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Note

Judicial Opinion as Historical Account: Parents Involved and the Modern Legacy of Brown v. Board of Education

Scarlet Kim*

The story of school desegregation in America is so pivotal to our understanding of the Civil Rights Movement that divergent interpretations become more than scholarly endeavors; they rattle our faith in social change. The story about desegregation traditionally begins with Brown v. Board of Education.1 When Michael Klarman first suggested in 1994 that Brown may have contributed less to the Civil Rights Movement than conventionally believed,2 legal historians pilloried his scholarship.3

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Brown had attained a position "so politically sacrosanct" that any recalibration of its import or influence threatened to fundamentally undermine the accepted history of the Civil Rights Movement itself. Although Klarman's theory is no longer as controversial as it once was, debates over the legacy of Brown continue to raise fundamental questions about social change in America that transcend the bounds of academic dispute.

Much of the reinterpretation of Brown's significance naturally focuses on the history of the Supreme Court, particularly on its role in effecting

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contention that "a transformation in American race relations was . . . a virtual inevitability" by 1950, a highly optimistic assertion that leads him to claim that Brown was "unnecessary from the perspective of long-term racial change." He continues with the even more dubious argument that "regardless of Brown, the underlying forces for racial change," such as international events and the increasing emergence of a black middle class, "would have led to congressional legislation to squelch" the most visible manifestations of southern segregation.

Mark Tushnet, The Significance of Brown v. Board of Education, 80 VA. L. REV. 173, 184 (1994) ("One might be as pessimistic as Professor Klarman is in his characterization of Brown, and as optimistic as he is in his determinist account of the transformation of race relations, without thinking that his pessimism is properly attached to Brown when characterized as a Supreme Court decision. To the extent that Professor Klarman appears to believe that he has established the unimportance of Brown in that sense, and to believe that he has deepened our understanding of the limits of judicial power, he is mistaken."). Several years prior to the publication of Klarman's argument on the subject, Gerald Rosenberg advanced a more extreme view, categorically dismissing the importance of Brown in catalyzing the successes of the Civil Rights Movement. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Rosenberg's discussion of Brown, however, was embedded within a larger argument about judicial efficacy and social change. Perhaps legal historians found Klarman's thesis more threatening because it did suggest a connection between Brown and the Civil Rights Movement, just not the relationship traditionally depicted in academic literature. See Garrow, Hopelessly Hollow History, supra, at 151-52 & n.7 ("Gerald N. Rosenberg's wholly unpersuasive contention that Professor Klarman . . . overstates Brown's influence" because the decision was "merely a ripple" with only "a negligible effect" on intensifying southern segregationist sentiment is so thoroughly rebutted and disproved by a credible and copious scholarly literature that no further rejoinder is required.").

4. Michael J. Klarman, Brown v. Board of Education: Facts and Political Correctness, 80 VA. L. REV. 185, 185 (1994) (observing that "it is today unacceptable not only to question the constitutional basis of Brown but also to ponder the decision's significance for the civil rights revolution of the 1960s"); see, e.g., Tushnet, supra note 2, at 174 ("Professor Klarman's account has the peculiar and no doubt unintended effect of substantially reducing the apparent role of African Americans [in the Civil Rights Movement], coming close to eliminating African Americans as historical agents, as acting subjects in the historical process rather than its objects.").


6. Garrow, "Happy" Birthday, supra note 4, at 728-29 (arguing a decade after the original presentation of Klarman's thesis that Klarman's "interpretation of Brown will not be embraced by celebrants of Brown's fiftieth anniversary" and that "more is at stake here than simply Brown's historical stature and reputation").
One interesting question that arises from these inquiries is how the Court itself understands the legacy of Brown. Of course, the Court has articulated its interpretation of Brown as legal judgment and judicial precedent time and time again. But to what extent has the Court expressed an understanding of Brown as historical event? Has the Court recognized Brown as embedded within a larger history of race relations in America? And if so, how has this recognition influenced the Court's evaluation of its own role in this history?

This paper will consider these questions by analyzing the judicial opinions in Parents Involved in Community Schools v. Seattle School District No. 1. The case, which considers whether local school districts may voluntarily adopt race-conscious student assignment plans in pursuit of racially integrated schools, may be read as “the final chapter of the constitutional and cultural legacy of Brown in public education.”

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7. See Jack M. Balkin, Preface to What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision xi (Jack M. Balkin ed., 2001) (“Brown has become a symbol of the role of courts in a democracy. It has been at the center of a continuing debate over the role of law in reshaping society, the extent to which courts can successfully push for lasting social change, and the legitimacy in their trying to do so.”); Rosenberg, supra note 2 (arguing that the Supreme Court is ineffective at catalyzing widespread social change and utilizing Brown and its aftermath as an example); Garow, “Happy” Birthday, supra note 4, at 728-29 (observing that Klarman’s book, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality, aims “to convince us that no decision of the U.S. Supreme Court can ever ‘fundamentally transform a nation’”); see also Garow, “Happy” Birthday, supra note 4, at 722-23 (noting that “[e]xtreme conservatives were ecstatic” by the publication of Rosenberg’s book for its attempt “to dispare the widespread belief that the greatest lesson of modern American legal history is that the Supreme Court can, and often has, almost single-handedly brought about transformative change in American life in decisions ranging from Brown to Baker v. Carr to Roe v. Wade”).

8. The Supreme Court’s interpretation of Brown’s legal holding has also evolved over time. The Court initially interpreted the holding of Brown quite narrowly. In 1958, the Court held in Cooper v. Aaron, 351 U.S. 1 (1958), that Brown stood for the proposition “that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property.” Id. at 2. However, “[w]ithin a decade . . . the meaning of Brown began to change and expand, both within the larger political culture and in the opinions of the Supreme Court itself.” Jack M. Balkin, Brown as Icon, in What Brown v. Board of Education Should Have Said, supra note 6, at 3, 9. In a series of subsequent decisions, the Court affirmed lower court orders requiring the desegregation of a variety of public facilities. Id. at 9 & n.24 (citing to New Orleans Park Improvement Ass’n v. Dettiege, 358 U.S. 54 (1958) (per curiam) (public parks), aff’d 252 F.2d 122 (5th Cir.); Gayle v. Browder, 352 U.S. 903 (per curiam) (public transportation), aff’d 142 F. Supp. 770 (M.D. Ala.); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public bath houses and beaches), aff’d 220 F.2d 386 (4th Cir.)). In 1963, the Court cited Brown for the proposition “that a State may not constitutionally require segregation of public facilities.” Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (holding that “[s]tate-compelled segregation in a court of justice is a manifest violation of the State’s duty to deny no one the equal protection of its laws”). A year later, Justice Arthur Goldberg declared that Brown “affirmed the right of all Americans to public equality.” Bell v. Maryland, 378 U.S. 226, 287-88 (1964) (Goldberg, J., concurring) (considering whether state enforcement of racial discrimination by a private restaurant violated the Equal Protection Clause, but remanding in recognition of a supervening change in state law).


10. Goodwin Liu, Seattle and Louisville, 95 Cal. L. Rev. 277, 277 (2007); Robert L. Hayman,
Parents Involved represents the "third generation" in a typology of school desegregation cases. In "first generation" cases such as Brown, the Court ruled that racially segregated schools were inherently unequal and ordered their desegregation. In "second generation" cases, consisting primarily of a trio of cases in the early 1990s, the Court found that schools could abandon desegregation efforts once they had demonstrated a "good faith" effort at compliance. The "third generation" of cases feature school districts such as Seattle and Louisville that have voluntarily committed to continuing desegregation efforts, without the mandate of a desegregation decree.

Parents Involved arose "in the modern context of demographic trends that portend an increasingly diverse but segregated society." Confronted with this stark reality, the Seattle and Louisville school districts voluntarily adopted race-conscious student assignment plans with the purpose of preventing de facto segregation. These plans sought to ensure that the student population in each school reflected the racial demographics of their respective school district. By striking down these
plans, a plurality of the Court asserted an end to the story of Brown, to the constitutionally cognizable problem of racial segregation in public schools. The legal resolution of de jure segregation had drawn to a close; de facto segregation did not present an issue as a matter of law. As Chief Justice Roberts put it:

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.

Yet, the fractured nature of the judgment in Parents Involved challenges this conclusive reading of Brown. Resting on a fragile plurality and heavily contested by impassioned dissent, Parents Involved reveals a Court deeply divided over the meaning of Brown. In a collection of five separate opinions, the Justices use Brown in different ways both to weave an historical account and to arrive at legal judgment. Among legal historians, as among the Justices, these interpretive differences reveal a heated debate over the history of race relations in America and the Court’s role in shaping this history.

The first part of the paper will engage in a theoretical comparison of judge and historian. The first section of this part will consider significant areas of overlap. The earliest associations between judge and historian focused primarily on the mutual importance of storytelling or narrative. As historians gradually developed a methodology of evidence and proof, the comparison between judge and historian shifted to the use and

school into balance.” The racial tiebreaker served “to address the effects of racially identifiable housing patterns on school assignments.” Parents Involved, 551 U.S. at 711-12 (citations and internal quotation marks omitted). Louisville initiated a voluntary student assignment plan in 2001, following the dissolution of a desegregation order by the District Court in 2000. In a school district where approximately 66% of the students are white and 34% are black, the plan “require[d] all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.” The plan assigned students, living in designated geographic areas, to a cluster of elementary schools. Kindergartners, first-graders, and new students could “submit an application indicating a first and second choice among the schools within their cluster.” The school district then assigned “students to schools within their cluster...based on available space within the schools and the racial guidelines in the District’s current student assignment plan.” When “a school ha[d] reached the extremes of the racial guidelines, a student whose race would contribute to the school’s racial imbalance [would] not be assigned there.” Id. at 715-17 (citations and internal quotation marks omitted).

16. Balkin, Brown as Icon, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, supra note 6, at 7 (observing that “[t]he Supreme Court’s decisions have accelerated the federal courts’ drive to end existing desegregation orders” and that school districts that remain “technically subject to court orders...now face virtually no enforcement activity”); Wendy Parker, The Future of School Desegregation, 94 Nw. U. L. REV. 1157, 1157 (“Today, we commonly define the future of court-ordered school desegregation as a non-issue: either desegregation cases are dead or, at the very least, the death knell has sounded.”).

17. Parents Involved, 551 U.S. at 747 (emphasis added).
evaluation of sources to buttress legal argument or historical account.

The second section of this part highlights a significant tension between judge and historian. This tension hinges on the different purposes each role serves. While the judge must dispense justice, the historian endeavors to provide an accurate or truthful account of matters past. These divergent goals may inherently structure the use of evidence by judge and historian, contributing to differences in methodological means.

Given that judges must deliver legal judgment, not historical account, how do we assess historical accounts embedded in legal judgment? Focusing on the Supreme Court as an institution of public authority, this paper suggests that the Court has the power, through judicial opinion, to institutionalize particular historical accounts that influence the collective memory of the nation. This section draws on the work of Pamela Brandwein to suggest that this institutionalization of history is the product of an interpretive competition, whereby the Court produces multiple "historical truths." Parents Involved provides a useful lens for examining this contest, as its judicial opinions embody several competing interpretations of the significance of Brown in American history.

The second part of the paper will analyze the judicial use of history by the Supreme Court in Parents Involved. The first section of this part will explore the judicial use of history as evidence in Chief Justice Roberts’s plurality opinion, Justice Thomas’s concurrence, and Justice Breyer’s dissent. Framing Brown as akin to constitutional text, this section will illustrate how these Justices applied historical methods traditionally reserved for interpreting the Constitution to Brown itself. Chief Justice Roberts and Justice Thomas applied the methodology of intent theory, examining the history behind the Brown decision to defend the plurality’s interpretation of the meaning of Brown. Justice Breyer applied the methodology of ongoing history, analyzing the history since Brown to buttress the dissent’s interpretation of Brown’s legacy.

The second section of this part will explore Justice Kennedy’s use of history as narrative in his concurrence. This part will posit that Justice Kennedy’s opinion structures Parents Involved as a constitutional narrative about schools or the meaning of civic education, rather than about race. Reading Justice Kennedy’s opinion as a narrative about schools helps explain his lack of engagement with the history of Brown relative to the other Justices. Moreover, by shifting the narrative from race to schools, Justice Kennedy’s opinion draws attention to the way in which narrative can affect the judicial use of history as evidence. Justice Kennedy looks not to the history of racial progress in this country since

Brown; rather, he considers the modern historical record on civic education in American schools.

This paper does not purport to elevate one judicial interpretation of history over another. It endeavors to identify the different judicial uses of history employed by the Supreme Court and examine how those uses structure legal judgment. This exercise is not, however, devoid of normative value. By revealing how both the contemporary legal interpretation of Brown and the history of race relations in America are subject to multiple readings, this paper urges critical evaluation, rather than passive acceptance, of the Court’s rendering of history.

I. COMPARING JUDGE AND HISTORIAN

A. Judge as Historian

The association between judge and historian bears an ancient history. Carlo Ginzburg has argued that the relationship stretches back to the birth of history itself, to “the beginnings in ancient Greece of the literary genre we call ‘history.’” The “argumentative ability [history] implied,” Ginzburg observed, “was related to the judicial sphere.” In the classical tradition, the point of convergence between judge and historian was precisely this “argumentative ability”; both judge and historian presented convincing arguments by “convey[ing] a vivid representation of characters and situations.” The modern salience of narrative as an aspect of legal argumentation may be a testament to this early historical tradition.

The comparison between judge and historian persisted as history evolved to entail the collection and examination of evidence. Ginzburg reported that the concept of a historian as one who “carefully evaluates proofs and witnesses” was alien until the late 18th century. But once historical scholarship embraced proof as its touchstone, modern parallels

20. Id.
21. Id. at 80.
22. See, e.g., Kim Lane Scheppele, Foreword: Telling Stories, 87 MICH. L. REV. 2073, 2073 (1989) (“Why is there such a rush to storytelling? Why has narrative become such an important and recurring theme in legal scholarship these days?”); see also id. at 2073 n.1 (giving an overview of the literature on legal storytelling).
23. Ginzburg, supra note 18, at 80-81 ("Collective proofs was, until the mid-eighteenth century, an activity practiced by antiquarians and erudites, not by historians. When, in his Traité des différentes sortes de preuves qui servent à établir la vérité de l'histoire (1769), the erudite Jesuit Henri Griffet compared the historian to a judge who carefully evaluated proofs and witnesses, he was expressing a still-unaddressed intellectual need. Only a few years later Edward Gibbon published his Decline and Fall of the Roman Empire, the first work that effectively combined historical narrative with an antiquarian approach.” (internal citations omitted)).
between judge and historian naturally came to focus on their use of evidence. Today, judicial decision and historical conclusion rely on more than colorful narrative; whatever narrative they employ must be grounded in persuasive evidence.

Modern American debates about the judge as historian, or the judicial use of history, largely concentrate on this relationship between historical evidence and legal judgment. According to these debates, an appeal to authority drives judicial use of history. Historians scrutinize primary and secondary sources—weighing them against each other, weaving bits and pieces of them together—to provide the most credible account of our past. Judges similarly invoke historical evidence as one basis of legal authority grounding their resolution of legal issues. What ultimately makes history so powerful, both as rhetoric and evidence, is its ability to proffer an authoritative explanation of what has past.

Historical evidence is a compelling basis for legal authority because the relationship between past and present is particularly critical in the legal context. This linkage has deep roots in the English common law tradition. In sixteenth- and seventeenth-century England, the prevailing concept of an ancient constitution and law immemorial transformed judges such as Lord Coke into historians, whose “historical thought could be described as founded on the presumption that any legal judgment declaring a right immemorial is perfectly valid as a statement of history.”

Across the Atlantic, Richard Posner has noted that “the law is in thrall to history.”

24. See, e.g., Matthew Festa, Applying a Usable Past: The Use of History in Law, 38 SEtON HALL L. REV. 479, 482-83 (2008) (“Within the legal profession, debates have taken place over whether using historical evidence in the resolution of legal questions is a proper normative methodology, or is even a legitimate enterprise. And, in an extended dialogue with historians, legal scholars and practitioners have also grappled with practical and methodological questions concerning the application of historical evidence to law.”). For a general sampling of this literature, see Daniel A. Farber, Adjudication of Things Past: Reflections on History as Evidence, 49 HASTINGS L.J. 1009 (1998) (considering the intersection between law and history in light of postmodernist attacks on the objectivity and truth of evidence and proof); Richard A. Posner, Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship, 67 U. CHI. L. REV. 573 (2000); John Philip Reid, Law and History, 27 LOY. L.A. L. REV. 193 (1993) (assessing critically the interdisciplinary study of law and history). For literature focusing on the use of history by the Supreme Court, see CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1655 Sup. CT. REV. 119 (1965) (criticizing the Warren Court’s use of history to serve political ends); Neil M. Richards, Clio and the Court: A Reassessment of the Supreme Court’s Use of History, 13 J.L. & POL. 809 (1997) (applying Kelly’s critiques of the Warren Court’s use of history to the Rehnquist Court).

25. Festa, supra note 23, at 487.


27. Posner, supra note 23, at 583. Posner takes issue with the assumption that “law’s obeisance to the past at the expense of the present and the future” can be “attributed to a mystical, perhaps quasi-religious, veneration of ancient ways.” Id. at 585. He outlines two alternative reasons for the judicial use of history—rhetorical and informational. In the former, the judicial use of history “is not a sign of thralldom to history but of the opposite, of bending history to the service of life.” Id. at 580. In the latter, Posner suggests that judges may simply find the use of history to be “their most efficient
Whether it be illuminating the meaning of constitutions and statutes, considering judicial precedent, or piecing together a fact pattern, law and history are inextricably intertwined.  

B. Judge Versus Historian

An account, no matter how condensed, of the comparison between judge and historian cannot dispense without a summary of the key divergences between the two. Perhaps the sharpest distinction between judge and historian lies in the "different ideals that regulate their tasks." While "the judge must render a just sentence: the historian must provide a truthful account." Thus, when judges and historians "invoke the notions of evidence and proof," their "respective regulative ideals of justice and truth decisively contribute to the understanding of what is to count as a piece of evidence, what is to count as proof." Legal evidence and historical evidence may overlap but are conceptually distinct in that the "former is in the service of establishing a just verdict, while the latter is relevant for securing a truthful account of events."

In service of different ends, judges have utilized historical evidence in a manner considered abusive to some historians. In 1965, the historian Alfred Kelly observed that the use of historical evidence by the Supreme Court led to false historical conclusions, whereby the Justices stated "as categorical absolutes propositions that the historian would find to be tentative, speculative, interesting, and worthy of further investigation and inquiry, but not at all pedigreed historical truth." Kelly argued that, given that the very "premises" that guide the preparation of historical evidence diverge radically from those guiding a professional historian, the Court cannot but fail to provide historical truth. He concluded that by attempting to serve both legal justice and historical truth, the Court had

method of deciding cases and resolving issues of institutional design." Id. at 585.

28. See Festa, supra note 23, at 484.
30. Id. The notion of a "truthful account" of history has come under attack. See, e.g., Peter Novick, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988) (tracing the history of the idea of objectivity in America, including its modern collapse); Farber, supra note 23, at 1024 (noting the influence of anthropologists such as Clifford Geertz and philosophers such as Michel Foucault and Jacques Derrida in deconstructing historical objectivity). For a discussion of historical objectivity with reference to law, compare Farber, supra note 23 (defending the concept of objectivity in both history and law) with Posner, supra note 23, at 594 (arguing that the "elusiveness of historical Truth . . . the truth of causal and evaluative assertions about history" makes it impossible for a judge to be "historically oriented").
32. Id.
34. Id. at 156.
“attempted to sit on two stools at once and had fallen between them.”  

Interestingly, Kelly, along with the historian C. Vann Woodward, assisted Thurgood Marshall prepare historical interpretations of the Fourteenth Amendment to buttress Marshall’s arguments before the Supreme Court in *Brown*. When Kelly criticized the Court, he was largely pointing to what he believed was the Warren Court’s use of historical evidence to arrive at decisions consistent with particular political preferences.  

Perhaps in light of perceived Warren Court excesses, Kelly later expressed concerns about his participation in crafting history for the purposes of legal advocacy in *Brown*:

> I am very much afraid . . . that I ceased to function as a historian and instead took up the practice of law without a license. The problem we faced was not the historian’s discovery of the truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of an historical case. . . . It is not that we were engaged in formulating lies; there was nothing as crude and naïve as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to do – ‘get by those boys down there.’

Kelly’s account is particularly relevant with regard to evaluating the judicial use of history in *Parents Involved*. As the second part of the paper discusses, both Justice Roberts’s and Justice Thomas’s opinions relied heavily on the arguments presented by the NAACP lawyers in *Brown*. Kelly suggests that those arguments themselves were crafted with more regard for judicial outcome than for “the historian’s discovery of the truth.”

Given this divergence between the role of judge and historian, the judicial use of history demands critical appraisal. Critical appraisal endeavors to understand what exactly is at stake when judges engage in

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35. *Id.* at 155.

36. However, he noted that the judicial use of history on the Supreme Court has been the subject of commentary and critique since the early national period. *Id.* at 119-120 (“Critical commentary upon the adequacy of the Justices’ historical endeavors, from both within and without the Court, is nothing new. Almost a hundred and fifty years ago, Spencer Roane of the Virginia Supreme Court accused John Marshall of inaccurately interpreting the intent of the Constitutional Convention of 1787 with respect to the true locus of sovereignty in the new ‘confederation.’ . . . Justices McLean and Curtis both attacked Taney’s opinion in the *Dred Scott* case in part on the ground that he had written bad history, and some of Abraham Lincoln’s comments were to the same effect. Similar criticisms have recurred repeatedly in the twentieth century.”) (internal citations omitted). For an application of Kelly’s critique to the Rehnquist Court, see Richards, *supra* note 24.

historical interpretation as part of their legal decision-making process. By incorporating historical account into legal judgment, judges create an authoritative interpretation of the past that doubles as official government record. Judicial interpretation of history may integrate itself into the findings of fact, legal argument, and ultimately the outcome of the case, which is then enshrined in official public record. Judges subsequently draw upon this record as binding precedent to guide their decision-making in future cases.

The use of history by the Supreme Court is of particular significance because it serves as an institution of public authority. Charles Miller observed that this authority “is maintained through the general acceptance of the Court’s decisions and the reasons offered for those decisions.” Through its decisions, the Court naturally engages in historical interpretation, for “[t]he Constitution itself is a product of the nation’s past.” As “the accepted interpreter of the Constitution,” the Court has become “a public interpreter of American political history.” When the Court declares the meaning of that history, it may, for better or worse, “shape our collective public memory about the meaning of the past.”

Pamela Brandwein has examined the production of “historical truth[]” by the Supreme Court in the post-Civil War context. She observed that “the process by which historical knowledge gains ‘truth’ status” involves a competition among “official” and “alternative” versions of events, a “rhetorical contest through which ‘authoritative’ accounts are created.” Brandwein applied this thesis to the Court’s interpretation of the Reconstruction Amendments in the 1870s. She asserted that the Court adopted an interpretation hewing closely to Northern Democratic views on slavery, which considered formal emancipation as marking “the

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38. Festa, supra note 23, at 506.
39. MILLER, supra note 23, at 25 (“By writing history into its opinions the Court contributes to the public’s view of the American past as much as, and sometimes even more than, professional historians and other historical writers do. When the Supreme Court has the chance to tell us what American history is, history becomes more than a tool of decision. It affirms or denies the significance of past events for the activities of the present.”). For a rather radical variant of this statement, see William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227-28 (1998) (describing the Supreme Court as “the only institution in human experience that has the power to declare history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding. . . . Even where the Court’s history is at odds with the actual past, that judicial history, as absorbed into a decision, and then a doctrine, becomes the progenitor of a rule of law.”).
40. Id.
41. Id.
42. Id.
43. BRANDWEIN, supra note 17. Brandwein did not focus exclusively on the Supreme Court, but examined the "production and use of the dominant history of Reconstruction" by "a variety of social institutions." Id. at 3.
44. Id. at 3.
resolution of the slavery problem." According to Brandwein, the Court interpreted the “one pervading purpose” of the Reconstruction Amendments as “the freedom of the slave race [and] the security and firm establishment of that freedom.”

Brandwein illustrated that the Court willfully ignored another interpretation of slavery, and, therefore, the Reconstruction Amendments. According to the Republicans, slavery’s problem “included slavery’s destruction of white men’s civil liberties, its stagnating commitments, and the accretion of illegitimate political power to the aristocratic slaveholding elite.” The Republicans believed these problems were alive and well throughout Reconstruction; the Reconstruction Amendments should have guaranteed federal protection against Black Codes, Ku Klux Klan violence, the reversion of economic control to a plantation elite, and other post-Civil War realities. But the Court’s adoption of the Northern Democratic definition of slavery structured an understanding of the Reconstruction Amendments devoid of such protection.

Brandwein demonstrated the cloak of authority this interpretation has worn over the years. The Warren Court’s subsequent expansion of rights under the Fourteenth Amendment, she argued, could not draw on Republican interpretations of the history of slavery because the Court had already enshrined the Northern Democratic interpretation in judicial opinion. This expansion was thus vulnerable to withering attacks that it was the project of politics, rather than law. Brandwein powerfully reveals how the Court’s early understanding of slavery and the Reconstruction Amendments became an “institutionally privileged” account influencing subsequent legal decision-making.

*Parents Involved* presents a useful lens for examining the contemporary production of historical truth by the Supreme Court. Its collection of opinions embodies no single authoritative interpretation of the legacy of *Brown* and the history of race relations in America. Rather, they reveal a lively “rhetorical contest” between multiple historical accounts. By studying a moment in which the Court is engaged in “rhetorical contest,” perhaps we may gain insight into how particular versions of our history eventually become “prevailing legal orthodox[y].”

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45. *Id.* at 2.
46. *Id.* at 61 (discussing *Slaughter-House Cases*, 83 U.S. 36, 71 (1873)).
47. *Id.* at 2.
48. *Id.* at 16.
49. *Id.* at 3.
II. PARENTS INVOLVED V. SEATTLE SCHOOL DISTRICT NO. 1

Parents Involved presented the question of whether local school boards may voluntarily utilize race-conscious criteria in student assignment plans as a means of promoting racially integrated schools. In a plurality opinion, the Court struck down such plans in Seattle and Louisville on the grounds that neither plan was sufficiently narrowly tailored to survive strict scrutiny. Chief Justice Roberts's opinion, representing the four-Justice plurality, further suggested that voluntary integration did not constitute a compelling interest. The opinion identified two interests that qualify as compelling when evaluating the use of racial classifications in the school context - (1) remedying past discrimination and (2) achieving diversity in higher education - and concluded that neither was applicable to the case.  

Justice Thomas, who joined the plurality's opinion in full, wrote a separate concurrence rejecting virtually all voluntary attempts to achieve racially integrated schools. He suggested that such efforts amounted to "social engineer[ing]" and argued that the "Court does not sit to create a society that includes all Americans or to solve the problems of troubled inner city schooling." Justice Thomas did note the "perceived negative effects of racial imbalance" but rejected the notion that an "ultimate remedy" for the problem was even attainable. Over time, he observed, schools would naturally "fall in and out of balance" and that balance itself would shift according to changing demographics.

Justice Kennedy, who joined the Court's opinion but not the plurality's, wrote a separate concurrence explicitly recognizing that a compelling governmental interest did exist in "avoiding racial isolation" and "achiev[ing] a diverse student population." Justice Breyer, who

50. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-23 (2007) (plurality opinion). While the opinion seems inclined to rule that voluntary integration does not advance a compelling interest, thus completely prohibiting the use of race in student assignments, it "only hint[s] in that direction." James E. Ryan, The Supreme Court and Voluntary Integration, 121 HARV. L. REV. 131, 131 (2007); see Parents Involved, 551 U.S. at 726, 732-733 ("The parties and their amici dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the district are not narrowly tailored to the goal of achieving the educational social benefits asserted to flow from racial diversity. . . . While the school districts use various verbal formulations to describe the interest they seek to promote - racial diversity, avoidance of racial isolation, racial integration - they offer no definition of the interest that suggests it differs from racial balance. . . . However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled 'racial diversity' or anything else.")

51. Parents Involved, 551 U.S. at 756 (Thomas, J., concurring) (internal citations and quotation marks omitted).

52. Id.

53. Id.

54. Id. at 797-98 (Kennedy, J., concurring).
authored the dissent, found that the student assignment plans were narrowly tailored to meet a compelling governmental interest.\textsuperscript{55} Justice Stevens endorsed Justice Breyer’s dissent in its entirety. However, he prepared a separate dissent, in which he asserted that the plurality’s decision represented a radical break from precedent.\textsuperscript{56}

\textit{Parents Involved} invokes a struggle over the legacy of \textit{Brown}. Justice Roberts acknowledged this struggle, observing that “[t]he parties and their \textit{amici} debate which side is more faithful to the heritage of \textit{Brown}.” The Court actively engaged this debate, but the opinions stake deeply conflicting claims to the mantle of \textit{Brown}. Justice Roberts declared \textit{Brown} to be a story about “schoolchildren [being] told where they could and could not go to school based on the color of their skin,” and \textit{Parents Involved} to be another chapter to that tale, refusing to “allow this once again—even for very different reasons.”\textsuperscript{58} Justice Thomas confirmed this reading of \textit{Brown}, citing Justice Harlan’s dissent in \textit{Plessy v. Ferguson} and noting that this view “was the rallying cry for the lawyers who litigated \textit{Brown}.”\textsuperscript{59} Justice Thomas further denied the dissent’s interpretive claim to \textit{Brown} by likening its arguments to those put forth by pro-segregationists during the \textit{Brown} litigation.\textsuperscript{60}

Justice Stevens and Justice Breyer rejoined scathingly. Justice Stevens remarked on the “cruel irony in the Chief Justice’s reliance on our decision in \textit{Brown}” and accused Chief Justice Roberts of “rewrit[ing] the history of one of this Court’s most important decisions.”\textsuperscript{61} He concluded his dissent with the searing declaration: “It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”\textsuperscript{62} Justice Breyer similarly invoked the word “cruel” in his dissent, describing the plurality’s opinion as a “cruel distortion of history.”\textsuperscript{63} The promise of \textit{Brown}, Justice Breyer advanced, was “of true racial equality . . . as a matter of everyday life in the Nation’s cities and . . .”

\begin{footnotesize}
55. \textit{id.} at 803-76 (Breyer, J., dissenting).
56. \textit{id.} at 798-803 (Stevens, J., dissenting).
57. \textit{id.} at 747 (plurality opinion).
58. \textit{id.}
60. \textit{id.} at 773-74 (“The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court’s jurisprudence for several decades. It first appeared in \textit{Plessy} . . . . The segregationists in \textit{Brown} embraced the arguments the Court endorsed in \textit{Plessy}. Though \textit{Brown} decisively rejected those arguments, today’s dissent replicates them to a distressing extent.”).
61. \textit{id.} at 798-99 (Stevens, J., dissenting).
62. \textit{id.} at 803.
63. \textit{id.} at 867 (Breyer, J., dissenting).
\end{footnotesize}
schools.” He concluded that “[t]o invalidate the plans under review is to threaten the promise of Brown.”

A. Judicial Use of History as Evidence

The modern comparison drawn between judge and historian focuses on the use of evidence. Despite his criticism of the Supreme Court’s use of history for political ends, Alfred Kelly observed a close relationship between the methodology of judicial decision-making and historical scholarship. Kelly noted that judges apply law by examining “a stream of judicial precedent,” not unlike when a historian studies the primary sources. When the “primary sources” prove lacking, courts often “inquire into the circumstances surrounding earlier judicial expositions of the law, . . . get[ting] still deeper into the writing of history.” Kelly likened this type of inquiry to the “external documentary criticism” historians engage in “as a means to an adequate and sophisticated evaluation of the source in question.”

If Parents Involved is a case about the meaning of Brown, how does the Supreme Court use Brown itself not only as judicial precedent, but also as a source of history? Such a consideration must begin with a recognition that Brown is far from an ordinary Supreme Court opinion. The Court has transformed a dull eleven-page opinion into a sublime statement of constitutional principle. This transformation has elevated Brown to an “exalted place in the constitutional canon,” generating a respect akin to that accorded constitutional text itself. In fact, Brown has largely

64. Id. at 867.
65. Id. at 868. Lest the words of the Court leave any doubt, public commentary on the decision depicted the case as a bitter fight between conflicting interpretations of Brown. See Linda Greenhouse, Justices, Voting 5-4, Limit the Use of Race in Integration Plans, N.Y. Times, June 29, 2007 (“With competing blocs of justices claiming the mantle of Brown v. Board of Education, a bitterly divided Supreme Court declared Thursday that public school systems cannot seek to achieve or maintain integration through measures that take explicit account of a student’s race.”); Adam Liptak, The Same Words, but Different Views, N.Y. Times, June 29, 2007 (“[Parents Involved] has reignited a societal debate about the role of race in education that will almost certainly prompt divisive lawsuits around the country. Indeed, the decision has invited a fundamental reassessment of Brown itself, perhaps the most important Supreme Court decision of the 20th century. ‘There is a historic clash between two dramatically different visions not only of Brown,’ said Laurence H. Tribe, a law professor at Harvard, ‘but also the meaning of the Constitution.’”)
66. Kelly, supra note 23, at 121.
67. Id.
68. Id.
69. Id.
70. J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963, 998 (1998) (“Brown is normatively canonical. One can no more criticize it than one can suggest that Mozart is a wildly overrated composer of music for eighteenth-century dinner parties. One establishes oneself as a cultured person by affirming Mozart’s genius; one establishes oneself as a properly acculturated lawyer by affirming Brown’s correctness.”); Mark A. Graber, The Price of Fame: Brown as Celebrity, 69 Ohio St. L.J. 939, 942 (2008) (outlining a three-stage process that
replaced the Fourteenth Amendment as the preferred historical foundation for understanding modern equal protection cases.\(^71\)

The analogy to constitutional text is apt given that *Parents Involved* applied two methods of historical interpretation to *Brown* that are normally reserved for historical interpretation of the Constitution. Charles Miller distinguished these two methods as “intent theory” and

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\(^71\) Pamela S. Karlan, 58 DUKE L.J. 1049, 1051-52 (2009) ("Brown occupies a peculiar position within constitutional interpretation. . . . [W]hatever originalism means with respect to other constitutional issues, when it comes to the Equal Protection Clause and its application to questions of race-conscious government action, the Court seldom looks beyond Brown. Put simply, the Court has abandoned 'Framers' originalism' in favor of 'Brown originalism,' in which Justices claim fidelity, not to what the Equal Protection Clause meant in 1868, but rather what the Supreme Court meant in 1954."); Schmidt, supra note 69, at 206. The Supreme Court's own investigation into the historical record of the Fourteenth Amendment in *Brown* may illuminate modern reliance on *Brown* in adjudicating equal protection cases. Alexander Bickel, who was serving as a law clerk for Justice Felix Frankfurter when the Court took the segregation cases, was assigned by Justice Frankfurter “to read through the *Congressional Globe* and the equivalent records, wherever extant, of the state legislatures during the immediate post-Civil War years to determine if there was anything in the history of the legislative debates over the framing of the Fourteenth Amendment that foreclosed the Court from now striking down segregation.” *KLUGER, supra* note 36, at 602. Bickel’s project "precisely presaged the research that would be carried on by the litigants" in answers to questions later posed by the Court. *Id.* at 656. Bickel’s conclusion, embodied in a memorandum that Justice Frankfurter distributed to the other justices on the Court, "held that the legislative history, while revealing no evidence that the framers of the amendment had intended to prohibit school segregation, did not foreclose future generations from acting on the question, either by congressional statute or by judicial review." *Id.* at 658. In 1955, Bickel reviewed this historical project with reference to Chief Justice Warren’s declaration in *Brown* that after “exhaustive[] consideration” of “the circumstances surrounding the adoption of the Fourteenth Amendment in 1868,” the sources proved “inconclusive.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Bickel explained that despite extensive historical briefing, the "brevity of the [Court’s] reference to the history of the fourteenth amendment’s adoption" was a reflection of the necessity "to exert to the utmost the prestige, the oracular authority of the institution." *Id.*, at 2. For the Court to "speak unanimously, with one voice from the deep," it chose to say less, for "the less said, the less chance of internal disagreement." *Brown* was a decision "which, like a poem, 'should not mean / But be,' and . . . the Court saw this and acted on it." *Id.* Thus, *Brown* itself eschewed an approach grounded in an interpretation of the past, declaring: “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” *Brown*, 347 U.S. at 492-93. *Brown* sharpens the distinction between judges and historians, for the force of the opinion illustrates that when historical evidence appears (or is declared) inconclusive, historians may opt for silence, but judges remain bound to issue a ruling that carries the same weight as one backed by historical research.
"ongoing history." Intent theory uses history to clarify the meaning of the Constitution as originally drafted and ratified. It construes the Constitution in accordance with the intentions of those who wrote it. Ongoing history, on the other hand, uses history to reveal conditions in the United States since ratification, which the Court believes have bearing on current interpretation of the Constitution. It venerates and applies lessons derived from experience. Whereas intent theory says "this is what was expected," ongoing history says "this is what the nation has become."

One way to understand the divergent interpretations of Brown in Parents Involved is to recognize the use of these two methods of historical interpretation by the Justices. Chief Justice Roberts's plurality opinion and Justice Thomas's concurring opinion drew on intent theory to arrive at their respective historical interpretations of Brown and its significance for race relations in America. Importantly, Chief Justice Roberts and Justice Thomas utilized source materials behind Brown, invoking the "history of the litigation that culminated in Brown," to interpret the intent of the decision when it was handed down and defend their reading as consonant with that intent. Their turn to these sources bears resemblance to the traditional application of intent theory to the Constitution, which looks primarily to the Philadelphia Convention of 1787 and the writing of the Founding Fathers to discern what the

73. Id. at 26. A few words about the distinction between "intent theory" and "originalism" are in order. Confusion is apt to occur given that "originalism" is sometimes referred to as "original intent" or "original intention." See INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 3-4 (Jack N. Rakove ed., 1990) (describing originalism as both a "a doctrine of original intent" and a "jurisprudence of original intention"). The history of originalism is long and complex, but this brief discussion will focus primarily on the modern originalism movement, which emerged in the 1970s and 1980s in response to the perceived activism of the Warren Court. Richards, supra note 23, at 823-24. First, Charles Miller's work was published in 1969, just prior to the emergence of modern originalism as a consistent theory of constitutional interpretation. Therefore, Miller's articulation of "intent theory" was not explicitly associated with a prevailing legal ideology (although he did note that "the history concerned with the formation and ratification of the Constitution serves to restrain the Court in its decisions."). MILLER, supra note 23, at 25. Second, modern originalists themselves distinguish the two concepts of "original understanding" and "original intent," the latter of which more accurately corresponds to Miller's "intent theory." BRANDWEIN, supra note 17, at 17. According to modern originalists, original understanding "refers to what the words of a provision could reasonably be taken to mean" and is thus "a more objective assessment of that provision." Id. Original intent, on the other hand, "refers to what legislators wanted to accomplish with a particular provision, or what legislators thought the language of the provision meant" and is a more "subjective assessment of a provision's meaning." Id. Some originalists associate "originalism" with "original intent" (e.g., Raoul Berger) and others associate "originalism" with "original meaning" (e.g., Justice Antonin Scalia). Bret Boyce, Originalism and the Fourteenth Amendment, 33 WAKE FOREST L. REV. 909, 915-18 (1998). Thus, "intent theory" might very well be a component to some variants of modern originalism.
74. MILLER, supra note 23, at 25.
75. Id. at 26.
76. Schmidt, supra note 69, at 204.
Constitution was intended to mean.\textsuperscript{77} Chief Justice Roberts drew on the briefs and oral arguments of the NAACP lawyers in \textit{Brown} to articulate an anti-classification interpretation of \textit{Brown}. The anti-classification principle holds that equal protection invalidates all distinctions – malicious or benign – based on race.\textsuperscript{78} Proclaiming that this reading is "more faithful to the heritage of \textit{Brown}," Chief Justice Roberts quoted directly from a brief submitted by the NAACP lawyers: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."\textsuperscript{79} The Chief Justice buttressed this citation with a direct quotation from NAACP lawyer Robert Carter's oral arguments before the Supreme Court: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording education opportunities among its citizens."\textsuperscript{80} Chief Justice Roberts concluded by declaring that it was Carter's "position that prevailed in this Court, which emphasized in its remedial opinion [\textit{Brown II}] that what was [a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was 'determining admission to the public schools on a nonracial basis.'\textsuperscript{81}

Justice Thomas similarly drew upon the briefs and oral arguments of the NAACP lawyers in \textit{Brown} to support his anti-classification interpretation, noting that this "view was the rallying cry for the lawyers

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\textsuperscript{77} See MILLER, supra note 23, at 26, 190.
\textsuperscript{78} Schmidt, supra note 69, at 204. The anti-classification principle, as well as its counterpart, the anti-subordination principle, were two distinct yet undistinguished formulations of the Equal Protection Clause contained in Justice Harlan's dissent in \textit{Plessy v. Ferguson}: "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Where the anti-classification claim advances that "the Constitution is color-blind and prohibits racial classification", the anti-subordination claim insists that "the Constitution is opposed to the maintenance of racial caste, group subordination, or second-class citizenship." Balkin, \textit{Brown as Icon, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID}, supra note 6, at 11. Owen Fiss identified these two principles in his foundational piece, \textit{Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107} (1976). When Justice Harlan wrote his dissent in \textit{Plessy}, "these two versions of the antidiscrimination principle – anti-subordination versus anti-classification, or equal citizenship versus color-blindness – did not strongly conflict." Balkin, \textit{Brown as Icon, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID}, supra note 6, at 11. However, "the promises and failures of black advancement in the second half of the twentieth century have brought the differences between the . . . approaches into starker contrast." \textit{Id.} at 12. \textit{Parents Involved} is so pivotal because it marks "the first time that the Court returned to the issue in \textit{Brown} – the assignment of children to public schools – in the context of contemporary colorblind constitutionalism." Karlan, \textit{supra} 70, at 1062.
\textsuperscript{80} \textit{Id}.
\textsuperscript{81} \textit{Id}.
who litigated *Brown.*"\(^8\) From the brief submitted by the NAACP lawyers, Justice Thomas plucked the lines, "[t]hat the Constitution is color blind is our dedicated belief," and "[t]he Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone."\(^8\) Justice Thomas also utilized the same statement from NAACP lawyer Robert Carter’s oral arguments that Justice Roberts quoted in his opinion. Finally, Justice Thomas introduced direct quotations from the briefs and oral arguments presented by the NAACP lawyers in the companion cases to *Brown,* which asserted that the Fourteenth Amendment categorically prohibits the government from engaging in racial classification.\(^8\)

*Brown* has long been recognized as "particularly the product of legal advocacy."\(^8\) By relying on the arguments of the NAACP legal team, Chief Justice Roberts and Justice Thomas advance that the NAACP’s legal claims in *Brown* are a vital source for interpreting the meaning of the case. Indeed, given the sparse language of *Brown* itself, the Justices’ turn to these sources is hardly surprising. At the same time, the use of these sources triggers important questions about the judicial use of historical materials more broadly. If Chief Justice Roberts and Justice Thomas chose to parse the arguments of the NAACP lawyers, why did they not consult materials depicting the *Brown* Court’s internal decision-making process and other briefs submitted to the Court?\(^8\)

Christopher Schmidt has noted that amicus briefs submitted by the Justice Department in support of desegregation, for example, were particularly influential with the Court.\(^8\) While the Justice Department also presented a strong case for an anti-classification reading of the Fourteenth Amendment, it integrated this argument with an anti-subordination claim. The Justice Department’s briefs discussed "colorblind constitution in the context of an analysis that highlighted the

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82. *Id.* at 772 (Thomas, J., dissenting). See also Anthony G. Amsterdam, *Thurgood Marshall’s Image of the Blue-Eyed Child in Brown,* 68 N.Y.U. L. REV. 226, 230, 235 (1993) (describing Thurgood Marshall’s decision to present an anti-classification argument as a “stroke of tactical genius” that brought “racial discrimination into the case as a vice that the Justices themselves must either practice or put aside” and necessarily “spur[red] them to action”).

83. *Parents Involved,* 551 U.S. at 772.

84. *Id.* at 773 n.20 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action." Juris. Statement in *Davis v. County Sch. Bd.*; "[T]he state is deprived of any power to make any racial classifications in any governmental field." Tr. of Oral Arg. in *Briggs v. Elliott*).

85. Schmidt, supra note 69, at 215.

86. See *id.* at 207-08, 216-33 (examining these historical materials and concluding that (a) “isolating the NAACP lawyers’ anticlassification argument as their only, or even primary, constitutional claim in the school segregation cases fails to do justice to the historical record”; and (b) the Justices on the *Brown* Court consciously chose not to ground their decision on the anti-classification principle).

87. Schmidt, supra note 69, at 229.
specific harms of racial segregation and the necessity of integrated education."88 While the NAACP lawyers had certainly formulated a particular understanding of Brown, their voice alone could hardly serve as the only "contemporaneous commentary."89

Although the dissenting opinions in Parents Involved decried the historical interpretation of Brown articulated by the plurality, they did not meaningfully engage the sources utilized by Justice Roberts and Justice Thomas.90 Rather, Justice Breyer's dissent provided an ongoing history account of Brown, focusing "on the experience with school desegregation following the Brown decisions – not the preceding litigation history."91 This difference in methodological approach informs the sources utilized by Justice Breyer in supporting his historical interpretation of Brown. These sources fall primarily into two categories: Supreme Court opinions descended from Brown and social science data, both of which serve to provide a contextualized history of segregation in America following the Brown decision.92

Justice Breyer's dissent reflected on the history of the Court's desegregation cases subsequent to Brown, as a means of demonstrating his commitment to judicial precedent as well as illustrating the social context in which these cases were decided. Charles Miller described one type of ongoing history as "an historical essay that traces a constitutional issue over a span of years."93 History is thus viewed as "process rather than event," and law is accordingly regarded "in terms of evolution and development rather than immanent meaning."94 Justice Breyer's review of the Supreme Court's desegregation cases takes the form of an historical essay, considering the Court's post-Brown jurisprudence as a reflection of changing circumstances on the ground.

88. Id. at 229-30.
89. MILLER, supra note 23, at 190. In fact, the accuracy of Chief Justice Roberts' and Justice Thomas' depiction of the NAACP position has been challenged by surviving members of the legal team following the Parents Involved decision. Robert Carter, the NAACP lawyer quoted by both justices in their respective opinions, stated in response to the decision: "All that race was used for at that point in time was to deny equal opportunity to black people. It's to stand that argument on its head to use race the way they use it now." Jack Greenberg, another lawyer for the plaintiffs in Brown, described Chief Justice Robert's interpretation as "preposterous" and stated: "The plaintiffs in Brown were concerned with the marginalization and subjugation of black people. They said you can't consider race, but that's how race was being used." Liptak, supra note 64.
90. The discussion of the dissenting opinions will focus exclusively on Justice Breyer's opinion. In his separate dissent, Justice Stevens noted that he "join[s] Justice Breyer's eloquent and unanswerable dissent in its entirety." Parents Involved, 551 U.S. at 798 (Stevens, J., dissenting). His brief four-page opinion served to emphasize his belief that the Court's judgment was a radical break from several decades of clear judicial precedent.
91. Schmidt, supra note 69, at 208 (emphasis added).
92. See id. at 212-13.
93. MILLER, supra note 23, at 191.
94. Id.
Defending the use of race-conscious criteria by local school boards to achieve integration, Justice Breyer noted that “dozens of” post-

Brown cases saw the Court requiring school boards to utilize “race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers” in order to “comply with Brown’s constitutional holding.” Furthermore, Justice Breyer observed that, in these cases, “the Court left much of the determination of how to achieve integration to the judgment of local communities.” He supported this observation by quoting the same passage twice from the 1971 case Swann v. Charlotte-Mecklenburg Board of Education:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Justice Breyer employed the word “context” repeatedly in explaining the reasoning behind Supreme Court cases granting local school boards discretion to employ race-conscious criteria in pursuit of integration. He emphasized the need for contextual sensitivity in distinguishing types of racial classification. He disputed Chief Justice Roberts’s historical rendering of segregation, noting pointedly that “segregation policies did not simply tell schoolchildren ‘where they could and could not go to school based on the color of their skin.’” Rather, Justice Breyer advanced an anti-subordination claim, arguing that segregation “perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination.” Justice Breyer observed that “from Swann to Grutter, this Court’s decisions have emphasized this distinction,” recognizing the social context underpinning segregation. He concluded that “[t]he lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration.”

Justice Breyer further noted the importance of context in

95. Parents Involved, 551 U.S. at 804 (Breyer, J., dissenting).
96. Id.
99. Id. at 867 (citing id. at 747 (plurality opinion)).
100. Id.
101. Id. at 864.
102. Id. at 867 (emphasis added).
“acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils.”

Perhaps referencing the Court’s own mixed record in implementing desegregation, Justice Breyer observed that “judges are not well suited to act as school administrators.” He drove this point home by providing another ongoing history, a richly detailed record of desegregation efforts in the Seattle and Louisville school districts over the past five decades. The histories of these school districts, Justice Breyer observed, are “typical school integration stories” that help make sense of the Court’s past decisions to delegate authority to local school districts on matters of racial integration. These histories highlight the “complexity of . . . tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration.” Justice Breyer noted that such facts and circumstances help explain why in [the school desegregation] context, the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving different communities the opportunity to try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs.

By integrating the history of Supreme Court precedent with that of the Seattle and Louisville school districts, Justice Breyer engaged in a multi-layered exercise of ongoing history, describing the interplay between evolving legal judgment and social experience.

Justice Breyer’s copious citation of social statistics to illustrate the experience of school desegregation post- Brown further reveals his use of the methodology of ongoing history. Charles Miller observed that since “the evidence of ongoing history merges into contemporary observation at no clearly definable date,” it “eventually yields to the use of social evidence as a principle of adjudication.” Early in his dissent, Justice Breyer noted demographic trends that augured “a return to school systems

103. Id. at 849.
104. Id. at 848-49. In the immediate decade following the Brown decision, school desegregation “proceeded at a snail’s pace in southern school districts.” School boards and state officials “engaged in dilatory and evasive maneuvers aimed at nullifying Brown’s command.” Elaine R. Jones, Foreword to Orfield, Eaton & the Harvard Project on School Desegregation, Dismantling Desegregation, supra note 13, at ix; Balkin, Brown as Icon, in What Brown v. Board of Education Should Have Said, supra note 6, at 5.
105. Parents Involved, 551 U.S. at 807-819.
106. Id. at 806.
107. Id. at 822.
108. Id. (internal citations and quotation marks omitted).
that are in fact (though not in law) resegregated.” Justice Breyer utilized this historical trend as a way to understand the school assignment plans in Seattle and Louisville, which operated “for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression.” In contrast to this bleak demographic data, Justice Breyer introduced social studies that suggested positive “educational benefits” and “civic effects” of integrated schooling.

Justice Breyer refused to “claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race.” Nevertheless, his dissent gave voice to these social trends and argued the need to consider Seattle and Louisville’s student assignment plans with reference to these social realities.

Perhaps the most telling evidence of Justice Breyer’s use of ongoing history to interpret the significance of Brown is his identification of Brown with a promise. For the dissent, the significance of Brown was not to be found in evidence contemporaneous with the case, but in the present circumstances of America. Brown, Justice Breyer concluded, “held out a promise,” a “promise of true racial equality – not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools.” For the dissent, Brown was significant for articulating an ideal against which to measure “how we actually live” in post-Brown America.

B. Judicial Use of History as Narrative

This section shifts from an analysis of the judicial use of history as evidence to the judicial use of history as narrative by examining Justice Kennedy’s concurring opinion. The primary reason for this shift is that Justice Kennedy did not articulate another interpretation of Brown. In fact, he hardly engaged in the meaning of Brown at all. Instead, Justice Kennedy drew on history in the form of a particular narrative about public education in America. Thus, his opinion was largely at odds with those focusing on historical interpretations of Brown.

110. Parents Involved, 551 U.S. at 806 (Breyer, J., dissenting).
111. Id. (emphasis added).
112. Id. at 839-41.
113. Id. at 862.
114. Id. at 867 (emphasis added).
115. Id.
116. Schmidt, supra note 69, at 212 n.48 (“Justice Kennedy’s concurrence touched on Brown only lightly and showed none of the interest in its background history that is evidenced in the opinions of the Chief Justice and Justice Thomas.”).
The earliest association between judge and historian focused on the shared importance of storytelling. Traditional historiographers, extending back to the time of Herodotus, have long observed that history consists of "categories of lived stories, individual and collective." The job of the historian is "to uncover these stories and to retell them in a narrative." History translates as narrative for several reasons. First, historians construct an account after gathering the relevant facts, and are therefore inclined to relay that account chronologically "like a storyteller . . . attempting to follow that order in his exposition, rather than jumping backwards and forwards in time." Second, historians are often consciously appealing to a particular audience, to which like a storyteller, he may also wish to offer moral lessons. Third, history, like any story, is teleologically driven; historians either know or infer a particular outcome and "only those events which are considered by him to be relevant to that outcome will find a place in his work." Finally, historians often emphasize human action or choice, similar to "paradigm cases of what constitute 'stories,'" which "stress[] the changes in fortune which follow upon these choices."

Legal decision as narrative makes sense for the same reasons. Facts are recounted in chronological fashion. The decision tells a story to an audience and often includes lessons in law, policy, and ethics. Judges emphasize those facts and legal arguments most favorable to their conclusion. Finally, cases and their outcomes emerge from a particular set of conscious human action, whether it be a breach of contract, violence against another, or protest against state action.

At the same time, in both history and law, critiques of narrative discourse have debunked the notion of storytelling as objective account. Many "modern historians hold that narrative discourse, far from being a neutral medium for the representation of historical events and processes, is the very stuff of a mythical view of reality." Similarly in the law, some argue that "[t]he resolution of any individual case . . . relies heavily on a court's adoption of a particular story," albeit "one that makes sense, is true to what the listeners know about the world, etc."
and hangs together.” Therefore, to the extent that legal judgment is structured as historical narrative, we should construe that narrative as but an “official” or “institutional” account that has managed to trump others.

Understanding Justice Kennedy’s opinion in Parents Involved as historical narrative holds particular resonance because of his position as the swing Justice in the case. Technically speaking, Justice Kennedy’s opinion is nothing but dictum. But if one approaches the opinion from a Holmesian law-as-prediction perspective, Kennedy’s opinion is controlling. School districts pursuing the goal of racial integration are likely focused on Justice Kennedy’s opinion to guide their policies moving forward. In that sense, Kennedy’s narrative, while unique among the opinions, may eventually become the “institutionally privileged” account of Brown’s legacy in America.Examining this narrative provides further perspective on the process through which “particular versions of events beat out their competition and gain truth status.”

In a comment assessing Justice Kennedy’s concurrence in Parents Involved, Heather Gerken eloquently posited that Justice Kennedy’s opinion is structured around a “constitutional stor[y]” about schools, not about race. This story is one that Justice Kennedy “has long associated with the educational domain – the exceptional role that public schools play in inculcating civic morality.” By using the narrative construct of

124. Scheppele, Foreword: Telling Stories, supra note 21, at 2080 (emphasis added).
125. BRANDWEIN, supra note 17, at 3; Kim Lane Scheppele, Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth, 37 N.Y.L. SCH. L. REV. 123, 163-64 (1992) (“In courts of law, judges and juries cannot do what a correspondence theory of language would have them do; they cannot hold up testimony against events in the world to see which versions ‘match’ better. . . . The whole idea of matching descriptions against the world is misleading because, apart from being metaphorical, it assumes that there is only one perspective, only one point of view, only one ideology, no room for multiple meanings, and no potential for disagreement. In short, it assumes no problem with understanding how accounts as socially situated cultural products relate to evidence of the world. But particular ‘true’ stories and particular descriptive statements are often selected from among a set of arguably accurate versions of reality. . . . The vexing question is . . . how it is that some particular description instead of some other description comes to be forwarded as the authoritative version of events. This raises questions of power and ideology, of the ‘situatedness’ of the descriptions that pass for truth, and of the social agendas they support.”).
126. See Ryan, supra 49, at 137 (citing Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1897)) (“This is because the four dissenters would uphold the Seattle and [Louisville] plans and would apply looser criteria to assess voluntary integration plans than would Justice Kennedy. A fortiori, they would uphold any plan that Justice Kennedy would approve. There are thus five votes for upholding some uses of race to achieve integration, but the only vote that really counts is Justice Kennedy’s. . . . Separating holdings from dicta is an exercise conducted most often by courts looking to distinguish prior cases rather than follow them; in the real world, most people count to five.”).
127. BRANDWEIN, supra note 17, at 3.
129. Id. at 106. Gerken credits Robert Post for the term “domain” although she notes that the domain of education bears more likeness to Michael Walzer’s “spheres,” as it is “tied to a sense of
schools, rather than race, Justice Kennedy transformed *Parents Involved* into a “story about what students learn in school, not whether they have an equal opportunity to do so.”\(^{130}\) By way of contrast, Chief Justice Roberts employed the structure of historical narrative to tell a story about the anti-classification, and thus anti-racial balancing, argument of the NAACP lawyers in *Brown*. And Justice Breyer tells a story about the racial integration efforts of school districts across the nation in the wake of *Brown*. Both stories invoke interpretations about the history of race relations in America and ask what proper role the Supreme Court should play in this history.

Justice Kennedy framed his opinion in a dramatically different fashion. His opinion begins by championing the role that schools play in imparting civic morality to students and relating that role to racial integration policies. The first lines of the opinion read: “The Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts . . . seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community.”\(^{131}\) *Brown* was not mentioned in these opening sentences; the “core narrative” is “less about equal educational opportunity, the dominant note in any equal protection story,” than about the prevailing virtues of diversity in the civic education of our nation’s children.\(^{132}\)

By presenting a narrative about public education, Justice Kennedy utilized aspects of the ongoing history methodology. Like the dissent, Justice Kennedy measured current social realities against past ideals articulated by the Court. The opening of his opinion acknowledged the present concerns of the Seattle and Louisville school districts: “That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.”\(^{133}\) Justice Kennedy later criticized the plurality’s anti-classification approach as one that failed to “recognize and confront the flaws and injustices that remain.”\(^{134}\) He observed that while the “enduring hope is that race should not matter the reality is that too often it does.”\(^{135}\) Justice Kennedy concluded that while Justice Harlan’s appeal to a “color-blind” Constitution “must command our assent,” the truth is that “it cannot be a universal constitutional

\(130.\) *Id.*
\(133.\) *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring).
\(134.\) *Id.* at 787.
\(135.\) *Id.*
principle."\textsuperscript{136}

Where the dissent and Justice Kennedy part ways is in defining unfulfilled aspirations. For the dissent, those aspirations are firmly grounded in \textit{Brown} and the promise of true racial equality. School desegregation is only one element in that story, albeit a critical one:

For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, \textit{Brown v. Board of Education} challenged this history and helped to change it. . . . \textit{[Brown]} sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.\textsuperscript{137}

Justice Kennedy, on the other hand, viewed \textit{Parents Involved} through the prism of educational progress. This narrative shifts the focus away from racial equality per se, towards racial equality as a proxy for fostering diverse, and thus, positive educational environments. While Justice Kennedy concluded his opinion by declaring that "\[t\]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children," his understanding of equal opportunity was not informed by race.\textsuperscript{138} Rather, in the context of schools, equal opportunity is about "achiev[ing] a diverse student population" to foster civic morality; race is but "one component of that diversity."\textsuperscript{139} According to Justice Kennedy, our unfulfilled aspirations are borne out in the "important work" of schools, which seek to "bring[] together students of different racial, ethnic, and economic backgrounds."\textsuperscript{140}

The different narrative structures employed by Justice Breyer and Justice Kennedy explain their divergent readings of Court precedent despite their common use of the ongoing history methodology. Take, for example, their interpretations of \textit{Grutter v. Bollinger},\textsuperscript{141} a case in which the Court affirmed the University of Michigan Law School's use of race-conscious criteria in admissions decisions. Justice Breyer's dissent cited \textit{Grutter} repeatedly, most notably for the proposition that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."\textsuperscript{142} Justice Breyer's understanding of \textit{Grutter} flowed

\begin{itemize}
\item \textsuperscript{136} \textit{Id.} at 788.
\item \textsuperscript{137} \textit{Id.} at 867-68 (Breyer, J., dissenting).
\item \textsuperscript{138} \textit{Id.} at 797 (Kennedy, J., concurring).
\item \textsuperscript{139} \textit{Id.} at 798.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} 539 U.S. 306 (2003).
\item \textsuperscript{142} \textit{Parents Involved}, 551 U.S. at 833 (Breyer, J., dissenting) (citing \textit{Grutter}, 539 U.S. at 326).
\end{itemize}
from his anti-subordination narrative of race; “[t]he context [in Parents Involved] is one of racial limits that seek, not to keep the races apart, but to bring them together.”143 Justice Kennedy disputed Justice Breyer’s reading of Grutter, contending that Grutter cannot even be considered a case wholly about race.144 Not surprisingly, Justice Kennedy chose to focus instead on the value of diversity in higher education. Grutter, Justice Kennedy asserted, withstood strict scrutiny because it considered race to be only one factor of many “pertinent elements of diversity.”145

Comparing Justice Breyer and Justice Kennedy’s use of the ongoing history methodology suggests how the judicial use of narrative can inherently structure the judicial use of evidence. Although both opinions measure social realities against articulated ideals, the choice of narrative results in different readings of the same materials. Choice of narrative might even influence the universe of sources consulted by the Justices. For example, if we imagine Justice Kennedy’s narrative becoming the dominant framework for considering future equal protection cases in the context of schools, the sources consulted by the Court might shift accordingly. Perhaps Brown will remain the canonical text for such cases, but justices engaging in a methodology of original intent might mine contemporaneous records for evidence regarding Brown’s intended effect on the nature of civic education. And justices engaging in a methodology of ongoing history might consider Brown’s subsequent effect on education itself, such as the modern curriculum of schools.

Justice Kennedy’s account of Parents Involved shifts his attention away from a narrative informed by race and focuses on a narrative structured around public education in America.146 While Justice Kennedy “has long thought of schools as institutions for teaching students to be citizens,” he now “sees that those lessons extend to interracial relations.”147 Drawing this connection produces a visual gestalt.148 School desegregation is no longer presented as a struggle over racial equality, but becomes a story

143. Id. at 835.
144. Id. at 792-93 (Kennedy, J., concurring) (“Gratz involved a system where race was not the entire classification. The procedures in Gratz placed much less reliance on race than do the plans at issue here. . . . The same must be said for the controlling opinion in Grutter.”).
145. Id. at 793.
146. Gerken, supra note 127, at 107.
147. Id. at 119.
148. The concept of “visual gestalt” comes from Thomas Kuhn’s study on the structure of scientific revolutions. Kuhn argued that scientific revolutions occurred through paradigm shifts, which sometimes entailed little more than “handling the same bundle of data as before, but placing them in a new system of relations with one another by giving them a different framework.” This reorientation is like a visual gestalt: “the marks on paper that were first seen as a bird are now seen as an antelope.” THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 85 (3d ed., 1996). Similarly, Justice Kennedy “handles” much of the same evidence — e.g., fact pattern, judicial precedent — as the other members of the Court, but “by giving them a different framework,” comes away with a remarkably different story about the meaning of Parents Involved.
about how best we educate our nation's children.

III. CONCLUSION

This paper considered the judge as historian by examining the Supreme Court's treatment of Brown as historical event in Parents Involved. In a collection of opinions, the Court revealed its use of several different historical methodologies to arrive at divergent interpretations about the legacy of Brown and the history of race relations (and public education) in America. The plurality focused on an intent-based history of Brown, evaluating the briefs and oral arguments of the NAACP lawyers to argue for an anti-classification reading of Brown. The dissent studied the ongoing history of Brown, considering the interaction between a line of judicial precedents extending from Brown and evolving social circumstances to champion an anti-subordination interpretation of Brown. And Justice Kennedy, the swing justice, eschewed a historical narrative of Brown structured around race, opting instead to tell a "constitutional story" about public education in America.

If this interpretive splintering makes us uneasy, it is because Brown is held to represent America's "national narrative." Michael Klarman's reinterpretation of Brown's relationship to the transformation of race relations in America so offended members of the legal academy because he challenged that narrative. But unlike academic scholarship, the public authority vested in the Court endows its historical accounts with the force of legal judgment. For all the similarities the judge bears to historian, the official weight accorded judicial decisions provides the meaningful difference.

Parents Involved may be welcome because it reveals competing conceptions of Brown as historical event. Interpretive splintering may make us uneasy, but it opens up the Court's various uses and interpretations of history to critical inquiry. By critical inquiry, we learn not to dutifully accept the Court's rendering of history, whether it be embodied in an unanimous or plurality opinion. We may also have to teach ourselves to come to terms with a more open or plural understanding of Brown. Brown, like the Constitution, is a sacred public text; time is unlikely to settle battles over its interpretation.

But perhaps a particular history of Brown, such as Justice Kennedy's narrative about the values of civic education and the progress we have made in this arena, will eventually ascend to "institutionally privileged" status. Then Parents Involved itself may one day serve as an historical source. The other opinions would remind us of alternative accounts of

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149. Balkin, Brown as Icon, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, supra note 6, at 5.
*Brown*, particularly as a story about race relations in America, albeit with conflicting versions. By exposing a moment in which the Court was engaged in a battle over historical truth, *Parents Involved* helps us understand the process by which the Court constructs an official account of both history and law.