirement, seen as an exercise of instrumental rationality, would economize on the sacrifice of equal protection values. As such, it reflects the understandable desire, as frequently expressed in free-speech cases, where strict scrutiny also applies, to hold out for the least restrictive alternative.

Conceivably, strict scrutiny may also be used when state action appears, as was the case in *Parents Involved*, to further, rather than offend, the values protected by the Equal Protection Clause. In this context, the narrow tailoring requirement provides a second hurdle—the first is the compelling public purpose component, which, almost by hypothesis, is satisfied. Admittedly, good intentions are often not good enough, so it might seem appropriate for the Court to ascertain that the means chosen by the state are reasonably calculated to achieve this purpose. Such a rule would be a more relaxed version of the instrumental component of strict scrutiny than the narrow tailoring requirement. However, even if this option is not pursued and the more traditional narrow tailoring component of strict scrutiny is retained in such cases, as seems likely to occur in the near future, that requirement should be emphatically confined to an instrumental assessment of the means the state chose to pursue particular ends. Under no circumstances should it become a vehicle for moral speculations about human dignity, especially when such speculations interfere with the progressive realization of the overarching purpose of the Equal Protection Clause.

Even once the law of narrow tailoring is shorn of its excesses, the issues that divided the center and more liberal wings of the Court—and that in truth account for Justice Stewart's and Justice Kennedy's concurrences—will remain. These issues are supremely difficult and do not lend themselves to any easy answers. The hope is, however, that if the Justices who occupy such positions can put aside their debates about narrow tailoring and openly

discuss that which truly divided them, the agreement that at first seemed unattainable might be achieved.

In addition, recognizing the limited domain of the law of narrow tailoring might well also enhance the integrity of the Court's deliberations as a whole and eventually improve the quality of its opinions. The mask narrow tailoring might otherwise provide for minimizing the threat to equal protection values (as occurred in *Milliken*) or for undisciplined moralizing (as occurred in *Parents Involved*) would be removed. In this way, the stated reason for a decision might more closely approximate the actual reason for it. Such a change would facilitate critical analysis of the Court's work and thus strengthen the system—maybe the only system—through which we may hold Justices accountable.