

ARTICLE

Re-Casting *Brown*: Post-Racial Federalism and the Demise of the Anti-Subordination Principle

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ABSTRACT

Brown v. Board of Education represents the scope of state power, and how the Court deploys it in accordance with its post-racial interpretation of the Fourteenth Amendment. The Court is actively engaged in dismantling anti-discrimination law generally, and the anti-subordination principle specifically. Post-racial federalism, the doctrinal analogue of post-racial constitutionalism, conceptualizes how the Court apportions state power, expanding or contracting it, to advance its post-racial conception of society. The Court's jurisprudential doctrine of post-racialism embodies post-racial federalism.

Until 1974, *Brown* and its jurisprudential remedial progeny embraced the power of federal courts to intervene to dismantle dual school systems. In *Milliken v. Bradley* (1974), the Court rejected federal remedial power and expanded local and state power, dooming school integration efforts. Yet the school cases are just one aspect of post-racial federalism: it underpins all aspects of the Court's race and rights jurisprudence. The Court viewed race-conscious remedial measures with marked skepticism in voting rights cases, as evinced by its striking down key provisions of the Voting Rights Act and espousing equal state sovereignty. Endorsing state autonomy and representative democracy, the Court overruled four decades of protected reproductive freedom. Rejecting state regulatory power and endorsing the fundamental libertarian underpinning of individual gun rights, the Court ignored the devastating impact of gun violence in society. Empowering white Christian Nationalism and expanding the free exercise right, the Court eviscerated the constitutional principle of state neutrality toward religion. Finally, the Court held that diversity is not a compelling interest, and race conscious affirmative action is unconstitutional. All these outcomes are explained by post-racial federalism. The forthcoming book, *Post-Racial Federalism: Race, Liberty, and the Democratization of Oppression* (Cambridge University Press) offers a comprehensive treatment of the

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Roberts Court’s post-racial federalism. It posits that state power expands or contracts based upon the Court’s conception of post-racial constitutionalism. In other words, it argues that state power is shaped by how the Court allocates it based on its racial skepticism and preservation of systemic privilege.

This Article focuses on one aspect of post-racial federalism: how the Court shifted federal enforcement power from the courts to the states and local school boards, eroding the anti-subordination principle and ensuring the perpetual segregation of schools. This Article chronicles, conceptualizes, and critiques the Court’s post-racial federalism school cases jurisprudence. Specifically, Re-Casting Brown explores how the Court constricts or expands state power to advance its conception of society through post-racial federalism. In the school cases, this means that the Court first advanced the anti-subordination principle and a skeptical view of state power. The Court initially adopted a deferential view of broad federal equitable supervisory power, only to reverse course and prioritize local and state authority while sharply narrowing the scope of federal enforcement power. This ultimately led to Parents Involved in Community Schools v. Seattle School District No. 1, where the Court held that the school assignment plans in Louisville and Seattle were unconstitutionally race-conscious, and Justice Thomas’s ahistorical interpretation of the Fourteenth Amendment in Students for Fair Admissions Inc. v. President and Fellows of Harvard College (SFFA). Justice Marshall’s dissents in San Antonio Independent School District v. Rodriguez and Milliken v. Bradley serve as doctrinal precursors to Justice Jackson’s full-blown structural inequality dissent in SFFA and offer the doctrinal framework to reclaim the anti-subordination principle. Using these dissents as theoretical guides, this Article argues that Brown must be reinterpreted to restore the anti-subordination principle to the Court’s race jurisprudence and to accurately reflect the reality of the present-day effects of past discrimination. But in these existential times, with direct threats to our democracy, reclaiming the anti-subordination principle is just the first step. There must be a fundamental reordering of local and state decision-making power; this Article offers insights about the way forward.

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INTRODUCTION: *BROWN*, STATE POWER, AND THE ANTI-SUBORDINATION PRINCIPLE

Brown v. Board of Education (*Brown I*)¹ is about state power;² that is, how states’ rights federalism was disrupted by overruling *Plessy v. Ferguson*,³ and the purported erasure of the color line. The line, while formally eradicated, was nevertheless entrenched in the systems, structures, and practices of the new colorblind regime. And it has been proven, virtually every time, that when there is any progress toward

1. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

2. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988) (“It is not separation *per se* that made segregation subordinating, but the fact that it was enforced and supported by state power and accompanied by the explicit belief in African-American inferiority.”). *Brown* thus dismantles the color line that was maintained by state power.

3. 163 U.S. 537 (1896), overruled by *Brown I*, 347 U.S. at 494-95.

the establishment of an inclusive democracy, the response is retrogression and retrenchment.⁴ *Brown II*, decided one year later, is both a process decision eradicating the noxious “separate but equal” mandate and a substantive remedial decision⁵ proclaiming that dual school systems should be dismantled “with all deliberate speed.” Embracing the anti-subordination principle of the Fourteenth Amendment, the Court rejected state mandated racial caste-based oppression. *Brown I* is a powerful limit on the subordinating power of the state. Yet this constraint was diminished by *Brown II*’s remedial indeterminacy. State power was limited in *Brown I*, but nevertheless expanded in *Brown II*, creating a unique doctrinal duality that typifies post-racial federalism. Post-racial federalism denotes how the Court conceptualizes state power in determining who is included in the American polity and which rights are worthy of protection. This is a new doctrinal strand of post-racial constitutionalism, wherein “[f]ormalistic equality and neutrality, while still important in the Court’s analysis, have given way to an all-out assault on anti-discrimination law and a re-envisioning of what American society is in terms of its values and normative principles.”⁶

This Article analyzes how post-racial federalism undermines efforts to achieve unitary school systems by describing how the Court allocates state power to advance post-racial constitutional neutrality.⁷ Indeed, over the past seventy years, the constitutional mandate of *Brown I* and *II*⁸ has been repeatedly thwarted by the Court’s expansive interpretation of the scope of state power. As state power expands, the anti-subordination principle contracts so that it is a front for formalistic equality rather than the eradication of caste-based subordination.⁹ This is the demise of the anti-subordination principle.

Re-Casting Brown: Post-Racial Federalism and the Demise of the Anti-Subordination Principle traces the doctrinal development and conceptual underpinnings of post-racial federalism in the school context. The school cases reflect the duality of *Brown*: the constitutional mandate to eradicate dual school systems is never fully realized because the Court narrowly circumscribes federal enforcement power to preserve state and local autonomy. This conceptual move expands state and local power in

4. Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1194-95 (2021); Crenshaw, *supra* note 2, at 1384-87.

5. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

6. Cedric Merlin Powell, *The Post-Racial Deception of the Roberts Court*, 77 SMU L. REV. 7, 9 n.4 (2024) [hereinafter Powell, *Post-Racial Deception*].

7. This is one aspect of post-racial federalism. Each doctrinal strand of post-racial federalism, either expanding or contracting state power, is fully explored in CEDRIC MERLIN POWELL, *POST-RACIAL FEDERALISM: RACE, LIBERTY, AND THE DEMOCRATIZATION OF OPPRESSION* (forthcoming 2027) [hereinafter POWELL, *POST-RACIAL FEDERALISM*].

8. *Brown II*, 349 U.S. at 301 (directing that desegregation proceed “with all deliberate speed”).

9. Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 NYU L. REV. 293, 300 (2014) (“The anti-subordination doctrine suggests that heightened scrutiny should be applied when a classification creates hierarchies, rather than solely when legislation classifies a group. When scholars discuss anti-subordination principles, three key themes emerge: (1) the existence of a group status that perpetuates subordination, (2) group history that includes discrimination or subordination, and (3) group political powerlessness.”); see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

school cases and produces the opposite result in affirmative action decisions. *Brown* leads to *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* (*SFFA*) because the Court interprets it as a colorblind school assignment case. *Brown*'s progeny, from *Milliken v. Bradley* through *Parents Involved in Community Schools v. Seattle School District No. 1*, are all articulations of post-racial remedial authority. In the absence of identifiable discrimination by the state, race-conscious remedies are prohibited.

Justice Marshall's dissents in *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley* reaffirm the anti-subordination and anti-caste principles of the Fourteenth Amendment and deconstruct local and state autonomy as perpetuating the present-day effects of past discrimination.¹⁰ These dissents, identifying the structural underpinnings of racism through state power, decry the expansion of local and state authority insulated from federal intervention. While Justice Marshall's focus is on the Court's dilution of the Fourteenth Amendment as a limit on state subjugation, Justice Jackson's dissent in *SFFA* reorients the anti-subordination principle and affirms that the Fourteenth Amendment is not colorblind. Thus, whenever state or private institutions pursue substantive inclusion, race, as one of many factors, may be considered. To illustrate this, Justice Jackson employs a historical narrative that emphasizes the present-day effects of intergenerational inequality. This is the first comprehensive structural inequality dissent in the Court's history.¹¹

The jurisprudential contraction of the anti-subordination principle was achieved over time and advanced chronologically by the Court's deployment of post-racial federalism in the school and affirmative action decisions. In those decisions, the Court articulated the following post-racial propositions:

1. Federal intervention was appropriate when local school boards failed to fulfill their affirmative constitutional duty to eliminate dual school systems "root and branch;"¹²
2. Federal courts had broad equitable powers to implement school integration plans to overcome the intransigence of local school board authorities;¹³

10. *Milliken v. Bradley*, 418 U.S. 717, 790 (1974) (Marshall, J., dissenting) ("[T]he State of Michigan, through state officers and state agencies, had engaged in purposeful acts which created or aggravated segregation in the Detroit schools."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting) ("Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause.").

11. *Students for Fair Admissions, Inc. v. President of Harvard Coll. (SFFA)*, 600 U.S. 181, 385-403 (2023).

12. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968) (School officials are charged with an affirmative duty "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," and the court will retain jurisdiction until state-mandated segregation is eliminated.).

13. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

3. Education is not a fundamental right and wealth is not a suspect class;¹⁴ thus, local control and decision-making authority must be respected in determining the adequacy of education;¹⁵
4. There must be a temporal limit on federal intrusion into matters of local control in the absence of clearly identifiable discrimination;¹⁶
5. School choice is the constitutional mandate of *Brown*;¹⁷ and
6. The anti-subordination principle is unduly race-conscious and thereby prohibited by the colorblind constitution.¹⁸

Three years after *Swann v. Charlotte-Mecklenburg Board of Education*, federal power shrank dramatically as the Court concluded that education is not a fundamental right, local and state autonomy over schools is sacrosanct, and the Fourteenth Amendment is colorblind and post-racial. This Article chronicles the demise of the anti-subordination principle due to the Court's post-racial federalism, whereby local and state autonomy is expanded at the expense of transformative social change. Identifying post-racial federalism in the Court's school and affirmative action

14. *Rodriguez*, 411 U.S. at 37; Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 333 (2016) (referencing *Carolene Prods.*, 304 U.S. 144, and defining suspectness as whether "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (omission in original) (quoting *Rodriguez*, 411 U.S. 1, 28 (1973))).

15. *Rodriguez*, 411 U.S. at 42, 49-50 (embracing local control of public education).

16. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721, 747-48 (2007); *Missouri v. Jenkins*, 515 U.S. 70, 100-03 (1995) (holding that an interdistrict remedy designed to increase expenditures to attract white students was impermissible absent an interdistrict violation); *Freeman v. Pitts*, 503 U.S. 467, 490-91 (1992) (holding that federal courts should return supervisory control to local authorities as soon as practicable and may withdraw control incrementally upon good faith compliance); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (explaining that upon a finding of good faith compliance, a desegregation decree may be dissolved where the vestiges of de jure segregation have been eliminated "to the extent practicable"); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436-37 (1976) (holding that once a racially neutral attendance plan is implemented, courts may not adjust desegregation orders to account for demographic shifts absent intentional discrimination).

17. *Parents Involved*, 551 U.S. at 747-48 ("For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation such as Jefferson County [in Louisville, Kentucky], the way 'to achieve a system of determining admission to the public schools on a nonracial basis' is to stop assigning students on a racial basis." (citation omitted) (quoting *Brown II*, 349 U.S. 294, 300-01 (1955))). *Brown* becomes a simple school choice case unmoored from the anti-subordination principle of the Fourteenth Amendment.

18. *Students for Fair Admissions, Inc. v. President of Harvard Coll. (SFFA)*, 600 U.S. 181, 246-47 (2023) (Thomas, J., concurring) ("Despite the extensive evidence favoring the colorblind view . . . it appears increasingly in vogue to embrace an 'antisubordination' view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, [B]lacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment."). Justice Thomas's selectively crafted and contrived interpretation of the Fourteenth Amendment turns it inside-out, the Amendment becomes a formalistic anti-differentiation amendment, rather than an anti-subordination (and anti-caste) amendment enacted in the aftermath of the Civil War as part of the constitutional trilogy eradicating slavery (Thirteenth Amendment), ensuring equal citizenship and due process of law to the former slaves and new citizens of the United States (Fourteenth Amendment), and the right to vote (Fifteenth Amendment). See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 340 (1998) (discussing how the "anticaste principle [of constitutional equality under the Constitution] was transformed into an antidifferentiation principle").

decisions, this Article posits that the Court privileges state power as it withdraws from enforcing the constitutional mandate of *Brown*. After the Court's broadest pronouncement of federal equitable power in *Swann*, the Court contracts federal power in the name of local control and state sovereignty.

For a fourteen-year period after *Brown*'s mandate,¹⁹ states' rights federalism undermined virtually all efforts to dismantle dual school systems through neutral subterfuges like freedom of choice plans, pupil assignment laws preserving neighborhood schools, and state statutes enacted to preserve the perverse symmetry of the color line.²⁰ *Brown*, then, is about state power because after *Plessy*'s noxious separate but equal societal rule was overturned, the Court balanced its own constitutional mandate within the scope of state power.

Post-racial federalism is the Court's jurisprudential practice of reallocating local, state, and federal power in whichever direction promotes its post-racial and formalistic vision of equality. Depending on the Court's conception of neutrality, state autonomy expands or contracts, and this fluctuation undermines the anti-subordination principle.

This is the essence of post-racial federalism: (i) first, the Court is skeptical of state power, as *Brown* is a constitutional rebuke of state-mandated segregation,²¹ but nevertheless the Court is receptive to a remedial approach based on local control and "[a]ll deliberate speed;"²² (ii) next, after years of resistance and recalcitrance, the Court embraces federal enforcement power and state power is narrowly circumscribed, but only for a brief period as the Court begins a full scale retreat from school integration culmination in *Parents Involved*; (iii) finally, as state power increases, the anti-subordination principle is substantially diluted because it contradicts the Court's post-racialism.

Post-racial constitutionalism²³ conceptualizes the reifying neutrality of the Court's race jurisprudence—formalism is its guiding principle so that race-consciousness is

19. Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107, 122-23 (2004) ("Indeed, as *Brown* marked the commencement of a new epoch in constitutional law, it also gave rise to the classic example of the consequences of ambiguous exposition of law, namely the Supreme Court's 1955 pronouncement that desegregation was to be pursued 'with all deliberate speed.' Fourteen years later, some jurisdictions had not begun to comply." (quoting *Brown II*, 349 U.S. 294, 301 (1955))).

20. *Id.* at 111-21; W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 16 (1903) ("The problem of the twentieth century is the problem of the color-line.").

21. Bertrall L. Russell, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1584 (2013) ("Once the Court in *Brown* transformed segregation from a neutral to a minority-subordinating state action, deference to the State was no longer considered appropriate."); Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 14 (2017) ("[T]he Equal Protection Clause prohibits racial hierarchy or subordination, rather than simply forbidding intentional racial discrimination.").

22. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 612-13 (1983) (noting that *Brown II* justified gradualism by referencing local administrative problems, and was an "inappropriate accommodation of white feelings," "yield[ing] an imperfect remedy; the delay that it permitted resulted in a failure to implement fully the rights and substantive remedial goals stated (albeit vaguely) in *Brown I*").

23. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593-621 (2009) for a discussion on post-racialism and how neutrality, specifically the proposition that race has no place in decision-making, is a defining feature of legal post-racialism. This rhetoric of legal post-racialism has become a central tenet of the Roberts Court's race jurisprudence.

constitutionally invalid—and post-racial federalism constitutionalizes neutrality in the allocation of state power. The Court's school cases are all about state power and the balance between state autonomy and purportedly anti-democratic intrusions into local affairs. Ultimately, state sovereignty supplants substantive equality. *Brown* is recast so that the Fourteenth Amendment means “to stop discriminating on the basis of race,”²⁴ while school districts are free to advance neutrality even when doing so preserves extant systems of exclusion.

The Court's post-racial constitutionalism is grounded in colorblind neutrality, formalistic equality, and a strict adherence to discriminatory intent. Conversely, post-racial federalism, while rooted in neutrality, is concerned with allocation decisions and the power of the Court to determine which entity will implement its post-racial vision.

Post-racial federalism suggests that the doctrinal progression from the constitutional mandate of *Brown* to decisions that ultimately displace federal enforcement power, insulate white suburbs from school integration, and prohibit any consideration of race delineates how the Court constructs the scope of state power ultimately circumscribing federal power premised on a states' rights federalism rationale. But this doctrinal rationale was always present in the Court's jurisprudence. *Brown I* was a constitutional mandate that eradicated the color line and *Brown II* offered an affirmation of this obligation with no jurisprudential guidance other than its slow speed edict of “all deliberate speed.” This tacit remedial obligation left much to the decision-making whims of the local school boards and the states.²⁵

Part I conceptualizes state power in the school decisions—post-racial federalism is how the Court deploys state power to advance neutrality. But what is interesting here is that the Court initially embraces a broad conception of federal power, and even a structuralist interpretation of systemic racism in its *Green v. County School Board* and *Swann* decisions, but in a short period of time, the Court severely limits federal power based on its endorsement of state autonomy and local control. Doctrinally, the anti-subordination principle is read out of the Fourteenth Amendment. In *San Antonio v. Rodriguez*, the Court held that education is not a fundamental right and wealth is not a suspect class, so that an adequate education is a constitutional guarantee determined by the prerogatives of the state.

Parts I.F and G connect the post-racial aspects of the secondary and post-secondary school decisions. Post-racial federalism here takes an interesting turn, rather than expanding state (and local) power, the Court diminishes local power so that it discredits the community's political will to embrace diversity in *Parents Involved*,²⁶ and

24. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007).

25. Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 L. & INEQ. 1, 3 (2006) (“At a minimum, *Brown II*'s ‘all deliberate speed’ formula enable public school districts in the South to delay segregation for more than a decade.”).

26. Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 607-08 (2008) [hereinafter Spann, *Disintegration*] (Spann reframes *Parents Involved* as “the Resegregation case” and concludes that “the white majority decided that it was in its own best interest to reduce the continuing effects of white privilege in our racially pluralist culture. But the Supreme Court, nevertheless, told the white majority that the Constitution required white privilege to persist.”).

overturns race-conscious affirmative action in *SFFA* by rewriting its precedent to jettison diversity as a compelling interest.²⁷ As a result, the Court subjects the decision-making authority of state post-secondary institutions to its post-racial orthodoxy. Part I.G offers a critique of the Court's jurisprudential revisionism in erasing the anti-subordination principle from the Fourteenth Amendment, reinterpreting *Brown* and its affirmative action jurisprudence, and displacing state decision-making power in the University of North Carolina companion case in *SFFA*. Drawing analytical parallels to Justice Marshall's dissent in *Milliken v. Bradley*²⁸ as a doctrinal precursor to Justice Jackson's structural inequality dissent in *SFFA*,²⁹ Part I concludes by re-centering the anti-subordination principle in the Fourteenth Amendment.

Part II re-casts *Brown* by positing that state power and local control should be tools of empowerment for communities that embrace substantive equality—the foundational element of the anti-subordination principle—and *Brown*'s promise of inclusion. Concluding with an action plan for community engagement, *Re-Casting Brown* offers an argument for structural inclusion. *Brown* is re-cast as the embodiment of the anti-caste and anti-subordination principles.

I. STATE POWER IN THE SCHOOL DECISIONS: POST-RACIAL FEDERALISM

It is a stark constitutional irony that the Reconstruction Amendments, enacted to eradicate slavery and substantively include the formerly enslaved into a new multi-racial polity, are consistently neutralized to foreground white interests. The question is and has always been whether these Amendments are equally applicable to whites who already had all the attributes of full citizenship and more.³⁰

In prioritizing the Fourteenth Amendment's formalistic applicability to whites, colorblindness is reframed as the touchstone of Fourteenth Amendment jurisprudence, rather than the anti-subordination principle.³¹ Interestingly, there is a historical dispute in *Brown* where the Court notes the legislative history of the Fourteenth Amendment as either positing race-conscious remediation or colorblind neutrality.³² Ultimately, the Court concludes that the issue presented is whether substantive equality could exist on both sides of the color line.³³ The Court rejects "separate but

27. Girardeau A. Spann, *Political Affirmative Action*, 112 GEO. L.J. 895, 902 (2024) ("[T]he use of race as a proxy for diversity violated the equal protection prohibition . . .").

28. 418 U.S. 717, 781-815 (1974) (Marshall, J., dissenting).

29. Powell, *Post-Racial Deception*, *supra* note 6, at 56-60.

30. Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651, 658 ("Even *Brown v. Board of Education* has come to further white supremacy.").

31. See *id.* at 664 ("The courts have abandoned an anti-subordination perspective under which they could understand the Constitution as a tool to help Black people overcome the legacy of slavery.").

32. *Brown I*, 347 U.S. 483, 489-90 (1954) (noting that the legislative history of the Fourteenth Amendment was "inconclusive" because there was little in the history of the Fourteenth Amendment making the connection between it and public education, but concluding that in the Court's first Fourteenth Amendment decisions, the Court interpreted the Fourteenth Amendment "as proscribing all state-imposed discriminations against the Negro race").

33. *Id.* at 491-92 (chronicling the graduate and professional school decisions where the Court compared unequal tangible benefits to hold the educational systems constitutionally invalid to the instant case in *Brown*).

equal” as a societal convention and holds that the color line must be dismantled because the Fourteenth Amendment prohibits caste-based oppression by the state. Overruling *Plessy*, the Court says, “No.” But how it reaches this conclusion is a function of post-racial federalism. *Brown* stands for the proposition that the Constitution is not colorblind, because the Fourteenth Amendment is a structural limitation on the exercise of state power to mandate dual school systems based on the color line.³⁴

By the logic advanced in *Brown*, the Fourteenth Amendment is a prohibition on the subordinating power of the state³⁵—emancipated African Americans would no longer be subjugated, subordinated, or stigmatized by state power and states’ rights federalism. The imprimatur of the state could not be employed to maintain a racial caste system based on the racial theory of Black inferiority: “To separate [school children] 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.”³⁶

Brown is skeptical of this exercise of state power—it is a disruption of state power (and states’ autonomy) and a rejection of the “separate but equal” doctrine. The race-conscious focus of the Fourteenth Amendment³⁷ was not intended to be universalized (so that any impact on white interests was constitutionally significant). While the Amendment codifies due process and equal protection for all American citizens, it was African Americans who needed substantive inclusion in the American polity.³⁸

where educational facilities were “equalized,” so the issue was “the effect of segregation itself on public education”).

34. Karla McKanders, *Before Brown: Interdisciplinary Strategies for Civil Rights Lawyering*, 16 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 1, 8 (2024) (noting that the Legal Defense Fund’s position was that the “Fourteenth Amendment was intended to deprive the states of the power to (1) maintain a class or caste and (2) differentiate on the basis of race” (quoting Letter from Robert L. Carter, Assistant Counsel, NAACP Legal Def. & Educ. Fund, to Horace Bond, President, Lincoln Univ. (Oct. 22, 1953) (on file with Libr. of Cong., NAACP Legal Defense and Educational Fund Records, 1915-1968 (bulk 1940-1960), Box 5, Folder 14), <https://www.loc.gov/resource/mss65570.mss65570-00514/?sp=17> [<https://perma.cc/3Q8W-LD23>])).

35. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); Joel K. Goldstein, *Teaching the Transformative Fourteenth Amendment*, 68 ST. LOUIS U. L.J. 581, 598 (2018) (“The Fourteenth Amendment imposed constitutional limits on state power and authorized Congress to legislate to enforce those limits.”).

36. *Brown I*, 347 U.S. at 494.

37. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1984).

38. Zamir Ben-Dan, *Supreme Mirage: Clarence Thomas’s Invented History of Colorblindness Originalism*, 87 ALB. L. REV. 183, 187-88 (2024) (“What the Fourteenth Amendment did . . . was embed in the nation’s founding document a guarantee of civil rights for Black people. Because white people were already citizens, the Fourteenth Amendment did not confer something upon them that they did not have before. Thus, the Fourteenth Amendment, race-neutral language notwithstanding, was specifically designed to benefit African Americans.”). Obviously, the Reconstruction legislators were well aware that the legislation was enacted to constitutionalize African Americans’ status as citizens: chattel slavery was abolished by the Thirteenth Amendment, full citizenship rights of due process and equal protection of the laws, under the Fourteenth Amendment, were given so that the exclusivity of the white polity was eradicated, and the newly emancipated citizens were given political voice through the franchise in the Fifteenth Amendment. See U.S. CONST. amends. XIII-XV. The Fifteenth Amendment does reference race and color, so the Reconstruction Amendments, read together, in the context of time and history, are unambiguously race-conscious.

To that end, the Fourteenth Amendment was intended to eradicate racist caste-based subordination backed by the power of the state:

Segregation of white and colored children in public schools has a detrimental effect upon colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. . . . Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system.³⁹

Post-racial federalism denotes how the Court balances, negotiates, and allocates state power based on its conception of equality and society. In *Brown*, the Court, while skeptical of state autonomy, nevertheless attempts to balance it with the immediacy of the constitutional mandate to convert dual school systems into an integrated, unified system.

Recognizing the nature of education,⁴⁰ not as a fundamental right, but close to it, as “the very foundation of good citizenship,”⁴¹ the Court acknowledges state power. Here is where the balancing effect of post-racial federalism begins:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁴²

This balance later evolved into a negotiation of how much substantive equality (and integration) can be achieved while still preserving local and state decision-making power. *San Antonio v. Rodriguez* is indicative of this prong of post-racial federalism.⁴³ Furthermore, *Milliken* represents the Court’s complete abdication of

39. *Brown I*, 347 U.S. at 494 (brackets in original).

40. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 47, 50-51 (2011) (positing that education is a fundamental right by framing that the “fifth freedom is freedom from ignorance”); Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 2 (Kimberly Jenkins Robinson ed., 2019); see also Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1189-92 (2022) (conceptualizing substantive due process “to accommodate school children’s claims against the state for deprivation of educational property interests, but only those that the *state itself* has conveyed” (emphasis in original)).

41. *Brown I*, 347 U.S. at 493.

42. *Id.*

43. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (“The very complexity of the problems of financing and managing a statewide public school system suggest that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect.” (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972))).

federal supervisory power, as well as an expansive allocation of local and state power to determine the scope of constitutionally permissible remedies for segregated schools.⁴⁴

This devastating doctrinal “one-two punch”—i.e., that education is not a fundamental right and school desegregation stops at the district boundary line—is illustrative of how post-racial federalism foregrounds neutrality. Specifically, under post-racial federalism, substantive equality is secondary to the preservation of state power and formalistic equality. The illusion of access becomes a normative constitutional principle.⁴⁵ Formalistic equality is illusory; it offers the promise of access while preserving structural inequality—the illusion of access is enshrined in the post-racial Constitution. *Brown* is pivotal to modern race jurisprudence, because it centers the Fourteenth Amendment as embodying the anti-subordination principle, a constitutional limit on the oppressive power of the state, and an enforceable equal protection claim that envisions federal enforcement power to ensure that state power does not perpetuate the present-day effects of past discrimination.⁴⁶ Yet, the challenge has always been whether *Brown*’s remedial mandate could be enforced.

Given the Court’s historical recalcitrance to confront state power,⁴⁷ *Brown* was a bold departure from the Court’s post-Civil War Reconstruction jurisprudence. But this boldness is limited by post-racial federalism. *Brown I* is a process decision rejecting the perverse symmetrical formalism of *Plessy*, while *Brown II* is a substantive decision articulating an unenforceable (deferential) remedial standard that expands state power:

Brown is essentially a decision about process (*Brown I*) and substance (*Brown II*). *Brown*’s inherent duality of process and substance ensures that even the Court’s most substantive pronouncements, those which apparently embrace the anti-caste

44. *Milliken v. Bradley*, 418 U.S. 717, 751-52 (1974) (rejecting the claim that state-approved school construction “fostered segregation throughout the Detroit Metropolitan area,” and concluding that “absent an interdistrict violation, there is no basis for an interdistrict remedy”). This is an articulation of post-racial federalism—state power is expanded and insulated from judicial scrutiny to preserve local control in determining access to integrated public schools. Cedric Merlin Powell, Milliken, “*Neutral Principles*,” and *Post-Racial Determinism*, 31 HARV. J. RACIAL & ETHNIC JUST. (ONLINE ISSUE) 1, 9 (2015) [hereinafter Powell, *Neutral Principles*], <https://ssrn.com/abstract=2657194> [<https://perma.cc/9G6H-DFM9>] (“Construing the exercise of federal remedial power as an intrusion into an educational political process, the Court posits a view of process that insulates suburbs from any connection with inner city Detroit schools.” This is a post-modern incantation of the color line.).

45. The promise of integrated, unitary school districts has not been fulfilled. Schools remain racially segregated across the nation. See Richard E. Levy, *Brown v. Board of Education and the Problem of Remedy*, KAN. BAR J., Nov./Dec. 2024, at 5, 6 (noting that school segregation has been on the rise over the last three decades, and that “after the Supreme Court determined that continued judicial supervision was untenable, the combination of neighborhood schools and segregated housing patterns has led to increased segregation in practice”).

46. *Brown I*, 347 U.S. at 495 (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), and declaring that “[s]eparate educational facilities are inherently unequal,” and that “segregation is a denial of the equal protection of the laws”).

47. CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY 12-33 (2022) [hereinafter POWELL, POST-RACIAL CONSTITUTIONALISM] (discussing how the Court in its early race decisions, such as the *Civil Rights Cases*, 109 U.S. 3 (1883) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), aggrandize state power and diminish federal enforcement power).

and anti-subordination mandate of the Fourteenth Amendment, will be limited in their reach.

Brown is two decisions: on a process level, it stands for the proposition that race may no longer be used invidiously to subjugate and stigmatize in violation of the Fourteenth Amendment. . . . On a substantive level, *Brown II* holds that integration is required to comply with Equal Protection in the public schools: if separate but equal is inherently unequal and constitutionally noxious, then dual school systems must be eradicated.⁴⁸

This duality is a defining feature of post-racial federalism, in which neutrality is prioritized in defining the scope of state power. *Brown I* conceptualizes public education as a product of state and local power.⁴⁹ This means that the viability of the constitutional mandate to dismantle dual school systems is determined by how *Brown II*'s "all deliberate speed" command is reconciled with state power.⁵⁰

The doctrinal contradiction that is inherent in *Brown* is rooted in the process–substance distinction in the two decisions. *Brown I* rejects neutrality in overruling *Plessy* yet embraces it in *Brown II*, adopting a reasonableness standard to analyze the substantive remedy required by the anti-subordination principle. This contradiction is more acute because *Brown* is a rare instance where the Court rejects "Rhetorical Neutrality:"⁵¹ Reconstruction history is embraced rather than mythologized as colorblind;⁵² discrimination is defined broadly and structurally;⁵³ and substantive equality is buttressed by rhetoric that foregrounds the Reconstruction Amendments.⁵⁴ Yet this purported rejection of neutrality is nevertheless skewed by *Brown II*'s abject

48. Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 391-92 (2008) [hereinafter Powell, *Schools, Rhetorical Neutrality*] (italics added).

49. *Brown I*, 347 U.S. at 493 ("[E]ducation is perhaps the most important function of state and local governments.").

50. Charles J. Ogletree, Jr., *All Deliberate Speed? Brown's Past and Brown's Future*, 107 W. VA. L. REV. 625, 628 (2005) (noting that "'all deliberate speed' meant 'slow'" and that while *Brown* was "well-intentioned," it was a "moral equivocation at a crucial moment, a political backing off so as to leave the solution to the very states that had created the problem"). The Court yet again repeats its practice of affirming state power that has a subordinating effect and impact based on its post-racialism—neutrality is endorsed to preserve state autonomy.

51. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 13, 12-19 ("Rhetorical Neutrality is the narrative doctrinal structure that is the fulcrum of the Court's race jurisprudence." Comprised of three interlocking myths which reify neutrality: a historical myth ignores the legislative history of the Reconstruction Amendments; a definitional myth defines discrimination so narrowly that it is virtually impossible to prove; and a rhetorical myth rationalizes the existence of discrimination so that race-conscious remedial efforts are viewed skeptically and invalidated.); accord Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV., 823, 831-59 (2008) [hereinafter Powell, *Rhetorical Neutrality: Colorblindness*] (further discussing the historical, definitional, and rhetorical myths of the Court's race jurisprudence).

52. *Brown I*, 347 U.S. at 490 ("[T]his Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.").

53. *Id.* at 495.

54. *Id.* ("We have now announced that such segregation is a denial of the equal protection of the laws.").

indeterminacy. Its purposefulness is severely limited by an open-ended command to “all deliberate speed,”⁵⁵ which effectively insulates state power from scrutiny for years.

Thus, it is ironic that while *Brown I* is a rejection of states’ rights federalism (and a contraction of oppressive state power), *Brown II* expands state power and preserves the status quo. It seeks to balance the power of local authorities and the courts, so the concern is not so much with substantive constitutional rights and equality, but with preserving local authority while providing for federal supervisory power:

Full implementation of those constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. . . . Accordingly, we believe it appropriate to remand the cases to those courts.⁵⁶

This good faith standard has evolved in the Court’s school decisions. Post-racial federalism references how presumptive good faith has been employed by the Court to narrow the scope of federal supervisory power and expand state power to determine the extent, efficacy, and duration of school integration plans.⁵⁷ Good faith is a malleable standard in the face of structural inequality and systemic racism.

The language of *Brown II* was an open invitation to increase the decision-making power of local school boards, placing the timetable for substantive equality solely in the discretionary authority of local school boards. This expansion of local power meant that school boards weaponized (or evaded) ostensibly neutral terms such as “a prompt and reasonable start toward full compliance”⁵⁸ and “good faith compliance at the earliest practicable date” to severely limit or completely halt school desegregation.⁵⁹ While courts retained broad equity power in fashioning remedies—the flexibility to balance public and private interests and to adjust to the practical dynamics in school integration cases—this broad power was nevertheless tempered by “[a]ll deliberate speed.”⁶⁰

Ironically, it is the process prong of *Brown*, rejecting the formalism of *Plessy*, that refutes neutrality, while the substantive remedial prong of *Brown II* is mired in

55. *Brown II*, 349 U.S. 294, 301 (1955).

56. *Brown II*, 349 U.S. at 299.

57. Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 823 (2010) (“By focusing on the good faith efforts of the school board and the practicability of eliminating segregation, and by remaining silent on the return to a substantial number of schools that overwhelmingly educated either Black or white students,” the Court ignored the potential of resegregation and elevated state power over judicial intervention to enforce the constitutional mandate of *Brown*—the eradication of state-mandated dual school systems.).

58. *Brown II*, 349 U.S. at 300.

59. *Id.*

60. Robinson, *supra* note 57, at 804, 804 n.104 (quoting J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 126 (1979)) (noting that the Court did not overturn freedom of choice plans that perpetuated dual school systems and stating that “lack of guidance coupled with the Court’s failure to overturn tactics that sought to delay and evade desegregation allowed all but a small percentage of Black and [w]hite students to continue to attend racially separate schools throughout the South in the decade following *Brown I* and *II*” (italics in original)).

procedural terms that offer no analytical frame for interpreting the efficacy and validity of school integration plans proffered by the state. This underscores how the process–substance distinction shapes state power under post-racial federalism. Neutrality defines the constitutional right and the remedy itself, and this is dependent on the power of the state to act, define, and implement a constitutionally permissible remedy. In essence, the duality of *Brown* is an articulation of the scope of state power. *Brown I*, as a constitutional mandate, rejects oppressive state power. However, the substance of that mandate is diluted by “all deliberate speed,” which expands state power to evade the affirmative obligation to dismantle dual school systems.

After the constitutional proclamation in *Brown* shattered the color line and American apartheid, the Court’s *Brown II* remedial decision is uncharacteristically tepid: it equivocates on a substantive timetable, gives cursory consideration to appropriate benchmarks, and leaves ample room for the expansion of state power by employing a deferential good faith standard. The result was a series of plausibly neutral schemes by local school boards to perpetuate racial segregation.⁶¹

In 1968, fourteen years after its decision in *Brown I*, the Court issued a rare judicial conceptualization and acknowledgement of structural inequality and systemic racism and rejected a deceptively neutral freedom-of-choice school assignment plan. The “racially nondiscriminatory school system”⁶² ordered by *Brown II* had not been achieved. The Court rejected its balancing approach and adopted a skeptical view of state power as inherently systemic and structurally racist.⁶³ Over a decade of inaction, active resistance, and violent defiance confirms this.⁶⁴

A. *Green v. County School Board: Reaffirmation of Brown*

In the wake of this resistance, the Court would issue its opinion in *Green v. County School Board*. There is a shift from the process-based underpinnings of *Brown II*’s substantive remedial mandate⁶⁵ to the Court’s structuralism and rejection of state autonomy in *Green*. Here, post-racial federalism exposes how the state deploys neutrality to

61. James M. McGoldrick, Jr., *Two Shades of Brown: The Failure of Desegregation in America; Why It Is Irremediable (and a Modest Proposal)*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 271, 277 (2018) (discussing freedom of choice plans and segregated housing as ostensibly neutral but products of the exercise of state power).

62. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437 (1968).

63. *Id.* at 435 (“The pattern of separate ‘white’ and ‘Negro schools’ . . . established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed . . . [T]he State, acting through the local school board and school officials, organized and operated a dual school system, part ‘white’ and part ‘Negro.’” (italics added)).

64. *The Southern Manifesto and “Massive Resistance” to Brown v. Board*, LEGAL DEF. FUND, <https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/> [<https://perma.cc/Z2FH-LNTN>] (last visited May 4, 2025).

65. This is to suggest that “all deliberate speed” is a procedural formalism that dilutes the remedial prong of *Brown II*. Rejecting this in a Critical Race Theory reinterpretation of *Brown*, Derrick Bell posits immediate substantive equalization of all school resources; a restructuring of school boards to include those once “formally excluded” from decision-making power; and continued judicial oversight through monitoring committees. Derrick Bell, *Brown v. Board of Education of Topeka*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 25, 36–37 (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig eds., 2022).

perpetuate racial subordination under the contrived guise of “freedom of choice.”⁶⁶ Of course, the “choices” are defined by state power. Post-racial federalism conceptualizes state power, and *Green* illustrates of how the Court, in interpreting the scope of state power and autonomy, acknowledges structural inequality, systemic racism, and the continuing effects of past discrimination after fourteen years of intentional inaction.

Rejecting the contrived neutrality and formalism of the “freedom of choice” school plan that perpetuated segregated schools fourteen years after *Brown*,⁶⁷ the Court concluded that state power reified dual school systems:

The New Kent [Virginia] School Board’s “freedom-of-choice” plan cannot be accepted as a sufficient step to “effectuate a transition” to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the system remains a dual system.⁶⁸

This is a rejection of formalistic equality, neutrality, and the illusion of “freedom-of-choice.” The Court was skeptical of state power in *Green* and narrowly circumscribed it. This skepticism is directly related to the Court’s supervisory power to ensure that the school board performed its affirmative duty⁶⁹ to dismantle the dual school system. To meet this constitutionally mandated obligation, the school board was compelled to come forward with a realistic plan to “convert to a unitary system in which racial discrimination would be eliminated root and branch.”⁷⁰

The phrase “root and branch” is the Court’s acknowledgement that segregated schools are the product of systemic racism and structural inequality, and that years of delay were endemic to state power amounting to the “deliberate perpetuation of the unconstitutional dual system” in violation of *Brown II*.⁷¹ The Court rejected post-racial federalism and affirmed the doctrinal and conceptual applicability of the anti-subordination principle—school boards had an affirmative obligation to dismantle racial caste in the school system.⁷² This meant that state power, in the perpetuation of racial subordination, had to be disrupted and the Court embraced federal supervisory power as an appropriate intervention.

Green is a rejection of the narrative of post-racial constitutionalism—Rhetorical Neutrality.⁷³ The Court explicitly references the historical significance of intentional

66. *Green*, 391 U.S. at 438-39 (holding that there was a “deliberate perpetuation of the unconstitutional dual system” through a freedom-of-choice plan and declaring that the “burden on a school board today is to come forward with a plan that promises realistically to work, and promises to work realistically to work now”).

67. *Id.* (discussing the “deliberate perpetuation of the unconstitutional dual system”).

68. *Id.* at 441.

69. *Id.* at 437 (noting that *Brown II* “was a call for the dismantling of well-entrenched dual systems”).

70. *Id.* at 438.

71. *Id.* at 437-38.

72. *Id.* at 442 (“The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”).

73. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 12-19 (discussing neutrality and the Court’s creation of doctrinal myths—historical, definitional, and rhetoric—that perpetuate inequality).

intransigence by the state, defines discrimination broadly, noting its systemic and structural underpinnings, and offers a rationale for dismantling subordination through *Brown II*'s remedial command by emphatically stating that school boards "come forward with a plan that promises realistically to work, and promises realistically to work *now*."⁷⁴

Eschewing the core myths of post-racial constitutionalism—the historical, definitional, and rhetorical myths—the Court interprets the anti-subordination principle as a limit on state power:

Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.⁷⁵

The Court, skeptical of state power and of the efficacy of ostensibly neutral freedom-of-choice plans, presumably adopted in good faith by the school board. Nevertheless, the Court is equivocal about the use of freedom-of-choice plans, there could be circumstances when such plans are effective;⁷⁶ yet, on the *Green* facts, fourteen years of purposeful inaction spelled constitutional doom for the New Kent plan.⁷⁷

The Court posited a structural remedy to eradicate the dual school system buttressed by the deceptively neutral freedom of choice plan. Time was of the essence, "mere [all] 'deliberate speed' ha[d] run out,"⁷⁸ and in considering the validity and efficacy of school plans, district courts retained supervisory authority to evaluate a host of systemic and structural factors such as:

problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public school on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.⁷⁹

In dismantling dual school systems, school boards had an affirmative obligation to achieve racial balance in every component of school operations.⁸⁰ The Court embraced structural reform.

74. *Green*, 391 U.S. at 439 (emphasis added).

75. *Id.*

76. *Id.* at 439-40.

77. *Id.* at 441-42 ("Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board." (italics added)).

78. *Id.* at 438 (quoting *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 234 (1964)).

79. *Id.* at 436 (quoting *Brown II*, 349 U.S. 294, 300-01 (1955)).

80. Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477, 498 (2003).

B. Swann v. Charlotte-Mecklenburg Board of Education.⁸¹ Federal Equitable Power and Local Control

The Court's most expansive articulation of federal equitable power would come in *Swann v. Charlotte-Mecklenburg*. This would be the Court's last rejection of post-racial federalism as it consistently expanded state power and severely limited federal equitable power as intrusive on local control and state autonomy.

Swann is the Court's broadest pronouncement of federal equitable remedial power. It affirms the anti-subordination principle⁸² and balances the affirmative obligations of the state. But there is a limitation in *Swann* that will soon be expanded in the Court's post-federalism decisions. This is the inherent contradiction in *Swann*—the Court's broad conception of federal enforcement power is blunted by the acknowledgement that resegregation will occur and the remedial response would be proportionately limited.⁸³ There is, at least implicitly, an acknowledgement of the permanence and adaptability of racism. Specifically, post-racial federalism denotes the expansion of state power and the Court's deference to it.

Post-racial federalism references how state power is allocated by balancing the Court's post-racial normative principles. Post-racial constitutionalism shapes state power premised on colorblind neutrality, and post-racial federalism defines how that power expands, or contracts based on the Court's societal view. In *Swann*, the Court reviewed a desegregation plan that rezoned school attendance lines, grouped outlying suburban school districts with Black inner city school districts, and employed inter-district busing between Black and white schools.⁸⁴

Swann is illustrative of this allocational balancing: (i) it recognizes the inherent structuralism and systemic underpinnings of racism;⁸⁵ (ii) rejects neutrality under the guise of process-based incrementalism;⁸⁶ (iii) prohibits state-mandated segregation and authorizes expansive judicial authority to remedy caste-based subordination;⁸⁷

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

82. Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 40 (2007) (discussing *Swann* as the embodiment of the anti-subordination principle).

83. *Swann*, 402 U.S. at 32 ("Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. . . . [I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.").

84. *Id.* at 9-11.

85. *Id.* at 12-15 ("The objective today remains to eliminate from the public schools all vestiges of state-mandated segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measure of *Brown II*. That was the basis for the holding in *Green* that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" (italics added) (quoting *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437-38 (1968))).

86. *Id.* at 12-15 (referencing the dilatory tactics of school authorities during the 17 years since *Brown* and the scope of remedial responses to dual school systems).

87. *Id.* at 16 ("In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.").

and (iv) balances deference to local and state power by concluding that “[j]udicial authority enters only when local authority defaults.”⁸⁸ This was a rare rebuke of states’ rights federalism that expanded federal supervisory power while acknowledging some semblance of local autonomy—the scope of federal power is defined in reference to local autonomy.

Swann was a broad mandate with limits: affirming the equitable power of federal courts to fashion remedial plans while limiting that power with a deferential acknowledgment of local autonomy. Inevitably, the expansiveness of state power is based on the Court’s commitment to colorblind neutrality. In fact, some of the broad remedial propositions espoused by the Court would later be turned inside out—due to the formalism of the *de jure–de facto* distinction⁸⁹—as the Court advances its post-racial constitutionalism (and state power is defined broadly as federal enforcement power is diminished and ultimately abandoned).⁹⁰ Post-racial federalism exposes “the curtailment of the power of the federal government and the federal courts to regulate and supervise the state governments.”⁹¹ This ultimately led to the demise of the anti-subordination principle.

Writing for a unanimous Court,⁹² Chief Justice Burger identifies the courts’ power to grant equitable relief⁹³ as essential in remedying state-mandate segregation and its continuing effects. *Swann* is, in effect, the constitutional articulation of the anti-subordination principle. It authorizes the positive use of race-conscious remedies to eradicate subordination by the state in the form of segregated schools. There is a distinction, embodied in *Swann*, between “the use of race to subordinate and the use of race to build-up.”⁹⁴ Thus, the Court’s rejection of post-racial federalism eschews

88. *Id.*

89. Micheal L. Wells, *Race-Conscious Student Assignment Plans After Parents Involved: Bringing State Action Principles to Bear on the De jure/De facto Distinction*, 112 PENN. ST. L. REV. 1023, 1025-26 (2008) (discussing the *de jure/de facto* distinction as a formalism in which “the Court picks and chooses among government activities, labeling some state action and others not, depending on whether a given activity falls on one side or the other of ‘a particular baseline, establishing the normal natural, or desirable functions of government’” (quoting SUNSTEIN, *supra* note 18, at 72)). This is an expression of post-racial federalism—the Court selects ostensibly neutral governmental activities that should be insulated from judicial review thereby expanding and enhancing state power.

90. Katy J. Harriger, *The Civil Rights Act of 1964 and School Desegregation: A Double-Edged Sword?*, 6 WAKE FOREST J.L. & POL’Y 157, 183 (2016) (“In [*Swann*], the Court unanimously required school districts in the South to stop delaying implementation of *Brown* and to take affirmative actions to integrate schools. But looming on the horizon and clearly already in the minds of the justices were the questions that would be raised about Northern and Western segregation, *de facto* rather than *de jure* segregation, and how the election of Richard Nixon would affect the Court.”); see *supra* note 16 and accompanying text. The Burger and Rehnquist Courts advance transitional equality and post-racial colorblindness, which thus leads to the Roberts Court’s post-racial federalism. See POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 34-86.

91. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 225-26 (2004).

92. “*Swann* would be the Court’s last unanimous school desegregation decision.” Myron Orfield, Milliken, Meredith, and Metropolitan Segregation, 62 UCLA L. REV. 363, 384 (2015) (italics in original).

93. *Swann*, 402 U.S. at 12.

94. Crocker, *supra* note 82, at 40.

neutrality;⁹⁵ acknowledges race-conscious remedies are essential in eradicating dual school systems;⁹⁶ and presents a bright line for federal intervention while respecting traditional federalism principles underlying local autonomy in the school context.⁹⁷ Reaffirming *Brown II* and *Green*,⁹⁸ the Court fashioned the remedial framework for school desegregation and integration.

Swann offers a rare instance of the Court rejecting neutrality and acknowledging structural inequality. Construing the scope of local decision-making power in the construction and closing of schools on purportedly neutral questions such as “location and capacity in light of population growth, finances, land values, [and] site availability.”⁹⁹ The Court notes that the choices underlying these questions “have been used as a potent weapon for creating or maintaining a state-segregated school system.”¹⁰⁰ Specifically, the Court pinpoints how demographic patterns, under the ostensibly neutral guise of “neighborhood zoning” have been manipulated to preserve dual school systems: “school authorities have sometimes since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns.”¹⁰¹ While noting a policy of “building new schools in the areas of white suburban expansion farthest from Negro population centers,” the Court emphasizes the reifying function of state-mandated subordination “prom [oting] segregated residential patterns which, when combined with ‘neighborhood zoning,’ further lock the school system into the mold of separation of the races.”¹⁰² This interlocking feature of systemic racism and structural inequality perpetuates segregated school systems to this day.¹⁰³ After more than seventy years, *Brown’s* unfulfilled legacy is a historical and present day reality.¹⁰⁴

95. *Swann*, 402 U.S. at 13-15.

96. *Id.* at 22-25 (“Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.”).

97. *Id.* at 16 (“Judicial authority enters only when local authority defaults.”).

98. *Id.* at 12-15.

99. *Id.* at 20.

100. *Id.* at 21.

101. *Id.* (italics added).

102. *Id.* This analysis is completely absent from the Court’s decision in *Milliken v. Bradley*. See *infra* Section I.D.

103. Sarah Mervosh, *Some Republicans Push to Put School Desegregation Officially in the Past*, N.Y. TIMES (May 21, 2025), <https://www.nytimes.com/2025/05/16/us/louisiana-republicans-school-desegregation.html> [<https://perma.cc/J758-DX3C>] (“Nationally, more than 300 desegregation orders are estimated to still be on the books from the 1960s and 1970s, when school districts resistant to integration were put under the supervision of federal courts. In the decades since, many orders have gone dormant, with little federal enforcement.” Republicans argue that these orders are outdated and unduly intrusive on local autonomy.). This is a tenet of post-racial federalism—the exercise of federal supervisory power disrupts local power and undermines principles of federalism; thus, desegregation orders and consent decrees are anti-democratic usurpations of traditionally local decision-making and contrary to the constitutional edict of colorblind neutrality.

104. McGoldrick, *supra* note 61, at 312 (“It is unlikely that the federal courts are ever going to achieve the remedy of even desegregation of illegally segregated schools [i.e., de jure discrimination], let alone integration of the vast majority of public schools, so many of which are segregated based upon de facto reasons beyond court power.”); GARY ORFIELD & DANIELLE JARVIE, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY 6 (2020) <https://civilrightsproject.ucla.edu/wp-content/uploads/2020/12/BLACK-SEGREGATION-MATTERS-final-121820-1.pdf> [<https://perma.cc/>

Nevertheless, *Swann* is a pivotal decision in the Court's school desegregation jurisprudence; it offered a remedial race-conscious framework rooted in the anti-caste and anti-subordination principles of the Fourteenth Amendment. The Court advanced four anti-subordination remedial principles: (i) racial quotas are a mere starting point in eradicating state-mandated segregation;¹⁰⁵ (ii) absolute equality, in the form of complete eradication of dual school systems may be unattainable, but that does not preclude a finding of a fully integrated school system;¹⁰⁶ (iii) rearrangement of school districts and attendance zones are permissible tools in dismantling dual school systems, and should be employed to advance substantive inclusion;¹⁰⁷ and (iv) busing can be used to expand the remedial reach beyond the neighborhood schoolhouse door to adjacent school districts.¹⁰⁸

What is striking about *Swann* is its direct connection to the race-conscious mandate of the Fourteenth Amendment¹⁰⁹—it is a prohibition of the exercise of state power in the maintenance of a racial caste system of separation.¹¹⁰ While equivocating by listing a “myriad [of] factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds,”¹¹¹ the Court nevertheless concluded that the mandate of *Brown* “was to dismantle dual school systems.”¹¹² This, of course, was to limit the scope of state power so that federal equitable power is exercised “only when local authority defaults.”¹¹³ The Court's broad proclamation of federal equitable power is dichotomous—it acknowledges systemic racism and structural inequality,¹¹⁴ but narrows the scope of remedial relief to eradicating dual school systems because “[o]ne vehicle can carry only a limited amount of baggage.”¹¹⁵ This metaphor underscores the Court's adherence to a narrow conception of discrimination (it makes no connection between segregated housing and segregated schools).¹¹⁶ Thus, “[t]he elimination of racial discrimination in public schools . . . should not be retarded by efforts to achieve broader purposes lying

Q8LQ-A7YT] (“Black students are far more segregated from [w]hite students now than in the civil rights era but attend school with many more Latinos.”).

105. *Swann*, 402 U.S. at 22-25.

106. *Id.* at 25-27.

107. *Id.* at 27-29.

108. *Id.* at 29 (noting that bus transportation “was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school”).

109. See Schnapper, *supra* note 37, at 754 (chronicling race-conscious Reconstruction programs, and concluding that “[t]his history strongly suggests that the framers of the [Fourteenth Amendment] could not have intended it generally to prohibit affirmative action for [B]lack or other disadvantaged groups”). This would also affirm the broad remedial mandate in *Swann* with federal courts being empowered with broad equitable powers to dismantle dual school systems.

110. *Swann*, 402 U.S. at 22.

111. *Id.*

112. *Id.*

113. *Id.* at 16.

114. *Id.* at 11-15.

115. *Id.* at 22.

116. This is a common theme throughout the Court's race jurisprudence. See generally POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47 (analyzing the Supreme Court's rhetoric on race discrimination in its race jurisprudence).

beyond the jurisdiction of school authorities[,] . . . although desegregation of schools ultimately will have impact on other forms of discrimination.”¹¹⁷

There is an implicit acknowledgement of the systemic and structural underpinnings of racist state action, but the Court does not reach this issue and simply notes that “[w]e do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree.”¹¹⁸ The objective is to eradicate the subordinating effect of state-mandated exclusion of Black public school students, not to “embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.”¹¹⁹ This statement again illustrates the duality of *Brown*—a constitutional mandate to eradicate state-mandated segregation and a remedial imperative limited by post-racial judicial constraints buttressed by the intent requirement, incrementalism, and post-racial federalism.

The Court’s remedial framework lacks a meaningful analytical connection between segregated schools and housing.¹²⁰ In other words, the Court recognizes structuralism *within* school systems but not how systemic racism connects to elements *outside* of them. The Court’s race jurisprudence is paradoxical—at the apex of its broadest pronouncement of federal enforcement power, *Swann* nevertheless sets the stage for the demise of broad equitable remedial power.¹²¹ The Court states that “[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.”¹²² Of course, this is true as a practical proposition, but this has

117. *Swann*, 402 U.S. at 22-23.

118. *Id.* at 23.

119. *Id.*

120. *Swann* portends what was to occur in *Milliken* just three years later, and would become a dominant post-racial federalism proposition in the Court’s school desegregation jurisprudence. “Since that time, members of the Supreme Court have indulged themselves in an increasingly vivid fantasy that segregated schools are caused by residential segregation alone and that residential segregation is either based on neutral demographic shifts caused by the incompatible preferences of racial groups or solely by private discrimination that cannot support an integrative remedy.” Orfield, *supra* note 92, at 428. Segregation becomes “natural” under this reading, federal intervention is unnecessary and unduly intrusive, and state power expands and is insulated from review by the discriminatory intent requirement. Justice Thomas is a key proponent of this strand of post-racialism: voluntary choice does not equate to remediable segregation. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749 (2007) (Thomas, J., concurring) (“[R]acial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.”); Ronald Turner, *On Parents Involved and the Problematic Praise of Justice Thomas*, 37 HASTINGS CONST. L.Q. 225, 230 (2010).

121. *Swann*, 402 U.S. at 24 (“If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.”).

122. *Id.* Ironically, there is also the reality that total integration may not be the goal of all Black students. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (arguing that middle class values of integration blunted the real legal goals of the clients in *Brown* who were less concerned with the dismantling color line and more concerned with substantive equality in school resources however that could be achieved). But see Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913, 1945-46 (2003) (analyzing and critiquing Bell, and also chronicling how upper class Black

been inverted by the Roberts Court to rationalize re-segregation as a natural result of neutral actions.¹²³ Yet the *Swann* Court approves the limited use of racial quotas as a starting point to achieve unitary school systems.¹²⁴

Because there are ostensibly neutral factors, apart from state-mandated segregation, that could account for the existence of one-race schools in metropolitan areas where people of color are concentrated, the Court concludes that “the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.”¹²⁵ Recognizing that this proposition could be construed as turning a blind eye to the potential of resegregation, the Court invokes a skeptical presumption against systems “with a history of segregation” and “substantially disproportionate” racial school populations.¹²⁶ The Court holds that there must be “sufficient specificity to assure a school authority’s compliance with its constitutional duty” and that school assignments are nondiscriminatory.¹²⁷

Here, state power is circumscribed by federal supervisory power; schools are scrutinized and have the burden “to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.”¹²⁸ This is an acknowledgement of the present-day effects of past discrimination. Yet ironically, while *Swann* rejects post-racial federalism it embraces it at the same time by endorsing an *optional* (and purportedly neutral) majority-to-minority transfer school plan. Characterizing an optional majority-to-minority transfer provision as an “indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation,”¹²⁹ the Court references caste-based systemic oppression mandated by the state while being seemingly oblivious to it. The burden is placed on the students to voluntarily transfer to a school where they will be in the minority. Resegregation is inevitable under this voluntary majority-to-minority scheme.¹³⁰

individuals in Atlanta, Georgia navigated around *Swann*’s expansive holding to avoid the impact of busing, while Black children from poor Atlanta communities bore the brunt of busing; paradoxically, “the plan endorsed the voluntary student transfer program, even though the Supreme Court had rejected such freedom-of-choice programs as effective remedies for de jure segregation in its 1968 decision *Green v. County School Board*” (italics added)).

123. See *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring) (distinguishing state-mandated segregation from racial imbalance and concluding that “[a]lthough there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation”). *Contra* Spann, *Disintegration*, *supra* note 26, at 577-80.

124. *Swann*, 402 U.S. at 24-25 (noting that a dual school system had been maintained by the state from 1954 to “at least until 1969” and that the school board defaulted in its affirmative obligation to eradicate dual school systems so that “the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy,” because “[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations”).

125. *Id.* at 26.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 26-27.

130. David Schraub, (*The Limits of*) *Judicial Resegregation*, 58 HARV. C.R.-C.L. L. REV. 311, 319 (2023) (“Consequently, American schools have been effectively resegregating since the 1970s. Unbridled free choice

What is striking about *Swann*'s broad proclamation of federal equitable enforcement power is its underlying equivocation. That is, *Swann* evokes the primacy of federal enforcement power but stresses the limits of that power when there is a neutral explanation for segregation.¹³¹ And this neutrality presumes legitimacy and ignores the structural underpinnings of subordination. Embedded in *Swann* are the ingredients of integration's demise.¹³² The Court presumes that voluntary choice is unencumbered by structural inequality, redlining, and other systemic manifestations of subordination. While disconnected from its housing analysis, the Court understands that neutrality perpetuates discrimination and segregated schools, noting that

When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.¹³³

The facts of *Swann* lead to the conclusion that school authorities did not fulfill their affirmative constitutional obligation to dismantle dual school systems.¹³⁴ Thus, the Court endorses "the pairing and grouping of noncontiguous school zones"¹³⁵ as a permissible remedial measure.

Swann is the first Supreme Court decision to endorse busing as a remedy to be fashioned by the courts' equitable power to eradicate dual school systems. As the Court explained, "[d]esegregation plans cannot be limited to the walk-in school."¹³⁶ Local school board authorities should employ busing as one of many remedial options designed to ensure a unitary school system. But, here again, the limitation of this broad equitable power is exposed:

Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.¹³⁷

by parents has facilitated renewed segregation in practice." (first citing Jeremy E. Fiel, *Decomposing School Resegregation: Social Closure, Racial Imbalance, and Racial Isolation*, 78 AM. SOC. REV. 828, 829 (2013); and then citing R. Kenneth Godwin et al., *Sinking Swann: Public School Choice and the Resegregation of Charlotte's Public Schools*, 23 REV. POL'Y. RES. 983, 994 (2006)); see Spann, *Disintegration*, *supra* note 26, at 607-08.

131. *Swann*, 402 U.S. at 28-32.

132. Goodwin Liu, Brown, Bollinger, and *Beyond*, 47 HOWARD L.J. 705, 718 (2004) ("After *Swann*, however, the Court never issued another unanimous opinion vindicating an equal protection claim brought by minority schoolchildren. By the time the Court decided its last school desegregation case in 1995, it had effectively abandoned the standard for remedial compliance developed in *Green* and *Swann*. Doctrinally, the Court accomplished this by repeatedly invoking the tradition of local control over public schools, a concept whose origin in Supreme Court jurisprudence lies in three cases—*Wright v. City of Emporia*, *San Antonio Independent School District v. Rodriguez*, and *Milliken v. Bradley*—decided in the years immediately after *Swann*." (italics in original)). Indeed, these decisions are emblematic of the Court's post-racial federalism jurisprudence in its school decisions.

133. *Swann*, 402 U.S. at 28.

134. *Id.* at 30-31.

135. *Id.* at 28.

136. *Id.* at 30.

137. *Id.* at 31-32. This proposition would later be weaponized by Justice Thomas to assert that mere racial imbalances are irremediable because there is no constitutional requirement of racial proportionality in the

The shift to the Court's embrace of post-racial federalism begins in *San Antonio v. Rodriguez* and is fully realized in *Milliken v. Bradley*. In tandem, these post-racial federalism decisions reorder the scope of state power and federal regulatory power—in the absence of state-mandated segregation, disproportionate impact is circumstantially significant but constitutionally irrelevant. Thus, post-racial federalism shapes race, class, and the scope of interdistrict remedial authority to advance the anti-subordination principle in dismantling separate and unequal school systems.

C. *San Antonio v. Rodriguez and Post-Racial Federalism: Race and Class*

Eschewing classifying Mexican American school students in the poor San Antonio school district of Edgewood as discrete and insular minorities,¹³⁸ the Court holds that education is not a fundamental right, and wealth is not a suspect class.¹³⁹ Because there is no identifiable class and no fundamental right, the subordinating impact of state power through school district boundaries and property tax-based educational funding is essentially insulated from judicial review. Applying rational basis review, the Court expands state power and insulates it from judicial review. *San Antonio v. Rodriguez* is a paradigmatic example of post-racial federalism: state power here is expanded, premised on the Court's conception of post-racial constitutionalism and the existence of identifiable discrimination.

Because there is no identifiable state discrimination, the disparate impact of the school tax funding system is a rational outcome of a neutral market system that evaluates property values based on neighborhood location, not race. There is a fundamental disconnect between race and class, which makes formalistic equality particularly appealing to the Court.¹⁴⁰ This is a quintessential post-racial proposition—where there is no identifiable state-mandated discrimination, the *de facto* manifestations of structural inequality are irremediable. Post-racial federalism conceptualizes this post-racial proposition as an expansion of state power, and that power is particularly pronounced in matters of local education and taxation.

schools. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749 (2007) (Thomas, J., concurring). Moreover, Justice Thomas disputes the existence of the anti-subordination principle under the Fourteenth Amendment. See *Students for Fair Admissions, Inc. v. President of Harvard Coll. (SFFA)*, 600 U.S. 181, 246–48 (Thomas, J., concurring).

138. Shayan H. Modarres, *The Fourteenth Amendment Isn't "Broke": Why Wealth Should Be a Suspect Classification Under the Equal Protection Clause*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 171, 196 (2011).

139. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25–38 (1973).

140. Camille Walsh, *Erasing Race, Dismissing Class: San Antonio School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133, 144 (2011) (critiquing the formalistic erasure of race, and concluding that “[t]hrough financing differences were repeatedly framed by opponents, and later justices, as matters of private choice and marketplace decision-making, even without the taxation caps, any purported educational choice by the local Edgewood community was largely illusory. As one of the co-counsels who worked with Gochman on the case later said, ‘[p]oor districts do not choose to spend less for education. It’s like telling a man who makes \$50 a week that he has the same right as a millionaire to send his son to Exeter.’” (quoting Mark Yudof, Co-Counsel for Respondent in *San Antonio v. Rodriguez*, Remarks at the Nat’l Council for the Advancement of Educ. Writing Seminar on Sch. Fin. (Oct. 3, 1972) (transcript available in the Library of Congress, Manuscript Division in the William J. Brennan Papers, Part I, Box 297))).

The Court's post-racial determinism¹⁴¹—the outcome determinative analytical framework in which the Court erases race to foreground neutrality—guarantees the result in *San Antonio v. Rodriguez*. Adopting colorblind constitutionalism and post-racial federalism, the Court expunges race and disaggregates class from its analysis so that formalistic equality (and marketplace choice) lead to the conclusion that stark economic disparities between poor and affluent school districts are constitutionally permissible.¹⁴² The Court's deferential approach, buttressed by its adherence to neutrality, leads to an expansive conception of state power which displaces federal enforcement power. Indeed, while all the school decisions are rooted in post-racial federalism because they reference local and state autonomy in education, *San Antonio v. Rodriguez* portends a doctrinal shift where the Court consistently affirms local autonomy in educational decision-making.

1. The Rational Basis Test and State Power

The rational basis test expands state power. Comparing the massive wealth disparity between the affluent Alamo Heights Independent School District and the poverty-burdened Edgewood Independent School District, with its approximately 96% Mexican American and Black student population,¹⁴³ the district court concluded that wealth was a suspect class, and education was a fundamental right, thereby applying strict scrutiny to hold that the local property tax system was unconstitutional.¹⁴⁴ The district court rejects marketplace neutrality and instead centers its analysis on the core value of education as a fundamental interest (right) and on the disparate impact of the tax funding system, which privileges choice for the wealthy and leaves no choice for the poor.¹⁴⁵ The district court's decision was based on a substantial record of structural inequality:

[The ad valorem taxation system] makes education a function of the local property tax base. . . . [W]hile the ten [school] districts with . . . taxable property per pupil above \$100,000 enjoyed an equalized tax rate per \$100 of only thirty-one

141. Cedric Merlin Powell, *Justice Thomas, Brown, and Post-Racial Determinism*, 53 WASHBURN L.J. 451, 452 (2014) [hereinafter Powell, *Justice Thomas and Post-Racial Determinism*] (“[R]ace-conscious remedial approaches, like school assignment plans, will virtually *always* be struck down as violating the Fourteenth Amendment. The anti-subjugation [anti-subordination] and anti-caste underpinnings of the Fourteenth Amendment have been replaced by an anti-differentiation mandate that advances formalistic equality as the guiding touchstone of constitutional analysis.” (emphasis in original)); Powell, *Neutral Principles*, *supra* note 44, at 7.

142. Walsh, *supra* note 140, at 160-62.

143. *Rodriguez*, 411 U.S. at 12.

144. *Id.* at 16.

145. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Texas 1971) (“[T]he current system tends to subsidize the rich at the expense of the poor. . . . Any mild equalizing effects that state aid may have do not benefit the poorest districts.”). “The various school finance litigations, whatever the state, have two things in common: First, courts generally do not make the connection between unequal funding and race; and second, there is reason to doubt that equalizing funding without additional funds will always make a substantive difference.” DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 163 (2004). Certainly, the district court made this connection, only to have it undone by the Court. This is a systemic component of post-racial federalism—inequality and subordination are rationalized through state power.

cents, the poorest four districts, with less than \$10,000 in property per pupil, were burdened with a rate of seventy cents. Nevertheless, the low rate of the rich districts yielded \$585 per pupil, while the high rate of the poor districts yielded only \$60 per pupil. . . . [T]hose districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominately minority in composition.¹⁴⁶

The district court is appropriately skeptical of state power. It rejects marketplace neutrality and makes the connection between wealth, class, and race. This is not a mere marketplace function, it is state-mandated subordination through taxation because the rich are favored over the poor, and they bear the burden of systemic windfalls to the privileged.¹⁴⁷ The Supreme Court eschews this connection (and the comparative figures referenced above) and instead advances post-racial constitutionalism and post-racial federalism.

Casting aside the district court's substantive findings and holding, the Court cursorily concludes that the district court's opinion lacked analytical depth in addressing the complexity of the Texas school financing system because it based its application of strict scrutiny on inapposite criminal law cases and wealth-based restrictions on the right to vote.¹⁴⁸ Thus, the Court casually disregards what forms the core of fundamental rights—their essential nature in advancing democratic principles like equal protection, the right to vote, and a well-informed citizenry rooted in the First Amendment.¹⁴⁹

In perhaps the most telling passage in its decision, the Court concludes that “this case, which in significant aspects is *sui generis*, may not be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause.”¹⁵⁰ This is a jurisprudential admission that the Court will adhere to a rigid, formalistic, and limited tiered approach to equal protection analysis.¹⁵¹ Throughout the Court's race jurisprudence, its exclusive focus is on remedying clearly identifiable state-mandated discrimination—the wealth disparities between the poor and affluent school districts, while stark, are irremediable because there is no proof of intentional discriminatory state action.

Because there is no absolute wealth equality, and, in a free market economy, there will be the wealthy and those less so (the economically disadvantaged), this means that the Constitution cannot be read to require proportionate wealth across classes,

146. *Rodriguez*, 337 F. Supp. at 282.

147. *Id.*

148. *Rodriguez*, 411 U.S. at 18.

149. See Caroline A. Veniero, *Education's Deep Roots: Historical Evidence for the Right to a Basic Minimum Education*, 88 U. CHI. L. REV. 981, 995-96 (2021) (conceptualizing education as deeply rooted in American history under a substantive due process analysis). This can be coupled with the First Amendment underpinnings inherent in education to conclude that education is a fundamental right.

150. *Rodriguez*, 411 U.S. at 18.

151. See John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1221 (1999); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 164-77 (1984).

racess, or neighborhoods. There are no constitutional absolutes here—education is not a fundamental right, and wealth is not a suspect class.

To reach this post-racial conclusion, the Court posits several propositions which leads it to conclude that strict scrutiny is inapplicable to the school district tax funding system. All of the propositions are anchored in facially neutral conceptions of state power. First, the Court noted that there is no discernible suspect class to whom strict scrutiny could be applied—the lower court simply assumed a suspect classification “through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth.”¹⁵² The disadvantaged poor “cannot be identified or defined in customary equal protection terms”¹⁵³ because economic status is diffuse, and poverty is not an immutable quality.¹⁵⁴ But it is the Court’s interpretive frame that is simplistic; it presumes neutrality and prefers a superficial analysis of economic inequality over a substantive examination of structural inequality.

Next, the Court notes that there is no identifiable injury. To the Court, there is a question as to whether the disparate tax funding between the poor and affluent school districts is discrimination (an absolute deprivation) or a relative deprivation due to neutral market factors.¹⁵⁵ The Court’s analysis conflates the question of whether education is a fundamental right with its analysis of wealth as a suspect class—where education is construed as a benefit¹⁵⁶—and access is defined as dependent on relative wealth which is not limited to a specific school district. Thus, the Court concludes that “there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.”¹⁵⁷ On this record, with no cognizable fundamental education right and no suspect wealth classification, there is no identifiable injury because “harm” can be defined neutrally.

Finally, “the Equal Protection Clause does not require absolute equality or precisely equal advantages.”¹⁵⁸ According to the Court, Texas provided an adequate education to “every child in every school district.”¹⁵⁹ Texas’s Minimum Foundation Program provides an adequate education to all citizens “by assuring teachers, books, transportation, and operating funds”¹⁶⁰ are provided. Because the Court finds no identifiable suspect class, no cognizable injury, and that education is a state provided benefit rather than a fundamental right, the Court applies rational basis review to the

152. *Rodriguez*, 411 U.S. at 19.

153. *Id.*

154. *Id.* at 19-20 (noting that poverty is relative and that the poor could be “functionally indigent,” or relatively poorer than others, or “those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts” (internal quotation marks omitted)).

155. *Id.* at 19.

156. *Id.* at 36-40.

157. *Id.* at 23.

158. *Id.* at 24.

159. *Id.*

160. *Id.*

Texas school finance system. *San Antonio v. Rodriguez* is about the scope of state power, and the Court acknowledges the federalism principles underlying its opinion.¹⁶¹ Here, state power expands so that federal enforcement power is superfluous.¹⁶²

Post-racial federalism posits that the Court should embrace the neutrality of the school finance system and insulate the system from rigorous judicial review.¹⁶³ Moreover, it discounts disparate impact and rationalizes subordination as irremediable because state power has not been intentionally deployed to subjugate an identifiable group. There are no discrete and insular minorities under the Texas school tax funding system. Instead, there are simply people who live in poor and affluent districts, and so there is no discriminatory state action here. However, this does not explain the stark disparities between Edgewood and Alamo Heights.

2. Justice Marshall's Dissent: Rejection of Textualism

In his dissent, Justice Marshall explains these disparities by rejecting the Court's formalistic equality, its post-racial federalism, and its contrived textualism. He conceptualizes education as a fundamental right, connects structuralism with the inevitable plight of the poor, and applies strict scrutiny to state power and local control. Indeed, Justice Marshall's dissents in *San Antonio v. Rodriguez* and *Milliken v. Bradley* are the doctrinal precursors to Justice Jackson's comprehensive structural inequality dissent in *SFFA*.¹⁶⁴

All of the doctrinal components of the structural inequality critique are foregrounded here: the rejection of neutrality and formalistic equality;¹⁶⁵ an acknowledgment of structuralism and systemic inequality;¹⁶⁶ the identification of race as a salient

161. *Id.* at 44.

162. Walsh, *supra* note 140, at 154 (“*Rodriguez* was one of the cases that signaled the judicial redemption of federalism as legal doctrine after what was seen by many as ‘judicial activism’ in *Brown*.” (italics in original)); Christine Rienstra Kiracofe & Spencer Weiler, *Surfing the Waves: An Examination of School Funding Litigation from Serrano v. Priest to Cook v. Raimondo and the Possible Transition to the Fourth Wave*, 2021 B.Y.U. EDUC. & L.J., no. 2, March 2022, at 189, 200 (“*San Antonio v. Rodriguez* shut the proverbial door on petitioners’ hope for addressing school funding inequities at the federal level. Instead, what resulted over the next decades—and continues today—are scores of cases filed in state courts.” (italics in original)).

163. *Rodriguez*, 411 U.S. at 39 (stating that Texas’s funding system “should be scrutinized under judicial principles sensitive to the nature of the State’s efforts and the rights reserved to the States under the Constitution”).

164. See *infra* Section I.G.3.

165. *Rodriguez*, 411 U.S. at 71-72 (Marshall, J., dissenting) (critiquing the political process as inadequate in providing a remedy for the inferior education received by the students in the poverty ridden Edgewood school district); *Milliken v. Bradley*, 418 U.S. 717, 782-86 (1974) (Marshall, J., dissenting) (rejecting the Court’s cramped view for remediable state-mandated segregation in Detroit, Michigan).

166. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 147-55 (1st ed. 2018); *Rodriguez*, 411 U.S. at 85-90 (Marshall, J., dissenting) (noting that the Texas school financing system results in state-mandated inequality based on taxable property); *Milliken*, 418 U.S. at 789 (Marshall, J., dissenting) (referencing purposeful discrimination as state action through the acts of the State of Michigan, and its instrumentality, the Detroit Board of Education, and also rejecting the Court’s narrow holding by concluding that “interdistrict relief was seen as a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the City of Detroit”).

and defining feature of American life;¹⁶⁷ and the conceptualization of disparate impact as indicative of the present day effects of past discrimination.¹⁶⁸ It is the fundamental nature of education that drives Justice Marshall's analysis, not whether such a right can be explicitly located in the text of the Constitution. Because of the "fundamental importance of education,"¹⁶⁹ mere rational basis review is insufficient to protect substantive educational opportunities for all.

By rejecting textualism¹⁷⁰ and the Court's rigid multi-tiered Equal Protection analysis,¹⁷¹ Justice Marshall's dissent offers a comprehensive critique of the Court's facile marketplace analysis of the Texas public school tax financing system. He repudiates neutrality by discarding the rigidity of the Court's "two neat categories" of equal protection cases—"strict scrutiny or mere rationality"¹⁷²—and instead posits analysis emphasizing the fundamentality of core constitutional values:

I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. . . . [T]hat is, an approach in which "concentration (is) placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."¹⁷³

167. *Rodriguez*, 411 U.S. at 109-110 (Marshall, J., dissenting) (rejecting the lenient rational basis inquiry and positing that Texas school financing system discriminates against the "important individual interests" of a "disadvantaged or powerless class[]" (a discrete and insular minority)); *Milliken*, 418 U.S. at 783 (Marshall, J., dissenting) ("Our nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.").

168. *Rodriguez*, 411 U.S. at 92 (Marshall, J., dissenting) ("[W]hile on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live."); *Milliken*, 418 U.S. at 785 (Marshall, J., dissenting) ("The constitutional violation found here was not some de facto racial imbalance, but rather the purposeful, intentional, massive de jure segregation of the Detroit city schools . . .").

169. *Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting).

170. *Id.* at 100 ("But it will not do to suggest that the 'answer' to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest 'is a right . . . explicitly or implicitly guaranteed by the Constitution.'" (omission in original) (quoting *id.* at 33)).

171. *Id.* at 102, 111 (arguing for a sliding scale approach to equal protection analysis determining "the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution" so that these rights are "firmly rooted" in the text of the Constitution due to a close connection between "the specific constitutional guarantee and the nonconstitutional interest"). For example, the First Amendment, explicitly mentioned in the Constitution, is closely connected to education, which is "the very foundation of good citizenship." *Brown I*, 347 U.S. at 493. Thus, strict scrutiny is applicable, not mere rationality review. See Mark Tushnet, *The Principled Dissenter*, 72 A.B.A. J. 29, 30 (1986) (noting that the sliding scale approach "require[s] judges to analyze the importance of the interests affected by a classification, the degree to which they should be suspicious of the political process that produced the classification, and how the classification actually further what the legislature wanted to do"); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 575-81 (2014); Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372, 385-93 (2002).

172. *Rodriguez*, 411 U.S. at 98 (Marshall, J., dissenting).

173. *Id.* at 99 (alterations in original) (quoting *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970)).

Not only is this a rejection of the tiered approach to equal protection analysis, but it is also a rejection of the expansion of state power and post-racial federalism's affirmation of neutrality—this is not a neutral result of an equitable school financing system, it is the systemic reification of caste-based oppression. As Justice Marshall concludes:

[L]ocal control is a myth for many of the local school districts in Texas. As one district court observed, “rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes).”¹⁷⁴

Post-racial federalism's configuration of state power advances structural inequality under the guise of neutrality and local control.

Justice Marshall's dissent is a rejection of post-racial federalism and recasts *Brown* as a decision that enshrines education as a fundamental right, affirms the anti-subordination principle as a constitutional mandate to eradicate structural inequality, and applies strict scrutiny to circumscribe state power that perpetuates unequal school systems under the guise of local control. There are substantive interests that are so foundational that their explicit mention in the Constitution is not a prerequisite in establishing their fundamental nature as constitutional rights deserving of “special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees.”¹⁷⁵

These interrelated rights, then, are essential to a fully participatory democracy where its members are fully engaged in the polity. Free speech, which is rooted in the fundamental core of education, is explicitly referenced in the Constitution, and education is interrelated to that constitutional guarantee;¹⁷⁶ the right to travel is essential to a robust democracy and society (and implicitly related to freedom of expression, and the fundamental derivative rights of personal autonomy and education);¹⁷⁷ and the “exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment.”¹⁷⁸ Significantly, these are all rights that are crucial to discrete and insular minorities, and they must be protected by the Court. Justice Marshall concludes, “[o]nly if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself.”¹⁷⁹ Thus, education is a fundamental right that must be protected from state discrimination.

174. *Id.* at 129 (quoting *Van Duzart v. Hatfield*, 334 F. Supp. 870, 876 (D. Minn. 1971)).

175. *Id.* at 103.

176. *Id.* at 99, 112–113; see generally Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 39 DUKE L.J. 431, 439 (1990) (conceptualizing *Brown* as a speech case: “the practice of segregation, the practice the Court held inherently unconstitutional was *speech*. . . . *Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that [B]lack children are an untouchable caste, unfit to be educated with white children.” (emphasis in original)).

177. *Rodriguez*, 411 U.S. at 99–100 (Marshall, J. dissenting).

178. *Id.* at 103.

179. *Id.*

a. Education is a fundamental right

Brown is a First Amendment decision; it prohibits the state-mandated message of racial caste and stigmatization.¹⁸⁰ Rather than anchoring his analysis in the neutrality of the Texas school financing system, Justice Marshall locates the “fundamental importance of education”¹⁸¹ in the *Brown* decision nearly twenty years earlier:

[T]he fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values. . . . “Today, education is perhaps the most important function of state and local governments. . . . [Education] is the very foundation of good citizenship.”¹⁸²

The Court has empathically stated that providing public education is “at the very apex of the function of a State,”¹⁸³ and that “[n]o other state function is so uniformly recognized as an essential element of our society’s well-being.”¹⁸⁴ While the Court has never explicitly stated that education is a fundamental right, its “fundamental importance” is interrelated to core constitutional principles—the First Amendment’s freedom of speech and marketplace of ideas;¹⁸⁵ the classroom as laboratories of democracy preparing students for engaged citizenship;¹⁸⁶ and the preservation of democracy through “the exercise of the state franchise.”¹⁸⁷

Education is fundamentally important, essential to democracy, and foundational in connecting the social, cultural, and political interests of the American polity.¹⁸⁸ Thus, state action based on a disparate taxing scheme that deprives students of color of substantive access to equal educational opportunity should be subject to strict scrutiny.¹⁸⁹ Justice Marshall’s dissent pinpoints inequality and its cumulative impact in a compelling exposition of how purportedly neutral systemic processes—like a school taxation system based on property taxes—perpetuate and reify inequality.

180. Lawrence, *supra* note 176, at 439–40 (“Segregation serves its purpose by conveying an idea. It stamps a badge of inferiority upon [B]lacks, and this badge communicates a message to others in the community, as well as to [B]lacks wearing the badge, that is injurious to [B]lacks. Therefore, *Brown* may be read as regulating the content of racist speech.”).

181. *Rodriguez*, 411 U.S. at 111 (Marshall, J. dissenting).

182. *Id.* (quoting *Brown I*, 347 U.S. 483, 493 (1954)).

183. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

184. *Id.* at 112.

185. *Id.* at 111.

186. Laura McNeal, *Integrating the Marketplace of Ideas: A New Constitutional Theory for Protecting Students’ Off-Campus Online Speech*, 76 STAN. L. REV. 1575, 1581, 1599–600 (2024) (discussing how schools are “nurseries of democracy,” and conceptualizing the Integrated Contextual Disruption (“ICD”) test which balances a school’s regulatory interest and students’ off campus online free speech rights (quoting *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021)); Joshua Gutzman, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333, 347, 356 (2021).

187. *Rodriguez*, 411 U.S. at 115 (Marshall, J., dissenting). Unfortunately, this democratic tenet has been severely eroded by the Court’s post-racial voting rights jurisprudence. See POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 184–213.

188. *Rodriguez*, 411 U.S. at 116–17.

189. *Id.* at 117–24.

b. Structuralism and the poor

Eschewing the presumptive good faith in bridging the economic chasm between the Edgewood and Alamo Heights school districts, Justice Marshall highlights structural and economic inequalities that are glaringly absent from the majority opinion. The majority's marketplace approach accepts gross economic inequality as the consequences of individual choices in a neutral market.¹⁹⁰ San Antonio residents are free to live where they choose and so, there is no constitutional right to absolute economic parity. Thus, the numbers highlighted in the majority opinion underscore a deferential posture premised on rational economic gaps between the impecunious Edgewood district and the affluent Alamo Heights district.

Indeed, the majority's primary emphasis is on "the State's impressive progress in recent years,"¹⁹¹ and that a state-federal equalization plan amounted to \$356 per student expenditures in Edgewood and \$594 per student in Alamo Heights.¹⁹² The Edgewood school district made progress under the equalization scheme and there was the chance that the gap would close even further, and an adequate education was constitutionally sufficient. To the majority, there is no suspect class, no fundamental right, and, despite the economic disparities present, no cognizable injury. Discriminatory impact is simply part and parcel of the broad taxing power of the state. Post-racial federalism posits that this expansion of power is legitimate and that any injury that is not clearly identifiable as being caused by state action cannot be remedied.

Because the majority opinion endorses the expansion of state power in determining how the proceeds of property taxes will be distributed to school districts, it views the incremental (and largely inconsequential) gains to the economically depressed Edgewood school district as dispositive. There is an inherent inequality, unrelated to state action, that is a neutral result of taxation policy. But this post-racial rationale ignores the systemic inequality of the Texas school financing system. Post-racial federalism erases the anti-subordination principle from the Fourteenth Amendment. The doctrinal shift from *Brown's* substantive mandate to eradicate state subjugation in education is significantly diminished in *San Antonio v. Rodriguez* by the Court's deference to state power. Justice Marshall forcefully rejects this uncritical deference by highlighting the present-day effects of past discrimination. Concluding that the state educational financing system unconstitutionally deprives students of equality of educational opportunity,¹⁹³ Justice Marshall categorically rejects post-racial federalism (and deferential rational basis review) and reorients the substantive contours of the Equal Protection Clause. Critiquing the majority's "emasculat[ion] of the Equal Protection Clause,"¹⁹⁴ due to the Court's abdication of its

190. See *id.* at 72 (majority opinion) (While acknowledging that there are "substantial interdistrict disparities in school expenditures", the majority nevertheless "undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. . . . When the Texas financing scheme is taken as a whole, I do not think that it can be doubted that it produces a discriminatory impact on substantial numbers of school age children of the State of Texas.").

191. *Id.* at 11.

192. *Id.* at 13.

193. *Id.* at 71-72 (Marshall, J., dissenting).

194. *Id.* at 98.

role to protect “discrete and insular minorities”¹⁹⁵ from oppressive state power, Justice Marshall offers a structural analysis of the Texas financing system. His skepticism of state power is a rejection of post-racial federalism.

Justice Marshall unpacks structuralism on three levels—local, federal, and state. He analyzes structural and systemic inequality by construing the Texas financing scheme holistically, conceptualizing the (i) the disparate impact of local *ad valorem* property taxes; (ii) the federal government’s funding to school districts; and (iii) the state government’s allocation of funding to respective school districts.¹⁹⁶ Noting that the local property tax furnishes “40% of the cost of public education for Texas as a whole,”¹⁹⁷ Justice Marshall concludes that how school districts raise revenue leads to gross inequalities in violation of the Equal Protection Clause. The system as structured, with tax rates and taxable property reinforcing stark inequities, unconstitutionally burdens poor school districts. “The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.”¹⁹⁸ There is systemic intentionality as to how the poor are economically burdened: “[T]he poorest districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates.”¹⁹⁹

The “seriously disparate consequences of the Texas local property tax”²⁰⁰ are evinced by the fact that the ten most affluent districts, with more than \$100,000 in taxable property, raised an average of \$610 per pupil, “whereas the four poorest districts studied, each of which had less than \$10,000 in taxable property per pupil, were able to raise only an average of \$63 per pupil.”²⁰¹ The majority ignores this profound disparity and focuses instead on neutralizing it by proffering marketplace rationales.

The federal government’s ten percent funding of the total cost of public education in Texas is wholly insufficient in bridging the wide economic gulf between poor and affluent school districts.²⁰² Indeed, such funding does not “ameliorate significantly the widely varying consequences for Texas school districts and school children of the local property tax element of the state financing scheme.”²⁰³

The remaining fifty percent of funding of school districts is through state allocations in the Available School Fund (mandated by the Texas Constitution) and the Minimum Foundation School Program.²⁰⁴ The wealth gap widened rather than narrowed under the Texas funding scheme: “Alamo Heights received \$491 per pupil from the Program while Edgewood received only \$356 per pupil, [which] hardly

195. *Id.* at 105 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

196. *Id.* at 72-73.

197. *Id.* at 73.

198. *Id.* at 74.

199. *Id.* at 75.

200. *Id.* at 74.

201. *Id.* at 74-75.

202. *Id.* at 76.

203. *Id.*

204. *Id.* at 76-80.

suggest[s] that the wealth gap between the districts is being narrowed by the State Program.”²⁰⁵

Here, the subordinating impact of state power—the discrimination in educational opportunities due to a skewed financing system—is legitimized by the rationale of local educational control. This is yet another iteration of post-racial federalism that is rejected by Justice Marshall.²⁰⁶ Post-racial federalism insulates state power from judicial review affirming local control and state autonomy. It promotes neutrality by adopting a deferential view of state power to explain extant structural inequality and striking disparities in educational funding; and it views the exercise of federal supervisory power as an encroachment on state autonomy. Local control is not insular, nor is it isolated. It is an integrated component of state power that the majority privileges by ignoring structural inequality and systemic bias against poor Mexican American and Black school students in San Antonio. Thus, Justice Marshall concludes that “it is apparent that the State’s purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.”²⁰⁷ Justice Marshall’s skepticism of local control is well-founded because he locates the subordinating structuralism inherent in the Texas funding scheme: “the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes).”²⁰⁸

State power perpetuates inequality through the guise of local control. The structures, systems, and processes of the Texas school financing apparatus bars minorities from accessing substantive educational opportunities, given that, “because of the difference in taxable local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same [per pupil] yield as Alamo Heights.”²⁰⁹ This is not, in any way, a neutral process outcome²¹⁰—the anti-subordination principle is jettisoned from the Constitution, and the Court legitimizes subordination by ignoring the substantial economic disparity between the poor and affluent school districts. To restore the anti-subordination principle to the core of the Equal Protection Clause, strict scrutiny should be applied to the Texas school-financing system.

c. Strict scrutiny and local control

The Court has applied strict scrutiny, the highest level of judicial review, when fundamental rights are impacted by state action and when suspect classes are discriminated against by the state. Conversely, the Court has adopted deferential rational basis review when evaluating economic and social legislation. *San Antonio Independent School District v. Rodriguez* marks a definitive doctrinal shift from the

205. *Id.* at 80–81.

206. *Id.* at 126.

207. *Id.* This proposition is applicable to *Milliken v. Bradley*. See *infra* Section I.D.

208. *Rodriguez*, 411 U.S. at 129 (Marshall, J., dissenting) (quoting *Van Duzart v. Hatfield*, 334 F. Supp. 870, 876 (D. Minn. 1971)).

209. *Id.* at 128–29.

210. Property-poor districts, like Edgewood, exert the highest tax effort while obtaining the lowest per-pupil yield. Thus, Edgewood “raised only \$26 per pupil through its local property tax, whereas Alamo Heights was able to raise \$333 per pupil.” *Id.* at 128. None of these figures are referenced in the majority opinion.

Court's skepticism of state power (in the *Brown*, *Green*, and *Swann* decisions) to deferential review and the expansion of state power rooted in post-racial constitutionalism and federalism. The Equal Protection Clause serves as a limit on the subordinating power of the state²¹¹—*Brown*'s constitutional mandate requires that rigorous review be applied when state power has a stigmatizing purpose or effect.

Here, rational basis review unduly expands state power purportedly because a more rigorous review would be an intrusion into state (and local) authority, in legislating and implementing school financing decisions, to provide an adequate education for Texas students. The majority is concerned with the broad implications (a slippery slope) of constitutionalizing a fundamental right to education and how it would be financed by the states.²¹² But this concern is contrived due to the Court's refusal to acknowledge structural inequality and systemic racism, and its reliance on a slippery slope rationale minimizing the fundamentality of the education right.

The Court focuses on the historical legitimacy of state taxing systems and a stylized notion of federalism, rather than the twenty years of retrogression after *Brown*. . . . *San Antonio v. Rodriguez* constitutionalizes duality in school financing, thereby reifying the segregation and inequality between schools on either side of the district line.²¹³

Justice Marshall presciently notes that a local control rationale can be repurposed so that it legitimizes interdistrict discrimination²¹⁴—this is another strand of post-racial federalism: the insulation of state (and local) power from scrutiny due to an absence of clearly identifiable state discrimination. Justice Marshall dispels the myth of local control,²¹⁵ stating, "If for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us."²¹⁶

Applying strict scrutiny based on the fundamentality of education and "the relationship between education and the social and political interests enshrined within the Constitution,"²¹⁷ Justice Marshall concludes that "the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause."²¹⁸ The Court's decision in *San Antonio Independent School District v. Rodriguez* is completely

211. Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 112-25 (1991).

212. *Rodriguez*, 411 U.S. at 55-59. This rationale would soon become a defining feature of the Court's post-racial constitutionalism. See, e.g., *Washington v. Davis*, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent white.").

213. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 43; see *id.* at 43 n.54.

214. *Rodriguez*, 411 U.S. at 126 (Marshall, J., dissenting) ("[I]t is apparent that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.").

215. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 44-45.

216. *Rodriguez*, 411 U.S. at 130 (Marshall, J., dissenting).

217. *Id.* at 116.

218. *Id.* at 133.

devoid of a structural frame—there is no critical assessment of structural inequality, the continuing effects of past discrimination, and how state power reifies subordination. The Court focuses on local control rather than the interlocking features of local, state, and federal funding policies. The same is true in *Milliken v. Bradley*, where the Court emphasizes local control without connecting its analysis to state power.

San Antonio Independent School District v. Rodriguez advances post-racial federalism by promoting neutrality and formalistic equality. It presumptively affirms a local and state funding system with glaring funding disparities and disaggregates systemic features so that the analysis emphasizes neutral market functions rather than fundamental constitutional rights. *Milliken v. Bradley* expands these propositions and insulates the outlying suburbs of Detroit from school desegregation.

In tandem, *San Antonio* and *Milliken* erect impenetrable school district boundary lines that ultimately doom school integration efforts. *San Antonio v. Rodriguez* insulates an inequitable school financing tax structure from constitutional challenge, and *Milliken* finishes the job by demanding particularized proof of discriminatory state action thereby constitutionalizing formalistic equality. Neutrality is a normative principle of [post-racial federalism].²¹⁹

Both decisions focus on local control rather than the interlocking features of local, state, and federal power.

D. *Milliken v. Bradley: Insulating the Suburbs*

The *de jure–de facto* distinction, which was crafted by the Court to distinguish formal state-mandated dual school systems in the South from systemic (societal) discrimination in the North, conceptualizes state power and whether its exercise can be limited by the anti-subordination principle. Clearly identifiable discrimination (*de jure*) is remediable while discrimination in fact (*de facto*) without evidence of identifiable discriminatory state action is irremediable.

Milliken is a foundational doctrinal development in the Court's school jurisprudence—it sits squarely in the middle of the Court's recognition of structuralism in *Keyes v. School District No. 1* (1973)²²⁰ and *Columbus v. Penick* (1979).²²¹ Nevertheless, *Milliken* portends the demise of the anti-subordination principle as it forecasts the rigidity of the intent requirement in *Washington v. Davis* (1976) and it confines remediable segregation to that which is clearly identifiable. *Milliken* does not reference the *Keyes–Penick–Dayton* presumption of systemwide segregation.²²²

219. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 45.

220. 413 U.S. 189, 208 (1973) (The Court acknowledges systemwide segregation in Denver and concluding that “a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes . . . a prima facie case of unlawful segregative design on the part of school authorities . . .”).

221. 443 U.S. 449, 466–67 (1979) (“School board policies of systemwide application necessarily have systemwide impact.” (quoting *Penick v. Columbus Bd. of Educ.*, 583 F.2d 787, 814 (6th Cir. 1978))); *see also* *Dayton v. Brinkman* (*Dayton II*), 443 U.S. 526, 535–41 (1979) (chronicling systemwide program of segregation in Dayton schools with systemwide impact).

222. MICHELLE ADAMS, THE CONTAINMENT DETROIT, THE SUPREME COURT, AND THE BATTLE FOR RACIAL JUSTICE IN THE NORTH 354–55 (2025) (Adams notes that *Milliken* “was an anti-racial integration

Thus, *Milliken* is the embodiment of *Brown*'s duality. It splits the formal constitutional mandate in *Brown I* and neutralizes the substance of *Brown II*'s affirmative command to dismantle dual school systems. Post-racial federalism unpacks this duality because *Brown* is about state power, the Court's conception of its scope is based on how decision-making power should be allocated. While the Court initially embraced robust federal intervention in achieving the promise of *Brown*, and enforcing the anti-subordination principle, *Milliken* spelled the end of this constitutional endeavor. Moving forward, post-racial constitutionalism determines the content of any remedial approach, and post-racial federalism expands state power to determine the limited scope of any school integration remedy.²²³ Not only does school desegregation stop at the school district boundary line, so too does the scope of federal power. *Milliken* is a formalistic iteration of post-racial federalism.

1. Neutrality and Interdistrict Remedies

It is noteworthy that the Court's school decisions are articulations of state power. The *de jure-de facto* distinction is a doctrinal formalism that explains whether state power expands or contracts. State power contracts in the rare instance that there is *de jure* (by law) discrimination. Conversely, where discrimination is merely societal in nature, *de facto* (in fact) discrimination is irremediable and local control and state power expand. In the Northern school desegregation jurisprudence, the *de jure-de facto* distinction narrowly defines discrimination (and segregation) so that only clearly identifiable discrimination is remediable, not the effects of the urban-suburban dynamic and segregated housing patterns. When it did face this reality, in *Milliken*, the Court chose to ignore structural inequality and systemic racism. First, the Court disregarded the conclusions of the district and appellate courts, finding a close connection between local and state power and segregated school systems (the systemwide segregation that the Court acknowledged in *Keyes*).²²⁴ Next, the Court adopted a test that expanded local and state power by insulating it from judicial review. Finally, the Court constitutionalized neutrality by invoking a discriminatory intent requirement that expanded state power even further.

decision," and posits what society would look like if *Milliken* had come to a different result: "After *Keyes*, proving that a school district, North or South, had violated the Constitution was no longer a significant stumbling block."). *Keyes* rejected the formalism of the *de jure-de facto* distinction. It also recognized that because Blacks "were largely concentrated in urban areas, with whites safely ensconced in the suburban realm," substantive integration and the eradication of dual school systems was only achievable through an interdistrict remedial approach because "intracity desegregation orders wouldn't produce meaningful desegregation." *Id.* at 354 (emphasis added).

223. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 48 n.85 (discussing *Missouri v. Jenkins*, 515 U.S. 70 (1995), *Freeman v. Pitts*, 503 U.S. 467 (1992), *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991), and *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), as examples of how the Court expanded state power through ostensibly neutral doctrines such as: remediation being limited to identifiable discrimination; presumptive good faith compliance by local school boards; temporal time limits for federal supervision; and the proposition that school desegregation orders did not have to be adjusted in perpetuity to achieve racial balance). These decisions lead directly to *Parents Involved*. See *infra* Section I.E.

224. See *supra* notes 219-221 and accompanying text.

The Court's conceptualization of interdistrict discrimination in *Milliken v. Bradley* is a further articulation of post-racial federalism. State power is disaggregated so that the focus is on the *locality* (in Detroit) of discrimination rather than the structural dynamics of local and state power in perpetuating school segregation (in Detroit and its outlying suburbs). The Court begins by rejecting the lower court holdings finding systemwide discrimination.

Finding that an Act of the Legislature of Michigan thwarted the implementation of a school desegregation plan (the April 7, 1970 Plan),²²⁵ the Sixth Circuit Court of Appeals found a dual school system in violation of *Brown*.²²⁶ Because there was a direct causal connection between the segregative actions of the Detroit School Board, as an instrumentality of the state, and the State of Michigan, "[a]n interdistrict remedy was . . . 'within the equity powers of the District Court.'"²²⁷ This is an affirmation of the principles enunciated in *Brown II*, *Green*, and *Swann* (rejecting the ostensible neutrality of freedom of choice plans and affirming broad equitable enforcement power), and a recognition of systemwide segregation as the Court had previously acknowledged in *Keyes*.

Positing a rigid and formalistic interpretation of *Brown* and its progeny, Chief Justice Burger's opinion²²⁸ for the Court tramples federal enforcement power in the name of local control. Rejecting the remedial viability of an interdistrict remedy, he concludes that such a remedy violates equitable principles and "can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent."²²⁹ Of course, there is no reference to *Swann* in this passage.

Milliken is the embodiment of post-racial constitutionalism (neutrality) and post-racial federalism (insulation of expanding power from constitutional scrutiny). The

225. *Milliken v. Bradley*, 418 U.S. 717, 723, 725 (1974) (stating that the "District Court found that the Detroit Board of Education created and maintained optional attendance zones within Detroit neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. These zones . . . had the 'natural, probable, foreseeable and actual effect' of allowing white pupils to escape identifiably Negro schools." (quoting *Bradley v. Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971) (the district court's decision below), *aff'd*, 484 F.2d (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974))). The district court explicitly focused on the interconnected nature of state power: "The District Court also held that the acts of the Detroit Board of Education, as a subordinate entity of the State, were attributable to the State of Michigan, thus creating a vicarious liability on the part of the State." *Id.* at 727.

226. *Id.* at 734-35 (noting that the Sixth Circuit below held that the Detroit Board and the state violated the Constitution by perpetuating segregated schools and held that "the acts of racial discrimination . . . 'are causally related to the substantial amount of segregation found in the Detroit school system'" (quoting *Bradley v. Milliken*, 484 F.2d 215, 241 (6th Cir. 1973) (the circuit court's decision below), *aff'g*, 338 F. Supp. 582 (E.D. Mich. 1971), *rev'd*, 418 U.S. 717 (1974))).

227. *Id.* at 736 (quoting *Bradley*, 484 F.2d at 250 (the circuit court's decision below)).

228. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 45-49 (discussing the Burger Court's transitional equality and analyzing *Milliken* as an example of Rhetorical Neutrality: (i) the Court deploys a historical myth dismissing the continuing effects of past discrimination; (ii) it defines discrimination so narrowly that it does not exist beyond the schools district line of the Detroit inner city disconnected from state action (the definitional myth); and (iii) rhetorically, this drastic rewriting of *Brown*'s mandate is rationalized by preserving local control and discrediting federal enforcement power as unduly intrusive and unnecessary to make racial proportionality adjustments year after year (the rhetorical myth)).

229. *Milliken*, 418 U.S. at 747.

tenor of the opinion was dismissive and cursory, almost as if the Court decided that discrimination did not exist to any extent. And if it did, it was in Detroit, not the outlying innocent white suburbs. Dismissing the district court's six-volume record of substantial findings as "specific incidental findings"²³⁰ proffered to identify an inter-district violation warranting interdistrict relief, the Court concluded that there was "no proof of segregation practiced by any of the 85 suburban school districts surrounding Detroit."²³¹ Disaggregating state power from the Detroit School Board's decisions, the Court noted that "the nature of the violation determines the scope of the remedy,"²³² and that an interdistrict remedy was not constitutionally required because there was no interdistrict violation.²³³

In fact, the Court acknowledged that "during the late 1950's, Carver School District, a predominantly Negro suburban district, contracted to have Negro high school students sent to a predominantly Negro school in Detroit," because the white suburban districts refused to accept Carver students.²³⁴ The Court's evasiveness here is breathtaking—it references that there is a "segregative effect" ("with or without the State's consent") and that this "isolated instance affecting two of the school districts would not justify the broad metropolitan-wide remedy contemplated . . . since it embraced potentially 52 districts having no responsibility for the arrangement and involved 503,000 pupils in addition to Detroit's 276,000 students."²³⁵ Thus, "absent an interdistrict violation, there is no basis for an interdistrict remedy."²³⁶

Milliken v. Bradley illustrates how Rhetorical Neutrality²³⁷ and post-racial federalism coalesce to expand state power. The Court ignores historical context, eliminating analysis of the continuing segregative effects of excluding students from Carver School District (the historical myth deemphasizes systemic racism and structural inequality). Discrimination is defined so narrowly that it does not exist or, as in *Milliken v. Bradley*, it is simply an "isolated instance effecting two . . . school districts."²³⁸ The definitional myth posits that, because there is no clearly identifiable discriminatory action connecting Detroit to its outlying suburbs, an interdistrict remedy is too broad in scope. The rhetorical myth then provides legitimizing rhetoric for the Court's approval of an urban-suburban color line: "neutral legislation" established the boundaries of the school districts and there was no evidence of intentional segregation.²³⁹

Under this reading, the anti-subordination principle is cast aside, and *Brown* is reduced to a constitutional mandate prohibiting "relief balancing the racial composition of [Detroit's] schools with those of the surrounding districts."²⁴⁰ In the absence

230. *Id.* at 748.

231. *Id.*

232. *Id.* at 750 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

233. *Id.* at 748-52.

234. *Id.* at 749-50.

235. *Id.* at 750.

236. *Id.* at 752.

237. See *supra* note 227 and accompanying text.

238. *Milliken*, 418 U.S. at 750.

239. *Id.* at 748-49.

240. *Id.* at 749.

of federal enforcement power, and the Court's insulation of state and local power from judicial review, the school-district boundary lines become not only barriers to integration but expressions of state power.

Another permutation of post-racial federalism appears in how the Court sets the boundaries of state power by neutralizing all the structural factors that reify segregation in Detroit and the outlying suburbs. Effectively, the Court draws a jurisdictional circle around urban Detroit and insulates the outlying suburbs. This is a determination about the scope of local and state power: once discrimination is framed as limited and merely incidental, federal enforcement power becomes unduly intrusive here. Paradoxically, the Court's finding of discrimination in Detroit ultimately expands state power by narrowing the remedial reach of federal authority.

Disaggregating local and state power advances the Court's post-racial federalism by (i) rejecting the cross-district effects of state and local policies perpetuating dual school systems;²⁴¹ and (ii) diminishing the significance of annexation, including how Black students were systematically excluded from schools in the white suburbs. The Court reasoned that "the nature of the violation determines the scope of the remedy,"²⁴² and, because there was no identifiable state action excluding Blacks from suburban schools, annexation had no causal effect that was remediable.²⁴³ This reasoning further advances the Court's post-racial federalism by (iii) dismissing the segregative effect of state legislation (Act 48) which rescinded Detroit's voluntary integration plan, by noting that it "affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tricounty area,"²⁴⁴ (iv) presuming neutrality in school-site selection and concluding that no proof of discrimination existed outside of Detroit;²⁴⁵ and (v) negating the constitutional significance of unequal education expenditures between the suburbs and Detroit—in accord with the logic of *San Antonio v. Rodriguez*.²⁴⁶

Milliken v. Bradley thus becomes a paradigmatic model of post-racial federalism. The Court shifts state power according to its own societal views; or, more directly, its institutional aversion to racial reform, effectively advancing white supremacy as a doctrinal tenet.²⁴⁷ Here, school desegregation has gone far enough. In the North, where *de facto* segregation is severed from state action, the Court protects suburban autonomy by containing Black students within the metropolitan core of Detroit.²⁴⁸ The suburbs are off limits—*Brown's* remedial imperative is set aside. This post-racial jurisprudential distortion is achieved because the Court abandons the doctrinal

241. *Id.* at 748-49.

242. *Id.* at 750 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

243. *Id.* at 749-50.

244. *Id.* at 750.

245. *Id.* at 750-51.

246. *Id.* at 751-52.

247. Powell, *Neutral Principles*, *supra* note 44, at 25-28 (discussing localized federalism and formalistic equality, and concluding that "the Court nevertheless goes out of its way to protect white interests and privilege").

248. ADAMS, *supra* note 221, at 354-55.

mandate of *Green*, *Swann*, and *Keyes* and instead advances post-racial federalism through its disaggregation analysis. The Court concludes that there is no proof of a causal connection between discrimination in the core city of Detroit, state action, and the outlying suburbs.²⁴⁹ Reaffirming the anti-subordination principle as a constitutional prohibition of state mandated segregation, Justice Marshall's dissent emphasizes the close relationship between local and state power as a tool of subordination and caste creation.

2. Justice Marshall's Dissent: Local and State Power²⁵⁰

It must have been wholly disheartening for Justice Marshall to look back over twenty years of work as an advocate and jurist only to see the Court take "a giant step backwards."²⁵¹ From the outset, Justice Marshall rejects the premise that there is no connection between state and local power in the establishment and maintenance of segregated schools:

Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion.²⁵²

Justice Marshall uncovers the contradictory tension in post-racial federalism—the majority acknowledges local–state power in maintaining a segregated school system while denying that there is any local–state duty to eradicate the dual school system. Local and state power, he argues, are intertwined and cannot be disaggregated under the Court's post-racial allocation of state power.²⁵³ He therefore rejects the state power basis of post-racial federalism: "I perceive no basis either in law or in the practicalities of the situation justifying the State's interposition of school district boundaries as absolute barriers to the implementation of an effective desegregation remedy."²⁵⁴

Justice Marshall identifies the statewide, systemic discrimination that connects Michigan and Detroit. That is, "the State of Michigan, through its instrumentality, the Detroit Board of Education, engaged in widespread purposeful acts of racial segregation in the Detroit School District."²⁵⁵ Rejecting the majority's contrived expansion of state power and local autonomy, Justice Marshall reclaims *Keyes* as a limitation, under the Fourteenth Amendment, on state power and a reaffirmation of the anti-subordination principle.²⁵⁶ Indeed, the scope of the violation determines the

249. *Milliken*, 418 U.S. at 748-52.

250. See Powell, *Neutral Principles*, *supra* note 44, at 35-42 (discussing how local and state power is aggregated to advance subordination).

251. *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

252. *Id.*

253. *Id.* at 792 ("[T]he State was responsible for the many intentional acts of segregation committed by the Detroit Board of Education, an agency of the State.").

254. *Id.* at 783.

255. *Id.* at 784-85.

256. *Id.* at 785-86.

scope of the remedy, but Justice Marshall finds a systemwide violation rather than one isolated in Detroit.²⁵⁷

There is no constitutional significance to the formalistic dividing line between *de jure* segregation in the South and *de facto* segregation in the North.²⁵⁸ While there may not have been a statutory dual school system in Detroit, Justice Marshall references the structural and systemic elements of segregation.²⁵⁹ There was systemic intentional discrimination evinced in the actions of the Detroit Board of Education and the State of Michigan which included the following: attendance zones that perpetuated segregation, optional attendance policies that preserved dual school systems premised on the false neutrality of choice, transportation plans that concentrated populations at Black schools in the urban center of Detroit, grade structure and feeder-school patterns that reified segregated neighborhoods, and new school construction that promoted one-race schools.²⁶⁰ State power was deployed to “intentionally confine[] [Black students] to an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools.”²⁶¹ As Justice Marshall presciently observed, this vestige of systemic racism is present today in a predominantly Black Detroit school system with depleted resources and low achieving schools.²⁶²

By rejecting post-racial federalism—the expansion of local and state power to maintain inequality rationalized by neutrality—Justice Marshall conceptualizes the interrelationship between state and local power. State power is centralized, aggregated, and integrated. It is the actions of the State Board of Education, State Superintendent, and Detroit Board of Education that, when taken together,²⁶³ establish a systemwide pattern of segregation requiring an interdistrict remedy.²⁶⁴

Post-racial federalism affirms local control as a guiding principle in determining the scope of state power; Justice Marshall rejects this as a myth.²⁶⁵ Specifically, he critiques the local autonomy rationale as a way of shifting power and insulating the state from judicial review, which leads to the Court’s circumscribed view of remedy.²⁶⁶

257. *Id.* at 789-90.

258. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 224 (1973) (Powell, J., concurring in part and dissenting in part) (Justice Powell rejects the *de jure/de facto* distinction, and states that “I would not, however, perpetuate the *de jure/de facto* distinction I would hold, quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a *prima facie* case that the duly constituted public authorities [school board] are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.” (italics in original)).

259. *Milliken*, 418 U.S. at 786-814 (Marshall, J., dissenting).

260. *Id.* at 785, 790-98.

261. *Id.* at 785.

262. Robyn Vincent, *Still Segregated and Unequal: The Reverberations of Milliken v. Bradley in Detroit 50 Years Later*, CHALKBEAT DETROIT (July 29, 2024 at 11:02 ET), <https://www.chalkbeat.org/detroit/2024/07/29/milliken-v-bradley-affects-segregation-inequity-in-education-50-years-later/> [<https://perma.cc/RP29-Z376>]; Powell, *Neutral Principles*, *supra* note 44, at 22-23.

263. *Milliken*, 418 U.S. at 785-87 (Marshall, J., dissenting). In the state school system, there was “relatively little local control and a large degree of centralized state regulation.” *Id.* at 786. State and local action was “intertwined” in the maintenance of a segregated school system. *Id.* at 790-91.

264. *Id.* at 789-90, 809-814.

265. *Id.* at 795-97.

266. *Id.* at 741-44.

E. Post-Racial Federalism and the Allocation of State Power

The core of post-racial federalism is in the power shifting dynamic advanced by the Court. In *Milliken*, school desegregation is halted at the district line because the Court's conception of a constitutional violation is shaped by its narrow view of federal enforcement power. Local control serves as a rationale to displace federal power, neutralize any critical analysis of the connection between state power and auxiliary local entities, and affirm post-racialism by cabining the school desegregation remedy to the inner city of Detroit. An *intracity* remedy perpetuates segregated schools so that white suburban schools bear no burden.

This allocation of state power insulates the state from scrutiny by advancing the myth of local autonomy to preserve school district boundary lines and places the all-white suburban schools out of reach. But the suburbs are not out of reach, under Justice Marshall's conception, as the boundary lines are illusory—Detroit, and its surrounding suburbs, are a single community and the “tri-county area”²⁶⁷ must be integrated with an inclusive interdistrict remedy.²⁶⁸

Because a systemic state function²⁶⁹ created the racial makeup of the inner city and the suburbs, there must be an interdistrict remedy. Thus, “the State should no more be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children than it could hide behind its political subdivisions to avoid its obligations to its voters.”²⁷⁰

Justice Marshall rejected the formalism of post-racial federalism, arguing that state power cannot be insulated from judicial review in the name of local and state autonomy, nor can the exercise of such power be rationalized by the majority's narrow compartmentalization of local power disconnected from state power. In the Court's school decisions, post-racial federalism is comprised of the following doctrinal propositions:

1. Federal enforcement power, which was essential to the mandate of *Brown* is circumscribed by the Court's post-racial commitment to local control and autonomy in the nation's school systems;²⁷¹
2. Local and state power are privileged and expanded so that the anti-subordination principle is erased and *Brown*'s remedial mandate is undermined;²⁷²

267. *Id.* at 804.

268. *Id.* at 807.

269. *Id.* at 793-94 (noting that school districts are “auxiliaries of the State,” and concluding that “[v]esting responsibility with the State of Michigan for Detroit's segregated schools is particularly appropriate as Michigan, unlike some other states, operates a single statewide system of education rather than several separate and independent local school systems” (quoting Att'y Gen. *ex rel.* Kies v. Lowrey, 199 U.S. 233, 240 (1905))).

270. *Id.* at 808; Powell, *Neutral Principles*, *supra* note 44, at 39-41.

271. See *supra* notes 16 & 132 and accompanying text.

272. Janel A. George, *Deny, Defund, and Divest: The Law and American Education*, 112 GEO. L.J. 509, 511-15 (2024) (focusing on state and local laws that subordinate through denial (of access to quality education), defunding of Black schools (to funnel money into white schools), and diversion (moving Black educators out of the public school system)). The Court's post-racial federalism jurisprudence animates all of these post-modern efforts to thwart *Brown* and preserve the color line.

3. Structural inequality and systemic racism are ignored and neutral rationales are posited to explain inequality as unrelated to state power;²⁷³
4. Formalistic equality displaces the constitutional imperative of eradicating dual school systems;²⁷⁴ and
5. Post-racial federalism's conception of the scope of state power is directly related to post-racial constitutionalism: state power *expands* when it can be deployed to advance colorblind neutrality (or the transcendence of race); and conversely, state power *contracts* when it is viewed as being unconstitutionally race-conscious. Post-racial inversion is essential to how state power is ordered in post-racial federalism.²⁷⁵

Thus, *San Antonio v. Rodriguez* and *Milliken v. Bradley* lead to *Parents Involved*'s post-racial edict and *SFFA*'s decimation of the anti-subordination principle.

F. *Parents Involved: School Choice and State Power*

Doctrinally, the bright line between secondary and post-secondary school jurisprudence was the diversity principle²⁷⁶—there was no applicable diversity principle in the secondary school cases (*Brown* and its progeny) but diversity was a viable doctrinal proposition in the post-secondary school decisions from 1978 to 2023.²⁷⁷ *Parents Involved* affirmed this principle and left the diversity principle intact in post-secondary education formally, but there were ominous signs that the two doctrinal regimes would be unified by post-racialism now that there is no diversity interest.²⁷⁸

In *Parents Involved*, the Court held that the Seattle and Louisville school student-assignment plans unconstitutionally used race as a predominant factor. Writing for the plurality, Chief Justice Roberts famously concluded that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁷⁹ The *Parents Involved* decision is much more than a school-assignment case—it is a jurisprudential marker, a post-racial edict that anti-discrimination law and constitutional principles would be reordered in the name of post-racial constitutionalism. By

273. Powell, *Neutral Principles*, *supra* note 44, at 30-33.

274. *Id.* at 28-30.

275. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 219-20 (discussing how state power expands in the absence of federal enforcement power and conceptualizing the new states' rights federalism as an expansion of state power insulated from judicial review). Here, I mean to suggest that state power is turned “on” or “off” by the Court depending on whether a race-conscious remedy is implicated—state power expands to advance post-racial federalism and post-racial constitutionalism, and it contracts when the political community voluntarily chooses to advance diversity (or any other race-conscious remedial approach).

276. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-18 (1978) (holding that educational diversity is underpinned by First Amendment values and that race, as one of many factors, may be considered in evaluating applicants in the admissions process). *Bakke* has been overruled by *SFFA*. See *infra* Section I.G.

277. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (noting that the diversity interest is inapplicable in the secondary school context but applicable in the context of higher education).

278. *Students for Fair Admissions, Inc. v. President of Harvard Coll. (SFFA)*, 600 U.S. 181, 207 (2023) (rejecting diversity as a compelling interest and concluding that race-based governmental action is only permissible in remedying clearly identifiable instances of past discrimination and “avoiding imminent and serious risks to human safety in prisons”).

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

collapsing the distinction between state power used to subordinate and remediate historically oppressed minorities, and the political community (and local school boards) embracing the diversity principle, the Court claims authority to expand or contract state power in service of post-racial constitutionalism.

Post-racial federalism explains the shift from the broad equitable and remedial federal enforcement power endorsed in *Brown II*, *Green*, and *Swann* to the strict constriction of that power in *Milliken* and *Parents Involved*. There is something even more stark here—*Milliken* insulates local and state power from judicial review (so that the state determines the scope of race-conscious remedial measures).²⁸⁰ Conversely, in *Parents Involved*, the Court intervenes to negate local autonomy rather than insulating state power—because the diversity principle disturbs the settled expectations of white parents to free school choice unencumbered by the burden of race.²⁸¹ *Parents Involved* (where state power contracts) and *Milliken* (where state power expands) demonstrate how power is allocated to reify post-racial federalism and the subordination of Blacks and other oppressed minorities. In both decisions, white interests—the preservation of white suburbs in *Milliken* and white school choice in *Parents Involved*—are foregrounded, and how state power is exercised is directly related to the impact on white expectation interests.

Because there was no state-mandated discrimination in Seattle (the formalistic *de facto* distinction) and the consent decree had been lifted in Louisville²⁸² (the formalistic *de jure* distinction), the Court determined that there was no need to focus on race.²⁸³ Any reference to race, even as one of many factors, spells constitutional doom. Thus, *Parents Involved* anticipates the inevitable result in *SFFA*.²⁸⁴

1. Chief Justice Roberts's Post-Racial Edict

Post-racial federalism is evident in both *Parents Involved* and *SFFA* because there is the real question of whether there is a cognizable injury. In particular, the reverse discrimination suits are prime examples of how the Court privileges white claimants and erases the anti-subordination principle by rejecting the political community's commitment to diversity mandated by the Court's own precedents.²⁸⁵ Justiciability (standing) is colorized and shapes the scope of state power.²⁸⁶ Here, the positive

280. Powell, *Schools, Rhetorical Neutrality*, *supra* note 48, at 406-12 (discussing state power, neutrality, and discriminatory intent in negating substantive integration).

281. Spann, *Disintegration*, *supra* note 26, at 597-608 (discussing the Roberts Court's racism in protecting white interests over those of subordinated minorities).

282. *Parents Involved*, 551 U.S. at 715-16 ("Jefferson County [in Louisville, Kentucky] operated under [a consent] decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating '[t]o the greatest extent practicable' the vestiges of its prior policy of segregation." (last alteration in original) (quoting *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000))).

283. *Id.* at 747-48.

284. Powell, *Post-Racial Deception*, *supra* note 6, at 11 ("[T]he Roberts Court's defining jurisprudential mission is to constitutionalize post-racialism . . .").

285. *Id.* at 16-18.

286. Spann, *Disintegration*, *supra* note 26, at 606 ("[T]he Supreme Court appears to apply the law of justiciability in ways that are racially correlated. . . . In a very real sense, the law of standing is different for white

exercise of state power (or the local decision-making autonomy of the school board and political community) is a violation of the Court's post-racial constitutionalism. As Girardeau Spann observes "the Supreme Court has taken it upon itself to protect the white majority from minority advances even when the white majority *itself* has authorized those advances in the form of affirmative action or integration plans."²⁸⁷ As discussed above, this predilection for the protection of whiteness shapes the scope of state power. That is the essence of post-racial federalism.

Chief Justice Roberts's post-racial edict—"[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"²⁸⁸—reinterprets *Brown* as a neutral school assignment case requiring "admission to the public schools on a nonracial basis."²⁸⁹ This is also a pronouncement about the permissible scope of local autonomy—any race-conscious admissions process, even with race-neutral elements, will be considered constitutionally invalid²⁹⁰ and—local power will be limited exclusively to remediate clearly identifiable discrimination because diversity is not a compelling interest in the secondary school context.²⁹¹ Resegregation is permissible to protect white expectation interests.²⁹² Local autonomy to advance the anti-subordination principle and substantive inclusion is limited by the post-racial edict and post-racial federalism.

Here, post-racial federalism negates a voluntary integration plan adopted by the political community to advance the compelling interest of substantive inclusion mandated by *Brown*, and *Parents Involved* does so by endorsing these doctrinal propositions: (i) the diversity interest is inapplicable in the secondary school context;²⁹³ (ii) the *de jure-de facto* distinction marks the scope of permissible state power in adopting race-conscious remedial measures and initiatives;²⁹⁴ (iii) the anti-subordination principle is not an anti-caste principle but a colorblind anti-differentiation

and minority plaintiffs."); Powell, *Post-Racial Deception*, *supra* note 6, at 10-11, 17-21 (discussing the Roberts Court's post-racial deception—an elastic standing requirement creating a reverse discrimination claim to redress harms to whites and Asian Americans as model minorities while ignoring the present day effects of past discrimination and its impact on Blacks).

287. Spann, *Disintegration*, *supra* note 26, at 607 (emphasis in original); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 170 (1980) (making an analogous argument rooted in neutral proceduralism but noting that affirmative action is legitimate when the white majority chooses to burden itself).

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

289. *Id.* (quoting *Brown II*, 349 U.S. 294, 300-01 (1955)).

290. In his concurrence, Justice Kennedy notes that this goes too far. *Id.* at 782-83 (Kennedy, J., concurring) (noting that the majority's approach is "inconsistent in . . . its implications with the history, meaning, and reach of the Equal Protection Clause").

291. *Id.* at 725 (stating that higher education was a unique context where the diversity principle was applicable but concluding that diversity was inapplicable in the elementary and secondary schools context).

292. Spann, *Disintegration*, *supra* note 26, at 600 (concluding that the Court promotes resegregation by giving "a seat in an oversubscribed school to a white student rather than a minority student," and positing that "[t]he Resegregation case [*Parents Involved*] . . . 'overruled' *Brown*'s prohibition on racial oppression[] by sacrificing the integration interest of minority school children in order to advance what turns out to be simply the segregationist interest of white parents").

293. *Parents Involved*, 551 U.S. at 724-25 (stating that elementary and secondary school cases are not governed by *Grutter*).

294. *Id.* at 720-21; see *id.* at 793-96 (Kennedy, J., concurring) (explaining the distinction between *de jure* and *de facto* segregation and stating that legislatures "have broad power" to remedy *de jure* segregation).

principle;²⁹⁵ and (iv) *Brown* is not a constitutional mandate to integrate schools—it is a formalism requiring race-neutral assignments notwithstanding the inevitability of resegregation (mere racial imbalance is not constitutionally cognizable).²⁹⁶

2. Justice Thomas's Concurrence: Formalistic Neutrality

Justice Thomas embraces post-racial federalism: “the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable.”²⁹⁷ This means that state power contracts when it is exercised to advance a race-conscious remedy in pursuit of substantive equality: “What was wrong in 1954 cannot be right today. Whatever else the Court’s rejection of the segregationists’ arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession.”²⁹⁸ This glib statement says something about post-racial federalism—state power is conceptualized by the Court in post-racial terms and there is no distinction between state-mandated caste-based subordination and state-endorsed positive remedial efforts to advance integration. This disconcerting equivalence is due to the Court’s allegiance to white constituencies. In other words, when the exercise of state power conflicts with the maintenance of white supremacy, the Court will make an appropriate power adjustment aligned with post-racial federalism.

Of course, the rank symmetry of Justice Thomas’s contrived originalism conflating caste-based subordination and positive remedial efforts by the state distorts reality doctrinally and practically. *Brown* was not a school choice decision premised on neutrality and white school choice assignment prerogatives; rather, it was the modern constitutional articulation of the anti-subordination principle.²⁹⁹ Yet Justice Thomas denies the existence of the anti-subordination principle embodied in the Fourteenth Amendment—he begins this erasure in *Parents Involved* and completes it in *SFFA*.³⁰⁰

In a consistent theme in Justice Thomas’s race jurisprudence, he disavows the constitutional core of the Fourteenth Amendment concluding that the anti-subordination principle is a “faddish” social theory which requires racial results³⁰¹ and instead foregrounds liberal individualism as a touchstone constitutional principle. In other words, there is nothing to remedy because the Seattle school system never imposed a state-mandated color line and Louisville’s consent decree was lifted in 2000,³⁰² and while there may be racial imbalance in the school systems this was the direct result of voluntary individual choice,³⁰³ not state action.³⁰⁴

295. Powell, *Post-Racial Deception*, *supra* note 6, at 26; SUNSTEIN, *supra* note 18, at 340.

296. Powell, *Post-Racial Deception*, *supra* note 6, at 29-31.

297. *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring).

298. *Id.* at 778-79.

299. Daniel P. Tokagi, *Desegregation, Discrimination, and Democracy: Parents Involved’s Disregard for Process*, 69 OHIO ST. L.J. 847, 859-60 (2008).

300. See *infra* Section I.G.2.

301. *Parents Involved*, 551 U.S. at 780-82 (Thomas, J., concurring).

302. *Id.* at 753-54.

303. *Id.* at 750.

304. *Id.* at 749-50.

3. Justice Breyer's Dissent: Democracy and the Anti-Subordination Principle

Justice Breyer emphatically rejects Justice Thomas's formalistic neutrality by reclaiming the anti-subordination principle embodied in the Fourteenth Amendment. Justice Breyer rejects post-racial federalism and posits that state power is not neutral, because it can be exercised to advance the eradication of caste. This means that race-conscious remedial measures are constitutionally permissible to advance the anti-subordination principle.³⁰⁵ Locating the democracy interest at the heart of state power—the anti-subordination principle is a constitutional prohibition of structural exclusion and stigmatization based on race—Justice Breyer's comprehensive dissent identifies three compelling interests inherent in *Brown*: (i) a remedial element (“an interest in setting right the consequences of prior conditions of segregation”);³⁰⁶ (ii) an educational element (“in overcoming the adverse educational effects produced by and associated with highly segregated schools”);³⁰⁷ and (iii) a democratic element (“an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live”).³⁰⁸

Rejecting post-racial federalism and affirming local autonomy, Justice Breyer views the expansion of state power as an affirmation of the mandate of *Brown*, the anti-subordination principle, and the legitimacy of local decision-making to advance the diversity principle: “the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.”³⁰⁹ Because of its conception of state power, and how it must be circumscribed whenever it advances transformative racial progress, *Parents Involved* is an anti-democratic decision that displaces the voluntary choice of the political community (to embrace substantive integration in the schools) with its own conception of post-racialism.³¹⁰ School choice erases the anti-subordination principle, and the Court's post-racial federalism legitimizes this as a neutral result buttressed by race-neutral school choice.³¹¹ Thus, the Court is willing to disrupt the legitimate choice of the polity in order to reject diversity as contrary to post-racial constitutionalism. While *Parents Involved* leaves diversity intact, it is hanging on a thin doctrinal thread by the time the Court reaches its decision in *SFFA*.³¹²

305. *Id.* at 806 (Breyer, J., dissenting) (noting that race-conscious desegregation plans are constitutionally permissible, and that such plans serve a compelling interest and are narrowly tailored; that the *de jure-de facto* distinction is meaningless; and the Constitution “cannot plausibly be interpreted to rule out categorically all local efforts to use means that are ‘conscious’ of the race of individuals”); *accord* Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 600 U.S. 181, 318 (2023) (Sotomayor, J., dissenting).

306. *See Parents Involved*, 551 U.S. at 838 (Breyer, J., dissenting).

307. *Id.* at 839.

308. *Id.* at 840.

309. *Id.* at 845.

310. *Id.* at 863.

311. Spann, *Disintegration*, *supra* note 26, at 603 (“The racially oppressive elevation of anti-integration white interests over the pro-integration interests of racial minorities—and all of the ‘inherently unequal’ racial stigmatization that such an elevation conveys—violates the core anti-subordination principle of *Brown*.”).

312. *Parents Involved*, 551 U.S. at 865-66 (Breyer, J., dissenting).

G. SFFA: The Demise of the Anti-Subordination Principle

Transplanting his colorblind edict in *Parents Involved* to *SFFA*, Chief Justice Roberts constitutionalizes post-racial federalism—the Fourteenth Amendment is a prohibition on any race-conscious remedial efforts, and state power cannot be used to advance diversity. Likewise, private universities cannot include race as a factor in their decision-making.³¹³ The anti-subordination principle is absent from the majority opinion.

1. Chief Justice Roberts's Post-Racial Constitutional Revisionism

Holding that the Harvard and University of North Carolina³¹⁴ admissions programs unconstitutionally considered race, thereby discriminating against white and Asian American applicants,³¹⁵ Chief Justice Roberts offers another post-racial pronouncement: “Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause . . . applies ‘without regard to any differences of race, of color, or of nationality’—it is ‘universal in [its] application.’”³¹⁶ This colorblind universality reads the anti-subordination principle out of the Fourteenth Amendment.

In essence, “race no longer matters and the elimination of discrimination against white people (reverse discrimination) is the defining purpose of the Fourteenth Amendment. This is the essence of formalistic equality.”³¹⁷ Indeed, Chief Justice Roberts interprets the Fourteenth Amendment through a formalist lens, effectively rewriting it. He “redrafts the history of the Reconstruction Amendments as inherently post-racial; reimagines the constitutional mandate of *Brown v. Board of Education*; excises diversity as a compelling interest; and rejects the settled precedent of *Bakke*, *Grutter*, and *Fisher II*.”³¹⁸

Post-racial federalism reorients the decision-making powers of private and public institutions. The traditional judicial deference espoused in decisions from *Bakke* to *Fisher II*, where the Court acknowledged diversity as a component of the First Amendment,³¹⁹ is cast aside³²⁰—the Court will determine the scope and content of institutional autonomy.³²¹ This unifies the post-secondary school cases with the school desegregation decisions—state (and institutional) power contracts when the Court perceives any race-conscious remedy as impacting white claims to access.

313. *Students for Fair Admissions, Inc. v. President of Harvard Coll. (SFFA)*, 600 U.S. 181, 229-31 (2023) (noting that the judicial role is not to select winners and losers on the basis of race, and state power cannot be exercised based on race).

314. The same standing problems discussed previously are present here. See *supra* note 285 and accompanying text; Powell, *Post-Racial Deception*, *supra* note 6, at 16-21, 16 nn.38-39.

315. *SFFA*, 600 U.S. at 214-21 (noting that diversity is immeasurable; there was no connection between the means adopted to advance diversity and its underlying goals; race cannot be used negatively against whites and Asian Americans; and race cannot be used stereotypically to reach a racial result).

316. *Id.* at 206 (alterations in original) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

317. Powell, *Post-Racial Deception*, *supra* note 6, at 23.

318. *Id.* at 24-25.

319. *Parents Involved*, 551 U.S. at 724-25.

320. *SFFA*, 600 U.S. at 217-18.

321. *Id.*

Justice Thomas takes this proposition even further by reinterpreting the Fourteenth Amendment as a post-racial amendment rooted in the Declaration of Independence.³²² This backwards originalism distorts reality and constitutional history.

2. Justice Thomas's Concurrence: Universalism and Erasure

Justice Thomas's opinions on race carry a disconcerting resonance—he is both the Black proxy³²³ and a colorblind originalist who rewrites history to advance a post-modern redemption story.³²⁴ To do this, he ignores the anti-subordination principle and its constitutional origins. Indeed, he dismissively references the anti-subordination principle as being “in vogue,” but without any support within the original meaning of the Fourteenth Amendment.³²⁵

In Justice Thomas's *SFFA* concurrence, there is no reference to the scope of state power and how the Fourteenth Amendment prohibits subordination and subjugation of African Americans, as part of the constitutional trilogy of the Reconstruction Amendments which were race-conscious.³²⁶ Rather, Justice Thomas's conceptualization of equality is rooted in liberal individualism and the Declaration of Independence.³²⁷ Due to this colorblind interpretation, Justice Thomas views subordination as a product of race-conscious remedies: “Two discriminatory wrongs cannot make a right.”³²⁸ Thus, “[t]his vision of meeting social racism with government-imposed racism is . . . self-defeating, resulting in a never-ending cycle of victimization.”³²⁹ Within Justice Thomas's constitutional originalism, the Fourteenth Amendment is a universal colorblind document anchored by the Declaration of Independence's natural definition of equality.³³⁰ Justice Thomas's universalist post-racialism rejects autonomy in advancing

322. *Id.* at 266, 287 (Thomas, J., concurring) (“Rather, we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.”).

323. Powell, *Post-Racial Deception*, *supra* note 6, at 50–54 (noting the fallacy of Justice Thomas's authentic voice and his personally disparaging comments directed at Justice Jackson); see *SFFA*, 600 U.S. at 278–83 (Thomas, J., concurring) (forcefully criticizing Justice Jackson's “race-based theory”); Cedric Merlin Powell, *Woke? John McWhorter's Woke Racism*, 25 GREEN BAG 2d 123, 129–31 (2022) [hereinafter Powell, *Woke Racism*]. It is interesting to note that another member of the Court adopted this dismissive and coded narrative practice as well. Justice Barrett directed personal comments, masked as neutral critiques of Justice Jackson's dissenting opinion in the citizenship case, at Justice Jackson. Andrew Stanton and Jason Lemon, *Amy Coney Barret Rebukes Ketanji Brown Jackson's 'Extreme' Opinion*, NEWSWEEK (June 27, 2025, at 14:48 ET), <https://www.newsweek.com/amy-coney-barrett-rebukes-ketanji-brown-jacksons-extreme-opinion-2091676> [<https://perma.cc/TMF2-28SN>]. This is a silencing tactic of isolation, stigmatization, and intimidation through a veiled competency check. See Patricia A. Broussard and Shelly Taylor Page, *The Anita Hillification of the Honorable Judge Ketanji Brown Jackson: God of Our Weary Years, God of our Silent Tears*, 16 ELON L. REV. 1, 44 (2024) (“It is still a shame that Black women must work twice as hard to get half as far and that they do it under the scrutiny of men and women not nearly as qualified or competent.”).

324. *SFFA*, 600 U.S. at 231–53 (Thomas, J., concurring) (chronicling the “colorblind” history of the Fourteenth Amendment and its enacting statutes); Powell, *Post-Racial Deception*, *supra* note 6, at 46–48 (illustrating how Justice Thomas is selective in his recitation of the history of Reconstruction legislation).

325. *SFFA*, 600 U.S. at 246–47 (Thomas, J., concurring).

326. See *supra* notes 37 & 38 and accompanying text.

327. See *SFFA*, 600 U.S. at 279 (Thomas, J., concurring) (quoting THOMAS SOWELL, WEALTH, POVERTY AND POLITICS 333 (2016)).

328. *SFFA*, 600 U.S. at 232 (Thomas, J., concurring).

329. *Id.* at 283.

330. *Id.* at 266.

substantive equality by considering race-conscious factors. State-mandated oppression (prohibited by the Fourteenth Amendment) is no different than positive remedial efforts with race considered as one of many factors.³³¹

3. Justice Jackson's Dissent: Structural Inequality

Reclaiming the substantive core of the Fourteenth Amendment, Justice Jackson offers the first structural inequality dissent, which is connected conceptually and doctrinally to Justice Marshall's dissents in *San Antonio* and *Milliken*.³³² Justice Jackson's compelling dissent is an example of "New Structuralism."³³³ Building upon Justice Marshall's conceptions of state power and structural impact,³³⁴ Justice Jackson offers a comprehensive articulation of the scope of state power and structural inequality.³³⁵ "Justice Jackson's dissent is compelling because she tracks structural inequality—the intergenerational transmission of inequality and locked-in white privilege—through the narrative of John, a white would-be-seventh-generation graduate of UNC, and James, a would-be-first-generation Black applicant to UNC."³³⁶

Justice Jackson's dissent chronicles how John and James live in a world where the present-day effects of past discrimination are demonstrably illustrated by the intergenerational transmission of inequality. It is James who feels this acutely, and Justice Jackson concludes that "at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead."³³⁷ This is a result of systemic racism and structural inequality.

Highlighting the "[g]ulf-sized race-based gaps"³³⁸ that are the present-day manifestation of state-mandated segregation, Justice Jackson's dissent chronicles the scope and power of discriminatory state action. She rejects post-racial federalism and exposes it for what it is—neutrality buttressed by post-racial constitutionalism that severely limits institutional decision-making power on advancing substantive equality.

What is striking about Justice Jackson's structural inequality dissent is that she quantifies the structural observations that Justice Marshall made about disparate impact in his *San Antonio* and *Milliken* dissents. Noting that "[h]istory speaks,"³³⁹ Justice Jackson catalogues a litany of present-day effects of past discrimination: the wealth and income gap between Black and white families;³⁴⁰ debt disparities;³⁴¹ low

331. *Id.* at 267-68 ("Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories." (internal quotation marks omitted) (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780-81 (2007) (Thomas, J., concurring))); *see also id.* ("We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is 'good' for [B]lack students.").

332. *See supra* Sections I.C.2 and I.D.2.

333. Powell, *Post-Racial Deception*, *supra* note 6, at 56.

334. *See supra* Section I.D.2.

335. Powell, *Post-Racial Deception*, *supra* note 6, at 56-59.

336. *Id.* at 57.

337. *SFFA*, 600 U.S. at 397 (Jackson, J., dissenting).

338. *Id.* at 384.

339. *Id.* at 393.

340. *Id.* at 393-94.

341. *Id.* at 395.

homeownership;³⁴² low numbers of professional degrees and business establishments;³⁴³ and disparate health impacts and inequities.³⁴⁴ All these disparate impacts fall squarely and disproportionately on African Americans.

Just as Justice Marshall linked local and state power in his *San Antonio v. Rodriguez* and *Milliken v. Bradley* dissents, Justice Jackson explicitly underscores that “Federal and State Governments’ selective intervention further exacerbated the disparities”³⁴⁵ that began with the retreat from the First Reconstruction to the Court’s present day post-racial federalism. As Justice Jackson observes, “Given our history, the origin of persistent race-linked gaps should be no mystery.”³⁴⁶ This history illustrates the close connection between the subordinating power of the state to stigmatize based on race (this is what the Reconstruction Amendments, especially the Fourteenth Amendment, prohibit) and what should be the expansive power of the state to adopt remedial measures to eradicate caste. Justice Jackson rejects post-racial federalism—state power should not be curbed when it is exercised to advance substantive equality through race-conscious remedies.³⁴⁷ The Reconstruction Amendments, anti-discrimination statutes, and the Court’s own precedents reject post-racialism, but the Court has completely revised Equal Protection.

While Chief Justice Roberts and Justice Thomas would simply conclude that intergenerational inequality is irremediable societal discrimination or the result of race neutral choices (liberal individualism), Justice Jackson explodes this post-racial artifice and identifies the oppressive power of the state. She reclaims the anti-subordination principle in the Fourteenth Amendment through her conceptualization of structural inequality.³⁴⁸ Indeed, Chief Justice Roberts, notwithstanding his strict adherence to post-racial constitutionalism must concede that “as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”³⁴⁹ This is undoubtedly a response to the compelling

342. *Id.* at 394.

343. *Id.* at 395.

344. *Id.* at 395-96.

345. *Id.* at 390.

346. *Id.* at 393.

347. *Id.* at 406 (“Thus, we should be celebrating the fact that UNC, once a stronghold of Jim Crow, has now come to understand this. The flagship educational institution of a former Confederate State has embraced its constitutional obligation to afford genuine equal protection to applicants, and, by extension, to the broader polity that its students will serve after graduation.”).

348. *Id.* at 385 (Jackson, J., dissenting) (stating that our country “has never been colorblind,” and emphasizing how state power and subordination led to “intergenerational transmission of inequality,” which is what the anti-subordination principle, underlying the Fourteenth Amendment, is intended to dismantle (quoting MELVIN OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 128 (Melvin Oliver & Thomas M. Shapiro eds., 1st ed. 1997))). Justice Sotomayor’s dissent does this analytical work as well, but in the context of the meaning of the Reconstruction Amendments. See *id.* at 318-84 (Sotomayor, J., dissenting); see also *id.* at 327-28 (“*Brown* was a race-conscious decision that emphasized the importance of education in our society. Central to the Court’s holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system”).

349. *SFFA*, 600 U.S. at 230.

personal narrative advanced in Justice Jackson's dissent. As for Justice Thomas's arguments against race-conscious remedies, Justice Jackson dismantles them by exposing their lack of legal and factual support. Thus, she rejects Justice Thomas's stigmatization argument that Black and Latine students are harmed by affirmative action;³⁵⁰ the discrimination claim of Asian American students because there is no injury;³⁵¹ and the false equivalence between racial theories and *Dred Scott* and *Plessy*.³⁵²

II. RE-CASTING *BROWN*: STATE POWER AND SELF-DETERMINATION

Brown must be re-casted, post-racial federalism (and post-racial constitutionalism) must be rejected, and the anti-subordination principle must be restored to the Constitution. This Article has traced the doctrinal and conceptual contours of post-racial federalism in the Court's school desegregation race jurisprudence. This is but one aspect of post-racial federalism—the Court expands, contracts, or reallocates state power based on its relationship to neutrality, formalistic equality, post-racial constitutionalism, and the maintenance of white supremacy.³⁵³

Brown is about state power—the Fourteenth Amendment's prohibition against the subordinating power of the state to advance caste-based oppression—and the positive affirmation of federal and state remedial power to eradicate segregation. This is a race-conscious remedial imperative rooted in the constitutional core of the Reconstruction Amendments.³⁵⁴ Post-racialism, whether in the formalism of post-racial constitutionalism or post-racial federalism's purposing of state power to moderate the reach and scope of school integration, should be rejected. As Justice Jackson states in the beginning of her compelling dissent, "Our country has never been colorblind."³⁵⁵

Brown must be re-casted so that the anti-subordination principle is restored to the core of the Fourteenth Amendment. This would be in keeping with our constitutional history and the promise of substantive equality christened by the Second Founding.³⁵⁶ But to achieve this fundamental re-casting, the exercise of state power must be reconceptualized. Justice Jackson's structural inequality dissent comprehensively traces how

350. *Id.* at 372 (Jackson, J., dissenting).

351. *Id.* at 374-76.

352. *Id.* at 376.

353. See generally POWELL, POST-RACIAL FEDERALISM, *supra* note 7 ("The Court privileges state power to erode (and ultimately eradicate) voting rights, shifts power to the states to determine personal autonomy and life choices undermining fundamental rights, and constructs a new post-racial orthodoxy favoring religion over state neutrality and libertarian interests (gun ownership) over state regulation. Neutrality's fallacy is illustrated by the Court's selective use of it; the Court is only 'neutral' when neutrality serves to advance its view of the world.").

354. *SFFA*, 600 U.S. at 322 (Sotomayor, J., dissenting) ("[T]he Fourteenth Amendment does not impose a blanket ban on race-conscious policies.").

355. *Id.* at 385 (Jackson, J., dissenting).

356. See generally ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) (analyzing how the Reconstruction Amendments inaugurated the Second Founding of America by including African Americans in the polity and abolishing slavery (Thirteenth Amendment) in an attempt to create a multi-racial democracy, giving them equality and due process under law (Fourteenth Amendment), and voting rights (Fifteenth Amendment)).

ostensibly neutral state and federal power targeted Blacks for exclusion from the end of Reconstruction to the present.³⁵⁷

Justice Marshall's dissents in *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley* lay the doctrinal foundation for Justice Jackson's structural inequality dissent in *SFFA*. In *San Antonio v. Rodriguez*, Justice Marshall offers a comprehensive critique of the connection between race, class, and structural inequality—state power expands so that education is a societal benefit, not a fundamental right; a disparate tax funding system is rationalized although it relegates Mexican Americans to an “adequate” education; and interdistrict boundary lines are legitimized as autonomous notwithstanding how they perpetuate caste based inequality.³⁵⁸

Presciently observing in *Milliken v. Bradley* that a Detroit-only desegregation decree insulating the outlying suburbs from integration would ultimately lead to resegregation, Justice Marshall concludes that “all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.”³⁵⁹ Justice Marshall's interpretive framework for analyzing structural inequality is fully realized in Justice Jackson's conceptualization of intergenerational inequality in *SFFA*. She brings together all the components of Justice Marshall's dissents: the acknowledgment of structural inequality, the continuing systemic effects of past discrimination, and the constitutional validity of race-conscious remedies. Justice Jackson's dissent re-casts *Brown* and rejects post-racial federalism. *Brown* stands for the proposition that state power cannot be expanded to subordinate Blacks and other people of color, and that race-conscious remedies are constitutionally permissible to dismantle structural inequality.

Thus, re-casting *Brown* means that:

1. Post-racial federalism should be rejected, and the broad equitable powers of the federal courts to enforce the mandate of *Brown* should be reaffirmed; the exercise of state and local power should be presumptively constitutional if such power is premised on substantive inclusion;
2. *Brown* and *Swann* should be reaffirmed as constitutional mandates rooted in the anti-subordination principle—state and local power should expand whenever race-conscious remedial measures embrace substantive inclusion and equality;
3. Because the Court is not the place to advance empowerment of subordinated minorities, grassroots activism and advocacy must be employed to reject post-racial federalism, reorient the exercise of state power to advance substantive school integration, and stop the dismantling of anti-discrimination law generally;³⁶⁰

357. *SFFA*, 600 U.S. at 387-96 (Jackson, J., dissenting).

358. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 130 (1973) (Marshall, J., dissenting) (“If for the sake of local control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.”).

359. *Milliken v. Bradley*, 418 U.S. 717, 814 (1974) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971)).

360. See generally Annelise Orleck, *In Defense of Grassroots-Powered Progressive Federalism*, LPE PROJECT (July 12, 2019), <https://lpeproject.org/blog/in-defense-of-grassroots-powered-progressive-federalism/> [https://perma.cc/6VK5-PCRZ] (“Rather than jettisoning progressive federalism altogether, we should continue using the federalist system to play municipal, county, state and federal governments against each

4. Education should be conceptualized as a fundamental right underpinned by the First Amendment, and state power that advances opportunity, pluralism, and democratic principles should thus be viewed deferentially by courts; and
5. Structural inequality must be foregrounded so that the present-day effects of past discrimination have constitutional relevance. Movement lawyering would provide an advocacy and policy avenue to advance the anti-subordination principle and assert that education is a fundamental right rooted in the First Amendment and the defining democratic principles of the American polity.³⁶¹ State power must be reconceptualized as a function of the democratic will of the polity committed to substantive inclusion. School boards and community organizations should embrace and advance these principles.

But all of this pinpoints the limitations of the Court—its constitutional doctrine is skewed toward neutrality and the reification of white dominance. All recent events underscore this fact.

Indeed, the preceding propositions underscore how state power should expand when it is used to protect constitutional rights. Justice Brennan's conceptualization of the one-way ratchet and federal enforcement power through section five of the Fourteenth Amendment³⁶² is applicable to the state power argument here. While the Court rejected Congress's interpretive power to determine the core of substantive constitutional rights in *Boerne v. Flores*,³⁶³ the argument here is that state power should not be used to constrict constitutional rights by ignoring the mandate of the anti-subordination principle. "*Morgan's* one-way ratchet implicitly endorses the antistatutory interpretation of equal protection."³⁶⁴ That is, the Fourteenth Amendment prohibits the use of state power to enshrine subordination and caste-based oppression.

Post-racial federalism directly contradicts Justice Brennan's one-way ratchet—rights should not expand, or contract based on the post-racial whims of the Court. "The image of the 'one-way ratchet' . . . also serves to illustrate that a color-blind approach to equality is irreconcilable with the antistatutory principle."³⁶⁵ This is precisely why *Brown* must be re-cast.

other as a strategy for maximizing power."). This is an interesting argument for grassroots empowerment, but it does not consider the dynamics of structuralism, race, and disparate impact as a product of the continuing effects of past discrimination.

361. Caitlin Millat, *The Education–Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 593–605 (2023) (discussing how the anti-subordination principle can be advanced through democratic principles to affirm education as a fundamental right).

362. *Katzenbach v. Morgan*, 384 U.S. 641, 651–52, 651 n.10 (1966) (concluding that Congress has no power to "restrict, abrogate, or dilute" the constitutional guarantee of equal protection, and stating that "an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws").

363. *City of Boerne v. Flores*, 521 U.S. 507 (1997); see Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Protection*, 59 WASH. & LEE L. REV. 1203, 1287 (2002).

364. Chen, *supra* note 362, at 1241.

365. Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Act*, 16 J.L. & POL. 381, 419 n.141 (2000).

CONCLUSION

Education's anti-subordinating function³⁶⁶—as a societal equalizer, engine of substantive inclusion, and disruptor of caste-based subjugation—has been diminished by the Court through its post-racial constitutionalism, commitment to formalistic equality, and its structuring of state and local power to advance neutrality, which reifies systemic exclusion. Conceptualizing judicial power as a form of post-racial federalism, this Article offers a critique of the Court's school desegregation jurisprudence and connects it to its anti-diversity affirmative action decision in *SFFA*.

Brown must be recast: the anti-subordination principle embodied in the Fourteenth Amendment, *Brown II*, and *Swann* must be reaffirmed. But given the Court's doctrinal and jurisprudential allegiance to post-racial constitutionalism, this is unlikely. This Article posits that the Court manipulates state power to advance its post-racial view of the world, and this post-racial federalism has eroded any progress made in previous decades to substantively integrate public schools.

The dissents of Justice Marshall in *San Antonio* and *Milliken* and Justice Jackson in *SFFA* offer a conceptual blueprint for acknowledging how systemic racism and structural inequality undermine any positive remedial race-conscious approaches not only in the school context but across anti-discrimination law generally. Post-racialism (that race has been transcended) and colorblind constitutionalism (that the Constitution is colorblind) must be rejected as mythological depictions of an America that have never existed.³⁶⁷ The way to stop discriminating on the basis of race is to recognize the animating features of structural inequality such as post-racial federalism and manipulable state power.³⁶⁸ *Brown* must be re-cast as a substantive command to eradicate structural inequality in the schools and beyond.

This Article explored a specific aspect of post-racial federalism in the Court's desegregation decisions. Depending on whether the Court is analyzing a race-conscious remedy (where state power contracts)³⁶⁹ or advancing neutrality through a local control or state autonomy rationale (where state power expands),³⁷⁰ post-racial federalism denotes how the Court shapes the scope of state power. In its school desegregation jurisprudence, the Court advances local control and state autonomy so that state power is insulated from judicial review and federal court intervention. *Milliken v. Bradley* and *San Antonio v. Rodriguez* are illustrative of the expansion of state power, but this reasoning is equally applicable to its voting rights jurisprudence³⁷¹ and even

366. See Millat, *supra* note 360, at 605.

367. POWELL, POST-RACIAL CONSTITUTIONALISM, *supra* note 47, at 215 ("The institutional mission of the Court has been to explain racial progress in a manner that is palpable to whites."); see *id.* at 214-24.

368. See generally POWELL, POST-RACIAL FEDERALISM, *supra* note 7 (arguing same).

369. See *supra* Section I.F.1-2.

370. See *supra* Section I.C.1 & I.D.1.

371. *Shelby County v. Holder*, 570 U.S. 529, 534-35 (2013) (stating that the Voting Rights Act (VRA) of 1965 employed the "strong medicine" of requiring some states with a history of discriminatory voting practices to obtain federal permission, under §4 of the VRA, before enacting voting laws). This was antithetical to

its abortion rights (reproductive freedom) jurisprudence.³⁷²

Exploring these and other conceptions of state power, the forthcoming book *Post-Racial Federalism: Race, Liberty, and the Democratization of Oppression* offers a comprehensive analysis of how post-racialism shapes the boundaries of state power. Here, the argument is that restoring the anti-subordination principle to the Fourteenth Amendment means that the Court's post-racial federalism must be rejected. Re-casting *Brown* requires the Court to acknowledge structural inequality and reject the formalism of neutrality so that the law does not legitimize subordination.

federalism principles; thus, equal state sovereignty means that the federal government has no basis to intervene when there is no evidence of current conditions of voting discrimination. *See id.*

372. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 515, 302 (2022) ("Abortion presents a profound moral question. The Constitution does not prohibit citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."). The Court perpetuates the democratic myth. *See POWELL, POST-RACIAL CONSTITUTIONALISM, supra* note 47, at 125-27, 217-18.