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# Judging in a Vacuum, Or, Once More, Without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson

Chris Edelson

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**JUDGING IN A VACUUM, OR, ONCE MORE, WITHOUT  
FEELING: HOW JUSTICE SCALIA’S JURISPRUDENTIAL  
APPROACH REPEATS ERRORS MADE IN  
*PLESSY V. FERGUSON***

*Chris Edelson\**

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\* Assistant Professor, Department of Government, American University; J.D. Harvard Law School 1996; B.A. Brandeis University 1993. I would like to thank Alex Severin for his much-appreciated research assistance as well as Jessica Waters, Sam Goodstein, Richard Phillips, and Max Loper for their astute comments and suggestions. Above all, I am grateful to my wife, Jen Stark, for being involved at every stage of this article.

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## I. INTRODUCTION

Most of us in twenty-first century America think of *Plessy v. Ferguson*,<sup>1</sup> if we think of it at all, as a decision rightly buried deep in the dustbin of history.<sup>2</sup> That is hardly surprising—after all, *Plessy* was discredited by the *Brown v. Board of Education (I)*<sup>3</sup> decision in 1954, formally overruled two years later,<sup>4</sup> and now occupies a special place of dishonor in the historical record as a reminder that the nation’s most prestigious legal institution endorsed a system of racial segregation for nearly a century after the Civil War and passage of the Fourteenth Amendment. *Brown*, which effectively repudiated *Plessy*, commands nearly universal respect from modern Americans, including Supreme Court Justices, while *Plessy*, is universally scorned.<sup>5</sup> Lynne Henderson was surely correct to conclude that *Brown*, which “revers[ed] *Plessy* in principle, if not in literal terms,” can “hardly be questioned” by any modern American “as a symbol of human dignity, of law as agent for the good . . .”<sup>6</sup>

Ironically, although the *Plessy* decision has been discredited, rejected, and generally reviled, its spirit continues to animate Supreme Court opinions, in the sense that Justices on today’s Court repeat

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1. *Plessy v. Ferguson*, 163 U.S. 537 (1896) [hereinafter *Plessy*].

2. See David S. Bogen, *Why the Supreme Court Lied In Plessy*, 52 VILL. L. REV. 411, 416 (2007) (“*Plessy v. Ferguson* is high on the list of the most reviled decisions of the Supreme Court, mentioned in the same breath as *Dred Scott v. Sandford*.”).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown*].

4. *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

5. An April 1994 Gallup Poll showed that “an overwhelming 87% of Americans said they approved of the [C]ourt’s decision [in *Brown*].” Joseph Carrol, *Race and Education 50 Years After Brown v. Board of Education*, GALLUP (May 14, 2004), <http://www.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx>. See also JACK M. BALKIN, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 3-4 (2001) (“*Brown* has become a beloved legal and political icon . . . It is the single most honored opinion in the Supreme Court’s corpus.”); James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1142 (2008) (noting “iconic status of *Brown*”); Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 151 (2009) (“*Brown* is now part of our constitutional consensus, and its use as a litmus test for confirmation is both expected and accepted.”); Linda Hirshman, *Gay Marriage, the Old School Way*, SLATE (July 9, 2010), <http://www.slate.com/id/2260039> (describing *Plessy* as “the universally discredited 1896 Supreme Court ruling that upheld segregation”).

6. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1593-94 (1987). As Henderson notes, it took some time for this consensus to develop—*Brown* was “immediately and repeatedly attacked by legal scholars and the legal and political communities.” *Id.* at 1594.

*Plessy*'s jurisprudential errors. Goodwin Liu recently noted parallels between *Plessy* and Chief Justice John Roberts's plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>7</sup> James Fleming argues that "[Justice Clarence] Thomas's concurrence in *Adarand* and dissent in *Grutter* reflect the *Plessy* worldview."<sup>8</sup> I argue in Part V of this article that Justice Antonin Scalia follows the *Plessy* approach in several of his dissenting opinions.

One of this article's goals is to explain these incongruencies—how can it be that each of these Justices believes he is true to the legacy of *Brown*, but is inadvertently adopting the reasoning used by the majority in *Plessy*? The key to resolving this paradox depends on identifying precisely how *Plessy* went wrong in its reasoning and how *Brown* corrected *Plessy*'s errors<sup>9</sup>—tasks this article takes on in Parts II, III, and IV.

I argue in Part II that *Plessy* failed to take into account social and historical context, the real world of race relations in 1896, and, in Part III, that the Court ignored Homer Plessy's direct request that the Justices use empathy to imagine themselves in his position as an African American living under Jim Crow.<sup>10</sup> As Goodwin Liu observes, part of *Plessy*'s failure involved "the radical formalism of constitutional interpretation in the face of contrary social facts."<sup>11</sup> Or, to enlist language from a Supreme Court decision handed down forty years after *Plessy* and involving different issues, the *Plessy* Court essentially "shut [its] eyes to the plainest facts of . . . life and deal[t] with the [issues before it] in an intellectual vacuum."<sup>12</sup>

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7. See Goodwin Liu, "History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL'Y REV. 53, 63 (2008) ("[I]n refusing to confront the social meaning of segregation and its harm to black Americans, *Plessy* and the plurality opinion in [the 2007 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* case, 551 U.S. 701], are cut from the same jurisprudential cloth.").

8. Fleming, *supra* note 5, at 1145. Justice Thomas, in turn, has suggested that his colleague, Justice Breyer, followed the *Plessy* approach in his dissent in *Parents Involved*. See *id.* at 1147 (quoting *Parents Involved*, 551 U.S. at 773 (Thomas, J., concurring)). As discussed *passim*, I believe that Fleming has it right and Justice Thomas has it wrong as to who is following *Plessy*.

9. See BALKIN, *supra* note 5, at 50.

10. Cf. Liu, *supra* note 7, at 53-54 (arguing the plurality opinion in *Parents Involved*, like the Court in *Plessy*, "strayed . . . from social reality," by failing to take history and social facts into account); see also James E. Robertson, "Separate But Equal" In Prison: Johnson v. California and Common Sense Racism, 96 J. CRIM. L. & CRIMINOLOGY 795, 838 (2006) (quoting *Plessy*'s brief in *Plessy* and arguing that Homer Plessy sought, but did not receive, empathy from each Supreme Court Justice).

11. Liu, *supra* note 7, at 60.

12. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

*Brown*, on the other hand, represents the triumph of empathy and a careful appraisal of social and historical context, as discussed in Part IV.<sup>13</sup> Where the *Plessy*<sup>14</sup> majority ignored a plea for empathy and was unwilling or unable to consider the case in its full social and historical context, the *Brown*<sup>15</sup> Court listened, learned, and offered an effective rebuttal to *Plessy*'s reliance on abstractions. Where *Plessy* was unmoored from reality, *Brown* expressly grounded its reasoning in the world it and the parties lived in.<sup>16</sup> In other words, the reasoning in *Plessy* and *Brown* can be divided along the lines of context and empathy, with *Plessy* seen as a failed decision made in an intellectual vacuum, and *Brown* as the "triumph of empathy"<sup>17</sup> and the rejection of judicial decision-making in a vacuum.

This article focuses on Justice Scalia's tendency to replicate *Plessy*'s errors, but he is not the only Justice to reject social context and empathy as unsuitable considerations for constitutional decision-making. It is not hard to see why this is the case—daring to explore context and empathy in a Supreme Court opinion may seem like a detour into the squishy language of psychotherapy<sup>18</sup> or an indulgence in New Age frivolity. However, Justices, who dismiss the relevance of social context or mock the idea of empathy, run the risk of rejecting *Brown*'s reasoning and following *Plessy*'s. It is well worth remembering that *Brown* itself has been attacked—baselessly, in my view—for taking such detours.<sup>19</sup>

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13. See Henderson, *supra* note 6, at 1607-09; see Robertson, *supra* note 10, at 839 ("In *Brown*, Earl Warren honored Homer Plessy's empathic request"); Annie M. Smith, *Great Judicial Opinions versus Great Literature: Should the Two be Measured by the Same Criteria?*, 6 MCGEORGE L. REV. 757, 779 (2005) ("[T]he difference between *Plessy* and *Brown* lies in the *Plessy* Court's unwillingness to engage in empathy for the plaintiffs.").

14. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

15. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

16. *Id.* ("We must look . . . to the effect of segregation itself on public education. In approaching this problem, we cannot turn the clock back to 1868, when the [Fourteenth] Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.").

17. See Henderson *supra* note 6, at 1608-09 (referring to *Brown* as a "triumph of empathy").

18. For example, in *Lee v. Weisman*, which is discussed in greater detail at Part V.A.2 *infra*, Justice Scalia's dissenting opinion mocks the Court's citation to research in psychology as a "psycho-journey," and pooh-poohs a concurring Justice's quotation of Sigmund Freud, sniffing that he (Scalia) unlike, perhaps, his colleagues in the majority, has "made a career of reading the disciples of Blackstone rather than of Freud." *Lee v. Weisman*, 505 U.S. 577, 642-43 (1992) (Scalia, J., dissenting).

19. See Henderson, *supra* note 6, at 1594 ("The [*Brown*] opinion, varying as it did from the established form, was immediately and repeatedly attacked by legal scholars and the legal and political communities. The favorite criticism was trashing the social scientific evidence that

For instance, Justice Thomas, before joining the Court, criticized *Brown* for relying on “sensitivity” and “the feeling of inferiority” rather than “justice and conformity to the Constitution.”<sup>20</sup> Justice Thomas fails to recognize that the *Brown* Court’s ability to engage in empathy was critical in rejecting *Plessy*’s conclusion that, if African Americans experienced a feeling of inferiority as a result of de jure segregation, that was “their problem.”<sup>21</sup>

The problem I address here is that, while every member of the current Court purports to reject *Plessy* and embrace *Brown* (or, at least *Brown*’s result),<sup>22</sup> not every member of the Court acknowledges the essential differences between the reasoning used in each case, including the specific reasons **why** *Brown* rejected *Plessy*. This is important as it helps explain how some modern Justices end up unintentionally repeating *Plessy*’s errors in new cases. As this article will discuss, Justice Scalia has written a number of opinions that follow *Plessy*’s approach and reprise its errors in different contexts. Specifically, as discussed in Part V, several of Justice Scalia’s dissenting opinions in Equal Protection and Establishment Clause cases follow *Plessy* in two important ways: first, by operating in a kind of judicial vacuum that fails to take into account the “history and social facts”<sup>23</sup> needed to provide vital context for understanding controversies before the Court, and second, by rejecting, even deriding, the notion of judicial empathy (at least when it comes to empathy for a member of a minority group)<sup>24</sup>—a notion also rejected in *Plessy*, but embraced in *Brown*.<sup>25</sup>

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segregation stigmatized and harmed black children; there were also cries for “neutral principles” against “judicial legislation” and attacks on the opinion’s departure from “established form.”)

20. See Fleming, *supra* note 5, at 1143 (quoting Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 990 (1987)).

21. See Fleming, *supra* note 5, at 1145.

22. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 920 (2010) (implying that *Plessy* was properly overturned: “[a]t the same time, *stare decisis* is neither an inexorable command . . . nor a mechanical formula of adherence to the latest decision . . . . If it were, segregation would be legal . . . .” See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (internal quotations and citations omitted)).

23. Cf. Liu, *supra* note 7, at 53-54 (observing how the plurality opinion in *Parents Involved*, like the Court in *Plessy*, “strayed . . . from social reality” by failing to take history and social facts into account).

24. Justice Scalia’s opinions often demonstrate the ability to empathize with people like him—straight Americans in *Romer* and *Lawrence*, observant Christians in *Lee v. Weisman*, men in *United States v. Virginia*. See Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 151 n.8 (2009) (arguing that Justice Scalia’s dissent in *Lawrence* demonstrates “apparent empathy” for Americans who do not want to interact with gay and lesbian people). As Lynne Henderson observes, “we are more likely to empathize with people similar to ourselves, and . . . such empathic understanding may be so automatic that it goes unnoticed: elites will empathize with the experience

In exploring the relevance of empathy and context to the *Plessy* and *Brown* decisions, as well as the question of whether Justice Scalia repeats the mistakes of *Plessy*, I hardly start from scratch. This article builds on and, I hope, adds to existing ideas and arguments set forth by other writers. For instance, as noted, Goodwin Liu has explored the ways in which *Plessy* can be seen as a decision made in a vacuum closed to social and historical context.<sup>26</sup> Dwight Greene has argued that Justice Scalia fails to consider “social context or historical antecedents” in cases involving allegations of race discrimination.<sup>27</sup> Lynne Henderson, Susan Bandes, James Robertson, and others have discussed the role of empathy in judicial decision-making (Henderson specifically discusses empathy in the *Brown* decision and Robertson addresses *Plessy*’s failure of empathy).<sup>28</sup> I am also not the first to suggest one of the current Justices is repeating *Plessy*’s errors. As James Fleming notes, there is a “phenomenon, evident in both liberal and conservative scholarship and opinions, of charging one’s opponents with repeating the mistakes of *Plessy v. Ferguson*.”<sup>29</sup> I hope to show why some of these charges are better grounded than others.

These writers, and others mentioned and quoted *passim*, have discussed various pieces of the arguments I set forth here—I owe them a debt of gratitude for providing me with the building blocks for my

of elites, men empathize with men, women with women, whites with whites.” Henderson, *supra* note 6, at 1584. Henderson refers to this as “unreflective empathy.” *Id.* I do not argue that unreflective empathy is illegitimate any more than the more difficult “[e]mpathy for those unlike oneself” is illegitimate. *Id.* However, what connects Justice Scalia’s jurisprudence in the opinions discussed in this article with *Plessy* is the failure to empathize with the “other”—a task Henderson describes as “more work” but “certainly . . . not impossible . . .” *Id.*

25. See Henderson, *supra* note 6, at 1608-09 (referring to *Brown* as a “triumph of empathy”).

26. See Liu, *supra* note 7, *passim*.

27. See Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 1981 (1993).

28. Henderson, *supra* note 6; Susan Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133 (2009); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lani Guinier’s Demosprudence Through Dissent*, 89 B.U. L. REV. 589 (2009); Robertson, *supra* note 10; Tobin A. Sparling, *Resurrecting the Argument for Judicial Empathy: Can a Dead Duck Be Successfully Repackaged for Sale to a Skeptical Public?*, 20 TEMP. POL. & CIV. RTS. L. REV. 1 (2010).

29. Fleming, *supra* note 5, at 1141. Others have compared specific Justice Scalia opinions to *Plessy*. See, e.g., Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1066-68 (2009); Todd Brower, “A Stranger to Its Laws”: *Homosexuality, Schemas and the Lessons and Limits of Reasoning by Analogy*, 38 SANTA CLARA L. REV. 65, 87 (1997); Kenneth Miller & David Niven, *Mixed Messages: The Supreme Court’s Conflicting Decisions on Juries in Death Penalty Cases*, 5 CRIM. L. BRIEF 69, 94 (2009).

project, and I hope that I am able to extend and expand upon their observations and insights. This article does something different by connecting and synthesizing these earlier expressed ideas into a new framework to argue that (a) *Brown* succeeded in correcting *Plessy*'s errors by relying on social and historical context and by engaging in empathy; and (b) judges who fail to recognize that this is the crucial distinction between *Plessy* and *Brown* run the risk of repeating *Plessy*'s errors, though surely unintentionally, in different areas of the law, as Justice Scalia does in the Equal Protection and Establishment Clause cases I discuss in Part V. The overarching goal is to offer an explanation of what it really means to follow *Brown* and to reject *Plessy*, and to consider what happens when Justices do the opposite.

When I argue that Justice Scalia repeats *Plessy*'s errors, I am not suggesting that he would like to return to the days of de jure segregation. As I noted at the outset, everyone agrees in general that *Plessy* got it wrong and *Brown* set things right. Everyone **wants** to be true to *Brown*'s legacy while rejecting *Plessy*'s—and accusations that an intellectual foe is repeating *Plessy*'s errors fly back and forth.<sup>30</sup> The problem, of course, is: how do we sort this out—who is right in the *Plessy* accusation business, and why does this matter?

The starting point, I argue, is understanding what specifically separates the reasoning in *Plessy* from *Brown*. As discussed below, Justices who, as in *Plessy*, decide cases in an intellectual vacuum will run the risk of repeating *Plessy*'s errors. Of course, that does not mean they are likely to sanction racially segregated passenger train cars—that would be an easy case for any Justice today and, in any event, such cases, thankfully, are no longer likely to arise. It can mean, however, that modern Justices reach conclusions in other contexts that are as out of step with reality as the decision in *Plessy* was. For instance, Justice Scalia recently reiterated<sup>31</sup> his conclusion that the Fourteenth Amendment's Equal Protection Clause simply does not apply to discrimination based on sex or sexual orientation.<sup>32</sup> In reaching these conclusions, Justice Scalia argues that he is simply applying the original meaning of the Equal Protection Clause, deferring to tradition and the will of the people until democratic action provides new instructions.

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30. See Fleming, *supra* note 5, at 1141.

31. He had previously suggested as much in *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) and *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

32. See *The Originalist*, CALIFORNIA LAWYER (Jan. 2011), <http://www.callawyer.com/story.cfm?eid=913358&evid=1>.

This article argues that Justice Scalia's conclusions can be understood in a different way. Scalia's dissenting opinions in cases involving sex and sexual orientation discrimination under the Equal Protection Clause and in cases involving the Establishment Clause are the product of a failure to learn the fundamental lessons of *Plessy v. Ferguson* and *Brown v. Board of Education*.

The conclusions this article reaches have implications for future nominees to the Court, and for the questions that should be asked of them. If, as Lori Ringhand concludes, "*Brown* is now part of our constitutional consensus, and its use as a litmus test for confirmation is both expected and accepted[]"<sup>33</sup> then it is important to know precisely what potential Justices mean when they praise the decision, and what standards they must follow in order to be true to their pledge to follow *Brown* and, ideally, to use it as a model for future decisions. Any nominee can praise *Brown* and reject *Plessy* in general terms. The important thing to know, if we want Justices who will not repeat *Plessy*'s errors in new contexts, is **why** they think *Brown* was right and *Plessy* was wrong.<sup>34</sup> This article aims at clarifying the differences between each decision and demonstrating how failure to appreciate these differences can lead a Justice to repeat *Plessy*'s errors.

## II. PLESSY AS AN EXAMPLE OF JUDGING IN A VACUUM

### A. *Plessy's Failure to Consider Social and Historical Context*

As Goodwin Liu recently observed, *Plessy* suffered from its "refus[al] to confront the social meaning of segregation and its harm to black Americans. . . ."<sup>35</sup> In other words, the *Plessy* Court failed to take relevant social and historical context into account. Liu argues that the majority opinion in *Plessy* depends on an insular legal formalism<sup>36</sup> that shuts out the "history and social facts" needed to provide important

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33. Ringhand, *supra* note 5, at 151.

34. See BALKIN, *supra* note 5, at 25 ("Nowadays, we no longer fight about whether [*Brown*] was correct. Instead we dispute its meaning and its effects.")

35. Liu, *supra* note 7, at 63.

36. Roberto Unger explains that "[a] system of rules is formal insofar as it allows its . . . interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules . . . . Everything will depend on where one draws the line between the factors of decision that are intrinsic to the system, and therefore worthy of consideration, and those that are not." Lynne Henderson, *supra* note 6, at 1588 (quoting R. UNGER, *LAW IN MODERN SOCIETY* 204 (1976)). In other words, formalism can be used to define historical and social context or facts as simply irrelevant to legal inquiry, which proceeds in a vacuum, closed off from the reality people live in.

context for Supreme Court decision-making.<sup>37</sup> As Liu warns, “our history teaches that legal formalism (eventually) loses its authority when it strays too far from social reality.”<sup>38</sup> Supreme Court decisions do not suffer from acknowledging context and applying empathy. To the contrary, these are tools that, when used skillfully, help the Court reach decisions that correspond to the real world litigants and the general population inhabit.<sup>39</sup> When context is ignored, we run the risk of getting results like *Plessy*—decisions disconnected from reality that depend on abstractions in order to justify reasoning that does not describe the way laws and court decisions are experienced.

The *Plessy* decision suffers from a determined, successful effort to shut out the context that gave meaning to the social consequences of legally mandated segregation on railway cars in Louisiana in 1896.<sup>40</sup> The Court in *Plessy* proceeded as if racial segregation had no particular social meaning in the context of the case before it, observing that:

[w]e consider the underlying fallacy of the plaintiff’s argument to consist in the **assumption** that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>41</sup>

The Court further reasoned that:

[a] statute which implies **merely a legal distinction** between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.<sup>42</sup>

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37. See Liu, *supra* note 7, at 53-54.

38. *Id.*

39. As alluded to, *supra* at 3, the Court itself has expressly recognized the importance of context, for example in the *NLRB v. Jones & Laughlin Steel Corp.* decision, where the majority refused to “shut our eyes to the plainest facts of national life and to deal with the [relevant] question . . . in an intellectual vacuum.” 301 U.S. 1, 41 (1937). Lynne Henderson explains the utility of empathy as a tool in judicial decision-making: “[w]hile there exists a tendency on the part of lawyers, judges, and—might I add—law professors, to deny a role to empathic responses in their approaches to legal problems, it is no hunch to claim that the better understanding we have of a situation at all levels, the better our decisionmaking [*sic*] is likely to be.” Henderson, *supra* note 6, at 1576.

40. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896).

41. *Id.* at 551 (emphasis added).

42. *Id.* at 543 (emphasis added).

In order for the *Plessy* Court to reach these conclusions, it had to ignore, as Liu gently puts it, “contrary social facts.”<sup>43</sup> These facts included the reality of systematic discrimination, both *de jure* and *de facto*, against African Americans that persisted for decades after the Civil War. By ignoring these facts, *Plessy* became the product of a decision-making process operating in a kind of “intellectual vacuum.”<sup>44</sup> In *Plessy*, it is almost as if the Justices were visitors from another planet who, confronting legally required racial segregation on railway cars in Louisiana in 1896, blithely concluded such segregation did not necessarily signify that one race was officially deemed superior to another.

A visitor from another planet might well have reached this initial conclusion, knowing nothing of the long history of slavery and race discrimination in the United States and not understanding why an African American living in Louisiana in 1896 (who might well be a former slave) would reasonably perceive “enforced separation of the two races”<sup>45</sup> in the context of this history. Justices on the *Plessy* Court, being residents of the United States, Planet Earth, and having full access to the relevant history and surely their own personal understanding of what race meant in the United States at the time, could have reached a fuller, more accurate conclusion had they moved outside the confines of their contextual vacuum.<sup>46</sup> In fact, it is tempting to conclude that it must have been at least as difficult in 1896 as it was in the 1950s to “keep a straight face” when “solemnly told that segregation is not intended to harm the segregated race, or to stamp it with the mark of inferiority.”<sup>47</sup>

Before taking this historical leap, it is worth considering the personal limitations of Justices on the *Plessy* Court—the ways in which white Americans, including the Justices, thought about race at the time.<sup>48</sup> I ultimately conclude that, even though these Justices had specific and limiting views regarding race, they had the ability to perceive enough of the relevant context to reach a different conclusion (as evidenced by Justice Harlan’s dissenting opinion).<sup>49</sup> However, even

43. Liu, *supra* note 7, at 60.

44. *Cf. NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 41 (1937) (refusing to decide case in an “intellectual vacuum” with eyes closed to “the plainest facts of our national life”).

45. *Plessy*, 163 U.S. at 548.

46. In fact, one Justice, Harlan, did, as discussed at Part II.C, *infra*.

47. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 425 (1960).

48. See CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 93 (1987).

49. See *Plessy*, 163 U.S. at 552.

if I am wrong about this, it does not change the underlying analysis. If the ultimate goal is to understand how twenty-first century judges can avoid *Plessy*'s errors, whether Justices in 1896 were unwilling or simply incapable of taking context into account is beside the point. The lesson we can take away is that it is important to use context and empathy as tools that may allow Justices to see beyond the limiting framework of specific personal experiences and assumptions.<sup>50</sup> Empathy may be especially useful for Justices who, like the rest of us, have difficulty transcending personal limitations in appreciating context relevant to the times in which we live. The next section considers the context in which Justices on the *Plessy* Court operated.

*B. Could the Plessy Court Have Taken Social and Historical Context Into Account?*

It is certainly easy, from a vantage point in the early twenty-first century, to piously denounce the shortcomings of the *Plessy* decision—and an article criticizing the Supreme Court's failure to take social and historical context into account would be guilty of hypocrisy if it suffered from the same failure itself. It's well worth considering whether a twenty-first century observer recognizes "obvious" social facts that Justices on the *Plessy* Court simply couldn't have understood or appreciated.

Retired Justice David Souter argues that the *Plessy* decision itself must be considered in historical context, that "the members of the Court in *Plessy* remembered the day when human slavery was the law in much of the land. To that generation, the formal equality [*sic*]<sup>51</sup> of an identical railroad car meant progress."<sup>52</sup> Charles Lofgren agrees that "popular and scientific opinion provided broad grounds for [the *Plessy* Court] [to] conclud[e] that racial separation was 'reasonable' in the sense of arguably conducing to maintenance of public health, welfare, and

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50. Although Nick Carraway, narrator in *THE GREAT GATSBY*, asserted that "life is much more successfully looked at from a single window," judges (and all of us) can gain perspective from considering different ways of seeing the world. See F. SCOTT FITZGERALD, *THE GREAT GATSBY* 9 (Scribner Hardback Fiction 1925).

51. The railroad cars at issue in *Plessy* were not actually formally equal. See Blair L.M. Kelley, *Right to Ride: African American Citizenship and Protest in the Era of Plessy v. Ferguson*, 41 AFR. AM. REV. 347, 350 (2007) ("While [*Plessy* implicitly] endorsed "separate but equal," in reality, conditions for black passengers, particularly on southern trains, were usually separate but never equal.").

52. Justice David H. Souter, *Harvard University's 359th Commencement Address*, 124 HARV. L. REV. 429, 434-35 (2010).

morals.”<sup>53</sup> Evidence indicates that prevailing public opinion (among white Americans) “broadly accept[ed]” the “ideas of black intellectual and moral infirmity”—ideas that were given intellectual respectability by social scientists in the 1890s.<sup>54</sup> It was generally accepted among white Americans that African Americans were an inferior race, “race mixing” was undesirable, and an integrated society was “impossible in practical terms.”<sup>55</sup> Racist attitudes were in no way limited to the South. Massachusetts clergyman Henry M. Field (brother of Justice Stephen Field,<sup>56</sup> who voted with the majority in *Plessy*<sup>57</sup>) asserted that “the whole [black] race has remained on one dead level of mediocrity.”<sup>58</sup> White Americans broadly embraced a view of African Americans that was based on virulent stereotypes of “inborn pathologies.”<sup>59</sup> Against this backdrop of racist assumptions, prejudices, and stereotypes, segregation was seen as “guarantee[ing] the integrity of each race” and warranted by “the Negro’s well-established infirmities.”<sup>60</sup>

In this sense, the *Plessy* Court **did** take context into account—but it was a limited kind of context, based partly on what Lofgren calls “scientific racism.”<sup>61</sup> The Court’s opinion rests in part on the assumption that “racial instincts exist, and they, like physical distinctions themselves, are sufficiently rooted in man’s nature as to be impervious to alteration through legal schemes.”<sup>62</sup> The *Plessy* Court did not specifically cite social science findings, but its reference to fundamental “distinction[s]” between the white and black races, and its conclusion that “[l]egislation is powerless to eradicate racial instincts, or to abolish distinctions based on physical differences” each reflect a specific, and limited, attention to social context.<sup>63</sup> The Court assumed that there was only one way to understand and experience legally enforced racial segregation—or only one reasonable way, at any rate. It was eminently reasonable for the Louisiana legislature to “act with reference to the established usages, customs, and traditions of the

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53. LOFGREN, *supra* note 48, at 114-15.

54. *Id.* at 94, 103-10.

55. *Id.* at 114-15 (citing GEORGE M. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY* (1971) and JOHN S. HALLER, JR., *OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900* (1971)).

56. *Id.* at 95.

57. *See Plessy v. Ferguson*, 163 U.S. 537, 564 (1896).

58. LOFGREN, *supra* note 48, at 95.

59. *Id.* at 114.

60. *Id.* at 97, 108.

61. *Id.* at 99-111.

62. *Id.* at 179.

63. *See Plessy v. Ferguson*, 163 U.S. 537, 544, 551 (1896).

people, and with a view to the promotion of their comfort and the preservation of the public peace and good order[],” and it was simply irrational for Homer Plessy to “assum[e] that the enforced separation of the two races stamps the colored race with a badge of inferiority.”<sup>64</sup>

What is missing from the Court’s analysis—or, more to the point, what assumptions are woven into the Court’s analysis? When the Court referred to the “customs and traditions of **the people**,”<sup>65</sup> it was, in fact, referring only to a limited subset of the people—a majority, to be sure, but not everyone.<sup>66</sup> The Court was proceeding from an assumption either that “the people” means only the majority of the people—those people most similar to the Justices themselves—and/or that certain members of society simply didn’t figure into the equation when the legislature was considering public opinion and personal “comfort” (surely the Louisiana law was not designed to ensure **everyone’s** comfort).<sup>67</sup> The Court also assumed that there are fixed differences between the races, differences that no law can overcome. This assumption was supported by popular opinion and most social scientists in the late nineteenth century, but it was not undisputed.<sup>68</sup> Even before the Civil War, Frederick Douglass presented scholarly argument to counter claims of fundamental racial differences and black inferiority.<sup>69</sup> Though Douglass died the year before *Plessy* was decided, he pointed a way for the Court to appreciate the Constitution’s potential to reject segregation.<sup>70</sup>

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64. *See id.* at 550-51.

65. *See id.* at 550 (emphasis added).

66. It is important to note that some African Americans also publicly endorsed segregation, but they typically did so for strategic reasons. *See* LOFGREN, *supra* note 48, at 111-14.

67. *See* Bandes, *supra* note 28 (“Judges often face litigants from backgrounds with which they are familiar and comfortable. Their perspective-taking on behalf of such litigants is so natural it is unlikely to be coded as empathy at all. We tend to reserve the term for the more difficult feat of understanding the perspectives of those from very different backgrounds. Those who spend their days surrounded by people with shared backgrounds, assumptions and perspectives may mistake their own perspective for the universal. This mistake is an occupational hazard for judges, who are encouraged by the trappings of their role to speak in a universal voice and to regard themselves as taking the view from nowhere.”).

68. *See* LOFGREN, *supra* note 48, at 99-115; *see also* Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 979 (2005) (“The notion of a monolithically racist white society [at the end of the nineteenth century] is wrong.”).

69. *See* LOFGREN, *supra* note 48, at 111.

70. In an 1894 speech, Douglass argued that the problem of racism, with a focus on racial violence and lynching, could be solved “by simply no longer violating the amendments of the Constitution of the United States, and no longer evading the claims of justice.” Frederick Douglass, Address Before the Metropolitan African Methodist Episcopal Church (Jan. 9, 1894), *available at* <http://antislavery.eserver.org/legacies/the-lessons-of-the-hour/the-lessons-of-the-hour-xhtml.html>.

Would it have been asking too much for Justices on the *Plessy* Court to see past collectively shared white assumptions about race? Were these Justices simply products of their time, just as we are, incapable of seeing outside the social and cultural “water” they swam in?<sup>71</sup> It is fair to say that appreciating context outside of one’s personal experience or world view is especially difficult—that is, in fact, one of the central reasons why I will argue that empathy is an especially useful tool for judges.<sup>72</sup> It is also fair to say that, even if Justices on the *Plessy* Court had looked to social scientists to provide them with perspective, they would have mainly (though not exclusively) found reinforcement for the conclusion that racial segregation was reasonable, even desirable.<sup>73</sup> However, none of this necessarily means that it is impossible for Justices to appreciate social or historical context, though it may provide a useful cautionary note about the advisability of accepting social science evidence at face value.<sup>74</sup> As Susan Bandes observes, Justices who fail to take relevant facts into account may have “simply failed to seek out accurate information.”<sup>75</sup> Justices voting with the majority in *Plessy* could have looked elsewhere for information about how African Americans experience the world—in fact, Homer Plessy invited the Justices to do exactly that, by attempting to imagine the world from his perspective.<sup>76</sup>

Even assuming that it **was** impossible for the *Plessy* Justices to do this work does not mean modern Justices are similarly trapped by their own personal or cultural limitations. It does suggest that Justices who want to avoid *Plessy*’s mistakes would be well-served by seeking alternative ways of understanding the cases that come before them—ways that allow them to see beyond their assumptions and biases. One way, to quote Bandes again, is for Justices to recognize that they have “various means at their disposal for examining their assumptions about

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71. See Marcia Reynolds, *The Water We Swim In: A New Look at Cognitive Evolution*, 4(2) *IJCO* 45 (2006) (“Just as fish do not see the water they swim in, it is rare for us to glimpse the context that influences our choices and decisions.”), <http://pcpionline.com/~files/Authors/IJCO2006424556Reynoldsfinau.pdf>.

72. See *infra* Part III.

73. See LOFGREN, *supra* note 48, at 229 n.3 (citing support for the conclusion that “the social science used in *Plessy* [while] “questionable” and “dubious” . . . reflected dominant views of the period”).

74. Cf. Harry Hutchison, *Waging War on the “Unfit”? From Plessy v Ferguson to New Deal Labor Law*, 7 *STAN. J. C.R. & C.L.* 1, 5 (2011) (“The appropriate lesson America should learn from the struggle to impose involuntary sterilization on human subjects is that the nation should be reluctant to swiftly implement the results of scientific research in human society.”).

75. Bandes, *supra* note 28, at 145.

76. See Robertson, *supra* note 10, at 838.

how the world works,”<sup>77</sup> including by “comprehend[ing] the need for [empathy].”<sup>78</sup>

For the moment, though, I will put aside the question of empathy<sup>79</sup> as a way to transcend personal biases and assumptions and continue to address the ways in which social and historical context could have informed the Court’s decision. While the possibility exists that members of the *Plessy* Court were simply unable, given the times they lived in and the lives they lived, to recognize and appreciate relevant social and historical facts, there is also evidence that they had the ability to appreciate why it was ludicrous to suggest that the Louisiana law was neutral in meaning and did not relegate African Americans to an inferior status.

### C. Justice Harlan’s Attention to Context in His Dissent in *Plessy*

Perhaps the strongest evidence in support of the conclusion that the *Plessy* Court could have taken context into account is the fact that one member of the Court was actually able to do so.<sup>80</sup> Justice Harlan’s dissent, while hardly a model of racial transcendence,<sup>81</sup> is rooted in social and historical context that the majority opinion ignores. Harlan’s opinion is especially grounded in conscious acknowledgement of the recently fought Civil War, the central reason why it was fought, and the consequences of the Union’s victory.<sup>82</sup>

Justice Harlan saw the purpose of the post-Civil War amendments, including the Fourteenth Amendment, as “prevent[ing] the imposition of any burdens or disabilities that constitute badges of slavery or servitude” and “protect[ing] all the civil rights that pertain to freedom and

77. Bades, *supra* note 28, at 144, 146.

78. *Id.* at 146.

79. *See infra* Part III.

80. *See* Finkelman, *supra* note 68, at 981 (quoting Richard L. Aynes, *An Examination of Brown in Light of Plessy and Croson: Lessons for the 1990s*, 7 HARV. BLACK LETTER L.J. 149, 154 (1990) (“As long as John Harlan’s dissent remains in volume 163 of the United States Reports, no one can say with accuracy that the *Plessy* decision was merely a product of its times.”)).

81. For instance, Justice Harlan approvingly describes whites as “the dominant race in this country” and dismisses Chinese Americans as being of “a race so different from our own that we do not permit those belonging to it to become citizens of the United States.” *Plessy v. Ferguson*, 163 U.S. 537, 559, 561 (1896) (Harlan, J., dissenting).

82. Justice Harlan was a Civil War veteran—as were some of his colleagues on the Court (one, Justice Edward White, served with the Confederate Army). SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010, 26 (Apr. 9, 2010), available at <http://www.fas.org/sgp/crs/misc/R40802.pdf>.

citizenship.”<sup>83</sup> Harlan expressly recognized the context for the post-Civil War amendments—the backdrop of centuries of slavery—in concluding that the amendments “removed the race line from our governmental systems” and aimed to provide “a race recently emancipated, a race that through many generations have [*sic*] been held in slavery, all the civil rights that the superior<sup>84</sup> race enjoy [*sic*].”<sup>85</sup> Harlan understood that the law the Court upheld in *Plessy* was intended to thwart the very purpose of these amendments by recognizing “a superior class of citizens”<sup>86</sup> and marking African Americans as “a subordinate and inferior class of beings,”<sup>87</sup> just as they had been marked by the infamous *Dred Scott* decision. Harlan saw that laws like the one at issue in *Plessy* were “cunningly devised to defeat legitimate results of the [Civil] [W]ar under the pretense of recognizing equality of rights.”<sup>88</sup> Harlan recognized the cruel irony of excluding from whites-only rail cars “citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union. . . .”<sup>89</sup>

Harlan’s dissent exposes the absurdity of the majority’s conclusion that there was no objective reason for African Americans to perceive legal segregation as an act of racial discrimination—

[e]veryone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons . . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches.<sup>90</sup>

To Harlan, all this was obvious. In fact, “[n]o one would be so wanting in candor a[s] to assert the contrary”<sup>91</sup>—no one, of course, other than seven of his colleagues on the Court.<sup>92</sup> For Harlan, at least, the “real

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83. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

84. Though Justice Harlan recognized that the Louisiana law had to be understood in social and historical context, and that, consequently, it violated the Equal Protection Clause by designating different castes of citizenship, his opinion still portrayed racist opinions, as described at *supra* note 81.

85. *Plessy*, 163 U.S. at 555-56 (Harlan, J., dissenting) (internal quotation marks omitted).

86. *Id.* at 560 (Harlan, J., dissenting) (internal quotation marks omitted).

87. *Id.* at 559 (Harlan, J., dissenting) (quoting *Dred Scott*, 60 U.S. 393 (1857)).

88. *Id.* at 560-61 (Harlan, J., dissenting).

89. *Id.* at 561 (Harlan, J., dissenting).

90. *Id.* at 557 (Harlan, J., dissenting).

91. *Id.* (Harlan, J., dissenting).

92. Justice David Brewer did not participate in the case. *Id.* at 552.

meaning” of the law before the Court was transparent: to make clear that “colored citizens are so inferior and degraded that they cannot be permitted to sit in public coaches occupied by white citizens.”<sup>93</sup> It was a law that had to be understood in the context of centuries of slavery, and in that context, “[t]he arbitrary separation of citizens on the basis of race while they are on a public highway [wa]s a badge of servitude”<sup>94</sup>—an obvious effort to maintain important aspects of the slavery system, even if African Americans could no longer be held as property. Harlan further recognized the historical incongruity of the majority’s citation to pre-Civil War state court decisions, which were cited by the majority in an attempt to show that racial segregation was not confined to the South. Harlan charged that such decisions, rendered before the post-Civil War amendments had been enacted, were “wholly inapplicable.”<sup>95</sup>

If Justice Harlan could make each of these observations, accurately predicting that “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case,”<sup>96</sup> then surely his colleagues had the information at their disposal that would have allowed them to reach the same conclusion, had they considered the context Harlan took into account. If the *Plessy* majority had acknowledged the history and social context on which Justice Harlan based his dissent, it would have “recognize[d] that segregation was primarily a problem . . . of entrenched racial subordination,” as Charles Black later put it, “a massive intentional disadvantaging of the Negro race, as such, by state law.”<sup>97</sup> African Americans living in Louisiana in 1896 didn’t “choose” to perceive a “badge of inferiority”; they understood the realities of the world they lived in very well. The *Plessy* Court, however, “refus[ed] to confront the social meaning of segregation and its harm to black Americans,”<sup>98</sup>

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93. *Id.* at 560 (Harlan, J., dissenting).

94. *Id.* at 562 (Harlan, J., dissenting).

95. *Id.* at 563 (Harlan, J., dissenting). Charles Lofgren argues that it was not anachronistic for the majority to cite the 1849 *Roberts v. City of Boston* decision, which upheld school segregation nearly two decades before the Fourteenth Amendment was enacted: he asserts that “*Roberts* had been decided in the face of [state] constitutional provisions which could be interpreted as providing an equivalent of the Fourteenth Amendment’s protections.” LOFGREN, *supra* note 48, at 180. However, as Justice Harlan suggests, the context was different in 1896; the Court in *Plessy* was charged with interpreting and applying the Fourteenth Amendment, as well as the other post-Civil War amendments, as efforts to translate victory on the battlefield into social change. 163 U.S. at 560-61 (Harlan, J., dissenting).

96. *Id.* at 559 (Harlan, J., dissenting).

97. Liu, *supra* note 7, at 63 (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960)).

98. *Id.*

steadfastly insisting that there was nothing intrinsically remarkable about a law separating the races on railway cars thirty years after the Civil War, at a time when African Americans were broadly relegated to second-class citizenship, and producing a conclusion that was “a legal absurdity.”<sup>99</sup>

*Plessy* claimed neutrality, but it was neutrality achievable only in a vacuum: “[t]he Court in *Plessy* thought it was acting on neutral principles, and from a certain perspective, it was. Its fundamental error was to equate neutrality with a jurisprudence of legal formalism isolated from social meaning.”<sup>100</sup> All judges aspire to impartiality, which is often equated with neutrality, but “neutrality” that depends on shutting out social context produces formalistic decisions disconnected from reality.<sup>101</sup>

One lesson to draw from *Plessy*, as Liu notes, “is that the seduction of ‘neutral principles’ must be tempered by an honest accounting of relevant social facts.”<sup>102</sup> Judges can be impartial without ignoring context: the impartial judge draws on available information to ensure that his or her decision takes social context into account, making “legal principle . . . responsive to ‘the real world.’”<sup>103</sup> This is not bias, it is an effort to make a fully informed decision—or, at least, to approach that ideal.<sup>104</sup>

Another lesson *Plessy* teaches is that it is necessary to consider the possibility that deferring to the traditions and customs of the majority can sometimes mean erasing the constitutional rights of the minority. Few can presume to have the insight to recognize the failings of contemporary assumptions that seem reasonable at the time—whether it is segregated rail cars in 1896 or discrimination based on sexual orientation a hundred years later. But, by recognizing that such assumptions **may** be incorrect, there is at least a chance that we can learn a useful lesson from *Plessy* (and *Brown*) that is applicable to today’s questions: judges ought to consider ways to see the world from a perspective other than their own or the majority’s. One useful tool

99. *Id.* at 61.

100. *Id.* at 65.

101. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

102. Liu, *supra* note 7, at 65.

103. *Id.* at 66 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

104. See Henderson, *supra* note 6, at 1576 (“To have total historical, empirical, emotional, experiential, and contextual understanding of a given legal problem before making a decision is an unreachable ideal.”).

available to Justices who recognize the limits of their own experiences and look for a way to transcend these limits is empathy.

### III. EMPATHY AS A TOOL FOR JUDICIAL DECISION-MAKING

#### A. *Judicial Empathy as a Path to Understanding, Not a Euphemism for Bias*

Judicial empathy is often caricatured or misrepresented as bias, softness, or sympathy for considerations that form no legitimate part of legal inquiry.<sup>105</sup> In fact, as Lynne Henderson describes it, and as the *Plessy* and *Brown* decisions reveal, empathy “can and should be a proper and influential part of legal discourse.”<sup>106</sup> In practice, empathy does not dictate the outcome of a case.<sup>107</sup> Instead, like social and historical context, empathy can help judges ensure that their decisions are tethered to the real world and to the reality of “how people *do* live,”<sup>108</sup> instead of floating in a judicial vacuum, unmoored from reality. Empathy is not a code word for bias. To the contrary, “[i]t is those judges who are **unable** to understand the views and problems of others—who are unable to assess problems from any vantage point other than their own—who may not be up to the task of administering justice equally and impartially.”<sup>109</sup>

Those who would follow *Brown* while truly rejecting *Plessy* must recognize that part of *Plessy*’s jurisprudential error can be understood as a failure of empathy, while *Brown* can be seen as a “triumph of

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105. See Bandes, *supra* note 28, at 369 (noting that empathy is often characterized as a “soft emotion” incompatible with legal thought). President Barack Obama’s statement that he would look for empathy in a Supreme Court nominee provoked this response from Senator Jeff Sessions: “I don’t know what [President Obama] means. And it’s dangerous, because I don’t know what empathy means. So I’m one judge and I have empathy for you and not this party, and so I’m going to rule for the one I have empathy with? So what if the guy doesn’t like your haircut, or for some reason doesn’t like you, is he now free to rule one way or the other based on likes, predilections, politics, personal values?” Kim McLane Wardlaw, *Umpires, Empathy and Activism: Lessons Learned from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1647-48 (2010) (quoting SESSIONS SAYS HE’S LOOKING FOR JUDICIAL RESTRAINT, NAT’L J. ONLINE (May 7, 2009), <http://www.nationaljournal.com/njonline/no 20090507 5499.php>).

106. Henderson, *supra* note 6, at 1650.

107. See *id.* at 1653 (“Empathy cannot necessarily tell us what to do or how to accomplish something, but it does alert us to moral choice and responsibility.”); see also Bandes, *supra* note 28, at 137 (“Empathy assists the judge in understanding the litigants’ perspectives. It does not help resolve the legal issue of which litigant ought to prevail.”); Wardlaw, *supra* note 105, at 1646-47 (“Empathy allows the judge to appreciate more fully the problem before her; it does not solve it for her; it does not dictate a result.”).

108. See Henderson, *supra* note 6, at 1575.

109. Wardlaw, *supra* note 105, at 1649 (emphasis added).

empathy.”<sup>110</sup> Nine white Justices on the *Brown* Court did the hard “work” of empathizing with African American schoolchildren who lived a reality the Justices had not directly experienced.<sup>111</sup> As a result, their decision benefited from “a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.”<sup>112</sup> Justice Scalia would surely mock this description of the benefits offered by judicial empathy as the sort of extralegal, touchy-feely “coo[ing]”<sup>113</sup> better suited to those “who have made a career of reading the disciples of [Freud] rather than [Blackstone].”<sup>114</sup> But those like Justice Scalia who mock judicial empathy are following the jurisprudential approach of *Plessy*, not *Brown*.<sup>115</sup>

### B. Defining Judicial Empathy

Understanding how empathy, or the lack of empathy, separates *Plessy* from *Brown* begins with a definition of empathy itself. Henderson offers some useful first principles, identifying

three basic phenomena captured by the word [empathy]: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining

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110. See Henderson, *supra* note 6, at 1608; see also Souter, *supra* note 52, at 435 (“[T]he judges [in *Brown*] found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see. That meaning is not captured by descriptions of physically identical [*sic*] schools or physically identical [*sic*] railroad cars. The meaning of facts arises elsewhere, and its judicial perception turns on the experience of the judges, and on their ability to think from a point of view different from their own.”) (emphasis added).

111. See Henderson, *supra* note 6, at 1584; see also Bandes, *supra* note 28, at 139.

112. Cf. Henderson, *supra* note 6, at 1576.

113. Cf. Lawrence v. Texas, 539 U.S. 558, 604 (Scalia, J., dissenting).

114. Cf. Lee v. Weisman, 505 U.S. 577, 642 (Scalia, J., dissenting).

115. In fact, as noted *infra* Part IV, *Brown* was itself initially criticized for departing from the accepted legal model (i.e. one that denies empathy) and citing social science evidence (the kind of approach Justice Scalia mocks in his *Lee* dissent when he derides those who “read[] the disciples of . . . Freud.”). See Henderson, *supra* note 6, at 1594 (“The [*Brown*] opinion, varying as it did from the established form, was immediately and repeatedly attacked by legal scholars and the legal and political communities. The favorite criticism was trashing the social scientific evidence that segregation stigmatized and harmed black children there were also cries for “neutral principles” against “judicial legislation and attacks on the opinion’s departure from established form.” Such criticisms did not end in the immediate aftermath of *Brown*—decades later, Justice Thomas criticized Chief Justice Warren’s opinion in *Brown* for relying on “sensitivity” and “the feeling of inferiority” rather than “justice and conformity to the Constitution.”). Fleming, *supra* note 5, at 1143 (quoting Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 990 (1987)).

oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion).<sup>116</sup>

As Susan Bandes observes, however, there is ambiguity here as “these definitions describe a wide range of cognition and behavior.”<sup>117</sup> It may be more precise to distill from Henderson’s definition the idea that empathy is the human ability to (metaphorically) put oneself in another’s shoes<sup>118</sup> or, as Bandes describes it, “to take the perspective of another.”<sup>119</sup> This is an immensely useful exercise for a judge, as it

enables the decisionmaker [sic] to have an appreciation of the human meanings of a given legal situation. Empathy aids both processes of discovery—the procedure by which a judge or other legal decisionmaker [sic] reaches a conclusion—and processes of justification—the procedure used by a judge or other decisionmaker [sic] to justify the conclusion—in a way that disembodied reason simply cannot.<sup>120</sup>

Judges cannot literally live the experiences of the litigants before them, but as human beings capable of empathy, they can attempt to understand and “imaginative[ly] experience” the world from the litigants’ perspectives.<sup>121</sup>

Empathizing with someone does not require accepting that person’s view of the world as correct,<sup>122</sup> and, as noted, it does not dictate a specific outcome in any case.<sup>123</sup> Though it is often confused with sympathy or emotional identification with another, empathy is “a capacity, not an emotion.”<sup>124</sup> Empathy simply “entails **understanding** another person’s perspective[],”<sup>125</sup> not necessarily agreeing with it and not necessarily taking any action on that person’s behalf. Empathy is

116. Henderson, *supra* note 6, at 1579.

117. Bandes, *supra* note 28, at 373.

118. See Wardlaw, *supra* note 105, at 1648 (defining empathy as “the capacity to understand the views and problems of others”).

119. Bandes, *supra* note 28, at 136.

120. Henderson, *supra* note 6, at 1576.

121. *Id.* at 1581 (“[E]mpathy is not a dissolution of ‘ego boundaries’ or absorption of self by other—it is a means of relating to another or making another intelligible. A form of this [second] kind of empathy is imaginative experiencing of the situation of another. It is not the same as ‘getting it,’ as the ‘aha’ experience, but it gives important clues to understanding.”).

122. *Id.* at 1584-85 (explaining that empathizing with, for example, Hitler or SS guards does not mean endorsing Nazism in any way, rather it can be a path to preventing evils from recurring).

123. *Id.* at 1653.

124. Bandes, *supra* note 28, at 136.

125. *Id.* (emphasis added).

useful—sometimes vital—to judges because, like social and historical context, it helps to connect their opinions to the reality of how litigants live their lives and experience the law by providing access to

an entire mode of understanding and interpreting [that] is seemingly foreclosed by legal discourse . . . a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings; it is a rich source of knowledge and approaches to legal problems—which are, ultimately, human problems. Properly understood, empathy is not a “weird” or “mystical” phenomenon, nor is it “intuition.” Rather, it is a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.<sup>126</sup>

### C. *Plessy’s Failure of Empathy: More Judging in a Vacuum*

Even judges who scorn empathy as being outside “[t]he ‘normal’ discourse of law”<sup>127</sup> unconsciously weave empathetic responses into their decision-making.<sup>128</sup> As we will see, Justice Scalia, like the Justices in the *Plessy* majority, engages in what Henderson describes as the easier task of “empathiz[ing] with “people similar to ourselves.”<sup>129</sup> The achievement of the nine white Justices in *Brown* was their ability to do the harder “work” required to “[e]mpath[ize] with those unlike oneself.”<sup>130</sup>

Like social and historical context, empathy allows judges to escape the “neutrality in a vacuum” trap.<sup>131</sup> Justices who reject empathy for those who are unlike them embrace a legal formalism that allows them

126. See Henderson, *supra* note 6, at 1576.

127. See *id.* at 1575.

128. Cf. *id.* at 1584 (“The reality of empathy is that we are more likely to empathize with people similar to ourselves and that such empathic understanding may be so automatic that it goes unnoticed: elites will empathize with the experience of elites, men empathize with men, women with women, whites with whites. I would call this ‘unreflective’ empathy.”); see also Bandes, *supra* note 28, at 135-36 (“[I]t is misleading to discuss *whether* judges should exercise empathy. They should, and they inevitably do. The questions are *for whom* they exercise it, how accurately they exercise it, how aware they are of their own limitations and blind spots, and what they do to correct for those blind spots.”).

129. Henderson, *supra* note 6, at 1584. See also Bandes, *supra* note 28, at 139 (“Judges often face litigants from backgrounds with which they are familiar and comfortable. Their perspective-taking on behalf of such litigants is so natural it is unlikely to be coded as empathy at all.”).

130. Henderson, *supra* note 6, at 1584.

131. See *supra* Part II.A, for a discussion of the *Plessy* decision as an example of judging that falls into the “neutrality in a vacuum” trap by shutting out social and historical context.

“to block human pain and escape responsibility.”<sup>132</sup> For Justices intent on avoiding *Plessy*’s errors today, empathy offers a path to broader understanding. The *Plessy* Court’s previously mentioned conclusion that African Americans who believed segregation stamped them with a “badge of inferiority” were “choos[ing] to put that construction on it”<sup>133</sup> reflects, in addition to a failure to appreciate context, a failure of empathy. The *Plessy* Court imagined Louisiana in 1896 as a place where de jure segregation was merely something that gave life to “the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort. . . .”<sup>134</sup> One can imagine Homer Plessy laughing out loud at the idea that the Louisiana legislature was promoting his comfort by passing a law that required him to sit in a hot, sooty, cramped railcar instead of the elegantly appointed first class car available to whites.<sup>135</sup> The Justices in the majority in *Plessy* unconsciously empathized with the white American majority in the population—those were the falsely all-inclusive “people” whose customs and traditions were being upheld by the Louisiana law. People like Plessy, who were relegated to second-class cars and second-class citizenship, were left out of both the Louisiana state legislature’s and the Court’s understanding of how segregation affected African Americans.

Some mistakenly confuse empathy with bias, believing that neutrality in judging is incompatible with empathy.<sup>136</sup> First, as Susan Bandes reminds, it is useful to emphasize that empathy is just **one** tool “in the judge’s toolbox.”<sup>137</sup> Empathy helps give judges the understanding necessary to apply the law to various “aspects of human

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132. See Henderson, *supra* note 6, at 1590.

133. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (emphasis added).

134. *Id.* at 550.

135. See Blair L.M. Kelley, *Right to Ride: African American Citizenship and Protest in the Era of Plessy v. Ferguson*, 41 AFR. AM. REV. 2, 350-51 (2007) (“While [*Plessy* implicitly] endorsed ‘separate but equal,’ in reality, conditions for black passengers, particularly on southern trains, were usually separate but never equal. Most railroads designated that the first-class cars were available to most white patrons without distinction. These elaborate ‘Palace’ railcars provided plush seating and clean and smoke-free air, far away from the foul coal-burning engine . . . . Given that railroad investors wanted to avoid the expense of maintaining first-class cars exclusively for black use, most often the ‘Jim Crow’ car doubled as a plainly appointed smoking car, or was just a poorly partitioned section of the smoking car . . . . Smoke and soot made the car hot, loud and uncomfortable . . . . Segregated riders usually had only one bathroom for both men and women. Attendants provided no water for the hot, cramped compartment. In contrast to the plush velvet seating and ornate wood of the first class ladies’ [so-called, though not for ladies only] cars, the condition of Jim Crow cars was usually sparse and often ‘the oldest car in service on the road.’”).

136. See Bandes, *supra* note 28, at 138-39.

137. *Id.* at 137 (citing Judge Richard Posner).

conduct.”<sup>138</sup> Second, critics of judicial empathy ignore the reality that judges often unconsciously engage in what Bandes calls “selective empathy,” which occurs when judges “mistake their own perspective for the universal[],”<sup>139</sup> as the Court did in *Plessy*. The *Plessy* Court’s “neutrality in a vacuum” was a mode of reasoning reflecting a specific worldview, one that accepted white American assumptions about race as objective and dismissed African American perceptions of segregation as imaginary.<sup>140</sup> Because the Court “mist[ook] its own perspective for the [supposedly universal] view from nowhere[,] it fail[ed] to seek out other perspectives.”<sup>141</sup>

If the Court had accepted Homer Plessy’s invitation to see the world from his perspective, that would not have meant ignoring other perspectives—it simply would have helped the Court avoid making a decision “based on skewed and incomplete information.”<sup>142</sup> It took fifty-eight years, but the Court did ultimately accept Homer Plessy’s invitation, as seen in the *Brown* Court’s conscious effort to figuratively step into the shoes of African American children required to attend segregated school. The *Brown* Court also punctured *Plessy*’s judicial vacuum by taking social and historical context into account.<sup>143</sup> Acknowledging the roles empathy and context played in *Brown* will reveal the fundamental differences between *Plessy* and *Brown* and will point a way for modern Justices to avoid repeating *Plessy*’s mistakes.

#### IV. ESCAPING THE VACUUM: HOW THE *BROWN* COURT USED CONTEXT AND EMPATHY TO EXPOSE *PLESSY*’S ERRORS

It is a mistake to attempt to separate *Brown*’s result from its reasoning (or, perhaps, a conscious effort to limit *Brown*’s application). There is something to be said for James Fleming’s suggestion that he could contribute a chapter to the book, *What Brown v. Board of Education Should Have Said*, by providing “word for word, the opinion of Chief Justice Earl Warren in *Brown*,” as it “contains every argument

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138. *See id.* at 139.

139. *Id.*

140. *See id.* at 139-42 (discussing “occupational hazard for judges” of assuming their personal worldview provides neutral perspective, especially when a judge’s worldview coincides with view of the privileged and powerful).

141. *See id.* (discussing the problem of selective or unconscious empathy in general terms, not in the specific context of the *Plessy* decision).

142. *See id.* at 143 (discussing the problem of incomplete information in the context of the *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), decision).

143. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

one needs to justify *Brown*.”<sup>144</sup> *Brown*’s reasoning directly addressed the shortcomings in *Plessy* by consciously and productively taking social and historical context into account and by belatedly accepting Homer Plessy’s invitation to view the world from the perspective of an African American experiencing segregation.<sup>145</sup>

A. *The Importance of Social and Historical Context to the Brown Decision*

*Brown* provides an example of how Supreme Court decisions can benefit from taking social and historical context into account. Lynne Henderson argues that Thurgood Marshall and lawyers for the National Association for the Advancement of Colored People (“NAACP”) urged the *Brown* Court to consider empathy in striking down laws segregating public schools, and that nine white Justices accepted the invitation.<sup>146</sup> I will address Henderson’s fertile and astute observations regarding the role of empathy in *Brown* in Part IV.B. However, what Henderson identifies as “empathy” can sometimes be described as attention to social or historical context, which I will discuss here. For instance, during oral argument,<sup>147</sup> Marshall asserted that

[t]he only [conceivable reason for segregation] is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.<sup>148</sup>

Marshall’s point, like Harlan’s in *Plessy*, was that laws enforcing racial segregation after the Civil War had to be considered in the context of the more than two hundred years of slavery that preceded it.<sup>149</sup>

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144. Fleming, *supra* note 5, at 1142.

145. See Robertson, *supra* note 10, at 838 (quoting Plessy’s Supreme Court brief: “[If judges were African-American and lived under Jim Crow,] what humiliation, what rage would . . . fill the judicial mind . . . ?”).

146. Henderson, *supra* note 6, at 1593-95.

147. Of course, oral argument is separate from the Court’s opinion. However, as Christopher Schmidt observes, “there may be considerable value in recognizing that constitutional meaning derives not only from the traditional sources of legal interpretation—constitutional text, original understanding, and precedent—but also from the historical experience of contestation over the best reading of the Constitution.” Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 205 (2008).

148. See Henderson, *supra* note 6, at 1602 (citing oral argument in *Brown*).

149. This is not to suggest that Marshall’s argument was simply a request that the Court embrace Harlan’s dissent in full.

Without this essential context, our imagined extraterrestrial visitor could reasonably posit some benign reason(s) for segregation—perhaps both groups desired it, perhaps it was convenient. **With** this context in mind, given the American experience of slavery, it was clear that legally enforced racial segregation was a transparent attempt to preserve as much of the slave system as was possible in defiance of the post-Civil War amendments that aimed at “prevent[ing] the imposition of any burdens or disabilities that constitute badges of slavery or servitude” and “protect[ing] all the civil rights that pertain to freedom and citizenship.”<sup>150</sup>

The *Brown* Court accepted Marshall’s invitation to ground its decision in the real world, rather than relying on abstract legal principles divorced from reality. By 1954, the tide of social science had shifted, and Thurgood Marshall could assert<sup>151</sup> to the Court that “I know of no scientist that has made any study . . . who does not admit that segregation harms the child.”<sup>152</sup> By contrast, counsel for the State of South Carolina, John W. Davis, “mock[ed] social science in general” and urged the Court to rely on “settled legal doctrines”—abstract principles such as local control of schools and *stare decisis*.<sup>153</sup> Davis suggested that the case could be resolved by resort to legal principles that were not race-specific or race-conscious, and that segregating African American schoolchildren based on their race was, for the Court’s purposes, no different than making distinctions based on sex, age, or mental capacity.<sup>154</sup>

During oral argument, Marshall asked the Court to reject abstractions and, instead, to focus on what segregation meant to African Americans in the real world, pointedly insisting that “[opposing counsel] can’t take race out of this case. . . .”<sup>155</sup> Marshall’s argument to the Court drew on “knowledge and experience” and “underscored what it meant to be black in the United States, to be excluded, to be disempowered. . .

150. See *Plessy v. Ferguson*, 163 U.S. 537, 555 (Harlan, J., dissenting).

151. Note that there were three sets of oral argument in *Brown*. See Henderson, *supra* note 6, at 1595. The third set addressed the question of remedies, an issue resolved by the *Brown II* decision in 1955. My discussion here is concerned with the first two sets of oral argument that preceded the *Brown I* decision in 1954. Quoted excerpts from counsel come from these first two sets of argument.

152. See Henderson, *supra* note 6, at 1599-1600 (citing oral argument in *Brown*).

153. See *id.* at 1598-99.

154. See *id.* at 1598. At the time, the Court had not yet applied the Equal Protection Clause to strike down sex discrimination. Of course, it has since done so. See, e.g., *Reed v. Reed*, 404 U.S. 71, 77 (1971).

155. See Henderson, *supra* note 6, at 1602.

”<sup>156</sup> Where the *Plessy* Court could blandly describe segregation as reflecting “the established usages, customs, and traditions of the people,” Marshall reminded the *Brown* Court that African Americans were not represented in the legislatures that continued to uphold the Jim Crow system.<sup>157</sup> He pushed aside legal abstractions and charged that “the only way to arrive at [a decision affirming segregation] is to find that for some reason Negroes are inferior to all other human beings.”<sup>158</sup>

Marshall found a Court that was receptive to his argument that segregation could not be analyzed in a legal vacuum and had to be understood in social and historical context. In contrast with *Plessy*, the *Brown* Court recognized the “social meaning of segregation,” that “Linda Brown’s school assignment was an expression of racial hostility, a public humiliation, and a badge of inferiority not only for her but for all black children.”<sup>159</sup> Some of the Justices had personal experience that may have helped them understand what segregation meant—Justice Hugo Black had been a member of the Ku Klux Klan in Alabama as a young man and understood perfectly well that the purpose of segregation “was to discriminate against Negroes in the belief that they were inferior beings.”<sup>160</sup> Chief Justice Earl Warren and Justice Sherman Minton agreed that segregation was based on “a belief in black inferiority.”<sup>161</sup>

The *Brown* Court did not decide the case before it in an intellectual vacuum cut off from the real world meaning of segregation. The Court began its analysis by stating its intention to understand “the effect of segregation itself on public education.”<sup>162</sup> “In approaching this problem,” the Court said:

we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>163</sup>

Unlike the *Plessy* Court, the *Brown* Court considered context to be essential. It made no sense in *Brown* to consider what equal protection

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156. *See id.* at 1600.

157. *See id.* at 1599-1600.

158. *See id.* at 1602.

159. *See Liu, supra* note 7, at 60-61.

160. *See Henderson, supra* note 6, at 1605.

161. *See id.* at 1605-06.

162. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

163. *Id.* at 492-93.

of the laws meant with regard to public schools in the nineteenth century. By 1954, education had become “perhaps the most important function of state and local governments.”<sup>164</sup> Denying African American children equality in education meant denying them the possibility of success as adults.<sup>165</sup> The question, though, was whether racially segregated schools, assuming they were equal in tangible qualities,<sup>166</sup> satisfied the Equal Protection Clause. In answering this question, nine white Justices finally took up Homer Plessy’s invitation to imagine the world through the eyes of an African American—here, an African American child denied access to a school reserved for whites only.

### B. *Brown and the “Triumph of Empathy”*

Homer Plessy’s brief to the Supreme Court expressly invited the justices to use empathy as a way of understanding what segregation meant: “[if judges were African American and lived under Jim Crow], what humiliation, what rage would . . . fill the judicial mind . . . ?”<sup>167</sup> As James Robertson observes, the *Brown* Court accepted the invitation that the *Plessy* Court declined.<sup>168</sup> Lynne Henderson suggests that *Brown* is a “triumph of empathy.”<sup>169</sup> Indeed, *Brown*’s famous declaration that: “in the field of public education, the doctrine of ‘separate but equal’ has no place” flows directly from the Court’s use of empathy as nine white Justices attempted to place themselves in the shoes of African American schoolchildren denied access to whites-only public schools.<sup>170</sup>

Building on and going beyond prior decisions involving challenges to segregation, *Brown* concluded that “[s]eparate educational facilities are inherently unequal.”<sup>171</sup> In *Sweatt v. Painter*, decided four years before *Brown*, the Court had ruled, without disturbing *Plessy* as precedent, that denying African Americans entry to the University of

164. *Id.* at 493.

165. *See id.*

166. Like the separate railcars in *Plessy*, segregated schools in *Brown* were not really equal. *See* BALKIN, *supra* note 5, at 186 (“The ‘separate’ in ‘separate but equal’ has been rigorously enforced. The ‘equal’ has served as a total refutation of equality . . . with some notable exceptions, schools provided for Negroes in segregated systems [were] unequal in facilities—often obscenely so.”). However, the Court assumed that separate schools were equal in a tangible sense (e.g., in terms of facilities, teachers, buildings)—so that it could resolve the question of whether racially segregated schools could ever satisfy the Equal Protection Clause.

167. *See* Robertson, *supra* note 10, at 838 (quoting *Plessy*’s Supreme Court brief).

168. *Id.* at 839.

169. Henderson, *supra* note 6, at 1607-08.

170. *See Brown*, 347 U.S. at 495.

171. *Id.*

Texas School of Law was unconstitutional.<sup>172</sup> The *Sweatt* Court concluded that a separate law school opened for African Americans simply was not the equal of the University of Texas School of Law, either on the basis of objective criteria, like the number of faculty, scope of the library and variety of courses offered, or on the basis of intangible criteria “incapable of objective measurement,” such as reputation of the faculty, influence of the alumni, tradition, and prestige.<sup>173</sup> The *Brown* Court assumed that “the physical facilities and other ‘tangible’ factors [of the segregated schools were] equal.”<sup>174</sup> Therefore, Equal Protection analysis in *Brown* required the Court to consider “the effect of segregation itself on public education,” which boiled down to the question of whether racially segregated schools could **ever** be equal under the Fourteenth Amendment.<sup>175</sup>

*Brown* answered this question by providing a direct rebuttal to *Plessy*’s assertion that African Americans “chose” to perceive segregation as “stamp[ing] the colored race with a badge of inferiority.”<sup>176</sup> Nine white Justices tried to imagine themselves in Linda Brown’s shoes, concluding that she and other African American children were not “choosing” to feel inferior—rather, “separat[ing] them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>177</sup> The *Brown* Court, quoting findings by a lower court in the Kansas segregation case,<sup>178</sup> concluded that

[a] sense of inferiority affects the motivation of a child to learn [and] [s]egregation with the sanction of law . . . has a tendency to (retard) the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.<sup>179</sup>

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172. *Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

173. *Id.* at 633-34.

174. *See Brown*, 347 U.S. at 493. In fact, as noted *supra* note 158, like the segregated rail cars at issue in *Plessy*, segregated schools were not equal with regard to tangible factors. *See BALKIN, supra* note 5, at 186.

175. *See Brown*, 347 U.S. at 492-95.

176. *See Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

177. *See Brown*, 347 U.S. at 494.

178. The *Brown* decision consolidated a number of lawsuits challenging segregated schools in various states. *Id.* at 486 n.1. A separate lawsuit challenged segregated law schools in the District of Columbia. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

179. *Brown*, 347 U.S. at 494.

*Brown* turned to social science findings to further expose *Plessy*'s failure to consider empathy and context: "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*; this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."<sup>180</sup>

The "modern authority" *Brown* cited was social science evidence, including Kenneth C. Clark's doll study, in which Clark found that young African American children in the North and the South preferred white dolls to black dolls.<sup>181</sup> The Court's citation to Clark's study "generated the most controversy"—even William Coleman, one of the NAACP's lawyers, "thought [the doll study] was a joke."<sup>182</sup>

Clark's study is certainly not immune from criticism as it contained "numerous flaws," including a small sample size, lack of a control group, and failure to connect its findings with the effects of segregated schooling (African American children in northern states were **more** likely to prefer white dolls than African American children in segregated southern schools).<sup>183</sup> However, identifying flaws in Clark's study does not mean one must discredit the *Brown* Court's use of empathy.

The *Brown* Court was directly responding to, and rejecting, *Plessy*'s conclusion that African Americans "chose" to be offended by segregation.<sup>184</sup> There were a number of other ways in which *Brown* could have done this, though there may have been strategic reasons for relying on social science evidence.<sup>185</sup> The *Brown* Court could have relied on "the history of Jim Crow as evidence that segregation was a subordinating practice."<sup>186</sup> It could have held, quoting the 1943 *Hirabayashi*<sup>187</sup> decision, that "distinctions between citizens solely because of their ancestry are by their nature odious to a free people."<sup>188</sup> Or, it could have simply asserted, without citation, that "enforced racial segregation is psychologically harmful" (after all, *Plessy* did not cite any

180. *Id.* at 494-95.

181. *See* BALKIN, *supra* note 5, at 51.

182. *Id.*

183. *See id.*

184. *See* *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); BALKIN, *supra* note 5, at 50.

185. *See* BALKIN, *supra* note 5, at 51 ("Warren included footnote 11 [citing the Clark study and other research] as part of his general strategy of adopting a nonaccusatory [*sic*] tone. Apparently he believed that by grounding his decision in empirical social science, he would not appear to be engaging in moral condemnation of the South or of segregation, and he would strengthen the authority of his decision. The strategy backfired. If anything, footnote 11 gave critics of the decision more ammunition than if Warren had simply omitted any reference to the studies.").

186. *See id.* at 52.

187. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

188. *See* BALKIN, *supra* note 5, at 97 (quoting *Hirabayashi*, 320 U.S. 81).

source to support its conclusion that feelings of inferiority in response to segregation were a choice).<sup>189</sup> Even if the specific way in which the *Brown* Court chose to support its empathetic conclusion may be open to criticism, the choice to engage in empathy was critical in exposing *Plessy*'s failing and is crucial to understanding *Brown*'s continuing relevance.

As Lynne Henderson explains, *Brown* "is a human opinion responding to the pain inflicted on outsiders by the law."<sup>190</sup> The Justices were able to understand racism from the perspective of the "other"—African American attorneys and schoolchildren appearing before the Court—enabling them "to see the world in a new way and to understand the pain created by law in that world; and to respond to that pain."<sup>191</sup> This was the polar opposite of *Plessy*. Where the Court in 1896 closed its eyes to what segregation meant in practice, how it was experienced, and how it affected African Americans, Justices on the *Brown* Court turned to empathy as an attempt to correct error, to step outside of their worldview in an attempt to gather as much information and render as informed a decision as possible.<sup>192</sup>

Critics immediately attacked *Brown* (and continued to attack for decades<sup>193</sup>) for "varying . . . from the established form" (i.e., by delving into "feeling"), turning to "social scientific evidence that segregation stigmatized and harmed black children," and away from "neutral principles."<sup>194</sup> These critics missed (and some still miss) the point that it was exactly this variance from the standard form that allowed *Brown* to expose one of *Plessy*'s fundamental errors.

Where *Plessy* stands for judging in a vacuum, closing one's eyes to the perspective of the minority, *Brown* stands for the principle that empathy is legitimate and can be necessary. Critics who attack the specific sources *Brown* cited are missing this essential point. As we will see in Part V, Justices who deride empathy run the risk of writing opinions that follow *Plessy*'s logic, not *Brown*'s.

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189. *Id.* at 52.

190. See Henderson, *supra* note 6, at 1594.

191. *Id.* at 1603, 1608.

192. See Bades, *supra* note 28, at 146.

193. See, e.g., Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 990 (1987).

194. Henderson, *supra* note 6, at 1594. See also BALKIN, *supra* note 5, 51-52 (noting that critics attacked *Brown* for citing social science evidence).

## V. HOW JUSTICE SCALIA REPEATS PLESSY'S ERRORS BY ENDORSING BROWN'S RESULTS BUT NOT ITS REASONING

It is hard, at first glance, to know exactly what Justice Scalia thinks about *Brown*'s reasoning. Lori A. Ringhand states that "Justice Scalia, who answered very few specific questions at his 1986 confirmation hearing, felt it necessary to speak positively about *Brown*."<sup>195</sup> However, a review of the transcript from Justice Scalia's confirmation hearing reveals just one reference to *Brown* (in a question then-Senator Joe Biden asked) and three references to *Plessy*.<sup>196</sup> Then-nominee Scalia did not say anything that directly revealed his views about either *Brown*'s strengths or *Plessy*'s flaws. The closest he came was when he said that "*Plessy* might have been considered a settled question at one time, but a litigant should have been able to come in and say 'it is wrong' and get a judge who has not committed himself to a [Senate Judiciary] committee as a condition of his confirmation to adhering to it."<sup>197</sup> Then-nominee Scalia did not explain **why** he thought *Plessy* was wrong or *Brown* was right, and Justice Scalia still has not done so.

This is not to suggest that Scalia is a closet supporter of race segregation—precisely to the contrary, he has said that he would have voted with the Court in *Brown*.<sup>198</sup> But Justice Scalia has not made clear **why** he would have done so. What does he understand to be the essential meaning of *Brown*? Scalia has never directly addressed this question, but we may be able to extract some understanding from Chief Justice Roberts's plurality opinion in *Parents Involved*, which Justice Scalia joined.<sup>199</sup> Chief Justice Roberts's opinion reads *Brown* as standing for the principle of "colorblind constitutionalism"<sup>200</sup>—that the Constitution, in nearly all cases, prohibits the government from using race as a factor in providing educational opportunities, and mandates that racial classifications aimed at achieving integration are just as bad

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195. Ringhand, *supra* note 5, at 151.

196. *Hearings Before the Senate Committee on the Judiciary on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States August 5 and 6, 1986*, S. Hrg. 99-1064, at 49, 86, 105, <http://www.gpoaccess.gov/congress/senate/judiciary/sh99-1064/browse.html> (accessed Dec. 28, 2010).

197. *Id.* at 86, <http://www.gpoaccess.gov/congress/senate/judiciary/sh99-1064/browse.html>

198. Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, Mar. 28, 2005, [http://www.newamerica.net/publications/articles/2005/supreme\\_confidence](http://www.newamerica.net/publications/articles/2005/supreme_confidence).

199. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708 (2007).

200. See Schmidt, *supra* note 147, at 203.

as segregation was before *Brown*.<sup>201</sup> Proponents of colorblind constitutionalism point to language from Justice Harlan's dissent in *Plessy*.<sup>202</sup>

It is quite possible that this is Justice Scalia's starting point when it comes to *Brown*—that is, as he has suggested elsewhere, he prefers Justice Harlan's dissent in *Plessy* to the Court's reasoning in *Brown*.<sup>203</sup> This is certainly preferable to endorsing the majority opinion in *Plessy*,<sup>204</sup> but, just as it is not enough to praise *Brown* in general terms, it is not enough to express general agreement with Harlan's dissent in *Plessy*.<sup>205</sup> Moreover, if Justice Scalia's conclusion is that *Plessy* and *Brown* teach us simply that the Constitution requires “colorblindness,” then he is missing some fundamental points, namely that what distinguishes *Brown* from *Plessy* is *Brown*'s reliance on empathy and its attention to social and historical context. As discussed *passim*, truly embracing *Brown* means embracing *Brown*'s reasoning, which provided a direct rebuttal to *Plessy* by using context and empathy to move out of the judicial vacuum. Judges who discard *Brown*'s reasoning run the risk of deciding new cases in a judicial vacuum and reaching results that are detached from reality. Several of Justice Scalia's dissenting opinions illustrate this point<sup>206</sup>: like the *Plessy* Court, he ignores social and

201. See generally *Parents Involved*, 551 U.S. 701.

202. See *id.* at 730 n.14 (quoting *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”)). Critics argue that Justice Harlan's point was that the Constitution does not tolerate caste. See Liu, *supra* note 7, at 54-56.

203. See Adam Liptak, *From 19th-Century View, Desegregation is a Test*, N.Y. TIMES, Nov. 9, 2009 (describing Justice Scalia as saying that he agreed with the dissent in *Plessy* but refused to expressly endorse *Brown*'s reasoning), [http://www.nytimes.com/2009/11/10/us/10bar.html?ref=antonin\\_scalia](http://www.nytimes.com/2009/11/10/us/10bar.html?ref=antonin_scalia).

204. A position no one in the twenty-first century is likely to take.

205. For one thing, as noted at page 20, *supra*, it is essential to confront the racist elements of Justice Harlan's dissent—which is not to say that Justice Scalia embraces these sentiments himself, but it is important to temper praise for Justice Harlan's dissent with acknowledgement of its glaring shortcomings. In addition, and perhaps relatedly, Justice Harlan's dissent in *Plessy* is missing the essential empathy component that is vital to *Brown*.

206. It is worth noting, however, that Justice Scalia joined the majority in the recent decision of *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633, 2637 (2009). In *Redding*, the Court ruled that a public school administrator violated a middle school student's Fourth Amendment rights by ordering a strip search to find out if she was concealing prescription strength and over the counter drugs at school. *Id.* As Judge Kim McLane Wardlaw has suggested, the Court's decision required an empathetic ability to understand the unreasonableness of the search from a teenage girl's perspective. See Wardlaw, *supra* note 105, at 1649-52. Perhaps Justice Scalia's decision to join the majority opinion reflects a new approach, but his prior dissents, discussed here, suggest we may have to wait for more evidence before declaring him to have adopted a more generally empathetic approach to judging.

historical context, disdains empathy, and ultimately repeats *Plessy*'s errors, though in different areas of the law.

A. *By Failing to Apply Brown's Reasoning, Justice Scalia Repeats Plessy's Errors in Four Dissenting Opinions*

1. *Romer v. Evans*

In *Romer v. Evans*,<sup>207</sup> the first Supreme Court decision applying the Equal Protection Clause to strike down discrimination based on sexual orientation, the majority opinion drew on empathy and an appreciation of context to reach a decision in line with *Brown*'s approach. Justice Scalia's dissent repeated *Plessy*'s errors, disdaining empathy and ignoring relevant context to reach conclusions at odds with reality.

Justice Anthony Kennedy opens the majority opinion in *Romer* by quoting from Justice Harlan's dissent in *Plessy* "that the Constitution 'neither knows nor tolerates classes among citizens.'"<sup>208</sup> Justice Kennedy concludes that Harlan's words "now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."<sup>209</sup> In applying this principle to the case at hand, which involved a challenge to Colorado's Amendment 2, a voter-approved change to the state constitution that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect [lesbian, gay, or bisexual people],"<sup>210</sup> the Court considered what Amendment 2 meant in practice.

As Justice Kennedy observes, this was a "[s]weeping and comprehensive"<sup>211</sup> ban which meant, as a first step, that existing municipal laws prohibiting discrimination against lesbian, gay, or bisexual (LGB) people were repealed or rescinded.<sup>212</sup> Amendment 2's "ultimate effect [wa]s to prohibit any governmental entity [in Colorado] from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution [wa]s first amended to permit such measures."<sup>213</sup> In short, LGB people were

207. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

208. *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Justice Kennedy's selection from Harlan's dissent is revealing, as it suggests a commitment to equality that requires the rejection of caste. See Liu, *supra* note 7, at 54-56.

209. *Romer*, 517 U.S. at 623.

210. *Id.* at 624.

211. *Id.* at 627.

212. *Id.* at 623-24.

213. *Id.* at 627 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993)).

made “stranger[s] to [Colorado’s] laws.”<sup>214</sup> Amendment 2 made “[LGB people] by state decree . . . a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdr[ew] from [LGB people], but no others, specific legal protection from the injuries caused by discrimination, and it forb[ade] reinstatement of these laws and policies.”<sup>215</sup>

The *Romer* Court’s reasoning relied substantially on an understanding of social context and on empathy. Colorado argued that Amendment 2 was not motivated by animosity against LGB people—rather, that its “primary rationale . . . [was] respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”<sup>216</sup> A Court willing to “shut [its] eyes to the plainest facts of . . . life and to deal with the [issues before it] in an intellectual vacuum”<sup>217</sup> could easily have deferred to Colorado’s explanation, especially when applying the normally deferential rational basis review standard, as the *Romer* Court purported to do.<sup>218</sup> Visitors from another planet, unaware of the history of discrimination against LGB people,<sup>219</sup> might not see any subtext to Amendment 2. The *Romer* Court, however, recognized that anti-LGB bias might well be lurking behind Colorado’s claimed neutrality. In fact, the Court concluded the ban’s “sheer breadth” made “[A]mendment [2] inexplicable by anything but animus toward [LGB people].”<sup>220</sup>

214. *Romer*, 517 U.S. at 635.

215. *Id.* at 627.

216. *Id.* at 635. In addition, “Colorado . . . cite[d] its interest in conserving resources to fight discrimination against other groups.” *Id.*

217. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

218. See *Romer*, 517 U.S. at 631-32. Some question whether *Romer* actually applied a new “rational basis with bite” standard, as the application of the standard in *Romer* seemed to “depart from the usual deference associated with rational basis review.” Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011).

219. See, e.g., Historians’ *amicus* brief filed in *Lawrence v. Texas*: “[w]idespread discrimination against a class of people on the basis of their homosexual status developed . . . in the twentieth century . . . and peaked from the 1930s to the 1960s. Gay men and women were labeled ‘deviants,’ ‘degenerates,’ and ‘sex criminals’ by the medical profession, government officials, and the mass media. The federal government banned the employment of homosexuals and insisted that its private contractors ferret out and dismiss their gay employees, many state governments prohibited gay people from being served in bars and restaurants . . . . The authorities worked together to create or reinforce the belief that gay people were an inferior class to be shunned by other Americans.” George Chauncey et al., *The Historians’ Case Against Gay Discrimination*, HISTORY NEWS NETWORK (July 2, 2003, 6:24 PM), <http://hnn.us/articles/1539.html>. This brief was filed seven years after the *Romer* decision but described a history that predated *Romer*.

220. See *Romer*, 517 U.S. at 632.

This is reminiscent of Justice Harlan's assertion in *Plessy* that segregation's real meaning was to mark African Americans as an inferior class "so inferior and degraded that they cannot be permitted to sit in public coaches occupied by white citizens."<sup>221</sup> Just as Harlan saw this meaning transparently revealed beneath the thin veneer of explanations offered as neutral justifications for segregation,<sup>222</sup> the *Romer* Court found it "impossible to credit" Colorado's supposedly benign reasons for treating LGB people differently from other Coloradans.<sup>223</sup>

By contrast, Justice Scalia, who has suggested an admiration for Harlan's *Plessy* dissent,<sup>224</sup> was unable to adapt Harlan's logic and wrote a dissent in *Romer*<sup>225</sup> that follows the reasoning of the majority opinion in *Plessy*. Like the majority in *Plessy*, Justice Scalia wrote an opinion in a vacuum, cut off from real world context and the effects of discrimination on a minority group.

Justice Scalia, unable to see how *Plessy* and *Brown* related to *Romer*, charged that "[the majority] opinion [in *Romer*] has no foundation in American constitutional law, and barely pretends to."<sup>226</sup> In fact, the majority in *Romer* applied (though perhaps without full consciousness of doing so) important lessons from *Plessy* and *Brown*, producing an opinion that used empathy and an appreciation of context to reach a result that reflected understanding of what discrimination based on sexual orientation means to LGB people. Justice Scalia, by contrast, wrote a dissent perhaps best appreciated by our extraterrestrial friends.

Scalia's dissent begins with the odd declaration that "the Court has mistaken a Kulturkampf [culture war] for a fit of spite."<sup>227</sup> The word choice is striking. Just four years earlier, Pat Buchanan had declared at the Republican presidential convention that there was a "cultural war," a "struggle for the soul of America" that required standing "against the amoral idea that gay and lesbian couples should have the same standing in law as married men and women."<sup>228</sup> Justice Scalia insists that he does

221. See *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

222. See *id.* at 557 ("[n]o one would be so wanting in candor a[s] to assert the contrary").

223. See *Romer*, 517 U.S. at 635.

224. See Adam Liptak, *From 19th-Century View, Desegregation is a Test*, N.Y. TIMES, Nov. 9, 2009, [http://www.nytimes.com/2009/11/10/us/10bar.html?ref=antonin\\_scalia](http://www.nytimes.com/2009/11/10/us/10bar.html?ref=antonin_scalia).

225. See *Romer*, 517 U.S. at 653 (Scalia, J., dissenting).

226. *Id.*

227. *Id.* at 636.

228. Patrick J. Buchanan, Address to the Republican National Convention (Aug. 17, 1992), <http://www.americanrhetoric.com/speeches/patrickbuchanan1992rnc.htm>.

not “take sides” in the culture war,<sup>229</sup> but his decision to define the question before the Court by using this loaded term is revealing.

In addition, though Justice Scalia insists he is not taking sides and criticizes the majority opinion for being “long on emotive utterance,”<sup>230</sup> in his dissent, he **does** engage in empathy, though only with the majority<sup>231</sup> of Coloradans who supported Amendment 2. At times, he suggests this majority is synonymous with “the people of Colorado.”<sup>232</sup> Justice Scalia declares that “**Coloradans** are . . . *entitled* to be hostile toward homosexual conduct,”<sup>233</sup> only catching himself in the final sentences of his opinion to acknowledge that Amendment 2 did not actually reflect the views of all Coloradans, merely the (bare) majority of voters who supported it.<sup>234</sup>

Justice Scalia’s dissent deals in abstractions, unmoored from reality. To paraphrase Charles Black, how is it possible to keep a straight face when Justice Scalia compares LGB people to drug addicts, smokers, people who eat snails, people who hate the Chicago Cubs, or even murderers?<sup>235</sup> Justice Scalia protests: “I had thought that one could consider certain **conduct** reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”<sup>236</sup> In other words, voters who supported Amendment 2 were merely expressing their “moral disapproval of homosexual conduct . . . .”<sup>237</sup>

This is flawed logic that deals in detached principles rather than the reality of how discrimination against LGB people works. Employers who do not want to hire LGB people and landlords who do not want to rent to LGB people are not discriminating based on conduct, they are discriminating because they know, or believe, that the person they do not

229. *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

230. *Id.* at 639.

231. As noted, *supra* note 6, this is what Lynne Henderson describes as “unreflective empathy,” the “reality that we are more likely to empathize with people similar to ourselves, and that such empathic understanding may be so automatic that it goes unnoticed . . . .” Henderson, *supra* note 6, at 1584. Justice Scalia may not have been conscious of his identification with straight Coloradans who supported Amendment 2.

232. *See Romer*, 517 U.S. at 653 (Scalia, J., dissenting).

233. *Id.* at 644 (italics in original).

234. *See id.* at 653 (Scalia, J., dissenting). About 54% of voters approved Amendment 2 while about 46% of voters opposed it. *See id.* at 652 (noting 46% opposition to Amendment 2).

235. *See id.* at 647, 653 (Scalia, J., dissenting). In discussing the *Brown* decision, Charles Black asked: “[h]ow long must we keep a straight face . . . [when] we are solemnly told that segregation is not intended to hurt the segregated race, or to stamp it with the mark of inferiority?” Black, *supra* note 47, at 425.

236. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (emphasis added).

237. *See id.*

want to hire or rent to is lesbian, gay, or bisexual.<sup>238</sup> After all, as Justice Scalia remarked seven years later when dissenting in *Lawrence v. Texas*, sexual activity, whether involving same-sex or opposite-sex couples, “is rarely performed on stage.”<sup>239</sup> LGB job applicants (or straight job applicants, for that matter) do not typically describe their sexual exploits to prospective employers, and employers who discriminate do not actually know that they are responding to any specific “conduct.”

Justice Scalia has a ready answer for this: it does not matter whether discrimination is based on orientation instead of actual conduct. So long as Amendment 2 functions only “to deny special favor and protection to those with a self-avowed tendency or desire to engage in [sexual activity with a same-sex partner] . . . homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct.”<sup>240</sup> Justice Scalia permits sexual orientation to stand in for conduct even though Amendment 2 itself drew a distinction between the two, separately prohibiting anti-discrimination laws that applied to “homosexual, lesbian, or bisexual **orientation, conduct, practices, or relationships** . . . .”<sup>241</sup> Amendment 2’s drafters apparently saw a difference between sexual orientation and conduct, and wanted to make clear that discrimination on either ground could not be prohibited.

Even setting this problem aside,<sup>242</sup> it is not clear how Justice Scalia’s framework would account for discrimination based on one’s incorrectly perceived sexual orientation,<sup>243</sup> or discrimination against someone who identifies as lesbian, gay, or bisexual, but is celibate

238. Laws prohibiting discrimination based on sexual orientation take this reality into account by prohibiting discrimination based on perception of one’s sexual orientation. For instance, Colorado enacted a law in 2007 prohibiting discrimination based on “sexual orientation” which is defined as “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer’s perception thereof.” See COLO. REV. STAT. § 24-34-401, 24-34-402 (2007) (emphasis added) (quoting *Colorado Non-Discrimination Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/workplace/812.htm> (last visited Feb. 20, 2011)).

239. See *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

240. *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

241. *Id.* at 624. (emphasis added).

242. It could be argued that one reading of Amendment 2 would support an argument that the amendment was only unconstitutional as applied to people of lesbian, gay or bisexual “orientation” without regard to any specific conduct, as Justice Scalia discusses in *Romer. Id.* at 643 (Scalia, J., dissenting).

243. Amendment 2 itself was not clear on this point. It prohibited “protected status” based on “homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships,” but did not expressly address the question of discrimination based on incorrectly perceived sexual orientation. *Id.* at 624. It is possible that, had Amendment 2 survived challenge, laws could have been enacted prohibiting discrimination against people incorrectly perceived to be lesbian, gay, or bisexual without offending Amendment 2. The question of how one would prove he or she is incorrectly perceived as lesbian, gay, or bisexual may not be so simple, however.

and/or has decided not to engage in sexual activity with a same-sex partner. Should Colorado have been free to permit discrimination against such people on the grounds that it is motivated by disapproval of “conduct” when there is no intention to engage in such conduct?

Perhaps more to the point, Justice Scalia’s analysis simply equates categories of people who are distinctly different. Justice Scalia’s complaint that employers interviewing job applicants from law schools belonging to the Association of American Law Schools

may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs,

but may not discriminate because of a job applicant’s sexual orientation, suffers from a risible disregard for context.<sup>244</sup> To adapt Walter Dellinger’s observation with regard to the Court’s decision in *Parents Involved*,<sup>245</sup> Justice Scalia’s logic fails the *Sesame Street* test: “Which of These Things is Not Like the Others?”<sup>246</sup>

Justice Scalia suggests that there is no difference between being gay and eating snails, or engaging in any of the other activities he lists. Perhaps laughter is the best response to this preposterous claim,<sup>247</sup> but I will explain what ought to be obvious: of course it is different to be lesbian, gay, or bisexual than it is to hate the Chicago Cubs or attend a certain prep school. Even setting aside the contested question as to whether sexual orientation is an immutable characteristic,<sup>248</sup> there is a documented history of discrimination and violence against LGB people, and no such history of discrimination against snail eaters or womanizers.<sup>249</sup> As a number of courts have concluded, there is ample reason to define sexual orientation as a suspect or quasi-suspect classification, triggering heightened scrutiny under the Equal Protection

244. See *id.* at 652 (Scalia, J., dissenting).

245. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

246. Walter Dellinger, *Everything Conservatives Should Abhor*, SLATE, June 29, 2007, <http://www.slate.com/id/2168856>.

247. See Black, *supra* note 47, at 425.

248. Writers Travis Nuckolls and Chris Baker exposed weakness in the argument that sexual orientation is not immutable but chosen by asking people on the streets of Colorado Springs. Lu Wong, *When Did You Choose To Be Straight?*, THE GOOD MEN PROJECT (Nov. 22, 2010), <http://goodmenproject.com/2010/11/22/when-did-you-choose-to-be-straight>.

249. See *FBI Hate Crime Statistics for 2009*, U.S. DEPT. OF JUSTICE, FED. BUREAU OF INVESTIGATION (Nov. 2010), <http://www2.fbi.gov/ucr/hc2009/victims.html> (reporting over 8,000 victims of hate crimes, 17.8 % of whom were targeted because of sexual orientation).

Clause<sup>250</sup> (though the *Romer* Court did not reach this conclusion).<sup>251</sup> In 1996, and still in 2012, lesbian, gay, bisexual (and transgender, though not addressed in *Romer*) people were and are marked as second-class citizens in a number of ways, through, for example, laws that deny same-sex couples the right to marry, laws that prohibit adoption by “homosexuals” or same-sex couples, and gaps in the law that permit employers, places of public accommodation, and landlords to discriminate based on sexual orientation.

Justice Scalia’s casual suggestion that there is no difference between eating snails, smoking, or even taking drugs,<sup>252</sup> and being lesbian, gay, or bisexual, reflects a failure to take into account basic social and historic context as well as an utter inability to place himself in the shoes of the LGB people affected by Amendment 2. To paraphrase Thurgood Marshall, you can’t take sexual orientation out of *Romer*, as much as Justice Scalia tries.<sup>253</sup> Justice Scalia’s dissent in *Romer* is a nearly perfect example of judging in a vacuum and it produces a bizarre dissent that, like the majority opinion in *Plessy*, is disconnected from reality.

## 2. *Lee v. Weisman*

In *Lee v. Weisman*,<sup>254</sup> Justice Scalia again wrote a dissent that engages in a limited kind of empathy for the majority and relies on a selective use of history and context to mock the Court’s judgment that “including clerical members who offer prayers as part of [an] official [public] school graduation ceremony” violates the First Amendment’s Establishment Clause.<sup>255</sup> *Lee v. Weisman* involved the question of prayer at a public high school graduation.<sup>256</sup> After unsuccessfully attempting to prevent a rabbi from delivering an invocation and

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250. See, e.g., *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 412 (Conn. 2008) (applying intermediate scrutiny to discrimination based on sexual orientation); *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (applying strict scrutiny to discrimination based on sexual orientation). *In re Marriage Cases* ruled that same-sex couples in California have an equal right to marry, a conclusion rejected by California voters later that year, who enacted Proposition 8, which amended the state constitution to prohibit marriage by same-sex couples. Proposition 8 is itself the subject of litigation. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

251. See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

252. *Id.* at 647, 653 (Scalia, J., dissenting)

253. See Henderson, *supra* note 6, at 1602 (quoting Thurgood Marshall from oral argument in *Brown*).

254. *Lee v. Weisman*, 505 U.S. 577 (1992).

255. *Id.* at 580.

256. *Id.*

benediction at her middle school graduation ceremony, Deborah Weisman and her father sought to bar Providence, Rhode Island school officials from “inviting the clergy to deliver invocations and benedictions at future graduations.”<sup>257</sup> Justice Kennedy’s majority opinion concluded that the students were unconstitutionally “persuade[d] or compel[led] to participate in a religious exercise”<sup>258</sup> where the state made “religious conformity” the “price of [a student] attending her own high school graduation.”<sup>259</sup>

These conclusions depended on attention to context as well as empathy for the minority of students who are not comfortable with organized prayer at a graduation ceremony. The Court observed that a dissenting high school student attending such a graduation would be subject to “public pressure, as well as peer pressure, . . . [and] ha[ve] a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow”<sup>260</sup> and that, “given our social conventions,” a dissenting graduate who stood or remained silent during the prayer “could believe that the group exercise [of standing or remaining silent] signified her own participation or approval of [the prayer].”<sup>261</sup> The Court rejected the argument that, because attending graduation is voluntary, any coercion may be excused, declaring instead that, given the central role of high school graduation in American society, “to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.”<sup>262</sup>

The Court’s opinion consciously empathizes with students and parents who are not religious believers, acknowledging that, while many students and their parents see prayer at graduation as a “spiritual imperative[,] . . . for Daniel and Deborah Weisman [it was] religious conformance compelled by the State.”<sup>263</sup> For purposes of constitutional analysis, the Weismans’ minority perspective is important to understand: “[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment . . . rejects the balance [in favor of the majority] urged upon us.”<sup>264</sup> Though the Court’s opinion in

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257. *Id.* at 577, syllabus.

258. *Id.* at 599.

259. *Id.* at 596.

260. *Id.* at 593.

261. *Id.*

262. *Id.* at 595.

263. *See id.* at 596.

264. *Id.*

*Lee v. Weisman* did not cite the *Barnette*<sup>265</sup> decision, it was applying a principle stated there, that

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>266</sup>

Where the Court's opinion in *Lee*<sup>267</sup> focuses on the minority viewpoint of a student and her father who object to organized prayer at a public high school graduation, Justice Scalia's dissent<sup>268</sup> brushes aside these concerns, essentially leaving nonbelievers outside his definition of the American community. Toward the end of his dissent, Justice Scalia advises public school principals as to how they can comply with the Court's decision and still invite members of the clergy to deliver prayers at graduation, so long as a disclaimer is provided that "while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so."<sup>269</sup> This will clear the way, Justice Scalia writes, for "graduates and their parents . . . to thank God, **as Americans** have always done, for the blessings He has generously bestowed on them and on **their country**."<sup>270</sup> Justice Scalia's perspective brings to mind the words of the *Plessy* Court, which described segregation as reflecting "the established usages, customs, and traditions of **the people**."<sup>271</sup> For Scalia, as for the *Plessy* Court, "Americans" or "the people" is synonymous with the majority, people with viewpoints similar to his (or its) own.

This is not quite the "unreflective empathy" that Lynne Henderson describes<sup>272</sup> because Justice Scalia is aware of what he is doing: "[t]he reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on

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265. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Justice Scalia cited the decision in his dissent in *Lee v. Weisman*, focusing on specific facts in *Barnette* that differed from or clashed with the Court's appraisal of the facts presented in *Lee v. Weisman*. 505 U.S. at 638-39, 642-43 (Scalia, J., dissenting).

266. *Barnette*, 319 U.S. at 638.

267. *See Lee*, 505 U.S. at 580-81.

268. *See id.* at 646. (Scalia, J., dissenting).

269. *Id.* at 645.

270. *Id.* (emphasis added).

271. *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1986) (emphasis added).

272. *See Henderson, supra* note 6, at 1584.

the other side.”<sup>273</sup> The fact that Justice Scalia empathizes with a majority that sees organized prayer at graduation as a “spiritual imperative”<sup>274</sup> does not render his perspective illegitimate—judicial empathy means taking the perspective of all parties into account. However, in the final analysis, Justices must choose between competing values.<sup>275</sup> Although Justice Scalia describes the Court’s opinion as using a “bulldozer” to sweep aside tradition,<sup>276</sup> it is Scalia’s own seeming inability even to count religious dissenters or nonbelievers as Americans with a legitimate viewpoint that gives his opinion a bulldozer quality.

For Justice Scalia, the starting point for Establishment Clause analysis is tradition.<sup>277</sup> The meaning of the Establishment Clause flows from “historical practices and understandings.”<sup>278</sup> Justice Scalia suggests a nostalgia for a (perhaps mythic) past when a more refined people honored practices now swept aside by our own “vulgar age.”<sup>279</sup> Part of Justice Scalia’s point in invoking history and tradition is to assert that Justice Kennedy’s majority opinion in *Lee* betrayed Kennedy’s own previously stated principles—the citations to language regarding tradition and historical practice come from a previous opinion that Justice Kennedy had written.<sup>280</sup> Justice Kennedy, however, understood the danger of wholesale deference to historical practice: as in *Plessy*, “custom” or “tradition” can simply be a stand-in for the preferences of the majority.<sup>281</sup> Tradition is an ambiguous term. An important question

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273. See *Lee*, 505 U.S. at 645 (Scalia, J., dissenting).

274. *Id.* at 596.

275. See Souter, *supra* note 52, at 433 (arguing that the Court is sometimes “forced to choose” between competing values).

276. See *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

277. See *id.* at 631 (“[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”) (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (Kennedy, J., concurring in the judgment in part and dissenting in part) (punctuation in original)).

278. *Id.* at 631 (Scalia, J., dissenting) (quoting *Cty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

279. *Id.* at 637 (Scalia, J., dissenting).

280. *Cty. of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

281. See *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896). (“In determining the question of reasonableness, [the Louisiana legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people . . . .”). Another problem is placing organized prayer at a high school graduation in a historical context. Justice Scalia argues that the invocation and benediction at issue in *Lee v. Weisman* should have passed constitutional muster because “[t]he history and tradition of our nation are replete with public ceremonies featuring prayers of thanksgiving and petition.” 505 U.S. at 633. Justice Scalia cites presidential inaugural addresses, chaplain’s prayers to open congressional sessions and Thanksgiving proclamations “dat[ing] back to President Washington” as examples. *Id.* at 634-35. There are at least two problems here: (1) a high

to consider when looking to custom or tradition as a guide is *whose* custom and tradition do we mean? Justice Scalia means the majority's tradition, and he merges the views of the majority with the country as a whole, drawing a dividing line between dissenting Americans and "the historic practices of **our people**."<sup>282</sup>

Although Justice Scalia successfully empathizes with the majority—even to the point of defining the majority as a stand-in for the entire American community, he is unable to empathize with the minority, and dismisses, even mocks, the Court's efforts to do so. As the Court did in *Brown*, the *Lee* Court consciously attempts to place itself in the shoes of a student or parent in the minority, someone like Deborah Weisman or her father, who is not comfortable with a rabbi reading an invocation and benediction at a public school graduation. As part of the effort to understand Deborah's point of view, the Court considers the effects of "peer pressure" on a dissenting student who may feel pressured to stand and/or remain silent during the prayers.<sup>283</sup>

As the *Brown* Court cited social science research to reject *Plessy*'s conclusion that African Americans "choose" to feel inferior as a result of segregation, the *Lee* Court cited social science research to support its conclusion that "adolescents are often susceptible to pressure from their peers towards conformity, and . . . the influence is strongest in matters of social convention."<sup>284</sup> As critics of *Brown* denounced the Court for citing social science evidence,<sup>285</sup> Justice Scalia mocked the Court for doing so in *Lee*, deriding it as having embarked on a "psycho-journey" and declaring that he (unlike, perhaps, his colleagues in the majority), "ha[d] made a career out of reading the disciples of Blackstone, rather than of Freud."<sup>286</sup> But the *Lee* Court's observations regarding peer

school graduation presents a different context than an inaugural address (Justice Scalia does additionally cite the example of invocation and benediction at a public high school graduation in 1868), and (2) seeking to apply early American practices, as Justice Scalia does, several times, to twentieth century public school graduations is difficult given the enormous changes in the nature of public education since 1868, let alone the late eighteenth century. *Id.* at 635-36. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-90 (1954).

282. See *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (emphasis added).

283. See *id.* at 593.

284. See *id.*

285. See BALKIN, *supra* note 5, at 42.

286. See *Lee*, 505 U.S. at 642, 643 (Scalia, J., dissenting). Perhaps Justice Scalia gave away more than he intended by his reference to Sir William Blackstone. The English jurist wrote in his famous *Commentaries* that "[t]o deny the possibility, nay, actual existence of witchcraft and sorcery is at once flatly to contradict the revealed word of God in various passages of both the Old and New Testament." CARL SAGAN, *DEMON-HAUNTED WORLD* 119 (1995) (citing Blackstone's *Commentaries* (1765)). It is no wonder that a faithful disciple of Blackstone would have no problem with organized prayer at a high school graduation (so long as the invocation and

pressure were unremarkable and, like the *Brown* Court's observations regarding the psychological effects of segregation, perhaps no citation to social science evidence was necessary. In *Edwards v. Aguillard*,<sup>287</sup> decided just five years before *Lee*, the Court had observed that public elementary and secondary school students were "impressionable" and "susceptib[le] to peer pressure" without citing any social science research.<sup>288</sup> The *Lee* Court might have simply cited *Edwards* rather than the psychological research derided by Justice Scalia. However, Justice Scalia allowed himself to be distracted by the *Lee* Court's brief citation to psychology: the larger point was that the Court was engaging in empathy in an effort to understand the case from the perspective of people in the minority—here, people holding non-conforming views regarding religion. This is an endeavor that is faithful to *Brown*, not something to mock.

As in *Plessy*, Justice Scalia's approach in *Lee* leaves him unable to make room for the minority. If Justice Scalia's dissent had been the Court's majority opinion (and it fell just one vote short), the message to people like the Weismans would effectively be: you are not one of us. If you choose to attend high school graduation, you will hear the prayers that Americans desire.

There is room for religious dissenters and freethinkers in the sense that they cannot be forced to recite the prayer along with others, but the Americans who count are those who hold **some** religious belief. Non-sectarian prayer at a high school graduation is "characteristically American"<sup>289</sup> and the only concern must be to ensure that government does not offend religious believers by endorsing a sectarian message.<sup>290</sup>

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benediction were not delivered by a Wiccan priestess). However, the Framers did not follow Blackstone in all regards. For example, as Louis Fisher notes, on the question of executive power, "the record is overwhelmingly clear that the Framers consciously and deliberately broke with the British model of John Locke and William Blackstone, who placed all of external power and military decisions with the executive." Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUDIES QUARTERLY 1, at 10 (Mar. 2007) (citation omitted).

287. *Edwards v. Aguillard*, 482 U.S. 578 (1987). This opinion is discussed in more detail at pages 61-67, *infra*.

288. *Edwards*, 482 U.S. at 584. The Court has made similar observations regarding the impressionability of school children in the context of Establishment Clause cases since the early 1960s. See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

289. *Lee*, 505 U.S. at 642 (Scalia, J., dissenting).

290. See *id.* at 641-42 (Scalia, J., dissenting) ("[O]ur constitutional tradition . . . has, with a few aberrations . . . ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, 'peer-pressure' psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ). But there is simply no support for the proposition that the

This would be an America where the majority's religious traditions and customs could effectively be forced on the minority.

### 3. *Edwards v. Aguillard*

In *Edwards v. Aguillard*,<sup>291</sup> a case like *Lee v. Weisman* that involved religion and public schools, Justice Scalia wrote another dissent that “shut [its] eyes to the plainest facts of . . . life and deal[t] with the [issues before it] in an intellectual vacuum.”<sup>292</sup> Unlike in *Lee*, where Justice Scalia's dissent failed to empathize with religious dissenters, Scalia's dissent in *Edwards* suffers mainly from a determined effort to shut out context.

The *Edwards* Court struck down Louisiana's “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act or “Creationism Act” as violating the Establishment Clause.<sup>293</sup> The Creationism Act prohibited “the teaching of evolution in public schools unless accompanied by instruction in “creation science[.]”<sup>294</sup> which the Court found, according to the Act's legislative history, was “the religious belief that a supernatural creator was responsible for the creation of humankind.”<sup>295</sup> After considering the Creationism Act in historical context, the *Edwards* Court found that the Act did not have a clear secular purpose as required by the *Lemon*<sup>296</sup> test.

The *Edwards* Court saw historical context as crucial to analyzing the case before it, declaring that “[w]e need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous context between the teachings of certain religious denominations and the teaching of evolution.”<sup>297</sup> The Court understood that it was no coincidence that “[o]ut of many possible science subjects taught in the public schools, the legislature

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officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States.”)

291. *Edwards*, 482 U.S. 578.

292. See *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 41 (1937).

293. *Edwards*, 482 U.S. at 597-98.

294. *Id.* at 581.

295. *Id.* at 591-92.

296. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* states a three-pronged test that is sometimes, though not always, applied in Establishment Clause cases: “[F]irst, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.” *Edwards*, 482 U.S. at 582-83 (citing *Lemon*, 403 U.S. 602).

297. *Edwards*, 482 U.S. at 590.

chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects.”<sup>298</sup> Christian Fundamentalism, the belief in the Bible’s literal and infallible meaning, had developed in the nineteenth century “as part of evangelical Protestantism’s response to social changes, new religious thought, and Darwinism.”<sup>299</sup>

In the twentieth century, Christian Fundamentalism, “particularly in the South,” focused on “prohibiting the teaching of evolution in public schools.”<sup>300</sup> From the 1920s until the early 1960s, public school “textbooks [generally] avoided the topic of evolution and did not mention the name of Darwin.”<sup>301</sup> After biology textbooks, in the wake of the Soviet Union’s launching of the Sputnik satellite in 1957, “modernize[d] the teaching of science,” including by “incorporat[ing] the theory of evolution as a major theme,” Fundamentalists responded by developing the theory of “creation science.”<sup>302</sup> Creation science generally described “the idea that the Book of Genesis [i]s supported by scientific data.”<sup>303</sup> Creationists “adopted the view of Fundamentalists generally that there are only two positions with respect to the origins of the earth and life: belief in the inerrancy of the Genesis story of creation and of a worldwide flood as fact, or belief in what they call evolution.”<sup>304</sup> They see evolution as incompatible with the Biblical story of creation, and they view evolution as “a source of society’s ills.”<sup>305</sup>

Proponents of creation science wanted their view taught in public schools, though they understood it was likely to be found unconstitutional to do so,<sup>306</sup> and advised sympathetic legislators (including the sponsor of the Act at issue in *Edwards*) to downplay religious support for creation science, keeping ministers “behind the scenes” and to “be careful not to present our position and our work in a

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298. *Id.* at 593.

299. *Edwards*, 482 U.S. at 590 n.9 (citing *McLean v. Ark. Bd. of Ed.*, 529 F. Supp. 1255, 1258 (1982)).

300. *McLean*, 529 F. Supp. at 1259.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1260.

305. *Id.*

306. Especially after the Court’s decision in *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968), holding that a criminal statute prohibiting the teaching of evolution in public schools violated the Establishment Clause.

religious framework.”<sup>307</sup> The ultimate goal was to “kill[] evolution” rather than to debate creation science against evolution.<sup>308</sup>

Against this backdrop, the *Edwards* Court refused to accept at face value the assertion that the Creationism Act advanced the secular purpose of protecting academic freedom.<sup>309</sup> The Act’s legislative history revealed that its sponsor, Senator Bill Keith, had a “disdain for the theory of evolution [that] resulted from the support that evolution supplied to views contrary to his own religious beliefs.”<sup>310</sup> Senator Keith explained during legislative hearings that evolutionary theory was aligned with “cardinal principle[s] of religious humanism, secular humanism, theological liberalism, [and] atheism [*sic*].”<sup>311</sup> This echoed (in more restrained language) the view of a creationist who, in correspondence with Senator Keith, described the “battle” between creation science and evolution as being between “God and anti-God forces.”<sup>312</sup> Senator Keith and his witnesses testified, essentially, that “[t]here are two and only two scientific explanations for the beginning of life—evolution and creation science.”<sup>313</sup> Also during the legislative hearings, Senator Keith admitted that “[m]y preference would be that neither [creation science nor evolution] be taught.”<sup>314</sup>

Armed with historical context, the *Edwards* Court saw through the legislature’s (at times) asserted reason for passing the Creationism Act. Token references to “academic freedom” were a transparent attempt to conceal the latest effort to keep evolution out of the public schools because it is a “scientific theory disfavored by certain religious sects.”<sup>315</sup> In short, the legislature acted, as opponents of evolution had acted for decades, in an effort to “alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.”<sup>316</sup>

Justice Scalia, with eyes sedulously closed to context, accepts the asserted secular purpose for the Creationism Act at face value.<sup>317</sup> Rejecting the possibility that historical context could be useful in

307. *McLean*, 529 F. Supp. at 1261.

308. *Id.* at 1262.

309. *See Edwards v. Aguillard*, 482 U.S. 578, 581-82 (1987).

310. *Id.* at 592.

311. *Id.*

312. *Id.* at 592 n.14.

313. *Id.* at 622 (Scalia, J., dissenting).

314. *Id.* at 587 (punctuation in original).

315. *See Edwards*, 482 U.S. at 578, 579.

316. *Id.* at 593.

317. *Id.* at 610, 611 (Scalia, J., dissenting).

understanding the law's purpose, Justice Scalia chides the Court for "an intellectual predisposition created by the facts and the legend of *Scopes v. State*."<sup>318</sup> Perhaps there is some "legend" associated with the infamous *Scopes* "monkey trial," though Justice Scalia does not explain what this is or how it could have improperly predisposed the Court. However, Justice Scalia's jab at the majority is more style than substance. Whether or not *Scopes* itself provides helpful context, the Court did not rest its analysis on this case. Rather, it referred to the long history of Christian Fundamentalist opposition to evolution, particularly to its teaching in the public schools as a backdrop.

Justice Scalia does not engage with this long historical context—he simply deems it out of bounds. For Scalia, analysis rises and falls based on the legislative history considered in hermetically sealed isolation from historical context. From this perspective, Justice Scalia sees no consequence in testimony by supporters of the legislation that evolution and creation science are "the only two scientific"<sup>319</sup> explanations for the beginning of life," or that evolution is itself a religious belief—a tenet of "secular humanism" that is intended to "prove[] [other] religious beliefs false."<sup>320</sup> In the abstract, Justice Scalia's conclusion might be reasonable. But this is judging in a vacuum. A basic understanding of the history referenced in the majority opinion<sup>321</sup> reveals this to be nothing more than the familiar view that evolution and creationism are pitted in a battle between "God and anti-God forces,"<sup>322</sup> that the two are incompatible, and allowing discussion of evolution in public schools, without "counterbalancing its teaching at every turn with the teaching of creationism," undermines the religious belief that "a creator was responsible for the universe and everything in it."<sup>323</sup>

To Justice Scalia, writing an opinion that ignores historical context, it is merely unremarkable happenstance that "creation science coincides with the beliefs of certain religions."<sup>324</sup> This conclusion should not pass Charles Black's "straight face" test.<sup>325</sup> Justice Scalia's approach may be reassuring to proponents of intelligent design who might hope to persuade a future Court it is merely "coincidental" that the latest effort to

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318. *See id.* at 634.

319. As the Court noted, creation "science" is not a science but a "religious belief that a supernatural creator was responsible for the creation of humankind." *Id.* at 592.

320. *Id.* at 622, 624 (Scalia, J., dissenting).

321. *See Edwards*, 482 U.S. at 590-93.

322. *See id.* at 592 n.14.

323. *See id.* at 589, 591.

324. *Id.* at 616 (Scalia, J., dissenting).

325. Black, *supra* note 47, at 425.

undermine evolution shares much in common with creationism,<sup>326</sup> but Justice Scalia finds coincidence where history teaches us there is purpose.

#### 4. *United States v. Virginia*

In *United States v. Virginia*,<sup>327</sup> the Court decided that “the Constitution’s equal protection guarantee preclude[d] Virginia from reserving exclusively to men the unique educational opportunities Virginia Military Institute [“VMI”] affords.”<sup>328</sup> VMI, a public military college open to men only since 1839, would have to admit qualified women. Virginia argued that VMI should have been allowed to continue excluding women because: (1) “single-sex education contribute[d] to diversity in educational approaches,” and (2) the school’s unique educational model, based in part on an “adversative approach” and barracks living, would have to be changed.<sup>329</sup> The Court found each reason insufficient. First, an interest in diversity of educational approaches, even if genuine, provided “a unique educational benefit only to males . . . mak[ing] no provision for [women in Virginia]. That is not equal protection.”<sup>330</sup> Second, because “the parties agreed that ‘some women can meet the physical standards [VMI] now imposes on men,’”<sup>331</sup> there was no justification for excluding such qualified women.<sup>332</sup>

The majority opinion<sup>333</sup> in the VMI case, written by Justice Ruth Bader Ginsburg, looks to history for important context. The Court observes that

[i]n 1839, when the Commonwealth [of Virginia] established VMI, a range of educational opportunities for men and women was scarcely

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326. The Discovery Institute, which advocates for intelligent design, created the so-called “Wedge Document” in 1998, which describes intelligent design as essentially an updated version of creationism. The Discovery Institute, *Wedge Document*, NATIONAL CENTER FOR SCIENCE EDUCATION (Oct. 14 2008), <http://ncse.com/creationism/general/wedge-document>. The District Court for the Middle District of Pennsylvania ruled in 2005 that teaching intelligent design violates the Establishment Clause, but this issue has not (yet) reached the Supreme Court. *Kitzmiller v. Dover*, 400 F. Supp. 2d 707, 709 (M.D. Pa. 2005).

327. *United States v. Virginia*, 518 U.S. 515 (1996).

328. *Id.* at 519.

329. *Id.* at 534-35.

330. *Id.* at 539-40 (emphasis in original).

331. *Id.* at 525 (emphasis in original).

332. *Id.* at 544-45.

333. The decision was 7-1, with Chief Justice Rehnquist concurring in the judgment. *Id.* at 518. Justice Thomas recused himself from the case because his son attended VMI at the time.

contemplated. Higher education at the time was considered dangerous for women, reflecting widely held views about women's proper place . . . VMI was not at all novel in [excluding women].<sup>334</sup>

Until “well past the twentieth century’s midpoint,”<sup>335</sup> women were barred from admission to the University of Virginia as well, based on arguments that if women were admitted, they “would encroach on the rights of men . . . the old honor system would have to be changed; standards would be lowered . . .”<sup>336</sup>

Against this backdrop, the Court could not credit Virginia’s asserted interest in diverse educational approaches as a reason for VMI’s establishment as a males-only school.<sup>337</sup> Historical context helped the Court understand Virginia’s justifications for excluding women from VMI as familiar arguments rooted in stereotypes and “self-fulfilling prophecies once routinely used to deny rights or opportunities [to women].”<sup>338</sup> In the nineteenth century, women were generally barred from higher education because co-education would produce “terrible consequences,”<sup>339</sup> including by diminishing the quality of formerly males-only schools.<sup>340</sup> In the late twentieth century, Virginia argued that admitting women to VMI “would downgrade VMI’s stature, destroy the adversative system, and with it, even the school . . .”<sup>341</sup> Citing history as a guide, the Court concluded that “Virginia’s fears for the future of VMI may not be solidly grounded.”<sup>342</sup> Such fears were rooted in “overbroad generalizations” that were “likely to . . . perpetuate historical patterns of discrimination.”<sup>343</sup>

Justice Scalia sees the Court’s attention to history as an “irrelevant”<sup>344</sup> effort to “deprecat[e] the closed-mindedness of our forebears with regard to women’s education.”<sup>345</sup> He declares that his

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334. *Id.* at 536-37. The Court noted that a nineteenth century physician who wrote an influential book, “Sex in Education,” maintained that “the physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs.” *Id.* at 537 n.9. Other nineteenth century authors made similar arguments against co-education. *Id.*

335. *Id.* at 537.

336. *Id.* at 537-38.

337. *See id.* at 539.

338. *Id.* at 543 (internal quotation marks and citation omitted).

339. *Id.* at 542 n.12.

340. *Id.* at 542-43.

341. *Id.* at 542.

342. *Id.* at 544-45.

343. *Id.* at 542 (internal quotation marks and citation omitted).

344. *Id.* at 579 (Scalia, J., dissenting).

345. *Id.* at 566.

colleagues are “sweep[ing] aside the precedents of this Court”<sup>346</sup> and “not . . . interpret[ing] [the] Constitution, but . . . creat[ing] [a new] one.”<sup>347</sup> The problem is not so much that the *VMI* Court was creating a new Constitution, but that Justice Scalia was reverting to a discredited form of constitutional interpretation, the kind of judging in a vacuum seen in the *Plessy* decision.

As in *Plessy*, and as in other of his own dissenting opinions as discussed in Part V.A *supra*, Justice Scalia’s mode of constitutional interpretation blurs prevailing belief with the belief of **all** Americans. Justice Scalia asserts that “the function of this Court is to *preserve our society’s* values regarding (among other things) equal protection . . . .”<sup>348</sup> He insists that the Court’s opinion clashes with “**the people’s** understanding” of the Equal Protection Clause,<sup>349</sup> and “ignores the history of **our people**.”<sup>350</sup> A woman denied admission pursuant to VMI’s males-only policy might respond to Justice Scalia’s reference to “our society’s values,”<sup>351</sup> which Justice Scalia suggests we all endorse by asking: who exactly is this “we” you are talking about?<sup>352</sup>

As the Court’s opinion reminds, but Justice Scalia ignores, “[t]hrough a century plus three decades and more of [American] history, women did not count among voters composing “We the People.”<sup>353</sup> As he did in *Lee v. Weisman*, Justice Scalia offers “tradition” as a supposedly neutral foundation for constitutional interpretation,<sup>354</sup> but he

346. *Id.*

347. *Id.* at 570.

348. *Id.* at 568 (bold emphasis added).

349. *Id.* at 568.

350. *Id.* at 566 (emphasis added).

351. *Id.* at 568.

352. To quote a story Justice Scalia related in a different context: “I am reminded of the story about the Lone Ranger and his ‘faithful Indian companion’ Tonto. On one occasion, . . . the Lone Ranger was galloping eastward with Tonto when they saw . . . a large band of Mohawk Indians in full war dress. The Lone Ranger . . . asks, ‘Tonto, what should we do?’ Tonto says, ‘Ugh, ride-um west.’ So, they . . . gallop off to the west until suddenly they encounter a large band of Sioux . . . . The Lone Ranger asks, ‘Tonto, what should we do?’ Tonto says, ‘Ugh, ride-um north.’ So, they . . . ride north, and . . . there’s a whole tribe of Iroquois . . . . The Ranger asks, ‘Tonto what should we do?’ And Tonto says, ‘Ugh, ride-um south,’ which they do until they see . . . Apaches . . . . The Lone Ranger asks, ‘Tonto, what should we do?’ And Tonto says, ‘Ugh, what you mean, ‘we,’ white man?’” Greene, *Justice Scalia and Tonto*, 67 TUL. L. REV. 1979, 1980 (1993) (quoting Antonin Scalia, *The Disease As Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 47 WASH. U. L. Q. 147, 151-53 (1979)).

353. *Virginia*, 518 U.S. at 531.

354. See *id.* at 568 (Scalia, J., dissenting) (“[I]t is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”).

is falling into the *Plessy* trap—how can a tradition begun in 1839, at a time when women were not counted as part of the “people” Justice Scalia invokes as the source of tradition, be “neutral?” Justice Scalia argues that the purpose for excluding women from VMI in 1839 may have since changed,<sup>355</sup> but he misses the point that the tradition he approvingly cites **began** in that year, at a time when women were routinely denied access to higher education on the basis of insidious stereotypes and “men alone were [deemed] fit for military and leadership roles.”<sup>356</sup> The Court’s attention to history helps it reach a result that takes into account the context that is necessary to understand the meaning and implications of upholding VMI’s policy. Justice Scalia dismisses this context as irrelevant and would lock the Court into approving a tradition begun decades before the Equal Protection Clause<sup>357</sup> at a time when women were not full-fledged citizens. One person’s tradition is another’s barrier to equal protection.

## VI. CONCLUSION

To reframe an observation Chief Justice Roberts made in the *Parents Involved* case,<sup>358</sup> the way to truly consign *Plessy v. Ferguson* to the dustbin of history is to stop following *Plessy*’s jurisprudential approach. Simply rejecting *Plessy*’s specific holding is no longer very relevant. In the twenty-first century, explicit de jure racial discrimination is not a problem. However, lesbian, gay, bisexual and transgender Americans, African Americans and other people of color, women, religious nonconformists, immigrants, working Americans, people with disabilities, and others continue to face discrimination, though it comes in different forms.<sup>359</sup> It is important to know whether nominees to the Court understand the lessons of *Plessy* and *Brown*.

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355. *See id.* at 581.

356. *See id.*

357. Justice Scalia insists that even the Equal Protection Clause was not meant to prohibit sex discrimination. *See The Originalist*, CALIFORNIA LAWYER (Jan. 2011), <http://www.callawyer.com/story.cfm?eid=913358&evd=1>.

358. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

359. Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1309 (2009) (“Law has largely shifted from permitting or requiring discrimination (think segregated schools) to prohibiting discrimination (think employment discrimination law). At the same time, law has pushed discrimination underground. Most institutional decisionmakers [*sic*]—public and private—no longer say overtly discriminatory things. Discrimination is therefore harder to find and to regulate, because it has become less acceptable, legally and socially, to speak its language. Yet some groups in our society, such as people of color and disabled people, are still subject to systematic disadvantage.”).

Undoubtedly, all nominees will praise *Brown* and reject *Plessy*, but it is crucial to go further, to discover whether they fully embrace *Brown*'s reasoning. Future Justices, who can learn from the mistakes in *Plessy* by rejecting artificial neutrality that ignores context and by embracing empathy that brings better understanding, not bias, will be better able to give full meaning to the constitutional promise of equal protection. Those who narrowly reject only *Plessy*'s holding will be more likely to repeat its substantive errors and will fail to do justice, as the Court failed in *Plessy* itself.