INTRODUCTION

THIRU V IGNARAJAH

# THE PROMISE OF BROWN

**For *Brown v. Board of Education* held out a promise. It was a promise embodied in three Amendments de- signed to make citizens of slaves. It was the 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.1**

The worst kept secret in America is that our nation’s schools remain stubbornly segregated by race.

Over 8.4 million Black and Latino students—40 percent of those students nationwide—attend public schools that are more than 90 percent minority. Nearly a third of those students go to schools that are less than 1 percent white. These are the same malnourished schools that have been neglected for decades, yielding low test scores, high suspension rates, and bleak ca- reer and college opportunities for three generations of minority schoolchildren.

The consequences are everywhere. Maps of crime, unem- ployment, and disease mirror racial disparities in schools. Righ-

1. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting).

## Justice Stephen Breyer

teous fury boiling over on American streets and the toxic state of race relations in parts of the country are fueled—perhaps even preordained—by the black-and-white checkerboard pat- tern of our schools. How can this be the modern legacy of the civil rights movement?

After all, long-standing inequities and racial tensions were meant to recede as one generation’s prejudices surrendered to the tolerance of the next. Tolerance was to be cultivated on vibrant playgrounds full of children learning and laughing with com- panions of many races. That has not been the American story. Instead, hundreds of thousands of classrooms remain as segre- gated today as they were before *Brown v. Board of Education*.

The present conditions are not transient or novel or acciden- tal. They have persisted for fifty years because we have let them. And the U.S. Supreme Court is not free from blame. The very institution that first proclaimed and then doggedly pursued the promise of *Brown* has, despite formidable dissents by some of history’s great jurists, allowed its breach and retreat.

In 2007, local efforts to correct this dismal reality suffered a significant setback. In a jarring upheaval of settled law, the Supreme Court struck down two promising school board initia- tives designed to combat the risk of resegregation and achieve more inclusive schools. The 5-4 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and its companion case out of Louisville, Kentucky—together, what I call the “Resegregation Cases”—marked the end of an era of efforts by school authorities to fulfill the promise of racially in- tegrated education once imagined in *Brown*.2

The Resegregation Cases concerned high schools in Seat-

1. *Brown v. Board of Education*, 347 U.S. 483 (1954).

### Breaking the Promise of Brown

tle and elementary schools in Louisville that were undeniably polarized by race. Convinced that schoolchildren benefit from diverse classrooms, local authorities adopted school choice and school transfer policies, accompanied by race-conscious restric- tions, to promote integration. A sharply divided Supreme Court ruled that these initiatives, no matter their good intentions, were forbidden by the Constitution.

In a searing landmark dissent, Justice Stephen Breyer warned this was “a decision the Court and the Nation will come to regret.” Fifteen years later, the unabated resegregation of America’s schools has confirmed Justice Breyer’s fears, as many schools and school districts across the country are more racially segregated today than they have been since the late 1960s.

This volume contains Justice Breyer’s dissent in its entirety. It is the longest opinion—majority or dissent—of his career. For this son of a school board lawyer, it is also his most inspired. *New York Times* legal reporter Linda Greenhouse said those in the courtroom on the day of the decision had never heard Jus- tice Breyer “express himself with such emotion.”3 Justice John Paul Stevens wrote that Breyer’s dissent was “eloquent and un- answerable.”4 Another justice called it “the finest thing any of us on the current Court has ever done.”5 One of Justice Thur- good Marshall’s sons privately thanked Justice Breyer for his “wisdom, judgment, strength and courage”6 and shared that the opinion brought him to tears.

1. Linda Greenhouse, “Justices Reject Diversity Plans in Two Districts” (*New York Times*, June 28, 2007).
2. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 798 (2007) (Stevens, J., dissenting).
3. Letter from Associate Justice of the Supreme Court, to Justice Ste- phen G. Breyer (June 26, 2007).
4. Letter from Thurgood Marshall Jr. to Justice Stephen G. Breyer (June 28, 2007).

### Breaking the Promise of Brown

I had the privilege of serving as one of Justice Breyer’s law clerks the year the Resegregation Cases were decided. Serving as a law clerk and—along with my fellow clerks, Jaren Casazza, Justin Driver, Tacy Flint, and Stephen Shackelford—assisting with the preparation of Justice Breyer’s dissent in the Resegrega- tion Cases remains the honor of a lifetime.

No introduction can convey Justice Breyer’s even-handed ap- praisal of the law, the care with which he excavates the local his- tories in Seattle and Louisville that led to the legal controversy, or the deliberate arc of an argument aimed at those with open minds. This dissent was not designed to provide ammunition for like-minded allies or agitate those who vehemently disagreed, though it likely did both. It was meant to convince people of good faith, an audience seeking guidance on the uniquely Amer- ican project of forming “a more perfect Union,” that racial in- tegration in public schools was not merely compatible with that noble aspiration and our Constitution—it was essential to both. This introduction will honor that objective. It will first trace the critical sequence of Supreme Court decisions from *Brown v. Board of Education* (1954) to *Milliken v. Bradley* (1972) to the Resegregation Cases (2007) to explain the slow rise and current regression in school integration. Next is a synopsis of the struc- ture and thrust of Justice Breyer’s dissent, highlighting three of its most consequential features. This is followed by an account- ing of why this topic matters so much—to Justice Breyer, to the political independence and perceived integrity of the Court, and

to the future of public schools and race relations in America.

Understanding the context of these issues has never been more imperative. The images of our country these past few years—white supremacists draped in Confederate flags breach- ing the Capitol, racially charged violence in Charlottesville, pro-

## Justice Stephen Breyer

testors of police brutality enduring tear gas in Portland, march- ers tearing down symbols of colonization and the Confederacy in Baltimore—are not only about the murders of George Floyd, Ahmaud Arbery, and countless others. Today’s injustices are also the rotten harvest of a nation where Black children shiver in city classrooms with no heat, where suburban teenagers wear blackface and white robes for Halloween, and where too many parents everywhere look the other way.

Our generation’s campaign against suffocating, enduring injustices does not end in our nation’s classrooms, but it must begin there. As Justice Marshall wrote a half-century ago, “For unless our children begin to learn together, there is little hope that our people will ever learn to live together.”7

# Segregation in America’s Schools

School integration has stagnated in every corner of the coun- try. Some of our biggest states—New York, California, Texas, which combine to account for nearly 30 percent of total public school enrollment—face the most daunting challenges. In New York, nearly two-thirds of Black students can be found at 90 to 100 percent minority schools. Likewise, more than half of all Latino students in California, New York, and Texas attend schools that are just as intensely segregated.

But segregation today is not confined to large states, or to the deep South for that matter. Sandwiched between New York, Illinois, and California, Maryland ranks as the third most seg- regated state for Black students, with 53 percent of Black chil-

1. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissent- ing).

### Breaking the Promise of Brown

dren attending 90 to 100 percent minority schools, many in the hypersegregated schools of Baltimore City. Similarly, almost half of all Latino students in New Jersey attend such schools, placing it fourth nationwide.

Most disturbing is that America’s schools overall are as seg- regated today as they were fifty years ago. By 2011, the percent- age of Black students in majority-white schools had returned to exactly where it was in 1968. Since then, it has only further de- clined to a record low of 19 percent in 2018, a pronounced drop to half the high-water mark of integration in 1988, when nearly 37 percent of Black students attended majority-white schools.

Back then, at the apex of integration, only 6 percent of Amer- ica’s public schools had virtually no white students. The backslide has been stark. In the quarter-century since 1988, that percentage has tripled to over 18 percent. In absolute numbers, the reseg- regation of the nation’s school system has produced 4,000 more schools than there were in 1988 that are essentially devoid of white students (that is, schools with less than 1 percent white pop- ulations). To confess in 2022 that the late 1980s were the pinnacle of integration in America is to admit an epic national failure.

Responsibility for these disheartening trends lies at least partly with the Supreme Court. More than any other organ of government, the Court has defined the progress and retreat of school integration in America. At the start, it was the Court that, through its decisions, validated both the Civil Rights Act of 1964 and the enforcement activity of the Justice Department’s Office of Civil Rights in the years that followed. The timeline marked by the Court’s major decisions can be loosely divided into five intervals: (1) pre-1954, when the Court allowed overt de jure school segregation laws at the state and local level; (2) 1954–1968, a time of convulsion and noncompliance as local ju-

## Justice Stephen Breyer

risdictions disregarded the Court’s pronouncements beginning with *Brown*; (3) 1968–1974, a period of substantial desegrega- tion propelled by strong federal decrees; (4) 1974–1988, a longer phase of more modest integration supported by weaker court orders as the Court gradually withdrew from the business of supervising school assignment policies; followed by (5) 1988 to the present, a period of steady resegregation as longstanding de- segregation decrees were systematically dissolved.

So, how did we get from the clear-throated consensus of *Brown* to the division and acrimony coursing through the Re- segregation Cases?

It was May 17, 1954, when the Supreme Court unanimously announced in *Brown v. Board of Education* that “separate ed- ucational facilities are inherently unequal,” and, a year later, when it directed school districts to desegregate with “all delib- erate speed.”8

Rare in American history has a decision with so much prom- ise met with such resistance. Emblematic of the times was the open insurrection that unfolded in Little Rock, Arkansas. Three years after *Brown*, standing on the doorstep of integration, Governor Orval Faubus ordered the Arkansas National Guard to block nine Black children from entering Little Rock Central High School. Interceding to “avoid anarchy,” President Dwight Eisenhower federalized the National Guard to remove it from the governor’s control and dispatched the 101st Airborne Di- vision to integrate the school. An elite brigade of paratroopers took Black children by their hands and escorted them past mobs of protestors, all to comply with a Supreme Court decision that the governor of Arkansas was prepared to disregard.

1. *Brown v. Board of Education II*, 349 U.S. 294 (1955).

### Breaking the Promise of Brown

In *Cooper v. Aaron* (1958), the dramatic standoff reached the Supreme Court. Just as it had in *Brown*, the Court issued another *per curiam* decision—an unsigned opinion adopted by all nine justices—unequivocally reaffirming that states were bound by *Brown* and that “no state legislator or executive or ju- dicial officer can war against the Constitution without violating his undertaking to support it.”9

The clash in Little Rock was a sign of the times. Resistance nationwide was no less fervent than what Black schoolchildren encountered in Arkansas, and little changed in most places until the late 1960s, when the Court lost patience with delay. In a series of intrepid decisions, the Supreme Court ordered the im- mediate dismantling of segregated schools, “root and branch,” in Virginia in 1968,10 struck down inadequate school choice plans that failed to achieve integration in Mississippi in 1969,11 and authorized courts to impose busing plans and reconfigure school attendance zones to remedy past discrimination in North Carolina in 1971.12 Federal desegregation decrees proliferated in the years that followed, producing meaningful integration in many parts of the country, including the deep South.

Unfortunately, far-reaching changes in where people lived counteracted the moral leadership of the Supreme Court and curbed the magnitude and pace of integration. Five million Afri- can Americans left the South beginning in 1940, and 80 percent of America’s Black population lived in cities by 1970.13 At the

1. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).
2. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).
3. *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).
4. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971);

*Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973).

1. United States Census, “The Great Migration 1910–1970,” www.cen sus.gov/dataviz/visualizations/020/.

## Justice Stephen Breyer

same time as African Americans arrived in urban centers to find jobs, buy homes, and raise families, millions of whites left for the suburbs, their departure only hastened by federal transpor- tation policy, mortgage lending practices and redlining, and, for many, the specter of integrated schools.

Federal courts were ready to refashion desegregation de- crees to account for these tectonic shifts in demographics. De- troit, for example, was one of many school districts facing the vexing challenge of suburbs with swelling white populations and a city of predominately Black students. Prompted by an NAACP lawsuit, a federal court crafted an interdistrict deseg- regation plan that combined students and schools across the city as well as the suburbs. The trial court concluded that an alternate plan limited to Detroit alone was inadequate and that the state of Michigan, not just the city of Detroit, was respon- sible for the unconstitutional conditions leading to schools segregated by race. Michigan Governor William Milliken appealed.

In *Milliken v. Bradley* (1974), the Supreme Court had a chance to ratify the district court’s commonsense solution to achieve meaningful integration. It chose to construct a further roadblock instead. In a pivotal 5-4 decision, the Court ruled that suburbs shouldered no responsibility for segregation in city schools: “Where the schools of only one district have been af- fected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district’s schools with those of the surrounding districts.”14 To exonerate Michi- gan and relieve it of any responsibility for producing a remedy,

1. *Milliken v. Bradley*, 418 U.S. 717, 749 (1974).

### Breaking the Promise of Brown

the Court’s majority closed its eyes to the federal district court’s conclusion that Detroit’s segregated schools were the direct product of a series of decisions by the state of Michigan.

Justice Thurgood Marshall, who as a lawyer had repre- sented the winning side in *Brown*, feared that striking down the federal decree in Detroit would leave the district powerless to pursue integration in the face of white flight to the suburbs, a hurdle that was hardly unique to Detroit. The controversy provoked one of Justice Marshall’s most commanding dissents. Sadly, nearly fifty years later, its sentiment and stirring words still ring true:

We deal here with the right of all of our children, what- ever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future.

Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation’s childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the en- forcement of the constitutional principles at issue in this case.

## Justice Stephen Breyer

Today’s holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution’s guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great met- ropolitan areas to be divided up each into two cities— one white, the other black—but it is a course, I predict, our people will ultimately regret. I dissent.15

*Milliken* reflected the fact that honest efforts to integrate schools were up against momentous trends that would defeat the ingenuity of school boards and courts alike. Justice Mar- shall worried that depriving federal courts of even the option of interdistrict solutions would drain the judiciary’s power to the point of futility.

Despite the repercussions of *Milliken*, federal courts—albeit with their wings now clipped—refused to abandon the project of integration, and desegregation decrees continued to make some difference. Compared to the ten years of steady integra- tion preceding *Milliken*, however, progress slowed considerably over the next decade. And America’s schools would never be more integrated than 1988, when a wrenching reversal began.

The resegregation of America’s schools began in earnest in the early 1990s. Around that time, in a trilogy of cases—in 1991, 1992, and 199516—the Supreme Court materially lowered the standard for ending desegregation orders, making it easier than ever for courts to rule that school integration had come

1. *Milliken v. Bradley*, 418 U.S. 717, 814–15 (1974) (Marshall, J., dis- senting).
2. See *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v.*

*Jenkins*, 515 U.S. 70 (1995).

## Justice Stephen Breyer

far enough. Civil rights leader Julian Bond once warned, “The greatest impediment to achieving racial equality is the narcotic belief that we already have.”17 The 1990s and 2000s exempli- fied his admonition, as one federal court after another lifted desegregation decrees on the grounds that school districts had reached “unitary status” and that integration, as far as could be expected, had been accomplished. Nothing was further from the truth, and the fragile progress to date was in mortal jeopardy. By 2001, when President George W. Bush took office, there were just 600 school districts that were still subject to federal deseg- regation orders, a number that further dwindled to 380 by the end of his second term.

Such was the history inherited by the Supreme Court in 2007, when the next pivotal school segregation question would come before it. It was a history punctuated by bold pronounce- ments like *Brown* and *Cooper* only to see the gains inspired by them compromised and recede.

Looking back across the decades, it is easier to catalog the impact of the individual victories and setbacks. From 1954, when *Brown* was decided until the late 1960s, there was little adherence to the mandate of integration. In the late 1960s and early 1970s, the Court’s increasingly impatient directives to de- segregate generated momentum. In 1974, however, the Court’s divided ruling in *Milliken*, refusing to tackle the obstacle of white flight, flattened the pace of integration, which, remark- ably, peaked in 1988. This is when the resegregation phase com- menced, as the Supreme Court loosened its own standards, al- lowing school districts to untangle themselves from the federal decrees that had until then propelled integration forward.

1. Speech of Julian Bond, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin (January 28, 2015).

### Breaking the Promise of Brown

Like in 1974, when the Court was confronted with the prob- lem of suburban white flight, the Court had a chance in 2007 to reckon with the resegregation of America’s schools. By then, local school districts were choosing to battle resegregation on their own, often voluntarily undertaking the very strategies they had previously been compelled by federal courts to adopt. The Supreme Court was asked simply not to stand in their way.

# The Resegregation Cases

The very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities di- vided by race and poverty.18

As federal courts dissolved desegregation decrees and city-to- suburb population shifts continued, school districts across America struggled to cope with the resegregation of public schools. Some school systems affirmatively fought resegregation even without the formal spur of a federal court order. The cen- tral question that came before the Supreme Court in the Reseg- regation Cases arose from two such districts in Seattle, Wash- ington, and Louisville, Kentucky.

Both had a long history of segregated schools reinforced by state policy and had faced civil rights lawsuits in the past—in

1. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 868 (2007) (Breyer, J., dissenting).

## Justice Stephen Breyer

Louisville’s case resulting in a remedial decree that was not dis- solved until 2000. Both made progress but remained frustrated by mounting racial imbalance in their public schools. In Seattle, officials adopted a school choice program that, for the sake of creating high schools that reflected the racial diversity of the dis- trict, took account of a student’s race in a narrow set of cases. The Louisville school district—also for the purpose of integrat- ing its schools—simply reinstituted the same elementary school assignment plan it had originally been compelled to adopt when it was under a federal order.

In both cities, students ranked their school preferences and, in some instances, the districts took account of the race of the student and the composition of the school to ensure that student assignments did not exacerbate already segregated schools. Par- ents whose students were assigned to schools other than their top choices sued. Federal trial and appellate courts rejected those challenges and declared both programs lawful.

The Supreme Court agreed to review these decisions. Oral argument was held in December 2006, and the Court announced its decision on June 28, 2007, the last day of the first full term after Chief Justice John Roberts and Justice Samuel Alito joined the Court. Just as President Richard Nixon’s appointments of Justices Lewis Powell and William Rehnquist in December 1971 made the difference in the 5-4 decision in *Milliken* in 1974, so too did President George W. Bush’s appointments of Chief Jus- tice Roberts (2005) and Justice Alito (2006) prove decisive in the Resegregation Cases of 2007.

Chief Justice Roberts, joined by Justices Antonin Scalia, Clarence Thomas, and Alito, announced the judgment of the Court. He wrote that, because the school district programs took explicit account of race, they violated the Equal Protec-

### Breaking the Promise of Brown

tion Clause of the Constitution, no matter the severity of pub- lic school segregation or the claimed righteousness of the dis- tricts’ purpose to eradicate it: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”19

Justice Anthony Kennedy supplied the pivotal fifth vote to strike down the plans. While he accepted that combating reseg- regation was a laudable objective and would constitute a “com- pelling state interest,” he nevertheless found that Seattle’s and Louisville’s plans were not “narrowly tailored” enough.20 It did not matter to Justice Kennedy that the current plans resembled plans that the districts had previously used, sometimes under the mandate of a federal court.

Justice Stevens joined Justice Breyer’s dissent “in its en- tirety,” calling it “eloquent and unanswerable.”21 He added a short, separate dissent that took aim at the Chief Justice’s slo- ganeering, dismantling the Chief Justice’s confidence that “the way to stop discrimination . . . is to stop discriminating”22:

This sentence reminds me of Anatole France’s obser- vation: “[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” The Chief Justice fails to note that it was only Black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend Black schools. In

1. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007).
2. *Id.*, at 789 (Kennedy, J., concurring in part and concurring in the judgment).
3. *Id.*, at 798 (Stevens, J., dissenting).
4. *Id.*, at 748.

## Justice Stephen Breyer

this and other ways, the Chief Justice rewrites the his- tory of one of this Court’s most important decisions.23

Justice Stevens, the longest-serving justice then on the Court, ended with a reminder of how dramatic and indefensible a departure the majority’s decision was: “It is my firm convic- tion that no Member of the Court I joined in 1975 would have agreed with today’s decision.”24

The principal dissent was penned by Justice Stephen Breyer. His impassioned, seventy-seven-page dissent in the Resegrega- tion Cases marks a conspicuous departure in tone and length from his other opinions.

Part I of the dissent—titled, simply, “Facts”—begins with a thorough history of school integration initiatives in Seattle and Louisville, chronicling “the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools.” With each successive attempt, both cities sought to rely more upon school choice, to depend less upon racial classifications, and to saddle families with fewer burdens. The stories of Seattle and Louisville—typical of the sagas of so many American cities—illustrate “the complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration.”

With this history in focus, in Part II (“The Legal Stan- dard”), Justice Breyer surveys the law, reciting an unbroken line of Supreme Court, federal appellate, and state court decisions faithful to *Brown*. This part draws its strength from *Swann v. Charlotte-Mecklenburg Bd. of Ed.* (1971), where a unanimous Supreme Court said that school authorities were entitled to take

1. *Id.*, at 799 (Stevens, J., dissenting).
2. *Id.*, at 803 (Stevens, J., dissenting).

### Breaking the Promise of Brown

explicit account of race to prepare children of different races to learn and live together:

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.25

For Justice Breyer, this was controlling precedent, and evi- dence of *Swann*’s vitality was everywhere: it had “been accepted by every branch of government,” underpinning numerous state court decisions, presidential orders, and acts of Congress. Jus- tice Breyer further explains that this unwavering history, rooted in constitutional amendments “designed to make citizens of slaves,” supported a “careful review” of the districts’ plans, but not the kind of “strict scrutiny” reserved for policies meant to divide rather than unite people by race.

Even though a more relaxed constitutional test was appropri- ate, in Part III (“Applying the Legal Standard”), Justice Breyer nonetheless concludes that plans to combat resegregation in Se- attle and Louisville also survive the more exacting standard of “strict scrutiny.” Generally, to pass strict scrutiny, the govern- ment must show a “compelling state interest” and establish that its method is “narrowly tailored” to achieve that interest.

In Justice Breyer’s estimation, achieving racially integrated

1. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971).

## Justice Stephen Breyer

public schools constitutes a compelling state interest (a conclusion shared by Justice Kennedy). He explains that inclusive schools combine three critical interests—remedial, educational, and dem- ocratic. First, integration honors a pledge to set right the damage of “America’s heresies,”26 from the modern vestiges of past segre- gation back to the original sins of slavery and Black Codes and Jim Crow laws. Second, schools are entitled to seek the kind of classroom diversity they believe will produce superior academic outcomes for all children. Finally, bringing together children of different races to learn and cooperate with one another is perhaps the best hope to make of “a land of three hundred million people one Nation.”27 For Justice Breyer, if a governmental interest that unites “these three elements is not ‘compelling,’ what is?”28

Next, to prove the plans were narrowly tailored, Justice Breyer compares them to past desegregation plans and to the af- firmative action admissions policy at the University of Michigan Law School,29 all of which the Supreme Court had previously approved. Neither Seattle nor Louisville used impermissible racial quotas (which the Court’s precedent had forbidden) but, instead, looked to race only as a starting point. The predomi- nant factor for student assignment in both cities was not race but student choice. And the plans were literally tailored over time, as each school district experimented and innovated based on its experiences, with vanishing use of forced busing, greater reliance upon school choice, and less severe consequences than rejection from Michigan’s flagship law school.

Justice Breyer reminds us that countless school districts have

1. Ta-Nehisi Coates, *Between the World and Me* (2015), 6.
2. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 840 (2007) (Breyer, J., dissenting).
3. *Id.*, at 843 (Breyer, J., dissenting).
4. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

### Breaking the Promise of Brown

used more “explicitly race-conscious methods, including man- datory busing”30 to achieve integration than the plans under attack. At the same time, he challenges the majority to find a single example from anywhere in American history of a school district that fought off resegregation relying on a less race- conscious plan: “Nothing in the extensive history of desegre- gation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals.”31

After thirty-three pages of meticulous analysis in Parts II and III, Justice Breyer, in Part IV (“Direct Precedent”), rein- forces his legal conclusions by simple reference to controlling precedents that dealt directly with desegregation plans in Lou- isville and Seattle.32 On the basis of these prior rulings, Justice Breyer firmly rebuked the majority’s decision, which, in the name of equal protection, invalidated plans that the previous day the Constitution appeared to require:

Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court’s unanimous pronounce- ments concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not.33

1. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 850 (2007) (Breyer, J., dissenting).
2. *Id.*, at 851–52 (Breyer, J., dissenting).
3. See *Hampton v. Jefferson Cty. Bd. of Ed.*, 102 F.Supp.2d 358 (WD Ky. 2000); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).
4. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 865–66 (2007) (Breyer, J., dissenting).

## Justice Stephen Breyer

In Part V (“Consequences”), the dissent outlines the prac- tical fallout of the Court’s ruling. A constitutional pragmatist, Justice Breyer pays attention to what the Court’s decisions mean for those charged with the day-to-day responsibilities of admin- istering local schools. He warns of the decision’s dire impact on local efforts to come to grips with inequities of race and class in America’s schools. Guided by a review of hundreds of deseg- regation plans from all over the country, addressing different kinds of local challenges, each with distinct elements, most with explicit race-conscious features, Justice Breyer urges judicial humility:

I do not claim to know how best to stop harmful dis- crimination; how best to create a society that includes all Americans; how best to overcome our serious prob- lems of increasing *de facto* segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not autho- rize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation’s children and how best to administer Amer- ica’s schools to achieve that aim. The Court should leave them to their work.34

Justice Breyer then closes the dissent of his career with a poi- gnant reflection about the legacy of the Supreme Court’s most celebrated decision:

### Breaking the Promise of Brown

Finally, what of the hope and promise of *Brown*? For much of this Nation’s history, the races remained di- vided. 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, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amend- ments designed to make citizens of slaves. It was the 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. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.35

With the unmistakable echo of Justice Marshall’s closing in

*Milliken*, Justice Breyer ends:

The last half-century has witnessed great strides toward racial equality, but we have not yet realized the prom- ise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.36

Justice Breyer’s dissent is built upon an edifice of local his- tory, a faithful application of firm precedent, a candid appraisal

35. *Id.*, at 867–68 (Breyer, J., dissenting).

## Justice Stephen Breyer

of the decision’s practical consequences, and an appreciation of what it ultimately will mean for the nation’s fundamental aspi- ration to unite a divided people.

# Challenging Legal Convention

If Justice Breyer’s first audience is the American people and his- tory is his second, law professors and the next generation of law students are, no doubt, his third. Contained in Justice Breyer’s dissent are three steel-toed challenges to judicial orthodoxies that are usually just a topic of scholarly discourse.

First, Justice Breyer challenges the “distinction between *de jure* segregation (caused by school systems) and *de facto* segre- gation (caused, *e.g.*, by housing patterns or generalized socie- tal discrimination),” explaining that this difference is “mean- ingless in the present context.”37 When a court encounters *de jure* segregation—segregation by law—it enjoys virtually lim- itless latitude to fashion an appropriate remedy. Yet courts are thought to have no authority to rectify *de facto* segregation. For Justice Breyer, it is impractical and unwise to rest the scope of a federal court’s power to redress inequity upon such an aca- demic, elusive determination.

In Seattle, for instance, schools may not have been segre- gated by law, strictly speaking, but Black children were kept apart from white children by school boundary lines fixed by the school district. Thus, state policies bluntly produced segregation in Seattle just as much as laws directly segregated schools in other places. The city of Seattle admitted as much, voluntarily

### Breaking the Promise of Brown

desegregating its schools without a court order when its policies were challenged as *de jure* segregation by private plaintiffs. In that regard, the presence or absence of a judicial order predi- cated on *de jure* segregation cannot be dispositive either, since numerous school districts avoided a federal decree by conceding that their policies caused racially segregated schools. According to Justice Breyer, because a distinction between segregation in law and segregation in fact cannot be neatly drawn given the cluttered, chaotic history of America’s racist policies, this imag- ined distinction should not dictate what remedies are available to address the nation’s failures.

Second, Justice Breyer contests the common impression that courts are wholly free to brush aside “dicta,” no matter the leg- acy or character of that dicta. Dicta are those passages in a prior decision that are informative or explanatory but are not “nec- essary” to a court’s ruling. Such language is typically treated as extraneous, editorial commentary that may guide a court’s analysis but does not control the outcome of future cases.

In his dissent, Justice Breyer makes clear his view that all dicta are not equal. In *Swann*, Chief Justice Warren Burger ex- plains that race-conscious school policies designed to promote integration and prepare students to live in a diverse country were, undoubtedly, “within the broad discretionary powers of school authorities.”38 The claim was not controversial at the time, and the pronouncement was technically dicta*—*meaning it was not required to reach the result in *Swann*. For years, how- ever, public agencies and state and federal courts relied on Chief Justice Burger’s statement to resolve numerous cases. *Swann* had been affirmed by contemporary and subsequent Supreme

1. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971).

## Justice Stephen Breyer

Court pronouncements,39 as well as by numerous state courts that adopted the logic of *Swann* before and after it was decided. *Swann* was, thus, no different than Justice Lewis Powell’s concurring opinion in the 1978 affirmative action case, *Regents of the University of California v. Bakke*.40 Justice Powell’s opin- ion was also technically dicta but provided decades of guidance for university administrators across the nation as they sought to craft constitutionally sound affirmative action admissions pol- icies. For Justice Breyer dicta could harden into widespread ju- dicial consensus and should, then, carry the controlling weight of precedent. To give the pedantic label “dicta” the talismanic power to strip a court’s pronouncement of its authority is to ig- nore how the law develops, how judicial wisdom and reasoning

fortifies itself, and how courts operate in the real world.

Finally, Justice Breyer attacks the central plank of Chief Jus- tice Robert’s legal analysis, that any measure that takes account of race should be treated with the highest degree of suspicion, regardless of whether the goal is to divide the races or to bring them together. This mechanical approach to the law of equal protection is not just overly simplistic—for Justice Breyer, it also contradicts the origins and purpose of the Fourteenth Amend- ment of the U.S. Constitution:

The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery There is reason to believe that those

who drafted an Amendment with this basic purpose in

1. *North Carolina Bd. of Ed. v. Swann*, 402 U. S. 43 (1971); *Bustop, Inc. v. Los Angeles Bd. of Ed.*, 439 U. S. 1380 (1978).
2. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

### Breaking the Promise of Brown

mind would have understood the legal and practical dif- ference between the use of race-conscious criteria in de- fiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that pur- pose, namely to bring the races together.41

In the case of Seattle and Louisville, the school choice plans were devised not to divide and separate the races but, rather, to bring schoolchildren of different races together. In Justice Breyer’s view, while the Constitution “almost always forbids the former, it is significantly more lenient in respect to the latter.”42 After all, the promise of equal protection is rooted in the Four- teenth Amendment, which pledged equality to an emancipated race in a nation riven by civil war. A state or local government’s efforts to deliver on that hallowed promise could not, in fidelity with the Constitution, be equated with measures undertaken to break it.

Whether it is the rigid taxonomy separating *de jure* and *de facto* segregation, the crude recitation of the difference between loose dicta and strict precedent, or the uniform treatment of all race-conscious policies no matter their aim, Justice Breyer refuses to reduce the subtle alchemy of decisionmaking in hard cases into a rote chemical formula. The Resegregation Cases confirm that Justice Breyer is foremost a practical jurist, not an abstract professor of theory. These cases exemplify how Justice Breyer approaches the role of the law and the work of the Court. For him, Supreme Court decisions are not political, academic, or polemical exercises. At their best, they grapple with the na-

1. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 829 (2007) (Breyer, J., dissenting).
2. *Id.*, at 830 (Breyer, J., dissenting).

## Justice Stephen Breyer

tion’s enduring failures and provide to a messy democracy both the clarity and the freedom it requires to permit “we the people” to govern ourselves.

# The Power of Dissent

It is not often in the law that so few have so quickly changed so much.43

“Justice John Paul Stevens, Justice David Souter, Justice Ruth Bader Ginsburg and I dissent.” With this conspicuously formal opening, so began Justice Breyer as he delivered from the bench his landmark opinion in the Resegregation Cases. Issuing a dis- sent from the bench is itself a rare event. It is a clarion signal that the divergence of opinion in the case is no ordinary disagree- ment, even among the fiercely contested controversies that reach the nation’s highest court. Justice Breyer’s stirring oration lasted twenty-two minutes, longer than any prior reading of a majority, concurring, or dissenting opinion, in Supreme Court history.

In the middle of Justice Breyer’s recitation is a sentence that appears nowhere in his dissenting opinion, a rogue, uncharacter- istic line that pierced the apolitical veneer of the Court: “It is not often in the law that so few have so quickly changed so much.” Justice Breyer’s seeming reference to the arrival of Chief Justice John Roberts and Justice Samuel Alito and the legal cataclysms they had wrought in a single term was more than commentary about the individual case at hand. For Justice Breyer, the abrupt abandonment of significant precedent threatened the Court’s in-

1. Oral Opinion of Justice Breyer, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (No. 05-908), [www.oyez.org/cases/2006/05-908.](http://www.oyez.org/cases/2006/05-908)

### Breaking the Promise of Brown

stitutional legitimacy. It was a charged statement at the end of a term as divisive as any the Supreme Court had ever seen.

Of the seventy-three cases decided by the Court that year, a third of them—two dozen in total—ended in 5-4 splits, a greater proportion than any other term in modern history, before or since. In a substantial majority of those divided rulings, the same four justices (Stevens, Souter, Ginsburg, and Breyer) found themselves united in dissent. To place the October 2006 term in perspective, a decade later (the October 2016 term), there were only seven decisions that ended in 5-4 splits (10 percent).

What Justice Breyer feared most was the diminishment of the Court into just another political institution, no different than Congress or the presidency, defined by the popular trade winds of the moment. After all, if venerated legal precedent could vanish overnight with the arrival of a new presidential appointee, the Supreme Court becomes more an executive agency than an independent third branch of government. As Justice Breyer has articulated in speeches and writings over the years, the Court’s legitimacy—the reason the country honors its decisions—depends on its independence and the public’s confi- dence in its independence.

Justice Breyer often reminds audiences that, after *Worches- ter v. Georgia* in 1832, where the Supreme Court recognized the tribal sovereignty of the Cherokee, President Andrew Jack- son bluntly challenged the Court’s power to compel Georgia to honor its ruling. He reportedly said: “John Marshall has made his decision; now let him enforce it.”44 The tragedy of the Trail of Tears followed. A century later, *Cooper v. Aaron* (1958) doc-

1. Historians generally concur the memorable quotation is likely apoc- ryphal, but it fairly reflected the view President Jackson shared in written correspondence soon after the Supreme Court’s decision.

## Justice Stephen Breyer

umented the open disdain of the governor of Arkansas after the Supreme Court’s desegregation decisions. Deployment of the 101st Airborne Division was required to enforce those rulings.

Such measures, thankfully, are no longer needed. A jurist from another country once asked Justice Breyer, “Why do Americans do what the Court says?” Justice Breyer explained that it is our winding history, not any feature of our legal doc- trine, that explains the rule of law in the United States:45

Reflect for a moment upon how long it has taken for our Nation to learn the importance of the rule of law. Think of our ups and downs. Think of slavery. Think of a civil war. Think of eighty years of segregation. Out of those trying experiences and the many others that this Nation has endured, we have emerged with at least one substan- tial attainment: While we may not agree with the out- come of a particular case, we will follow the rule of law. And it is this fundamental belief that binds together our Nation of 300 million people.46

The cloak of legitimacy that America’s struggles have con- ferred upon the Supreme Court should not be taken for granted. Should the faith of the American people in the political indepen- dence of the federal courts begin to fray, we risk returning to a time when the Court’s pronouncements were only as valid as the weight of public sentiment supporting them.

In the context of school desegregation, this is not an abstract

1. Stephen G. Breyer, *Making Our Democracy Work: A Judge’s View*

(Vintage, 2011).

1. Stephen G. Breyer, “An Independent Judiciary: In Honor of the Ses- quicentennial Anniversary of the Massachusetts Superior Court.” Sept. 22, 2009, Fairmont Copley Plaza Hotel, Boston, MA.

### Breaking the Promise of Brown

fear. When two appointments by President Nixon changed the bal- ance of power in 1971, the Court’s commitment to desegregation shifted as well. Recall, in *Milliken*, Justice Marshall suspected the majority’s decision was “more a reflection of a perceived public mood” than it was “the product of neutral principles of law.”47 More than fifty years later, as two new Justices straightaway bull- dozed settled precedent in the Resegregation Cases, Justice Breyer, no doubt, heard the worrisome echo of that history.

Justice Breyer’s concerns about the politicization of the Su- preme Court are not confined to the Court’s decisions alone. He surely appreciates that in the days of his appointment, the con- firmation proceedings of Justices were far less fractious. Back then, the divided confirmation votes of Chief Justice William Rehnquist (65-33 in 1986) and Justice Clarence Thomas (52-48 in 1991) were notable exceptions. Justices were generally confirmed with the overwhelming support of the U.S. Senate: Justice John Paul Stevens (98-0, 1975), Justice Sandra Day O’Connor (99-0,

1981), Justice Antonin Scalia (98-0, 1986), Justice Anthony Ken-

nedy (97-0, 1988), Justice David Souter (90-9, 1990), Justice Ruth

Bader Ginsburg (96-3, 1993), and Justice Breyer (87-9, 1994).

After Justice Breyer’s appointment, a full decade would pass before a new justice would join the Court. The arrival of Chief Justice John Roberts (78-22, 2005) and Justice Samuel Alito (58- 42, 2006) marked the beginning of a far different era. Every suc- cessive appointment has produced a splintered Senate vote: Jus- tice Sonia Sotomayor (68-31, 2009), Justice Elena Kagan (63-37,

2010), Justice Neil Gorsuch (54-45, 2017), Justice Brett Kavana-

ugh (50-48, 2018), and Justice Amy Coney Barrett (52-48, 2020). It is almost hard to believe that Justices Stevens and Scalia,

1. See *Milliken v. Bradley*, 418 U.S. 717, 814 (1974) (Marshall, J., dis- senting).

## Justice Stephen Breyer

representing the right and left flanks of the Court, were unani- mously confirmed. So, too, were Justices O’Connor and Kennedy, who, each in their time, controlled the center of the Court, cast- ing the decisive vote in innumerable cases. They are the only two living justices—and they may very well be the last—who were confirmed by the Senate without a single vote cast against them.

Justices are stewards of the Constitution. They are also responsible for safeguarding the hard-earned authority of the Court itself. In this respect, Justice Breyer’s dissent in the Re- segregation Cases was not just about respecting legal precedent; it was also about preserving the Court’s political independence and institutional integrity in the increasingly jaundiced eyes of the American public.

# Breaking the Promise of Brown

Finally, what of the hope and promise of *Brown*? For much of this nation’s history, the races remained divided. In this Court’s finest hour, *Brown v. Board of Education* challenged this history and helped to change it.48

Above all, of course, the Resegregation Cases are about the fate of American schools. In his written opinion and in the solemn reading of his dissent, Justice Breyer warned of increasingly segregated schools, deteriorating educational outcomes, and a nation where the races remain divided. Tragically, the justice’s worst fears continue to come true.

Nationwide school statistics mask the appalling reality in

1. *Parents Involved in Community Schools v. Seattle School District No. 1, 551* U.S. 701, 867 (2007) (Breyer, J., dissenting).

### Breaking the Promise of Brown

America, as, too often, statistics do. The numbers at individual schools tell an even more ominous story than the stunning but abstract fact that America’s schools are more segregated today than they were in 1968.

Take my hometown of Baltimore. Of thirty-eight public high schools, all but four are over 90 percent minority; over half are 98 to 100 percent minority. None of these intensely segregated schools have an average SAT score above 1,000, with most of them hovering in the 700s and 800s. Each year, students at too many of these schools, between the ordinary gauntlet of home- work, hormones, and sports practice, attend the funerals of classmates who have been senselessly gunned down before grad- uation. Seven such students at Francis M. Wood High School (Excel Academy) were killed in the span of fifteen months, five of them in a single school year (2016–2017).

The three schools with the highest test scores—Baltimore Polytechnic (Poly) (where my mother first taught in 1970), Bal- timore School for the Arts (BSA), and Baltimore City College (City)—are also the most racially diverse, and each is a majority- minority school (that is, more than 50 percent minority). The best performing high school that is more than 90 percent mi- nority is Western High School (where my father ended his decades-long teaching career at the age of eighty). With over 1,000 students, Western is the oldest all-girls public high school in America; it is also predominantly Black, with white students accounting for less than 5 percent of the student population. City, Poly, School for the Arts, and Western are the acclaimed exceptions to the struggles of Baltimore schools.

Frederick Douglass High School in West Baltimore, where my father also taught, is more typical. The student body at Dou-

## Justice Stephen Breyer

glass is 99 percent Black, and most classes have no white stu- dents at all. Only 70 percent of its students graduate, and the average SAT score—742—is among the lowest in the state. Its 900 students know they cannot drink from the water fountains, not because of their race but because the corroding pipes under- neath them leech lead into the water supply. Students also know that some number of school days will be canceled each year be- cause Douglass has no heat or air conditioning. Remarkably, the one enduring source of pride for the beleaguered school is that, in 1925, a young Black man in the top third of his class grad- uated from Douglass and went on to become the first African American justice on the United States Supreme Court.

I like to believe Justice Marshall would be proud that we continue to fight to make real the promise of *Brown*, that for so many of us its ambition remains noble and worthy. He would, no doubt, be ashamed, however, of the state of public schools in the nation today, beginning with his alma mater. He would be rightly outraged to see the vast resegregation that has occurred. And he would be furious to hear of the practical impediments the Supreme Court itself continues to erect, from the *Milliken* decision that prompted his dissent to the Resegregation Cases that inspired Justice Breyer’s.

What would upset him most, I think, is the ignorance, vit- riol, apprehension, and hate that still characterize so many of our racial divisions. It is exactly as he predicted: “For unless our children begin to learn together, there is little hope that our people will ever learn to live together.”49

That was Justice Marshall’s vision of democracy in America.

1. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissent- ing).

### Breaking the Promise of Brown

I firmly believe it is Justice Breyer’s too. As Justice Breyer wrote in the closing passage of his dissent, the promise of *Brown v. Board of Education* was “about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.”

Until segregation in America’s schools is part of our history rather than our present—and even then, perhaps—the caution- ary words of Justice Breyer in the Resegregation Cases should reverberate in classrooms across the country and in the hearts and minds of citizens and schoolchildren everywhere.