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What Teaching Brown Teaches Us

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WHAT TEACHING *BROWN* TEACHES US

How we teach subjects in and out of classrooms is itself equally, if not more, important than the content of the subjects being taught. History and the law writ large are no exception to this broader statement, as our very understanding of the effects of the most consequential events we have experienced as a nation is shaped by how we teach and remember them. In the United States, few issues are more consequential to our social experience in recent decades, indeed than civil rights. As a social movement, the push for civil rights constituted a great upheaval in both our social structure and our understanding of relationship between race and nearly every other aspect of life. Whether or not any real progress was made towards ameliorating those problems, the judicial system plays its own role, and often a major one, in the push for progress on racial issues. The history written and told about the civil rights issues, particularly concerning race and racism, that have been adjudicated before the Supreme Court is critical to our understanding of just how far we have come and how far we have yet to go.

Brown v. Board of Education of Topeka (hereinafter “*Brown*”) is often held up as one of the crown jewels of civil rights litigation, paving the way to overturning one of the most controversial legal concepts in American jurisprudence and mandating the integration of school districts across the country. When speaking about *Brown* in this way, it is important to note at the outset that we are actually speaking about a collection of three cases: *Brown v. Board of Education of Topeka* (often referred to as *Brown* or *Brown I*); *Brown v. Board of Education II (Brown II* (1955) – which ordered that schools must obey *Brown* and desegregate with “all deliberate speed”)¹; and *Bolling v. Sharpe* ((1954) – which ruled that racial segregation in D.C. public schools was a denial of due process guaranteed by the Fifth Amendment)² (Hereinafter, all references to *Brown* should be understood to refer to the collection of all three cases, except as otherwise noted). But the story neither begins nor ends with the case and the integration order. What and how we learn about *Brown* in the modern day can influence our understanding of just how beneficial a decision it was to the people that it was meant to help. Analysis of the decision and how it is remembered and understood is important to comprehending the effects that we have actually seen as compared with the ideal effects that *Brown* was meant to achieve.

Recent developments in the American political sphere have led to ever increasing debates about what subjects are appropriate for our children to study in primary and secondary schools.³ Protests have erupted across the country in recent memory railing against the supposed “evils” of critical race theory, and the alleged hatred of the United States that such study brings with it.⁴ Conservative states and political activists are fighting to have schools “promote patriotism” and stave off the “erasure of American history,” and “indoctrination of our students with left-wing ideology,”⁵ equating learning about the nation’s history from a critical lens to these purported harms. In practice, this means that the States are all making different decisions on what and how

¹ *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., et al.* 349 U.S. 294, 300-301 (1955).

² *Bolling, et al. v. Sharpe, et al.* 347 U.S. 497, 500 (1954).

³ Goldstein, Dana, *Two States. Eight Textbooks. Two American Stories*, N.Y. Times (Jan. 12, 2020).

⁴ Gabriel, Trip and Dana Goldstein. *Disputing Racism’s Reach, Republicans Rattle American Schools*, N.Y. Times (November 8, 2021).

⁵ Goldstein. *Two States. Eight Textbooks. Two American Stories*.

to teach American children, especially with regard to race and the United States' sordid past and present with it. *Brown*, with its status as a landmark case, is no exception to unequal treatment in education among the States. The relevance of this topic is only enhanced by the upcoming 70th anniversary of the *Brown* decision, which will only serve to bring into sharper focus the importance of the decision and disparities in what students are taught about it.⁶

To that effect, it is important to analyze whether the *Brown* decision, its history, its progeny, and subsequent historical works, in the ways they are being taught and understood in the modern day are sufficient to the task of achieving the underlying social progress sought in *Brown*. Historiography, the mechanism through which we can determine the value and completeness of the histories we tell, is a critical tool in achieving exactly that end. Critical race theory too, and its many theorists, has its own ideas about the sufficiency of the stories that are told about civil rights. CRT thus has a vested interest in how the history of civil rights litigation and resulting effects is told. Hence, an historiographic analysis of the *Brown* decision and its effects through an additional lens of critical race theory can help us to understand the sufficiency of the history as told and how we could tell the story to better bring about the changes that the idealism of *Brown* sought to achieve. The purpose of this exercise is then to express or develop a framework of critical race theory historiography to determine the sufficiency or lack thereof of our treatment of *Brown* in the classroom and explore potentially better or more complete ways of remembering it. Applying this framework to the present teaching standards of the States regarding *Brown*, especially in our present politically charged educational environment, is all the more important.

This paper has five major components. Part I is an exploration of historiography in its more basic terms and the philosophical underpinnings of historiographic analysis. Part II discusses historiography and its relationship with critical race theory to establish a baseline for analysis of the teaching of *Brown*. Part III provides the background of the *Brown* decision, its progeny, its lingering effects and how we teach about it in schools. Part IV applies historiographic analysis with the added lens provided by critical race theory to the treatment of *Brown* in schools and looks to determine its sufficiency. Finally, Part V discusses what the use of this critical race theory lens in this analysis adds to our understanding and how *Brown* may be better used in schools.

I. *What is Historiography?*

In order to apply any historiographic lens to the history and teaching of *Brown*, it is important to first understand what the practice of historiography is, where it came from, and the ways in which it is used to evaluate history. The study of historiography, in its most basic terms, is the study of how history is written, to evaluate, in terms of modern standards, the value of

⁶ On the point of the 70th anniversary of the *Brown* decision, most States have yet to speak officially about their plans for any additional learning or special programs for commemoration. I avoid using non-governmental sources for such programs as such sources, like newspapers, are non-binding on educators statewide and will likely have little tangible effect on the classroom. Thus, in addition to discussion of current standards of teaching *Brown*, I also bring in the commemorative efforts for the 60th anniversary in 2014, despite those standards no longer necessarily remaining in effect.

historical works; it allows us to learn the defects and limitations of the writers of histories.⁷ Through those defects and limitations of the writers of history, we can further learn about the defects and limitations of the historical works that those same writers produce. A flawed writer will produce flawed works, and it is therefore all the more important to understand those flaws so that they may be addressed, and the proper context may be applied to both historical events and works which tell them. The history of the law in the United States is no exception to the rule of flawed writing and flawed works, regardless of the objectivity and distance the law consistently attempts to claim.

Flaws can come from numerous places including, but not limited to: the historian or author's bias or prejudice towards one point of view or the other; their lack of familiarity with the details or concepts of other disciplines (i.e., economics) that may play a part in explaining the behavior of states, individuals, or other actors; or even from the later introduction of information that had previously been undiscovered.⁸ Identifying these flaws and making them known can help us to present history in a more sound or accurate way. Filtering through the most flawed works should, in theory, allow us to present and understand history more completely. Historiography, as a tool of analysis, should be seen as a means to help us push towards the most complete telling of history that we can. Beginning with the foundations of historiography, this section intends to extract and express the framework through which historiographic analysis is conducted and the foundational principles underpinning its application.

a. The Historical Foundations of Historiography

At the outset, it is important to note that the modern conception of the historian is a fairly recent phenomenon, the idea of a person who cultivates a skillset to analyze and present the past in an (ostensibly) objective manner was not common at the time that the first histories were being written.⁹ The practice of historiography, then, does not come about until much later still, forming initially out of the practice of critique common to oratory and rhetorical thought practiced in Greek and Roman society.¹⁰ Methodologically, while this only provides us with a somewhat piecemeal and incomplete idea of the practice of historiography historically, it does provide important foundational principles that inform how the practice might form and evolve moving forward.

Historians of the past have, at the very least, been concerned with how their work would be seen by the generations to follow. Among the first historians in the Western canon, in ancient Greece and Rome, we see several references to how historians think about the act of writing history and the care that must be taken when doing so. A great deal of this work is incomplete or lost entirely, with the contributions of countless historians and critics having been lost to time and many of those that survived suffering degradation over the centuries. But at this stage, from our present understanding, historiography could be boiled down into two different strands of analysis, the remarks of writers themselves in reference to their own works or methodologies, and remarks

⁷ Carl Becker, *What is Historiography?* 44 *Am.Hist.Rev.*, Oct. 1938 at 20.

⁸ *Id.* at 21.

⁹ John Marincola, *On Writing History from Herodotus to Herodian* xix (2017).

¹⁰ *Id.* at xxx.

by critics or writers in other genres in works discussing or making reference to the works of historians.¹¹

The basic understanding of what history would come to be was primarily borne from the early historians' focus on what was "worthy of account" or "worthy of memory," guiding them to often recount the tales of so-called great men and create broad, sweeping accounts of battle and empire.¹² This rather limited view is on display in works like Herodotus' *Histories* which explicitly states that he will only ". . . recount everything that they did or suffered that is worth describing. . . ." or justifies skipping over a thirty-eight year period of events because ". . . no other great deeds were accomplished. . ."¹³ Historiography would have us ask why that was the case and question the objectives the historian sought to accomplish in deciding what was "worth describing." These early historians, through their own methodologies and criticisms, provide us a foundation of important criteria to consider in applying a historiographic analysis.

i. The Truth of History

The first of the necessary fundamentals may seem obvious, but is still critical to any analysis, namely the truth of the material presented. Truth has been held up, even among antiquity's historians as the "the very aim of history."¹⁴ In general, historians are likely to insist upon their material being true and accurate, though that does not always mean that their work will actually be true and accurate. The veracity of the claims made is the most basic piece of the framework, without which any further analytical steps or critiques have nothing to stand upon. While certainly significantly easier to gauge in the modern day than it was looking back into antiquity, "the truth" can still be something of an elusive concept. The difference between an error and a deliberate falsity is not unlike the difference between the objective truth and the "truth of real life."¹⁵ The "truth" in this way is also a malleable thing, as even in the American canon, interpretation of the same history can change from era to era to serve different needs.¹⁶

ii. Audience

The intended audience of the history also changes the accuracy and the completeness of the work. To take John Marincola's example, the Romans, at least according to Polybius, had written histories in ways that were designed to appeal to certain groups of readers: the more distant histories, or the "earliest genealogical material," were made to appeal to those who liked hearing stories; the treatment of colonies and their foundations appeals to the curious and "lovers of *recherché*"; while the actions of cities, states and individuals within them were meant for the

¹¹ Marincola at xxx.

¹² *Id.* at xxxiii.

¹³ *Id.* at 6.

¹⁴ *Id.* at 116. Truth should be understood in this context very narrowly, the use of factual information presented here by Polybius as the aim of history is juxtaposed with the aims of rhetoric/poetry and myth as vividness and entertainment/amazement respectively.

¹⁵ *Id.* at xlii.

¹⁶ V.P. Franklin, *Introduction: Symposium on African American Historiography*. 92 *J.Afr.Am.Hist.* 214 (September 2007).

“statesmen.”¹⁷ While the categories and who they are meant for have certainly changed, it remains true that the audience intended for the work changes with the nature of the work, and can change the work proactively, introducing a bias alongside. V.P. Franklin notes this phenomenon with regard to the American canon as well, with the pre-Civil Rights Movement histories not being written with African Americans in mind and thereby forcing them to record and keep note of their own history if they wanted it to be remembered.¹⁸

iii. Choice of Source

Choice of source is another point at which a form of intentional or unintentional bias can creep into a historical work. Here, the split between historians of antiquity and modern historians is not particularly wide. It was understood, even by the “father of history,” Herodotus, and his relative contemporary, Thucydides, that who you spoke to and who you got your information from regarding events for which you were not present could change the accuracy and completeness of the picture you ended up with.¹⁹ Herodotus said, of a battle between the Ionians and Phoenicians, that he could tell of the battle and the result but not of who among the Ionians were cowards and who stood bravely, as “they all blame one another.”²⁰ While this example is very granular, the lesson remains, every source that could be used could be biased or prejudiced one way or the other, and the decision to rely upon certain sources instead of others is critical in an accurate telling. This, of course also makes choice of source a highly relevant point for future criticism as it is the deciding factor in determining what facts a work will present.

iv. Bias

All of the preceding points relate directly and indirectly into bias and prejudice but could be introduced all the same into a work without the author necessarily intending to do so. On the other side of the coin, bias can be entered into the work with intention, deliberately pushing a specific viewpoint to the detriment of all others. Intentional bias is still based in facts and can be most clearly seen in determinations of which facts to include and which to avoid when both classes of facts are known. That could be as direct as making determinations of what accounts, events, or individuals to promote or lionize and which to condemn or blame, or as indirect as simply failing to provide impartial information at all.²¹

Taken together, we can presume that bias, in its various forms, completeness, and the soundness of the author’s choices of history are the foundational pieces of historiographic analysis. These fundamental building blocks form the basis of the analysis into something more concrete that we can use to critique the methods of teaching *Brown*. Understanding these, the next step can be taken, adding the specific lenses through which individual historiographers consider individual works or groups of works.

¹⁷ Marincola at xxxvii. At the time, these categories more reflect the idea that the study of history in this way would likely be the province of the elite until literacy and access to material would become more widespread.

¹⁸ Franklin at 214.

¹⁹ Marincola at 9; 15-16.

²⁰ *Id.* at 9.

²¹ *Id.* at xliii-xliv.

b. Additional Lenses of Historiography and Their Application to Brown

Unfortunately, beyond the fundamentals, there is no single way in which historiographic analysis is done, as the objective of the author shapes the direction of the analysis and the ultimate topics of critique. In this way, historiography is similar to CRT scholarship, in which there is no singular, defined way in which analysis and writing must be produced. Some analyses will lend themselves heavily towards a philosophical or literary bent, while others still will attempt a more concrete or empirical analysis. These can be considered the “pure” types of historiographic analysis, reflecting purely theoretical and philosophical concerns at one end and purely empirical and factual concerns on the other.²²

On the more philosophical or abstract side, the method of historiography rather than the substance of the thing being critiqued may take precedence. The *how* of historiography itself can be analyzed through the practice of other disciplines like literary theory or aesthetics.²³ On the other side of the spectrum lies the more concrete and empirical methods of analysis, itself encompassing topics like the logic of the choices historians make in deciding between competing interpretations and more historian-like overviews of the historical events and the coverage of them.²⁴ In between these two poles lie the bulk of historiographic analysis. Due to the more esoteric concerns of the most philosophical streams of historiography, the more substantive lenses of critique will be more applicable to discussing what our teaching of *Brown* gets right and gets wrong.

Substantively, the additional lenses have ranged greatly in scale and scope. To illustrate the separation of the lens from the foundation, take as an example William Bouwsma, who notes three separate lenses applied to different areas in works noting similar history in post-Renaissance Italy; he notes philosophical, political, and religiously based lenses for works originating from different cities, namely Florence, Rome, and Venice.²⁵ All engage with the idea of bias and truth, but the approach itself looks markedly different. From Florence, the works are critiqued both in style and substance, as becoming little more than a clerical recitation of statistics and facts than a retelling of history.²⁶ While factually very full, even praised by the historiographer as the one redeeming virtue of the works, the lack of other useful traits, such as themes, forces, insight, or analysis ensure that the work does very little to actually advance the reader’s understanding of what was happening in Florence at the time.²⁷ Rome became the subject of ecclesiastical restrictions, the religious fervor present in the seat of the Catholic Church lending itself to

²² Chris Lorenz, *Comparative Historiography: Problems and Perspectives*. 38 *Hist. and Theory* 27, 30 (1999).

²³ *Id.* Lorenz here makes reference to the works of two other historiographers, specifically Hayden White’s work *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (1973), related to the use of literary theory in the evolution of historiography; and Frank R. Ankersmit’s work “The Reality Effect in the Writing of History: The Dynamics of Historical Tropology” (1994), focused on the aesthetics of written history. These philosophical considerations, while valid, are largely applicable to large-scale trends in writing rather than the effects of choice of content needed here.

²⁴ *Id.* at 30-31.

²⁵ William J. Bouwsma, *Three Types of Historiography in Post-Renaissance Italy*. 4 *Hist. and Theory* 303, 303-306.

²⁶ *Id.* at 305. Reference specifically to Scipione Ammirato’s work *Istorie fiorentine* (1600).

²⁷ *Id.*

suppression of intellectual activity. This would lead to the analysis of the history written there, the *Storia d'Italia*, to be critiqued for intentionally leaving out entire passages worth of material regarding the Papacy, in the effort to make the history “safe.”²⁸ Venice, like Rome, would have its histories colored by the nature of the power that ruled there, but instead of being the center of the Catholic Church, Venice was host to a longstanding republic with a far more robust historical tradition.²⁹ There was there a tendency to color history with a mind towards the vital issues and social and political existence in Venice rather than any stricter adherence to the facts.³⁰ These examples show that, despite some of the same foundational critiques, the tenor and the focus of the historiography can change with the additional lens added on.

From these sources and explorations, we can see that the work of the historiographer primarily focuses in on these additional lenses, filtering the foundational criticisms through to come to a more final critique.

By bringing everything together, we can suggest a synthesized fundamental basis of historiographic critique: The foundation of historiographic critique centers on the factors of bias in its several forms (be they bias in truth, audience, sourcing choice, or just simple prejudice towards one point of view over another), the completeness of the work, and the soundness of the author’s choices of history. On this foundation, historiographers are able to add their own lenses of more specific critique, be those critiques of form, like literary theory or aesthetics, or critiques of substance, like those resulting from politics or religion. With this as an established baseline, what the additional lens of critical race theory will look like can be addressed.

II. *How do Historiography and Critical Race Theory Interact?*

Having established the groundwork and basic frames of reference through which historiographic analysis is conducted under normal circumstances, our additional lens can be added on. Critical race theory, while dealing only indirectly with historiography in their general work, has clear parallels. Critical race theory, much like historiography, is a discipline based largely in critique of how we understand the world around us to operate. It challenges the status quo understanding and presents a different way of looking at our political and social selves. Most importantly for critical race theory’s intersection with historiography, however, is the focus placed on recontextualizing the narratives we tell ourselves about the United States and bringing racial issues and the racialized basis of our myriad institutions to the fore. In this way, sweeping works like the *1619 Project* operate in a very similar vein to traditional historiographic analysis, criticizing the choice of history that we choose to tell to form the story of America in an attempt to bring greater attention to the importance and context of the part of the story of race.³¹ Like historiography for history, critical race theory understands that the major flaws in our education on race prevent us from being able to see the complete picture.

²⁸ *Id.* at 306.

²⁹ *Id.* at 309-310.

³⁰ *Id.* at 310. To be fully fair to the source, the exploration of the Venetian histories of the time does include several instances of historians being very true to the facts and unafraid to go against the political grain.

³¹ Nicole Hannah Jones. *Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true.* N.Y. Times (August 14, 2019).

In the American canon, much of our history is colored by a form of “national glory” telling of events.³² In these tellings, the assumption, indeed a form of bias, was that the steady progress of the United States across the North American continent and beyond to industrial advancements on into the twentieth century were told without regard to social or economic divisions. These were, if nothing else, framed through the experience of white men, leaving little room for the stories of any other group to be brought to forefront. Those stories, including those of African Americans and other racial minorities, were often ignored.³³ It was not until the civil rights movement and the racial reckoning (however broad or successful it may have been) that the movement brought with it that any real understanding of the history left out was publicly acknowledged.³⁴ African American historians, naturally, attempted to keep record for themselves where more mainstream historical accounts regularly failed them, keeping what could be called a “we were there too” documentation of events.³⁵

Just because the civil rights movement shed light on the relative lack of historical accounts and focus on African American stories, it does not mean that there have been sufficient steps to remedy the issue. States have given varying degrees of resistance to fundamentally reshaping the way that the United States should teach history, some more willing and others hesitant for political or racial reasons. Differing political goals surrounding education and textbooks have led to disparate outcomes in basic education about race and the racialized history of the United States, even if some progress has been made on all fronts.³⁶

California has placed its focus on racial disparities even in what were generally considered to be non-racial topics. They make sure to note that there was a racial undertone in the “suburban dream” of the 1950’s, specifically noting the desire of some white Americans to get away from increasingly racially and culturally diverse city neighborhoods and the difficulty, or even outright bar, that African Americans encountered in attempting to do the same.³⁷ California outright states that conditions were often placed in the loans or on the deeds that prevented the sale or resale of any homes in the suburb to African Americans. Texas, referencing the same “suburban dream,” makes no reference to race, the reason for the growth of the suburbs was escaping the “crime and congestion of the city or affordability and a better life; Texas never makes any mention of housing discrimination or redlining at all.³⁸

³² Franklin at 214.

³³ *Id.* at 214. Mr. Franklin explains the recording of American history within the confines of the works of early twentieth century historians, looking back at how the past got the United States to where it was. The undertone of the separation of this initial set of topics with the explanation of black historiography in the same time period suggests that the contributions of African Americans, among others, in that history was incomplete or insufficient. Thus, I operate on the presumption of this as a “white” or “majoritarian” historical record.

³⁴ *Id.*

³⁵ *Id.* at 215.

³⁶ Goldstein. *Two States. Eight Textbooks. Two American Stories*. Despite the notable differences between the approaches taken by California and Texas regarding the same information, there has been foundational progress over the past decades. Ms. Goldstein notes that both States’ books deal far more bluntly with the cruelty of the slave trade rather than teaching the kindly slave owner myth, denoting at least that the baseline racial education has improved.

³⁷ *Id.*

³⁸ *Id.*

Even in cases where the textbooks of the two analyzed States agree on racism, Texas is quick to offer additional explanations. Speaking about Reconstruction in the South, California and Texas both state that white opposition was due to them “. . . not want[ing] African Americans to have more rights.”³⁹ Only Texas, however, justifies the resistance by stating that the reforms necessary to grant African Americans those rights would require reforms that would cost money, causing an increase in taxes.⁴⁰ The difference between the two is a clear illustration of how the story of our history changes depending on how centrally one places race in the telling. By centering race, California clearly brings forward historical issues for students to engage with and allows for the potential opening of dialogue or consideration of how the issues continue or manifest in the modern day. By failing to do so, Texas makes it far easier for students to avoid dealing with potentially uncomfortable issues of race and could lead to those same students rejecting or failing to consider race in contexts where it may be critical to do so.⁴¹

In sum, the additional lens of critical race theory invites us to look to the centrality and treatment of race on top of the factual truth, completeness, and bias that may also exist in the teaching of *Brown* in the modern-day. We should be wary of just stopping there, however, as what happened after the ruling was handed down and what may continue today is just as important to teach and learn as the rote facts of the case. Following the example of *The 1619 Project*, the lens of critical race theory should extend our idea of completeness to looking to the lingering effects of *Brown*, good and bad, with regards to race in our society.

Overall, the applicable historiographic analysis will look for bias, in all of its forms, completeness and accuracy, and the soundness of choice of history, filtered through the lens of critical race theory. That lens will have an eye toward the racial impact of the decision and how that is taught and how effective our teaching is to combat lingering structural racial issues of concern to critical race theory.

III. *The History of Brown v. Board of Education of Topeka*

With the analytical framework and additional lenses in place, the analysis itself must begin with a discussion of where the *Brown* decision came from, why it was brought in the first place and what it and its progeny tell us about how the nation and how the courts saw and understood the decision and understood its effects at the time. A thorough understanding of the facts surrounding the case give immediate color to some of the shortcomings with regard to completeness of the current methods of teaching *Brown*.

It is difficult to begin speaking about the *Brown* decision without first referring to the origins of the major legal doctrine at the center of the issue in the first place. The Supreme Court upheld the doctrine of “separate but equal” in *Plessy v. Ferguson* in 1896, decreeing, in pertinent

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ In Ms. Goldstein’s piece, it is noted that these are state issues and that individual teachers are not considered in the making of the textbooks they are forced to teach from. To be fair to them, even teachers in Texas are able to go above and beyond to make sure the students have a more complete picture and there are certainly those that do.

part, “. . . the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges and immunities of the colored man . . . denies him the equal protections of the laws, within the meaning of the fourteenth amendment.”⁴² Curiously, this was not the basis for the creation of separate schools, but merely upheld the underlying contention that there should be separation of the races in public education. Indeed, the Supreme Court states in the very same case that, “. . . we cannot say that [separation on public conveyances] is unreasonably, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia . . .”⁴³ The decision itself had to do with the segregation of railroad cars rather than the segregation of schools or other public institutions; despite this, the doctrine it upheld would become the basis of segregation in significant parts of American society.⁴⁴ While *Plessy* could hardly be considered to be the origin point of the segregation rampant throughout the United States, it signified a codification of white supremacy and state-endorsed racial discrimination representing the deeply flawed incorporation of African Americans into free American society.⁴⁵

The system flourished, especially in the most heavily segregated areas of the country, where there was legitimate fear of challenging the system; reprisal for speaking out both economically from the municipalities and the states and physically from the police departments and white neighbors was commonplace.⁴⁶ Racial intimidation and violence, buttressed by a decision that made legal the exclusion of African Americans, led to a post-Reconstruction “Reformation” of virtually uncontested white power in the South; we know this period as the rise of the Jim Crow era.⁴⁷ Over the course of the closing years of the nineteenth-century, African Americans were increasingly barred from political life and the exercise of their constitutional rights through restrictions like poll taxes and the “white primary,”⁴⁸ constituting nothing less than a formal political erasure.⁴⁹

Jim Crow did not just derail the political lives of African Americans, but also attacked their social and economic existences as well. In this era, the “white man’s burden” was still seen as a truism, reinforcing that the appropriate social structure would confine African Americans, and other peoples of color, as socially and even intellectually inferior to their racial superiors, whites.⁵⁰ Even with that understanding, that African Americans could “rise to a higher level of civilization,”

⁴² *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896).

⁴³ *Id.* at 550-551.

⁴⁴ Robert A. Pratt, *Review: Brown v. Board of Education Revisited*. 30 *Rev. in Am.Hist.* 141 (Mar. 2002).

⁴⁵ Waldo E. Martin, Jr. *Brown v. Board of Education: A Brief History with Documents*. 1-4. (1998).

⁴⁶ Pratt at 141.

⁴⁷ Martin at 4.

⁴⁸ As the name suggests, the “white primary” is a primary system in which only white voters are allowed to participate. While violative of the Fourteenth Amendment on its face and acknowledged as such by the Supreme Court in a series of decisions (*Nixon v. Herndon*, 273 U.S. 536 (1927); and *Nixon v. Condon*, 286 U.S. 73 (1932)), it was only a violation if it was a state actor enforcing the system. In *Grovey v. Townsend*, 295 U.S. 45 (1935) (later overruled by *Smith v. Allwright*, 321 U.S. 649 (1944)), the Court acknowledged that a rule enforcing a white primary was constitutional when administered by the Democratic Party, as it was a private institution, not a state actor.

⁴⁹ Martin at 4-5.

⁵⁰ *Id.* at 5. While the language may have changed, this idea has hardly been entirely eradicated in white America. While not nearly as commonplace as it once was, this view is clearly in line with the idea that race is biological, and will likely continue to persist as long as racism does.

there was little doubt that there was no scenario in which the “white man’s burden” would be fulfilled and African Americans and other people of color would exist on the same level playing field as whites.⁵¹ Economically, Jim Crow, in enforcing segregation, functionally severed African Americans from the rest of society. This forced the creation of Black variations of already existing businesses in order to serve the Black clientele that were no longer allowed to take their business elsewhere.⁵²

Enforcement of the new system was characterized by the brutal suppression of dissent and even attacks against those not actively dissenting to send a message. This repression was characterized by the sharp increase in extrajudicial killings of black men at the hands of white lynch mobs and an equally intense rise in the incidence of rape of black women at the hands of white men.⁵³ The courts of the day were willing to turn the other way and allow this to continue, tacitly agreeing with the rampant myths of black animality and black hypersexuality as justifications for their crimes against the very humanity of African Americans.⁵⁴

While it would be unfair to suggest that there was no meaningful resistance or movement from the African American community against this system, the sheer brutality of what African Americans were being forced to suffer would stave off any large-scale resistance until the emergence of the modern civil rights movement in the 1950’s. Most black activism during the Jim Crow era, akin to black activism in preceding decades, was local and largely unheralded, though African Americans never gave up the struggle.⁵⁵ In general, the campaign for black freedom was persistently growing in the background while organizations, like Marcus Garvey’s Universal Negro Improvement Association in the 1920s and W.E.B. Du Bois’ (among others) National Association for the Advancement of Colored People (hereinafter “NAACP”) in 1909, were being formed. to push for reform in the political sphere.⁵⁶

In the realm of education specifically, it would not be until the 1930’s that larger campaigns against the clear and pervasive inequalities between the black and white schools began gathering steam. The NAACP was at the forefront against such inequities. The NAACP called out and documented the indisputable proof that many whites were far more interested in enforcing only half of the *Plessy* doctrine, providing African American students with “separate” but hardly “equal” schools and education.⁵⁷ Over time, the NAACP would win critical legal battles, fighting segregation first across higher education institutions and successfully making some inroads into the issue. But, as a general matter, these legal battles were fought and won specifically over the

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* Just as much as the persistent survival of the “white man’s burden” idea, the myths of black animality and hypersexuality continue to haunt the American psyche. The idea that African Americans just have a proclivity towards violence and criminal behavior is still pervasive, and in some cases the courts are still willing to accept it. The recent campaign to ban use of rap lyrics as evidence in court evidences this, as with some exceptions, there is no evidence beyond conclusory statements made after reading a violent lyric to presume that the author had committed a violent crime, and yet it can be enough to convict.

⁵⁵ *Id.* at 5-6.

⁵⁶ *Id.* at 6.

⁵⁷ Pratt at 141.

lack of equality between black and white schools. The NAACP had intentionally avoided attempting to challenge segregation as a *per se* matter and instead focused their efforts at, at the very least, ensuring that if segregation in education was going to be allowed to continue that it would be done in actually equal facilities.⁵⁸ There was a prevailing fear that any more direct challenge to segregation itself through its jurisprudential core, the *Plessy* decision, could result in more damage to their cause if they lost than the possibility of winning in one fell swoop could justify. Should the NAACP directly challenge *Plessy* and lose, not only would they have lost the case, they would also run the risk of the Court making another *Plessy*, strengthening segregation and costing them what ground they had managed to win.⁵⁹

The NAACP in the early- to mid-twentieth century, in addition to lobbying for legislative and executive action, had pursued a strategy of attacking judicial issues in areas where it was confident that it would be able to win and effect far-reaching change to the status quo.⁶⁰ This litigation would be favored due to the relatively limited resources at the disposal of the NAACP and related organizations in relation to the systems of power that were propping up the racist status quo; the way they saw to be the most effective was to focus their limited resources on smaller battles that they stood a better chance of winning.⁶¹

This strategy led to NAACP to bring several cases building to a challenge to segregation itself, the first of which was *Sweatt v. Painter* in 1950. That case, while not overturning segregation outright, did see the Court instead force the admission of a black student to an all-white law school because of the lack of any equal all-black facility in which he had a hope of an actual legal education.⁶² Similarly the decision in *McLaurin v. Oklahoma State Regents* in 1950 that additional segregation for a black student in an all-white school (requiring McLaurin to sit in an anteroom while learning, eat only during hours white students weren't in a dingy alcove, and use the library out of sight of white students) was an intolerable inhibition on the ability of the student to learn his profession.⁶³ While these cases showcased progress, the Court in each instance was not willing to take the final step and overturn *Plessy*, carefully crafting each decision to leave it in place; but Marshall saw that, taken together, the decisions took the Court right to the brink of where he wanted to be, remarking, "All three of the decisions [*Sweatt*, *McLaurin*, and *Henderson*] are replete with road markings telling us where to go next."⁶⁴

That took him and the NAACP, among other places, to Topeka, Kansas. Kansas law permitted cities with populations of 15,000 or more to segregate their schools, and Topeka was one of the ones that chose to continue segregating; otherwise, Kansas was less a bastion of Jim Crow than many other places in the South.⁶⁵ Though even with that, on the whole, Topeka elementary schools were largely considered to be equal in facilities, and that never formed a basis

⁵⁸ *Id.* at 141-142.

⁵⁹ *Id.* at 142.

⁶⁰ Martin at 7-8.

⁶¹ *Id.*

⁶² *Id.* at 36.

⁶³ *Id.* at 36-37.

⁶⁴ *Id.* at 37.

⁶⁵ *Id.* at 46.

for the challenge there.⁶⁶ In searching for a plaintiff for their action, the NAACP landed on Oliver Brown, on behalf of his daughter, Linda Brown, largely due to Mr. Brown's unassuming and non-militant nature. There was functionally no way that such a man, a pastor, World War II veteran, and lifelong resident could be painted as a dangerous radical seeking to upend society.⁶⁷

With the sympathetic plaintiff secured, the strategy to win was to focus not on the fact that the schools were separate nor on the more utilitarian argument that segregated schools caused longer commutes to and from school for black students, but instead to attack segregation as a system in and of itself.⁶⁸ The idea was to stress that the very system of segregation was intolerable, making the students who were forced to be a part of it feel inferior and therefore lose the motivation to learn.⁶⁹ Added on to this argument was the contention that segregation had a damaging effect on the psyche of black children leading both to less motivation but also to adverse educational outcomes.⁷⁰ Testing for these effects, the doll test⁷¹ was developed and introduced to both segregated and non-segregated black children. The results noted that the majority of black children tested drew associations between the white doll and "good" or "nice" and associations with the brown doll as "bad." This was used to argue that the "Negro child accepts as early as six, seven, or eight the negative stereotypes about his own group."⁷²

The case went through the District Court and Court of Appeals, and arrived before the Supreme Court in December 1952. In argument, Marshall for the Plaintiff stressed in their argument that state-imposed segregation was inherently discriminatory and therefore a direct denial of the equal protection clause of the Fourteenth Amendment.⁷³ The Court initially delayed the decision, as there were those among the justices, namely Justice Stanley Reed, Justice Tom Clark, and even Chief Justice Fred Vinson, who were not comfortable with the idea of racial mixing (for J. Reed) or were concerned with the potentially drastic consequences of overturning *Plessy* (for J. Clark and J. Vinson).⁷⁴ The delay and potential stalemate on the Court over overruling *Plessy* would be solved, in large part, due to the death of Chief Justice Vinson in the months leading up to the rehearing and his replacement by Chief Justice Earl Warren.⁷⁵

Despite Chief Justice Warren's unequivocal desire to see segregation overturned, there was initially no agreement on the Court to actually accomplish this.⁷⁶ But Chief Justice Warren knew that he needed to present a unified front if the Court was to strike down *de jure* school segregation, and as such the decision itself was pared back, failing to fully overturn *Plessy* or rely upon the

⁶⁶ *Id.*

⁶⁷ *Id.* at 47.

⁶⁸ *Id.* at 48.

⁶⁹ *Id.*

⁷⁰ *Id.* at 54.

⁷¹ While there is plenty of good reason to be skeptical of the validity of the doll test, considering sample size and the somewhat conclusory way they got from the children's answers to psychological damage of segregation, the effects of its use warrant discussion of it.

⁷² Patterson at 54.

⁷³ *Id.* at 61.

⁷⁴ *Id.* at 62.

⁷⁵ *Id.* at 64.

⁷⁶ *Id.* at 69.

language of Justice Harlan's dissent in *Plessy*.⁷⁷ Still, the Warren Court agreed unanimously with Marshall and the NAACP's arguments, even finding persuasive the doll test argument.⁷⁸ The Court held that ". . . in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."⁷⁹ Regardless of the equality of the educational institutions, the Court held that "'Segregation of white and colored children in public schools has a detrimental effect upon colored children. . . . Segregation with the sanction of the law, therefore, has a tendency to (retard) the educational and mental development of Negro children. . .'" and that ". . . the policy of separating the races is usually interpreted at denoting the inferiority of the negro group."⁸⁰ Through this decision, the Warren Court, although they failed to overturn *Plessy*, secured the desegregation of public schools.

Despite the narrow scope of the decision initially, not all school districts were pleased with the idea of desegregating, with some schools shutting down entirely and others facing pickets and protests.⁸¹ The widespread resistance across much of the South, and the general lack of appetite among moderate politicians to desegregate⁸² would eventually necessitate the Court to announce *Brown II*, which reinforced the need of States to desegregate "with all deliberate speed," a phrase which was never defined, and never gave a clear sense of what timetable school districts had to comply with *Brown*.⁸³ It wasn't until the 1970 that the Supreme Court would finally acknowledge *Plessy* as officially overruled in *Oregon v. Mitchell*.⁸⁴

a. *What History do we Tell?*

The history that we teach in schools, while naturally limited by the amount of time we can keep students in the classroom and the myriad other subjects that warrant covering, is all the history education that a large percentage of the United States' population will ever receive. According to the Bureau of Labor Statistics, about 61.8% of high school graduates (or about 1.7 million students) will go on to attend college, meaning that the remaining 48.2% (or about 1 million students) never receive a post-secondary education at all.⁸⁵ In addition, while in post-secondary education, students are largely able to pick and choose which subjects to pursue, meaning the education each one will receive will be difficult to account for. As such, for the purposes of this paper, only primary and secondary educational resources will be analyzed, as they are the only ones to which all students are guaranteed exposure.⁸⁶ In this section, the resources of two states relating to *Brown*,

⁷⁷ *Id.* at 72. Criticisms of the case come from both sides, with liberals criticizing it for not going far enough and conservatives seizing upon the shaky foundations of the doll test to question the legitimacy of the decision.

⁷⁸ *Id.* at 71.

⁷⁹ *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.* 347 U.S. 483, 495 (1954)

⁸⁰ *Id.* (quoting *McLaurin v. Okla. State Regents*, supra (339 U.S. 637, 70 S. Ct. 853)

⁸¹ *Patterson* at 76-79.

⁸² *Id.* at 79-81.

⁸³ *Id.* at 83-84.

⁸⁴ *State of Oregon v. John N. Mitchell*. 400 U.S. 112, 133 (1970).

⁸⁵ Bureau of Labor Statistics. College enrollment rate of recent high school graduates of 16 to 24 years old by sex, race, and Hispanic or Latino ethnicity, October 1993-2021 (2022).

⁸⁶ I must note here that, on the whole, many of the school districts and State Departments of Education do not provide individualized lesson plans or learning objectives specifically tailored to the teaching of *Brown* to the general public. I individually dive into those that do, but will still make reference to education statutory code sections for states, such

representing a cross-section of American political ideologies will be presented, namely those presented in several earlier sections, California and Texas. These two states not only have notable differences in their textbooks but also on their methods for teaching *Brown*.

1. California

California, easily the most liberal of the states for which public information is available, makes public several types of information. Their Department of Education posts both wider ranging learning objectives specifically with regard to teaching *Brown* and specific sample lesson plans for educators to use to achieve those objectives. They provide the most and the clearest information on what they want students to learn and the resources to get them there. California provides lesson plans for educators to use covering Kindergarten through eighth-grade, so there is a conspicuous absence of standards for teaching *Brown* in secondary education.

To that end, California published instructional materials for *Brown* most recently as of 2017—the year of the most recent adoption of instructional materials.⁸⁷ They begin by providing access to the *Dialogue on Brown vs. Board of Education* from the American Bar Association Division for Public Education. This resource provides a quick synopsis of the landmark decision, beginning with Justice Harlan’s dissent in *Plessy*, in which he accurately predicts further “aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens.”⁸⁸ The document notes the rise of the NAACP and the role of Charles Hamilton Houston in educating and working with many of the bright legal minds that would raise the issue of segregation in courts across the country.⁸⁹ The legal strategy highlighted here is one that is focused first on ensuring that the *Plessy* standard be taken seriously, that while “white” and “colored” schools were certainly separate, far more work needed to be done to make them equal.⁹⁰ While not getting into many of the details of the case, the dialogue explains that all four cases that were brought varied in how stark the differences were between the school systems in different segregated states but were all the same in that the segregation in each was by law, and that the Court ruled that such segregation could not exist under the Constitution.⁹¹

Another of the important through points of the *Dialogue* is the Starting the Dialogue section, which contains a series of thought exercises for students to imagine themselves in the shoes of the children now forced to integrate and how they may have coped with their new surroundings.⁹² The critical question that is asked, though not answered in the text is the final

as Texas, that have an outsized influence on education in other States but do not publicly provide their educational materials or post primary and secondary education learning objectives.

⁸⁷ Cal. Dep’t. Educ., *Instructional Materials* (2022), <https://www.cde.ca.gov/ci/hs/im/>. These materials were adopted under Article IX, Section 7.5 of the California Constitution which provides that “The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State. . .” Additionally, all lesson plan materials were last reviewed and allowed to continue into use on Friday, September 2, 2022 for the 2022-2023 school year.

⁸⁸ A.B.A. Div. Pub. Educ., *Dialogue on Brown v. Board of Education*. (2003) at 1, <https://www.acslaw.org/wp-content/uploads/2021/04/Dialogue-on-Brown-V.-Board-of-Education.pdf>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1-2

⁹² *Id.*

question presented in this section, “To what extent do you think *Brown v. Board of Education*’s dream of an integrated America has been made real?”⁹³ This piece alone is important, as even though it does not provide any hard facts as to how the “dream” may not have been made real, it does open the discussion to bring in modern-day issues of schools funding and *de facto* segregation.

The lesson plans provided by California all draw from the same basic mold, telling the story, entitles “A Famous Child,” focusing in on Linda Brown and how her father did not agree that the school far away was as equal as her neighborhood school.⁹⁴ For Kindergarten through third grade students, the story is simplified as to be more relatable to such young children. The story follows Linda as she is taken to Sumner Elementary School, much closer to home, but is turned away by the principal because she was not white.⁹⁵ The NAACP, which fights for equal rights for black people, is contacted by Linda’s dad to help get her enrolled. The story states that the NAACP believed that separating children could make them think they were different from one another and that black and white children playing and learning together could help them be able to work well together when they grew up; this was opposed by people afraid of change or people who were simply prejudiced.⁹⁶ The story concludes with the NAACP going to court to change the law that said “separate but equal” is fine for schools, and now that the Supreme Court ruled that separate is not equal, it is okay for all children in the United States to attend the school closest to their home.⁹⁷

The lesson plans for the upper grades complicate the story slightly by adding more details, such as how long it took for Linda to get to school, her father’s unease as he tried to enroll her at Sumner Elementary School. And even that both schools had good teachers who were paid the same amount of money; the story of getting to the lawsuit becomes more complete.⁹⁸ The case itself is more detailed because the materials present the District Court opinion deciding that schools should remain segregated based on past Supreme Court decisions.⁹⁹ This case was different, they said, this was not about transportation or students in college, it was about elementary school students; the Fourteenth Amendment demands that everyone be protected equally under the law and black elementary school students were not being protected equally.¹⁰⁰ It should be noted that beyond discussions of the story, there are recommendations for teachers to add activities into the lesson,

⁹³ *Id.*

⁹⁴ Cal. Dep’t. of Educ.. *Lesson: Brown v. Board of Education of Topeka (Kansas): Kindergarten Through Grade Three* (2022), <https://www.cde.ca.gov/ci/hs/im/brownvboardk3.asp>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Cal. Dep’t. of Educ.. *Lesson: 50th Anniversary of Brown v. Board of Education of Topeka (Kansas): Grades Four Through Six* (2022) <https://www.cde.ca.gov/ci/hs/im/brownvboard46.asp>; Cal. Dep’t. of Educ. *Lesson: 50th Anniversary of Brown v. Board of Education of Topeka (Kansas): Grades Seven and Eight* (2022), <https://www.cde.ca.gov/ci/hs/im/brownvboard78.asp>. - The story of *Brown* is presented in the same way here for all grades, the differences lie in the additional learning goals of each grade. For example, Grade Six would be expected to use this to practice presentation skills, while Grade Five would be focused on how to ask questions to get information not already discussed in the lesson.

⁹⁹ *Lesson: 50th Anniversary: Grades Seven and Eight.*

¹⁰⁰ *Id.*

largely through role playing to more immerse the students in the story and have them understand better what the actors in the story may have been feeling¹⁰¹

2. Texas

Texas, in many ways, is the polar opposite of California for educational purposes, with far different priorities for teaching most subjects. This includes their handling of *Brown*, which starts with the apparent lack of public information about the resources and educational goals about the subject. But with a little deeper digging, Texas provides through both its State Educational Code and the resources provided to Texas educators through their own state Bar Association, and this allows us to get a picture of just what Texas students are likely to learn about *Brown* and the Civil Rights movement writ large.

At the outset, Texas does not provide the same learning goals to students for specific pieces of information in the way the California had done. Instead, the primary way of finding the overarching learning goals in Texas is through the Texas Administrative Code. Title 19 of the Code provides education related code sections and rules, and Subchapter C provides specific rules about high school. Within that subchapter, high school students are given a long list of United States History Studies subjects that they will be expected to cover, including things like the civil rights movement; the political, economic, and social issues in the U.S. in the 1970s-1990s; and the impact of significant national and international decisions in the Cold War.¹⁰² Specifically regarding civil rights education, Texas students are expected to learn to explain how Jim Crow and the Ku Klux Klan created obstacles to civil rights for minority groups¹⁰³; evaluate the changes in the United States that have resulted from the civil rights movement, specifically including the increased minority population in the political process¹⁰⁴; and finally, describe how litigation, specifically *Sweatt v. Painter* and *Brown v. Board of Education* played a role in protecting the rights of the minority during the civil rights movement.¹⁰⁵ While Texas does have code sections for each of Kindergarten through Grade 6, only the high school code sections make direct reference to civil rights and *Brown* at all. This is not to say that it is outside of the bounds for Texas teachers to bring the subject up, but the governing code does not require learning about the civil rights movement until high school history classes.

While the provided code sections do not specify exactly how the students must be taught about *Brown*, at least some of the resources Texas teachers would use to teach are accessible to the public. Specifically, an initiative of the Texas Bar Association provides educational resources to Texas teachers in order to help explain landmark Supreme Court decisions identified in the Texas Essential Knowledge and Skills (“TEKS”) for U.S. History and U.S. Government.¹⁰⁶

¹⁰¹ *Id.* This activity sheet is largely the same for each grade level, the upper levels complicate the activity by having students consider and present loftier ideas such as the mission of the NAACP and why such an organization may have been needed to achieve the ruling.

¹⁰² Tex. Admin. Code Title 19.2.113(C) § 113.41(c)(8), (9), (10)

¹⁰³ *Id.* at § 113.41(c)(9)(B)

¹⁰⁴ *Id.* at § 113.41(c)(9)(I)

¹⁰⁵ *Id.* at § 113.41(c)(9)(J).

¹⁰⁶ Tex. Bar Ass’n., <https://oyezoyezohyay.org/> - Oyezoyezohyay is the arm of the Texas Bar specifically meant to provide educational resources for 8th grade and higher students in Texas learning about landmark Supreme Court

Provided by the Bar Association is a video to be shown to the students and a worksheet to be done during and after the video.

The video begins with the history of the Monroe school and the foundation of the *Plessy* decision, speaking to the origins of the segregation issue, identifying that “the core of all this argument is whether or not the separate facilities were equal.” There is a short discussion of the leadup cases to *Brown*, and tells a very similar story initially to the California, speaking about the story of Linda Brown and her father’s attempt to enroll her in the elementary school far closer to their home. Texas students are taught about the psychological damage that the doll test sought to prove, stating, “when you stigmatize kids, and separate them on the basis of their race, you’re telling them that they are inferior.” The video digs in specifically to the opinion of the District Court and how they agree with the factual basis for the challenge but feel that their hands are tied by *Plessy* being precedent, which they identify as a perfect opinion for appeal. Goes into more detail about the Warren Court’s decision, reading off and placing quotes from the decision. Goes a step further, speaks about post-*Brown* resistance to integration, the Southern Manifesto and the need for *Brown II*. Ends by referencing how far we have come since *Brown*, having the first black President, integrated schools, and no one batting an eye at seeing an interracial couple walking down the street.¹⁰⁷

b. What History do we Leave Out?

The history left out of the classroom can largely be called the context of the *Brown* decision and analysis of how well we have implemented the spirit of the decision. What is left out are the things beyond the rote facts of the case, how we got there, and what the decision (and *Brown II*) compelled the country to do. These thoughts can be divided into two sections, the additional context of the decision and the long-reaching effects of the decision.

Context is important in this case, as there can be other reasons beyond the righteousness of the cause that could help to explain why the Court was unanimously willing to overturn a precedent that had stood for more than half a century. Derrick Bell explains, in his interest-convergence theory, that there were good reasons for the Court and the white population as a whole to allow African Americans out from under the thumb of segregation. Indeed, he suggests that “racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm social interests deemed important by middle and upper class whites.”¹⁰⁸ *Brown* was hardly the first time that the Court and society at large had been reminded of the harm inflicted upon African Americans by segregation, but that there were other factors in play that also led to the decision.¹⁰⁹ Bell

cases. While there is no guarantee of widespread affiliation between the Texas Bar and Texas public education institutions, their specific focus on the cases taught for Texas standards and the lack of other educational resources other than textbooks leaves it as likely that this is a utilized, if not required, resource.

¹⁰⁷ Tex. Bar Ass’n., *Brown v. Board of Education*, Oyezoyezohay (2023), <https://texasbar-wo4m90g.vids.io/videos/d49bd8bd111fe5c05c/brown-v-board-of-education>.

¹⁰⁸ Derrick Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv.L.Rev. 523 (Jan. 1980).

¹⁰⁹ *Id.* at 524.

contends that geopolitical reasons, economic reasons, and social reasons that the Court was more willing than ever before to consider the harm African Americans were experiencing.

i. Geopolitical, Economic, and Social Context

Geopolitically, the threat of a tarnished image would have been a strong motivator to eliminate official segregation. Notably, while less often discussed, desegregation was directly in line with the “Cold War imperative” that the world needed to be won over to, or made safe for, democracy.¹¹⁰ In the amicus briefs filed in the initial case, included were passages stating that “. . . the existence of discrimination against minority groups in the United States has an adverse impact upon our relations with other countries,” and that continued racial discrimination provides “grist for the Communist propaganda mills” and could lead our allied to doubt our “devotion to the democratic faith.”¹¹¹ Decisions handed down in the civil rights sphere in the post-war years preceding *Brown* often contained explicit consideration of the role of geopolitics in the decision, especially surrounding the Cold War struggle with Communism, as the necessary backdrop to their considerations.¹¹² While *Brown* itself never made direct reference to any Cold War geopolitics in its opinion, the knowledge of the implications of the decision could not have been far from the minds of the Justices.¹¹³ The speed with which the U.S. government jumped on the decision to counter Soviet propaganda further suggests the influence of the Cold War on the judicial and social landscape for the *Brown* decision and the Civil Rights Movement writ large.¹¹⁴

Economically, segregation held back the economic development and continued growth of the segregated South, as the divisions would make it difficult to transition the economy towards a more productive, industrialized model.¹¹⁵ Bell notes that the transition from the largely agrarian, plantation-based society and economy to the “sunbelt” with far greater potential and profit would be a struggle with segregation as a continued barrier to development.¹¹⁶ Indeed, his sources contend that the South’s economic development would need to increasingly undermine the

¹¹⁰ Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*, 100 (2000).

¹¹¹ *Id.*

¹¹² *Id.* at 103-104. Dudziak specifically refers to the 1951 *Dennis v. United States* case in making this point. The case involved the upholding of the prosecution of Communist party members for subversive activities. While this case more directly relates to the geopolitical concerns of the time, implicating domestic members of the Communist Party in a way that school desegregation does not, it is notable that the Court chose to consider the Cold War rather than just restricting itself to reading of the law. This shows their willingness to bring in non-domestic factors and considerations into their deliberations on otherwise purely domestic matters.

¹¹³ *Id.* Dudziak again notes that the knowledge and opinions known to be held by the Court of the time through decisions like *Dennis* and through other writings suggest that they could not have been unaware of the impact on foreign relations and knew about the negative impact that segregation was having on the United States’ standing in the world.

¹¹⁴ *Id.* at 107. The U.S. counter to Soviet propaganda referenced here functionally heralds the *Brown* decision as the beginning of racial equality under “. . . law under democratic processes” and a direct counter to the story that “. . . the Negro in the United States is still practically a slave and a declassed citizen.” This claim began being made *within the hour* of the decision being handed down. While it paints entirely too rosy a picture of the effect, real or intended, of the decision, it does show the desperation of the government to gain some civil rights change to cling onto to improve the country’s image abroad.

¹¹⁵ Bell at 525

¹¹⁶ *Id.*

foundations of traditional race relations there.¹¹⁷ It was this negative connection between continued economic growth and segregation that caused white elites in the business, philanthropic, and occasionally governmental words to speak out against racial discrimination.¹¹⁸ There is no great stretch that needs to be made to suggest that the economic headwinds facing the country as a result of segregation would be in the minds of those in power who had their hand in overturning it. Alone, this factor is less direct or compelling than the geopolitical factor, but is meant to show that there is more at play than simple moral grounds for the *Brown* decision.¹¹⁹

Socially, without giving African Americans some kind of victory in the civil rights sphere, there was a fear that African Americans' anger or frustration at the system would bubble over and create greater issues for the white majority.¹²⁰ As Bell notes, America was not only ideologically built upon the precepts of equality and freedom, as hollow as those ideals may be and have been throughout our history, but the United States had only recently come out of World War II in which those ideals were again heralded as a reason to fight.¹²¹ Returning black veterans experienced how little those ideals meant to the especially, but not exclusively Southern, white majority, as they suffered continuing discrimination and often violent attacks.¹²² The social fear could also be seen through the geopolitical lens as well, the frustration, disillusionment, and anger could be seen in the words of Paul Robeson in 1949, who said: "It is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country [the Soviet Union] which in one generation has raised our people to the full human dignity of mankind."¹²³ A broad fear of growing communist tendencies, real or imagined, among the African American population could have also gone some way in motivating racial change, first in cases like *Brown* and later through the Civil Rights Movement into the 1960's.

ii. Modern Trends

To the modern day, there have been notable disparities that have plagued black students far more than their white counterparts. To start, since the fall of *de jure* segregation, the level of integration in schools across the country has not increased the way that the *Brown* Court had intended, in fact we have seen something of a relapse into school segregation in the form of *de facto* segregation.¹²⁴ There was a notable delay in implementing desegregation, with enforceable orders only becoming available as of *Green v. County School Board of New Kent County* in 1968¹²⁵ and this allowed breathing room for a great many school districts to implement plans that relied on techniques that would result in segregation without obviously running afoul of the law including tactics like freedom of school choice and a tighter neighborhood school system restriction.¹²⁶

¹¹⁷ *Id.* at footnote 37.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 525

¹²⁰ *Id.*

¹²¹ *Id.* at 524.

¹²² *Id.*

¹²³ *Id.* at 525-525.

¹²⁴ Jerry Rosiek. *School segregation: A realist's view*. 100 Phi Delta Kappan, 8, 8 (2019).

¹²⁵ *Id.*

¹²⁶ Erica Frankenberg and Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*. 47 J. of Law and Educ. 189, 192-193 (Spring 2018).

While these exact tactics may have later been found to be insufficient to comply with *Brown*, there remained no clear distinction or method for the courts to determine exactly when a set of facts could be classified as *de facto* or *de jure* segregation.¹²⁷

While the deliberate mechanisms of enforcing *de facto* segregation may have been struck down by the courts, this does not mean that the effects that such segregation sought are not still felt. Other forms of discriminatory conduct, such as redlining and housing discrimination, also play their part in ensuring that black students often find themselves in underfunded and crowded schools, limiting the potential of their academic achievement as compared to students in more affluent, primarily white areas. School resources could have accounted for a nearly 25% gap in literacy rates between black and white students and a nearly 40% gap in standardized testing scores prior to the *Brown* decision¹²⁸ and as much as a 14% difference in income later in life.¹²⁹ While the hard data on the effect of *de facto* segregation on income and success rates is more difficult to come by, there can be little doubt that there remain significant issues creating a significant gap in achievement between black and white students.¹³⁰

While there were some notable steps in the right direction, the gap largely stopped closing between the 1990s and early 21st century, leveling out due to factors both within and without schools themselves.¹³¹ The National Assessment of Educational Progress (“NAEP”) reports that since the beginning of the 21st century, averages in reading and math scores place black students regularly behind white students by around 20 points accounting for different age ranges.¹³² We see similar issues when looking at college graduation rates, with white students holding slightly higher than double the graduation rate of black students as of 2000.¹³³ While there is no “smoking gun” reason that has been discovered to show why the discrepancies exist, but emphasis was placed on early-childhood education programs¹³⁴, the strength of the nuclear family¹³⁵, and differences in

¹²⁷ *Id.* at 193; 209.

¹²⁸ Orley Ashenfelter, William J. Collins and Albert Yoon, *Evaluating the Role of “Brown v. Board of Education” in School Equalization, Desegregation, and the Income of African Americans*. 8 *Am. Law and Econ. Rev.* 213, 222-223 (Summer 2006). Ashenfelter relies upon the works of Margo in 1987 and Orazem also in 1987 who analyze county and state-level data (though the data of the time in these regions is stated to have been imperfect) the length of school term between segregated black and white schools along with factors such as class size and the likelihood of literate parents to begin to explain the negative effects of the segregation regime in education on African Americans.

¹²⁹ *Id.* at 227. These figures are arrived at through a mathematical calculation (explained at 224) to quantify how much of an income disparity could reasonably be attributed to the quality of the black schools. Critically, this does not claim to measure the average income disparity between black and white persons in totality, but is limited exclusively to the portion attributable to segregated education, the full disparity is likely to be starker and more significant.

¹³⁰ Paul E. Barton and Richard J. Coley, *The Black-White Achievement Gap: When Progress Stopped*, Educational Testing Service, July 2010, at 2. The report notes that in the first few decades after *Brown* and the passage of the Elementary and Secondary Education Act in 1965, specifically in the 1970s and 1980s, the NAEP reported large reductions in the gaps in reading and math scores.

¹³¹ *Id.* at 3.

¹³² *Id.* at 5. It should be noted that there was noted closing of this gap in the 2008 year for 9-13 year-olds, but the difference remains stuck around the 20 point threshold.

¹³³ *Id.* at 17.

¹³⁴ *Id.* at 18-19.

¹³⁵ *Id.* at 21; 23. While this passage may be problematically labeled as “Disappearing Fathers,” the point being made is that the percentage of black children under age 18 living with only one or no parents was as high as 65% during the 2000s, with a gap of 38.8% existing between this figure and the 26.2% of white children in a similar situation.

family income and net worth, leading to more black children growing up in medium or high disadvantage neighborhoods.¹³⁶

The economic differences in modern predominantly black and white schools cannot be overstated. Simply put, “. . . money does matter. Schools and districts with more money clearly have greater ability to provide higher-quality, broader, and deeper educational opportunities to the children they serve.”¹³⁷ In recent years, studies on the impact of income, not only on the part of families seeking to send their kids to school, but also on the part of the schools teaching them have been done; these studies have found deep links between income and achievement that may outweigh pure race and achievement analysis.¹³⁸ These studies also find that in places where spending fairness policies are in place, distributing staffing and funding based upon need (i.e., higher poverty districts able to spend more per pupil), problems like overcrowded classrooms and insufficient staff can be alleviated and outcome gaps can close, but the trend has been for targeted funding like this to decrease rather than increase.¹³⁹ While poverty and areas with impoverished school districts are not exclusively black issues, it must be noted that poverty afflicts minority, especially black, populations at a far higher rate than whites, and thus the economic issues are likely to effect black students at a substantially higher rate.

IV. *Application of the Critical Race Theory Lens*

Applying the lens of critical race theory and historiographic analysis to the teaching resources in California and Texas, and keeping in mind the additional information that these resources do not cover, the major issues with both are less issues of truth or accuracy, but are of completeness with regard to race. They both mostly accurately recite the facts of *Brown*, telling the story of Linda Brown, her long walk to school, and the attempt that her father made to ease the burden by enrolling her in the far closer all-white elementary school. Even the basis of the arguments made by the NAACP before the Courts are accurate, if not totally complete to what Marshall and his team presented at each stage. Both, however, have a tendency to oversimplify the decision and largely fail to acknowledge *Brown* as merely the important first step on the path to desegregation, rather than the decision that truly overruled it. While it does need to be conceded that these tools are being used to teach children, any teaching of *Brown* that begins and ends with story and the decision itself fails to account for the legacy that it left us.

Texas, in many ways, comes out far ahead of the California system for factual information. The long history of segregation and the story of the prior cases and how we got to the point that *Brown* are run through and discussed. Even the fact that further cases, like *Brown II* were needed to effectuate the dictate of the *Brown* ruling is brought forward in the Texas model, rather than stopping with the understanding that *Brown* ended school segregation. While this may not be a complete analysis of everything behind the *Brown* ruling and digging into what came after,

¹³⁶ *Id.* at 29-33.

¹³⁷ Bruce D. Baker, Danielle Farrie and David G. Sciarra. *Mind the Gap: 20 Years of Progress and Retrenchment in School Funding and Achievement Gaps*, Educational Testing Service, May 2016, at 2.

¹³⁸ *Id.* at 2-3. A study conducted in 2003 found an increase of 5% in likelihood of students going forward into post-secondary education associated with a 20% increase in school funding.

¹³⁹ *Id.* at 18-20.

wrestling with the actual effectiveness of the decision and what it took to begin to make change is an important step, and a necessary one to make if we want to effectively educate children about issues surrounding school segregation. However, Texas ends on a far rosier note than their deeper dive into post-*Brown* history would suggest. They seem to fall into a trap of a “post-racial America” and point to significant points of progress, like the election of President Obama, the successful integration orders and how it is no longer considered unusual for one to see black children at school with white children or to see an interracial couple walking down the street together. It must be stressed how significant these advances are, but by ending the discussion on a note of positivity without acknowledging how many issues surrounding race still plague the American school system.

In fact, both fail at one very critical point for critical race theorists, they wholly end on the happy note of the decision and the integration that would come from it. There is no discussion of the *de facto* segregation that continues to persist in many parts of the country. There is no exploration of whether school integration means much of anything when schools can still be over 75% of one race or another¹⁴⁰, and whether true equality has been achieved. In many ways, this form of segregation can hurt black students more because there is no law to challenge. The issue of school funding is simply no longer one for the courts, as expressed by their general unwillingness to agree that *de facto* segregation was within the reach of federal intervention.¹⁴¹ While there is certainly something to be said about whether the courts hesitant in attempting to force certain economic outcomes, their failure to act, alongside failures to act at other levels of government, has indisputably led to a scenario in which black students are still consistently disadvantaged in relation to their white peers.

There is also a notable lack of nuance when discussing *Brown* and the myriad issues and other context of the times surrounding it. This reflects a certain bias in the presentation of the material on the part of the authors. The material presented, while it does not necessarily contain large factual errors, fails to account for any possibility that the decision in *Brown* was reached on anything except moral grounds. The simple acknowledgment that school integration and greater rights accorded to African American citizens during the Civil Rights Movement may have been the result of outside factors, the “interest convergence” forwarded by Bell, provides important context into why the decisions were made and why further decisions that would have helped longer term were not.

This overall lack of completeness tells us that the presentation and discussion of *Brown* in our schools is wholly inadequate. It succeeds in showing us the larger-scale importance of *Brown* as one of the watershed moments of the civil rights movement and one of the sparks that led to some major steps in the right direction. But it fails entirely to forward the understanding that the problems that *Brown* sought to solve, namely that black students were being chronically disadvantaged to the point that their education and post-school prospects in life were significantly harmed, are still very real in the United States today and still very much require solving.

¹⁴⁰ National Center for Education Statistics, *Racial/Ethnic Enrollment in Public Schools* (2020) at 2.

¹⁴¹ Frankenberg and Taylor at 228.

V. Conclusion

The analysis and overview of the history that we tell and the context or additional history we choose not to tell, shows that we still have a significant way to go to achieve the goals of equality and opportunity that *Brown* sought to promote. The importance of *Brown* to the Civil Rights Movement and to efforts at equality across the country is certainly adequately stated in our schools, but there is still further left to go. Due to social and economic factors, segregation has shifted from being a *de jure* burden allowing the state to officially treat black students differently to a more difficult to cure *de facto* segregation. This shift makes opposing it all the more difficult, as economic factors and personal choice¹⁴² provide cover for the issues; they are issues that are difficult to control and can be waved off as issues beyond judicial or legislative control. But the strength of opposition to change is not impossible to overcome, as the *Brown* ruling and the Civil Rights Movement show, and the first step needs to be to understand that there is a problem.

By teaching about the *Brown* decision in a more encompassing way, we can hopefully avoid the complacency that can come with success, and we can see that *Brown* was not the end of the educational issues facing the African American population. Through understanding those political, social, and economic issues behind the educational issues still lingering, we can understand that further steps need to be taken. And through understanding the interest-based analysis of the decision, we can hope to craft better arguments beyond strictly moral ones as to why we need to. Finally, making sure that all of this is taught to our children in school will ensure that we do not stay complacent and instead maintain the will for such sorely needed change.

¹⁴² With *de facto* segregation, arguments can be made that the ability to choose where one lives can change educational outcomes. A sort of “just move where the schools are better” mentality. This is difficult as housing discrimination and various forms of employment discrimination can combine to make “just moving” impossible. But as these are broad issues in and of themselves, and beyond the more limited scope of this paper.