



2024

Brown v. Board of Education: Enduring Caste and American Betrayal


Sheryll Cashin

Georgetown University Law Center, cashins@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/2618>
<https://ssrn.com/abstract=4895253>

Forthcoming in *The American Journal of Law and Equality* (MIT Press, Fall 2024).

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), [Fourteenth Amendment Commons](#), [Law and Race Commons](#), and the [Supreme Court of the United States Commons](#)

Draft, forthcoming The American Journal of Law and Equality (MIT Press, fall 2024).

Brown v. Board of Education: Enduring Caste and American Betrayal

Sheryll Cashin*

The 70th anniversary of *Brown v. Board of Education*¹ offers an occasion to reflect on whether America can achieve school integration or our professed ideal of universal human equality. In this essay I grapple with the aspirational, anti-caste vision of *Brown* and how it is betrayed by enduring practices borne of white supremacy and anti-Blackness. While Jim Crow was dismantled, by any intellectually honest measure, public schooling is largely separate and unequal along lines of race and economic status. This segregation deprives students of all colors of the opportunity to practice pluralism and social cohesion. And it facilitates and perpetuates severe inequality. A different caste system has replaced Jim-Crow exclusion – what I call American residential caste. Public and private institutions, through intentional policies, tend to hoard opportunity in bastions of affluence and concentrate disadvantage elsewhere. This enduring architecture of segregation betrays both the vision of *Brown* and the anti-caste intentions of the radical framers of the Fourteenth Amendment.

Brown was the second of a trilogy of unanimous opinions written by Chief Justice Earl Warren that sought to end policies of white supremacy. Two weeks before *Brown* was decided, in *Hernandez v. Texas*² the Court held that Latinos could not be systemically excluded from serving as jurors.³ In doing so the Court articulated a capacious vision of equal protection for all people. Humans singled out for perceived differences from “the community norm” could receive protection under the Fourteenth Amendment even if the basis of their differential treatment was not race, per se.⁴ The community norm operating against Mexican Americans in Texas in 1954—to exclude them from juries and other aspects of equal citizenship—was non-Hispanic whiteness.

* Carmack Waterhouse Professor of Law, Civil Rights and Social Justice, Georgetown Law. This original essay builds on ideas I first presented in my book *White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality* (2021) and includes some verbatim passages from it. I wish to thank my friend, mentor and former teacher, Randall Kennedy, for inviting me to submit this essay and my colleagues at Georgetown who gave me excellent feedback on an early draft of this essay at our law faculty workshop.

¹ 347 U.S. 483 (1954).

² 374 U.S. 475 (1954).

³ See *id.* at 482.

⁴ *Hernandez v. Texas*, 374 U.S. 475 (1954).

The same norm of elevated whiteness relegated many Black children, especially in the Jim Crow south, and Hispanic children in states they populated, to separate and unequal schools. *Brown v. Board of Education* was supposed to overrule not just the assumption that separate could be equal, as fabulized in *Plessy v. Ferguson*,⁵ but also the dreadful *Dred Scott*⁶ opinion which denied citizenship to Black Americans.⁷ Public education being “the very foundation of good citizenship,” it had to be “made available to all on equal terms,” Chief Justice Warren wrote in the *Brown* opinion.⁸ Intentional racial segregation of Black children implied their inferiority and retarded their development and that could no longer be squared with the Equal Protection Clause.⁹

In 1967, Chief Justice Warren completed the trilogy. In *Loving v. Virginia*,¹⁰ twice he named the ideology that animated anti-miscegenation laws that barred Whites from marrying non-Whites. With capital emphasis, “White Supremacy” could no longer be accommodated by the Court and U.S. Constitution, he reasoned.¹¹

Unfortunately, in *Loving*, Chief Justice Warren also offered a revisionist view of the Court’s race jurisprudence, claiming the it had “consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.”¹² In fact, before the Civil War and Emancipation, the Court consistently enforced constitutional protections of domestic enslavers against the interests of enslaved people, culminating in the Court’s declaration in *Dred Scott* that Blacks, even free ones, had no rights that Whites were bound to respect.¹³ The Court also had a long history of justifying the conquest of Indigenous nations and the abrogation of treaties with them, beginning with a legal doctrine of discovery premised on the superiority of Christian European conquerors.¹⁴

After Emancipation, the Court was openly hostile to the project of Reconstruction. It produced formalist opinions like *Plessy* that sanctioned and accelerated racial exclusion -- of southern Blacks from public accommodations,¹⁵ of

⁵ 163 U.S. 537 (1896).

⁶ 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁷ John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CON. L. Q. 655 (2001).

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁹ *Id.* at 494 (1954).

¹⁰ 388 U.S. 1 (1967).

¹¹ *See id.* at 5, 11-12.

¹² *Id.* at 11-12.

¹³ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857). *See also* *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (holding a state statute intended to protect Blacks from being taken out of the state and returned to slavery preempted by the Fugitive Slave Act and thus unconstitutional).

¹⁴ *See* *Johnson v. M’Intosh*, 21 U.S. 543, 543-54 (1823).

¹⁵ *See* *Plessy v. Ferguson*, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 3 (1883).

Chinese nationals from immigration,¹⁶ of non-Whites from co-habiting with Whites,¹⁷ of non-Black people of color from naturalized citizenship,¹⁸ to name a few examples. While there were a few pre-*Brown* victories in which the Court enforced the Equal Protection Clause for the benefit of non-White people,¹⁹ the Court's record with claims of racial discrimination was checkered at best. And in the 20th century the Court was not above rationalizing racial oppression, as in *Korematsu v. United States*²⁰ in which it upheld the military internment of Japanese American citizens.²¹

It is perhaps more honest, though uncomfortable, to think of *Brown* and the above-described trilogy as something of a radical departure from what had come before. In *Hernandez*, *Brown* and *Loving*, the Warren Court seemed to imagine a lot more than color blindness for the equality clause birthed by the Civil War. In this essay I show how the anti-caste vision of *Brown* is widely betrayed today.

The caste system of Jim Crow segregation was replaced with a system of residential caste at the intersection of place (where one lives), race and economic status. All caste systems depend for their endurance not merely on the social distinctions that come naturally to individuals but also the structural protections of majoritarian politics, itself a purveyor of cultural norms, and of law. Despite the edict of *Brown*, and the civil rights revolution it helped to accelerate, norms of land use that encouraged race and class segregation continued and even worsened after *Brown*. This architecture of segregation is pervasive and especially dominant in northern states. It has normalized the expectation on the part of many Whites and some affluent people of color to live in predominantly white spaces with limited or no poverty.

Government at all levels has had a hard time disrupting the policies that reinforce boundaries and opportunity hoarding. Policies and law concentrate abundant opportunity in affluent, majority-white spaces and concentrate poverty and disadvantage elsewhere, particularly heavily Black neighborhoods affectionately termed “the hood.”²² Meanwhile the Roberts Court has undermined the edict of *Brown*, giving

¹⁶ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

¹⁷ See *Pace v. Alabama*, 106 U.S. 583 (1883).

¹⁸ See *Ozawa v. United States*, 260 U.S. 178 (1922).

¹⁹ See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Equal Protection Clause prohibits people from being excluded from criminal juries because of their race, color, or previous condition of servitude); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Equal Protection Clause prohibits facially race-neutral laws from being enforced in racially discriminatory manner); *Sweatt v. Painter*, 339 U.S. 629 (1950) (Equal Protection Clause prohibits segregated state law schools).

²⁰ 323 U.S. 214 (1944).

²¹ See *id.* at 223.

²² See generally SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* (2021); see also DOUGLAS MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* (2007); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

all school districts a pass on enforcing it and restricting options for those that try. In its embrace of colorblind constitutionalism and fetish for individual conceptions of discrimination, the Roberts Court also encourages blindness to inequitable systems and stymies possibilities for repair of gaping racial inequalities. The Roberts Court has also facilitated a gerrymandered politics of extremism in which right wing leaders and followers staunchly oppose policies that support integration *or* racial equity, as well as teaching truth about racial history. In this political and legal environment, *Brown* has been weaponized by legal conservatives and reduced to a hunt and peck for racial classifications, that is, a demand for colorblindness.²³

While this essay defends the anti-caste vision of *Brown*, I acknowledge that many of my fellow Black Americans and Black legal scholars express profound misgivings about the costs and desirability of school integration. Critical race scholars, perhaps most famously Professor Derrick Bell, argued that civil rights lawyers like himself and Thurgood Marshall made a mistake in not demanding equality of all schools rather than elimination of racially identifiable Black schools.²⁴ I respect these differences of opinion and agree that children trapped in apartheid schools overwhelmed by poverty are denied the formal equality that *Plessy* in theory demanded. From the perspective of where the country was in 1954, and my experience as a civil rights baby growing up in Alabama, however, I agree with my agitating father that the *de jure* Jim Crow caste system had to be destroyed.²⁵ Sadly, as I describe below, we lack an effective multiracial politics to support either school integration or racial equity in school funding, in large part because systemic *de facto* caste continues.

I. Trends: Segregated Schools and Some Integration Innovators

Segregation defined the educational experience for most Black students in 1954 and continues to do so for most Black students in 2024. In 1954 most Black Americans lived in the 17 states that had refused to abolish slavery before the Civil War. After the fall of Reconstruction these states had channeled Black Americans into new systems of containment and control and later Jim Crow. In schooling they had required segregation by law until the *Brown* decision. After *Brown* these states massively resisted school integration. It took a civil rights revolution, increased prodding by the Supreme Court

²³ Brief for Petitioner at 47, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199, 27-707).

²⁴ See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 3-4 (2004); Gloria J. Ladson-Billings, *Can We At Least Have Plessy: The Struggle for Quality Education*, 85 N. C. L. REV. 1279, 1288-91 (2007). *But see* RUCKER JOHNSON, *CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS* (2019).

²⁵ See generally, SHERYLL CASHIN, *THE AGITATOR'S DAUGHTER: A MEMOIR OF FOUR GENERATIONS OF ONE EXTRAORDINARY AFRICAN-AMERICAN FAMILY* 148-151 (2008).

and the threat of loss of federal funding under Title VI of the Civil Rights Act of 1964, to achieve school integration in the South.²⁶

The Supreme Court finally began to enforce school desegregation in 1968,²⁷ rates of school integration began to increase across the South. Between 1968 and 1988 many southern Black children, including me, attended well-resourced, integrated public schools. At the peak of school integration in the South, 43 percent of Black students attended majority White schools – a number that has since declined to 18 percent.²⁸ The backlash to Black people acquiring civil rights enforced by federal courts began almost immediately. Richard Nixon and subsequent conservative politicians embraced a “southern strategy” to woo White voters by stoking resentment not only about Black gains but also rising feminism and lifestyles opposed by Christian conservatives.²⁹ Resistance to school integration, affirmative action, and government social spending became *de rigueur* in conservative politics and the tenor of the federal judiciary began to change.

In the 1974 case of *Milliken v. Bradley*,³⁰ the Supreme Court exempted white suburbs surrounding Detroit from participating in cross-boundary school integration with the city and thus exempted white suburbs everywhere.³¹ *Milliken*, decided only six years after the Court had begun to enforce *Brown* with alacrity, presaged *Brown*'s demise. In a series of cases decided in the 1990s the Court signaled that it was time for lower courts to stop enforcing school desegregation orders. To the extent that school segregation was caused by housing segregation that the school districts did not intentionally create, the Court reasoned that school districts could no longer be compelled to desegregate.³²

With a rapid return to neighborhood school assignments that tracked housing segregation, much of the gains of school integration were lost. By the 65th anniversary of

²⁶ GARY ORFIELD & DANIELLE JARVIE, UCLA CIVIL RIGHTS PROJECT, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY 4 (2020), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf>.

²⁷ See, e.g., *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968) (rejecting county's “freedom of choice” plan as being inconsistent with *Brown*'s desegregation mandate); *Raney v. Bd. of Educ.*, 391 U.S. 443 (1968) (same); *Monroe v. Bd. of Comm'rs*, 391 U.S. 450 (1968) (same, but for a “free transfer” plan).

²⁸ ORFIELD & JARVIE, *supra* note 26, at 28.

²⁹ Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST (July 26, 2019), <https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/>; KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969).

³⁰ 418 U.S. 717 (1974).

³¹ See *id.* at 745, 752-53.

³² See generally *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995).

Brown, most Black and Latino students attended majority-minority schools. Among them, nearly 40 percent of Black students attended schools that have been described as apartheid schools, with more than 90 percent students of color.³³

Nationally, less than one in five Black public-school students attend a majority White school. New York state and New York City lead the nation in segregation of Black students, and several large states including California and Texas are among the nation's most segregated. Since 1990, school segregation has increased throughout most of the nation, leaving Black children especially with scant interaction with middle class, White, or Asian students.³⁴

Latino children face a similar experience of segregation. Black and Latino children are much more likely than White and Asian students to be exposed to poverty at school. According to a report produced by the Civil Rights Project at UCLA, in 2018 the average Black student attended a school where two-thirds of the students were poor, despite an economic period of declining poverty and a robust job market. Latino and Indigenous students on average also attended high poverty schools. Meanwhile, White and Asian students tend to attend schools in which solid majorities of their classmates were middle class. The Civil Rights Project report's authors noted that Black students who face "double isolation by both race and class in schools . . . do not gain experience in understanding and successfully navigating those important boundaries."³⁵ In other words, they argue, Black children or any children relegated to high poverty schools are denied the networks and resources common to middle class and affluent schools. Schools with large numbers of Black and Latino students often have more novice teachers, more teachers with less academic preparation and no teacher certification, higher teacher turnover, larger class sizes, and higher poverty levels in the student body.³⁶

These realities are familiar to any parent shopping for schools and housing in any American metropolis with sizeable numbers of Black or Latino children. The patterns of American Apartheid can be rather stark and shocking. According to a 2020 analysis on

³³ ERICA FRANKENBERG ET AL., UCLA CIVIL RIGHTS PROJECT, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown>.

³⁴ ORFIELD & JARVIE, *supra* note 26, at 6.

³⁵ ORFIELD & JARVIE, *supra* note 26, at 27.

³⁶ Eric A. Hanushek & Steven G. Rivkin, *Harming the Best: How Schools Affect the Black-White Achievement Gap*, 28 J. POL'Y ANALYSIS & MGMT. 366 (2009); Hamilton Lankford, Susanna Loeb & James Wyckoff, *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, 24 EDUC. EVALUATION AND POL'Y ANALYSIS 37(2002); Roland G. Freyer & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 REV. ECON. & STAT. 447 (2004); Dennis J. Condrón, *Social Class, School and Non-School Environments, and Black-White Inequalities in Children's Learning*, 74 AM. SOCIO. REV. 673(2009).

school attendance boundaries, one in five public school students “live[s] virtually across the street from a significantly whiter and richer school district” and for every student enrolled in affluent bastions, three neighboring students “are left behind in lower-funded schools serving far more nonwhite students.”³⁷

And the boundaries insulating affluent school districts appear to be hardening. For example, a 2020 report produced by Virginia Commonwealth University's School of Education and its partners shows that school segregation by race and poverty is accelerating in Virginia.³⁸ Researchers attribute much of rising segregation to “school district and attendance boundary lines that wall-off communities with highly differentiated wealth.”³⁹ In Northern Virginia, boundaries between schools in the same school district contribute to 63 percent of school segregation.⁴⁰

School district administrators can choose to draw attendance zones in ways that encourage integration or encourage segregation. Throughout the country, many seem to be doing the latter. A 2021 analysis by The National Coalition for School Diversity identified 179 school districts across 37 states that are diverse *and* considerably segregated across schools.⁴¹ The report authors suggested that these school districts would benefit from federal assistance to encourage and support efforts to create diverse, integrated schools.⁴² By way of comparison, the authors also identified 68 large school districts with very high multi-group diversity *and* very low multi-group segregation.⁴³ Places like Utica City School District (NY), Malden School District (MA), Schenectady City School District (NY), Natomas Unified School District (CA), and Piscataway Township School District (NJ) are promoting inclusive schools.⁴⁴

Rapid demographic change can be harnessed to create and sustain multiracial diversity, but it requires vision and an attitude of seeing difference as an asset rather than a threat to be contained. There is also more stability in White public school student populations than some may imagine. In the 2018-19 school year, one fifth of the population in large central city school districts were White students – a relatively stable

³⁷ *Dismissed: America's Most Divisive Borders*, EDBUILD, <https://edbuild.org/content/dismissed> (last visited Dec. 15, 2023).

³⁸ GENEVIEVE SIEGEL-HAWLEY ET AL., CTR. FOR EDUC. AND CIVIL RIGHTS & VCU SCHOOL OF EDUC., *SCHOOL SEGREGATION BY BOUNDARY LINE IN VIRGINIA: SCOPE, SIGNIFICANCE AND STATE POLICY SOLUTIONS* (2020), https://cecr.ed.psu.edu/sites/default/files/School_Segregation_by_Boundary_Line_in_Virginia_Nov_2020.pdf.

³⁹ *Id.* at 1.

⁴⁰ *Id.*

⁴¹ BRIAN KNUDSEN & PHILIP TEGELER, THE NAT. COAL. ON SCH. DIVERSITY, *WHICH DISTRICTS MIGHT BENEFIT FROM THE STRENGTH IN DIVERSITY ACT? A LOOK INTO THE MOST DIVERSE, BUT SEGREGATED, LARGE SCHOOL DISTRICTS IN THE UNITED STATES* 4 (2021), https://www.school-diversity.org/wp-content/uploads/SID_Beneficiaries1.pdf.

⁴² *See id.* at 5.

⁴³ *Id.* at 6.

⁴⁴ *See id.*

number for the preceding decade.⁴⁵ In 2018, the suburbs of our nation’s largest metro areas were also very multiracial, with a substantial but declining White presence and growing Latino and Asian populations.⁴⁶

But federal, state and local policies are not helping school districts much to adjust to these changing demographic realities. President Obama’s second education secretary, John King, helped create a \$12 million grant program to encourage school integration – a tiny sum for a nation with more than 50 million public school students – and his successor in the Trump Administration promptly terminated it.⁴⁷ In 2020, the House passed the Strength in Diversity Act of 2020⁴⁸ to support local school efforts “to improve diversity and reduce or eliminate racial or socioeconomic isolation,” but the Act died in the Senate. The Supreme Court’s school segregation jurisprudence, as described, also makes it unlikely that any school district would be ordered to desegregate. And in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴⁹ the Roberts Court ruled against voluntary school desegregation plans in which the race of individual children were considered in school assignment.

And a new trend toward even more segregation has emerged. Many communities have tried to get the benefit of *Milliken* by seceding from diverse school districts. Since 2000, more than 128 communities attempted to secede and more than half of them succeeded, according to a 2019 report by the education nonprofit EdBuild.⁵⁰

This secession movement is accelerating and national in scope, occurring in states from Maine to Colorado to Alabama. But school district secessions are concentrated in the South.⁵¹ According to a recent academic study, they seem to be animated by a desire of residents of majority White, affluent areas to “preserve relative racial and economic advantages.”⁵²

Supporters of secession typically invoke the race-neutral mantra of “local control” – an argument and ideology that was used by prior generations to resist school

⁴⁵ See ORFIELD & JARVIE, *supra* note [35], at 24.

⁴⁶ *Id.* at 23.

⁴⁷ Martin Levine, *School Segregation? Not a Problem, Says DeVos*, NPQ (Dec. 6, 2019), <https://nonprofitquarterly.org/end-segregation-no-says-devos/>.

⁴⁸ H.R. 2639, 16th Cong. (2020).

⁴⁹ 551 U.S. 701 (2007).

⁵⁰ EDBUILD, *FRACTURED: THE ACCELERATING BREAKDOWN OF AMERICA’S SCHOOL DISTRICTS 1* (2019), <https://edbuild.org/content/fractured/fractured-full-report.pdf>.

⁵¹ See Kendra Taylor, Erica Frankenberg & Genevieve Siegel-Hawley, *Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded*, 5 AERA OPEN, no. 3, 2019, at 4, <https://journals.sagepub.com/doi/full/10.1177/2332858419860152>.

⁵² *Id.* at 1.

integration and to create new homogenous suburbs.⁵³ Not surprisingly, new boundaries created by secession increase school segregation. The study, which focused on secessions concentrated in Alabama, Louisiana and Tennessee,⁵⁴ found that segregation between Black and White students increased from 59.9 to 70.3 percent between 2000 and 2015 due to school district boundaries.⁵⁵ In the same period segregation between Latino and White students rose from 37.1 to 65.1 percent, again due to district boundaries.⁵⁶

The free common public school so important to the foundations of citizenship and a democratic society, according to the *Brown* Court, is very different depending on what side of a boundary a child is assigned to. In 2016, overwhelmingly white school districts received \$23 billion more in state and local funding than majority nonwhite districts that serve about the same numbers of children according to an analysis by EdBuild.⁵⁷ Reflect on that. The same number of children, but the whitest set receives \$23 billion more.

An American kindergartener, still innocent of the ways of her country, when presented with this word problem would scream, “That’s not fair!” For their own children, affluent parents would not stand for schools that look like prisons, twenty-five-year-old textbooks, leaking or wasp-infested ceilings, useless and outdated technology, crowded classrooms, and exhausted teachers who pay for supplies with their own limited paychecks. These are among the conditions thousands of teachers across the country shared with the *New York Times* in 2018.⁵⁸

In addition to persistent segregation and funding inequality, there is some evidence of open hostility to the basic project of free public schooling. Ninety percent of American students still attend traditional public schools, but a decades-long conservative movement for public funding of private school vouchers has triumphed.⁵⁹ More than half of states now have some form of publicly funded

⁵³ For an extended treatment of how “localism” redounds to the benefit mainly of affluent communities see Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L. J. 1985 (2000).

⁵⁴ TAYLOR, FRANKENBERG & SIEGEL-HAWLEY, *supra* note 70, at 5.

⁵⁵ *See id.* at 7, 7 tbl. 2.

⁵⁶ *See id.*

⁵⁷ EDBUILD, \$23 BILLION: NONWHITE SCHOOL DISTRICTS GET \$23 BILLION LESS THAN WHITE DISTRICTS DESPITE SERVING THE SAME NUMBER OF STUDENTS (2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

⁵⁸ Josephine Sedgwick, *25-Year-Old Textbooks and Holes in the Ceiling: Inside America’s Public Schools*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/reader-center/us-public-schools-conditions.html>.

⁵⁹ *See generally* CARA FITZPATRICK, THE DEATH OF PUBLIC SCHOOL: HOW CONSERVATIVES WON THE WAR OVER EDUCATION IN AMERICA (2023).

vouchers that pay for private school.⁶⁰ This idea first suggested by Milton Friedman in 1955,⁶¹ one year after *Brown* was decided, later drew some bipartisan support on a theory of helping poor students to escape low-performing public schools. But a conservative, culture-warring politics that accelerated during the pandemic has ballooned into a universal choice movement from which even affluent families now benefit.

In 2023 alone, six Republican-controlled states passed laws providing for universal or near-universal vouchers in which almost all students may receive public funding to support private schooling.⁶² Lawmakers in 42 states have introduced similar bills.⁶³ Aggressive supporters of these plans admit that their passage depends on a politics of distrust of public education.⁶⁴ Stoking hysteria about public schools as alleged sites of indoctrination in critical race theory appears to be part of this politics.⁶⁵

This movement toward ideological disinvestment in public schools is likely to be accelerated by a recent Supreme Court ruling that allows publicly funded vouchers to be spent at religious schools.⁶⁶ Ironically, some of the same private segregation academies that were created in the South to evade *Brown v. Board* and new Christian academies, many of which are very or exclusively white today, benefit from such voucher programs. Some of these schools have been accused of indoctrinating students in alternative narratives about history.⁶⁷ Above all, poor children trapped in high poverty schools are worse off from a universal choice movement that intentionally drains millions from traditional public schools while offering vouchers that rarely pay for the full cost of private school tuition.⁶⁸

⁶⁰ Elaine S. Povich, *More States Use Tax Dollars to Help People Pay for Private School*, GOVERNING (June 18, 2023), <https://www.governing.com/education/more-states-use-tax-dollars-to-help-people-pay-for-private-school>.

⁶¹ See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955).

⁶² Libby Stanford, *6 More States Will Soon Let Almost All Students Attend Private School With Public Money*, EDUC. WK. (June 15, 2023), <https://www.edweek.org/policy-politics/6-more-states-will-soon-let-almost-all-students-attend-private-school-with-public-money/2023/06>.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ Dale Russakoff, *Is School Choice Destroying Public Education?*, N.Y. TIMES (Sept. 11, 2023), <https://www.nytimes.com/2023/09/11/books/review/cara-fitzpatrick-death-of-public-school.html?searchResultPosition=3>.

⁶⁶ See *Carson v. Makin*, 142 S.Ct. 1987 (2022).

⁶⁷ Jonathan Merritt, *Segregation is Still Alive at these Christian Schools*, DAILY BEAST (Sept. 18, 2016), <https://www.thedailybeast.com/segregation-is-still-alive-at-these-christian-schools> (“[M]any popular textbooks used in Christian schools teach American history in ways that privilege white culture.”).

⁶⁸ Brynn Tannehill, *The Republican Plan to Devastate Public Education in America*, NEW REPUBLIC (Aug. 11, 2022), <https://newrepublic.com/article/167375/republican-plan-devastate-public-education-america>.

Thus, the field of public education, like so much else in American society, remains a battleground of contestation — in schooling between the radically inclusive possibilities suggested by *Brown* and a narrower vision in which the state and constitution protect individuals solely against state-sanctioned racial classifications. But segregation, whether *de jure* or *de facto*, shapes future educational outcomes, as does integration when it is achieved.

Long-term studies of Black students have found better outcomes for those who attended integrated schools: lower drop out rates,⁶⁹ higher achievement and attendance at more selective colleges,⁷⁰ higher incomes,⁷¹ better jobs,⁷² lower incarceration,⁷³ and superior long-term health.⁷⁴ Desegregation reduced violent crime by young Black men.⁷⁵ Other children benefit from, and are not harmed by, school integration. Children of all races and incomes who attend integrated schools improve their critical thinking skills, are less apt to accept stereotypes as truth, lead more integrated lives as adults, and are more civically engaged.⁷⁶ Racial minorities in integrated schools also achieve at higher levels, with no detriment to the learning of White students.⁷⁷ Ultimately, integrated schools benefit all students, and where true inclusion is achieved, society wins.

Thankfully some localities become “equality innovators” as legal scholar Robin Lenhardt describes them.⁷⁸ Places with a sizeable middle class that integrate rather than exclude poor families in housing have higher rates of upward mobility for poor children.⁷⁹ In the 2018 book *Moving Toward Integration*, three housing scholars

⁶⁹ Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AM. ECON. REV 919 (2004).

⁷⁰ See Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments 19-20* (Nat’l Bureau of Econ. Rsch., Working Paper No. 16664, 2011).

⁷¹ See *id.* at 21.

⁷² *Id.*

⁷³ See *id.* at 22.

⁷⁴ See *id.* at 23.

⁷⁵ David A. Weiner, Byron F. Lutz & Jens Ludwig, *The Effects of School Desegregation on Crime* (Nat’l Bureau Econ. Rsch., Working Paper No. 15380, 2011); David J. Deming, *Better Schools, Less Crime?*, 126 Q. J. ECON. 206 (2011).

⁷⁶ RICHARD D. KAHLBERG, HALLEY POTTER & KIMBERLY QUICK, THE CENTURY FOUND., A BOLD AGENDA FOR SCHOOL INTEGRATION 1-4 (2019), <https://tcf.org/content/report/bold-agenda-school-integration>.

⁷⁷ GARY ORFIELD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, CIVIL RIGHTS PROJECT, E PLURIBUS... SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 6-11 (2012), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf. See also MYRON ORFIELD & THOMAS LUCE, INST.ON METRO. OPPORTUNITY, AMERICA’S RACIALLY DIVERSE SUBURBS: OPPORTUNITIES AND CHALLENGES 39 (2012), https://www.prrac.org/pdf/Myron_Orfield_-_Diverse_Suburbs_FINAL.pdf.

⁷⁸ R. A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 265, 269, 291 (2011); see also Olatunde C. A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115 (2016).

⁷⁹ Raj Chetty, John N. Friedman, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* (Nat’l Bureau Econ Rsch., Working Paper No. 25147, 2018).

documented that for the 10 percent of Blacks who live in urban metro areas with only moderate segregation, their outcomes on indicators like employment, education, and life span are much closer to that of Whites than in highly segregated places that correlate with stark racial inequality.⁸⁰

Segregation in schooling and housing is not inevitable. For example, after the *Parents Involved* decision barring use of students' race in school assignments, the Louisville school district adopted a new integration program that *mixes* students based on their neighborhood characteristics. Researchers found that levels of housing segregation fell precipitously in Louisville as parents knew that school assignments were decoupled from where students lived.⁸¹ Communities that strive toward diverse institutions that work for everyone rather than continuing the devastation of caste should be applauded. As I argue in Part III of this essay, hopefully they will one day be supported by a constitutionalism and democracy that matches their ambitions. But first it is necessary to understand that despite *Brown*, processes of caste continue in America.

II. Residential Caste

As noted, school segregation reflects housing patterns. Here I summarize the construction and maintenance of residential segregation. In the twentieth and twenty-first century, the main response to increasing diversity has been structural containment. The structure and habits of residential caste were borne of anti-Blackness and white supremacy.⁸² But all groups now live with and must make choices within this enduring architecture. Social and residential distancing and distributional habits of favor and disfavor persist against a background norm of pathologizing those who cannot overcome unacknowledged systemic disadvantages.

As scholars of caste have argued, powerful classes tend to explain and accept the unearned benefits that flow from social hierarchies, a habit that is universal in human history. Most societies construct a pecking order. Founding fathers, and it is nearly always fathers, construct origin stories or what scholars call "hierarchy-enhancing

⁸⁰ RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION* (2018).

⁸¹ Alana Semuels, *The City that Believed in Desegregation*, THE ATLANTIC (Mar. 27, 2015), <https://www.theatlantic.com/business/archive/2015/03/the-city-that-believed-in-desegregation/388532/>; Genevieve Siegel-Hawley, *City Lines, County Lines, Color Lines: The Relationship Between School and Housing Segregation in Four Southern Metro Areas*, 115 TCHRS. COLL. REC. 1, 12, 14 (2013); see also Karl E. Taeuber, *Housing, Schools, and Incremental Segregative Effects*, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1979).

⁸² CASHIN, *supra* note 22, at 38-57.

myths” that encourage stereotyping.⁸³ National mythology promotes patterns of behavior that constitute culture.⁸⁴ National culture, in turn, reifies hierarchical institutions, like slavery and segregation.⁸⁵ Once created, such institutions tend to endure over generations.⁸⁶ Those who benefit tend to defend discrimination as they defend their preferred institution.⁸⁷ There are hierarchy-attenuating myths and practices, like abolitionism, civil rights and human rights.⁸⁸ But once a hierarchical structure is in place, it is much easier to maintain inequality than attenuate it.⁸⁹

From the Founding to Emancipation, America compromised our professed self-evident truths through a convenient, slavery-supporting mythology of Black inferiority. Subsequent generations of Americans were also inculcated in the myths of Black inferiority and white supremacy as new Black-subordinating institutions were constructed and justified. The myths and the practices championed by supremacists metastasized, but caste endured. The key myth propagated to justify Jim Crow and residential segregation was the alleged sexual predation of White women by Black men. Fomenting hysteria about Black men potentially raping White daughters was common political rhetoric concerning why Blacks could not sit, shop or live near Whites.⁹⁰ Nasty, anti-Black stereotypes had a political function: to encourage non-elite Whites to support institutions and practices that mainly benefitted elites.

With the distance of time and culpability, it is easy to see and acknowledge the role of racial myths in propping up slavery and Jim Crow that we now profess to abhor. But it is much harder to acknowledge how modern stereotypes — “thug,” “ghetto” — supplanted “rapist” or the N-word to perform a similar function in post-civil rights America. While there are ugly past and present practices of oppression against other races, ethnicities and groups, the enduring architecture of segregation is borne of a very specific history of anti-Blackness. As Charles Hamilton Houston and his protégé Thurgood Marshall were pursuing a successful incremental legal strategy that dismantled planks in the Jim Crow regime and culminated in *Brown v Board*,⁹¹ mechanisms of residential caste were being constructed and reified.

⁸³ See Felicia Pratto, Jim Sidanius & Shana Levin, *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 EUR. REV. SOC. PSYCH. 271, 275-76 (2006).

⁸⁴ See *id.* at 276.

⁸⁵ See *id.*

⁸⁶ See *id.* at 277.

⁸⁷ See *id.*

⁸⁸ *Id.* at 276.

⁸⁹ See *id.* at 277.

⁹⁰ CASHIN, *supra* note 22, at 41 n.8.

⁹¹ GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961* (1994).

In the first seven decades of the twentieth century, more than six million Black American descendants of slavery moved north or west to escape southern Jim Crow and seek opportunity elsewhere. The dominant response to this Great Migration was to contain migrants in dense quarters of Blackness and then redline and disinvest in these neighborhoods, cutting them out of the largesse rained down on majority-white communities.⁹² The policies deployed to create this architecture of inequality included racially restrictive covenants, exclusionary zoning that limited where multifamily buildings could be located, urban “renewal” projects that displaced Black residents and moved many of them into intentionally segregated public housing, interstate highways laid to create racial barriers between the produced “good” and “bad” sides of town, endemic redlining, and disinvestment in basic services such as schools and sewers in Black neighborhoods.⁹³

Law played a critical role in instantiating and continuing policies and habits of segregation. An anti-Black stereotype would drive the politics to support a policy of racial exclusion. Legislative bodies spurred by such politics enacted laws like racially restrictive covenants, racial or exclusionary zoning, and such laws in turn helped to teach and perpetuate anti-Black discriminatory practices among the White public.

Though the Supreme Court struck down racial zoning in 1917⁹⁴ and disavowed racially restrictive covenants in 1948,⁹⁵ it greatly enabled segregation in its 1926 case of *Village of Euclid v. Ambler Realty*.⁹⁶ In *Euclid*, the Court sanctioned what became known as Euclidian or single-family exclusionary zoning and pointedly cast duplexes, triplexes or apartments as a parasitic invasion of idealized single-family havens.⁹⁷ In later cases, the Court also upheld or enabled grand policies, like urban renewal and exclusionary suburban development, that drove metropolitan segregation patterns.⁹⁸ And Black neighborhoods and residents endured the cumulative blunt force trauma of the signature urban and suburban policies of the twentieth century. Historic redlining and recent predatory lending in Black neighborhoods contributed to a present wealth gap such that for every dollar of wealth held by a typical White family, a typical Black family holds about 10 cents.⁹⁹

⁹² CASHIN, *supra* note 22, at 41, 50-55.

⁹³ *See id.* at 38-57, 105-126.

⁹⁴ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁹⁵ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁹⁶ 272 U.S. 365 (1926).

⁹⁷ *See id.* at 394.

⁹⁸ *Berman v. Parker*, 348 U.S. 26 (1954) (sanctioning urban renewal); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (sanctioning exclusionary suburban development).

⁹⁹ Melvin L. Oliver & Thomas M. Shapiro, *Disrupting the Racial Wealth Gap*, 18CONTEXTS 16 (2019). *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2d ed. 2006).

The signature urban and suburban development policies also dramatically increased segregation of Blacks from Whites between 1900 and 1970. They created hyper-segregation in more than fifty cities -- an extreme degree of physical isolation that only African Americans were subjected to.¹⁰⁰ In the North, ghettoization was the process of working out a physical mechanism of white supremacy, and the South would adopt these strategies too after it lost Jim Crow as a mechanism of social control. Racism begat the Black ghetto and the ghetto, in turn begat more racism.¹⁰¹

Thankfully today only about 20 cities are still hyper-segregated¹⁰² and Black-White residential segregation, though still quite high, has been declining slowly since its peak in 1970.¹⁰³ But economic segregation has exploded since 2000 and the footprint of concentrated poverty is growing, enveloping not just poor Blacks but also struggling Whites, Latinos, Asians and Indigenous people.¹⁰⁴ Concentrated poverty is growing fastest in the suburbs.¹⁰⁵

Under the old Jim Crow, Blackness was the primary marker for discrimination and exclusion. But American caste now exists at the intersection of race, economic status, and geography – a system of sorting and exclusion that has been hardening. Despite gradual declines in segregation and some places that achieve economic or racial integration, the most persistent types of neighborhoods are affluent, high-opportunity spaces and, at the other end of the residential spectrum, ‘hoods of concentrated poverty. Because of intentional boundaries and exclusion of affordable housing, it is very difficult to enter and live in exclusive, affluent spaces. And the cumulative negative effects of concentrated poverty are such that it is very hard to exit the hood. One must be superhuman to overcome the obstacles of weak schools, limited job opportunities, healthy food deserts, junk food swamps, heightened exposure to industrial pollutants, disrespectful, excessively violent policing, and, yes, gun violence.¹⁰⁶

Caste is a system of subordination in which benefits and burdens are distributed unequally based upon hierarchy-justifying myths. In America we tend to overinvest and exclude in affluent, majority-White spaces and to disinvest, contain, and surveil people

¹⁰⁰ See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1998).

¹⁰¹ See CASHIN, *supra* note 22, at 38-57.

¹⁰² Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 *DEMOGRAPHY* 1025, 1026 (2015).

¹⁰³ Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 *SOCIO. F.* 571, 578-79 (2015).

¹⁰⁴ See CASHIN, *supra* note 22, at 7, 74-75.

¹⁰⁵ Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, *BROOKINGS* (Mar. 31, 2016), <https://www.brookings.edu/articles/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/>.

¹⁰⁶ See CASHIN, *supra* note 22, at 72-75, 145-163.

in concentrated-poverty communities, particularly Black ones.¹⁰⁷ And we tell stories about the people in the hood, the people I lovingly call “descendants,” to justify the way things are. The greatest hierarchy-enhancing myth we tell is that high-opportunity living is earned, and hood-living is the deserved result of pathological individual behavior.¹⁰⁸ Such narratives mask the fact that affluent, poverty-free space is engineered and subsidized by the people who are excluded. It would not be possible to have poverty-free havens without affluent places foisting the externalities of concentrated disadvantage elsewhere.¹⁰⁹

There are three *present* anti-Black processes of residential caste: boundary maintenance, opportunity hoarding and stereotype driven surveillance.¹¹⁰ While these practices were constructed and maintained based on othering of Black American great migrants, many non-Black people suffer under residential caste and the only people who benefit are those that can buy their way into affluent, high-opportunity bastions – a relatively small minority of metropolitan elites. Maps help to illustrate the truth of what most Americans experience simply by driving across boundaries. This is what “systemic racism,” or residential caste looks like. Geography is at its center.

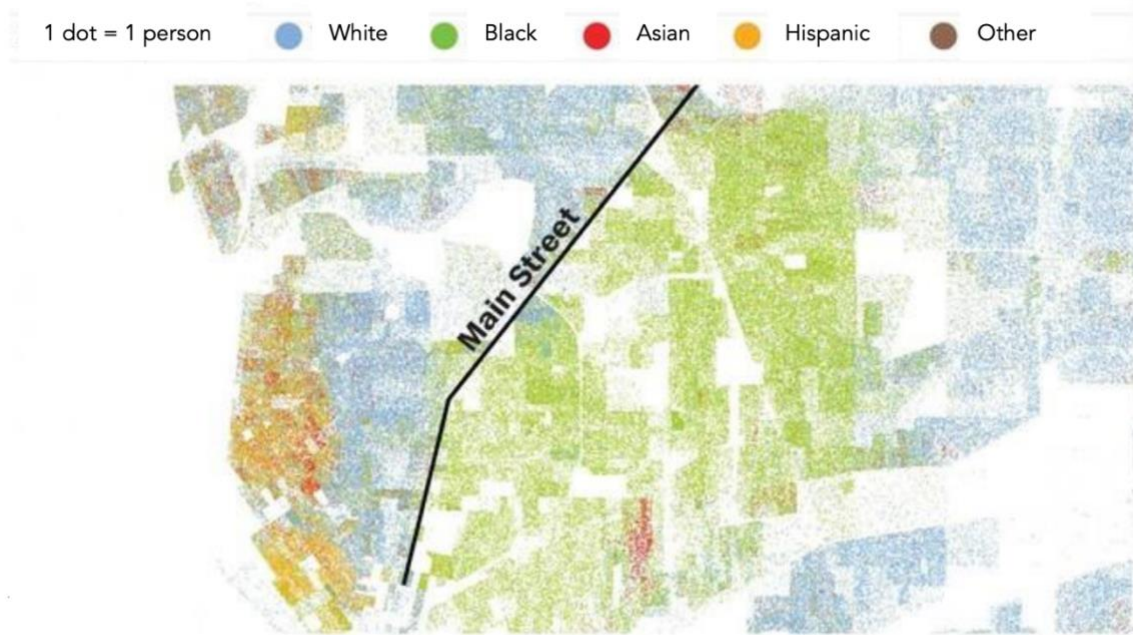
¹⁰⁷ In my book, *White Space, Black Hood*, in two hundred heavily end-noted pages, I present the extensive social science evidence of residential caste and my theorizing of it, including chapter 3 on boundary maintenance, chapters 5-6 on opportunity hoarding and over-investment in affluent white spaces, and chapter 8 on stereotype-driven surveillance of descendants. See CASHIN, *supra* note 22.

¹⁰⁸ See, e.g., Crystal L. Hoyt et al., *Believing in the American Dream Sustains Negative Attitudes Toward Those in Poverty*, 84 SOC. PSYCH. Q 203 (2021).

¹⁰⁹ See, e.g., MATTHEW DESMOND, *POVERTY, BY AMERICA* (2023) (arguing that U.S. poverty is pervasive *by design*, to enable the lifestyles of affluent people, and that among the quintessentially American habits that facilitate poverty are zoning codes that allow only single-family homes, which creates artificial housing scarcity that enhances property values for the rich while foisting high costs and homelessness on others).

¹¹⁰ See CASHIN, *supra* note 22, chapters 3, 5, 6, and 8.

LINES OF SEGREGATION IN BUFFALO



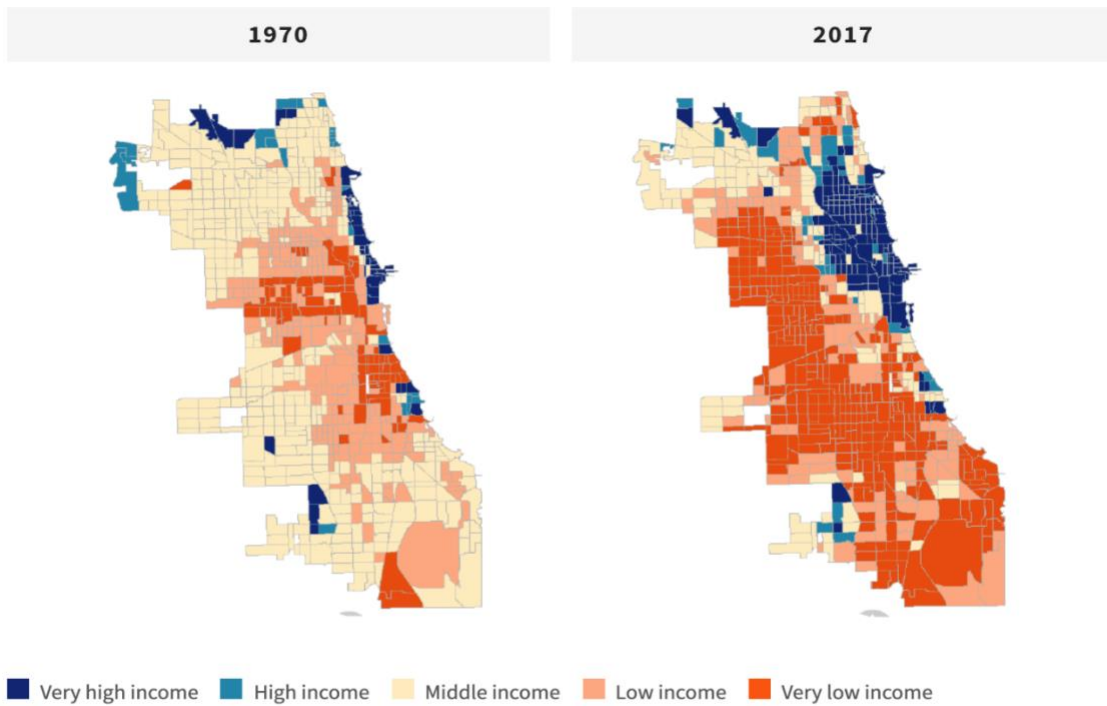
Source: U-Va. Cooper Center analysis of 2010 Census data, The Washington Post.

Enduring hyper-segregation in Buffalo, New York and the disinvesting processes of residential caste made it easy for an avowed supremacist to identify the *only* supermarket in East Buffalo as a shooting ground in which he could easily spray bullets to murder Black descendants. In a lengthy manifesto the young, White, male shooter wrote of Blacks and immigrants of color as “replacers” of White Americans who needed to be killed or chased out of the United States so that Whites would remain dominant.¹¹¹ But the fact that he had to travel more than 200 miles from his nearly all-white hometown to find a Black community concentrated enough to kill *en masse* proves that Blacks aren’t “replacing” Whites; in fact, Black Americans in Buffalo are still struggling to escape deliberate disinvestment and segregation.¹¹² Boundaries. Disinvestment. Stereotyping. Caste.

Buffalo is an extreme but far too many other metro regions follow similar patterns of concentrated affluence and poverty. This map shows the acceleration of this trend of sorting since 1970 in Chicago.

¹¹¹ See Keeanga-Yamahtta Taylor, *American Racism and the Buffalo Shooting*, NEW YORKER (May 15, 2022), <https://www.newyorker.com/news/our-columnists/american-racism-and-the-buffalo-massacre>.

¹¹² See, e.g., Thomas O’Neil-White, *Not A Thing of the Past: How a History of Racial Residential Segregation in Buffalo Led to the Tops Shooting*, WFBO (May 10, 2023, 3:25 PM), <https://www.wbfo.org/racial-equity/2023-05-10/not-a-thing-of-the-past-how-a-history-of-racial-residential-segregation-in-buffalo-lead-to-the-tops-shooting>.



Maps show average individual income by census tract.

Source: *Voorhees Center, University of Illinois at Chicago*

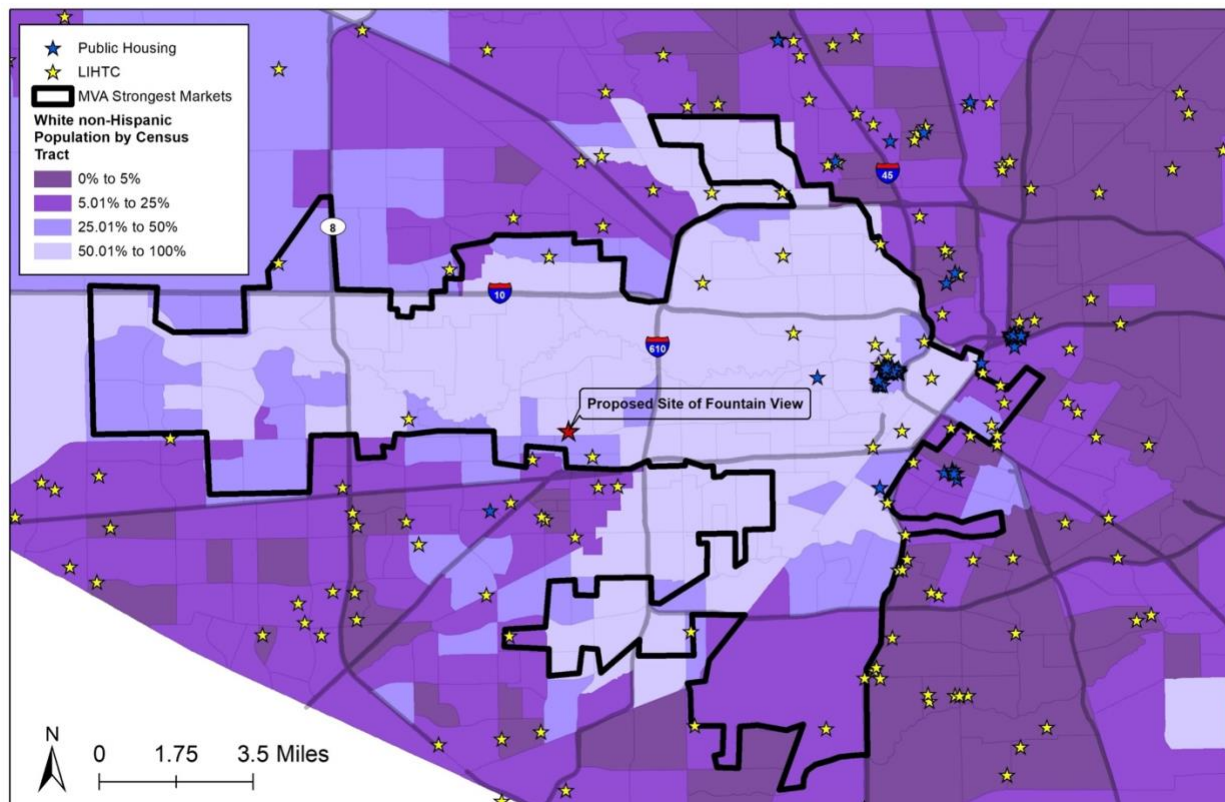
Similar patterns of intention can be found in southern cities. Even in very diverse Houston, a city that has no zoning and has been led by Black mayors for several terms, the city concentrated more than 71 percent of all government-subsidized housing in only five of its 88 neighborhoods, all of which were very poor and non-White.¹¹³ And low-income or affordable housing is rarely built in majority White space – a pattern replicated in other major Texas cities.¹¹⁴ In the map below, affordable housing subsidized by the national Low Income Housing Tax Credit program is represented by a yellow star and public housing by a blue star. Both types of housing are largely excluded from non-Hispanic, majority-White space in west Houston and certain western suburbs. A proposed site of mixed-income housing in an affluent community, represented by a red star, was rescinded by the mayor after successful resistance by “not-in-my-backyard” locals.

¹¹³ CASHIN, *supra* note 22, at 113 n.31.

¹¹⁴ *Id.* at 112-113.

Subsidized Housing in Harris County

Sources: American Community Survey (2012-2016), HUD, TDHCA



As sociologist Douglass Massey wrote in his important book *Categorically Unequal*, where social boundaries conform to geographic ones, the processes of social stratification that come naturally to human beings become much more efficient and effective.¹¹⁵ As urban policies concentrated Black poverty ghettos and disinvested in Black neighborhoods, it became much easier for non-Blacks to attribute the conditions in the hood to the individual behavior of the people who lived there, which in turn normalized policies to maintain segregation. The American way means trying to get into “good” neighborhoods and schools and avoid “bad” ones. Movers know, though they may not say it out loud, that what is really going on is avoidance of poor Black people in large numbers.

Regarding boundary maintenance, segregation persists through a host of practices. Black and Latino buyers and renters still experience racial steering from realtors and discrimination in mortgage lending. In many cities, exclusionary zoning renders it illegal to build anything other than a single family home on as much as 75

¹¹⁵ MASSEY, *supra* note 22, at 18-19.

percent of the land. Government subsidies for affordable housing tend to concentrate poverty in neighborhoods that already have their fair share of affordable housing. Local school boundaries encourage economic sorting in housing, and many but not all White Americans continue resistance to integration.¹¹⁶

Geography — physical segregation — alters not just race relations but also politics. Boundaries create direct horizontal competition for limited public and private resources between communities of abundance and communities of need. Most affluent neighborhoods enjoy the best public services, environmental quality, private, public and natural amenities, while all other communities are left with fewer, poorer-quality resource.¹¹⁷ Worse, taxpayers excluded from high-opportunity bastions typically subsidize the golden infrastructure of favored quarters through income and other taxes.¹¹⁸

For example, in Baltimore, despite majority-Black representation on the city council and mostly Black mayoral leadership for several decades, a researcher found that Baltimore was spending four times as much in majority-white neighborhoods for community development than in Black ones.¹¹⁹ And in 2015 Governor Larry Hogan rescinded funding for a new light rail line that would have connected poor Black neighborhoods of east and west Baltimore to downtown and suburban job centers. Worse, Hogan reallocated *all* of the funding that had been earmarked for the proposed “Red Line” to road projects in outlying suburban and exurban majority white areas. In Chicago, majority-White neighborhoods have been found to receive three times as much public and private investment as Black neighborhoods, which endured waves of public-school closures even as the city was investing in new specialized schools that serve relatively few low-income or Black students.¹²⁰

This pattern of overinvestment in exclusionary predominantly white space and disinvestment or neglect elsewhere is replicated in cities across the country, in part because business elites tend to bend local government to their will, ensuring that the luxury development they want gets built regardless of competing community and housing needs. Those who live in affluent areas may resist this analysis. Admittedly, individuals toil mightily to get into and stay in the winner column. My argument is that (1) it is much easier to win while riding the “up” escalator; and (2) the policies and

¹¹⁶ CASHIN, *supra* note 22, at 72; 112-18.

¹¹⁷ See, e.g., U.S. SURGEON GENERAL, *How Neighborhoods Shape Health and Opportunity*, in COMMUNITY HEALTH AND ECONOMIC PROSPERITY 22 (2021).

¹¹⁸ See generally, Cashin, *supra* note 53.

¹¹⁹ “The Black Butterfly”: Racial Segregation and Investment Patterns in Baltimore, URB. INST. (Feb. 5, 2019), <https://apps.urban.org/features/baltimore-investment-flows/>.

¹²⁰ CASHIN, *supra* note 22, at 24-30, 36, 122.

habits that facilitate a ride up for a relative few also force others to take the “down” escalator.¹²¹ This is America and American residential caste.

III – The Hope of Abolition Democracy and Constitutionalism

It doesn't have to be this way. By way of comparative example, the city of Medellin, Colombia transformed itself from one of the most dangerous on earth to a beacon of innovation over two decades by prioritizing investment in its poorest communities. Planners intentionally connected Metro cable cars to the most crime-ridden mountain-top barrios, reducing commutes to the downtown center from an arduous two-and-a-half-hours to 30 minutes. With thousands of residents able to reach jobs, universities and markets to sell to and buy from, homicides dropped significantly and poverty rates by more than half in these poorest neighborhoods. Life expectancy, education rates and food access increased significantly. The city also invested in new social institutions and invited residents to participate in the planning of “library parks” that provided youth and adults with the type of amenities common at affluent private schools in the US – libraries, sports and recreation facilities, computer and internet access, and opportunities to produce and stage theatre and community events that raised self-esteem. Medellin created new citizen centers in the same impoverished ‘hoods that enabled *la gente* to access government programs and services and offered conflict resolution and literacy programs. With access to opportunity these barrios were reclaimed from narco-guerillas and the city as a whole prospered and was remade.¹²²

A key ingredient to Medellin's transformation was to apply a lens of care to residents of the poorest neighborhoods, to view them as potential assets worthy of inclusion and the moniker, citizen. Laying aside stereotypes freed policymakers to innovate on inclusion and get started on new policies and institutions to achieve it. This is similar to the radically inclusive vision of *Brown v. Board of Education*, one that America did, for a while pursue, with successes. At the height of school integration in the South, the Black-White achievement gap had narrowed substantially.¹²³ But with

¹²¹ *Id.* at 118-120. I first heard this apt metaphor of the escalator in a speech given by Berkely University scholar John Powell, and have used it, with attribution, in prior writing. I suppose my modification of it is to connect the ability to ride up with the foisting of externalities and the designed downwardness of other places.

¹²² David H. Freeman, *How Medellín, Colombia, Became the World's Smartest City*, NEWSWEEK (Nov. 18, 2019), <https://www.newsweek.com/2019/11/22/medellin-colombia-worlds-smartest-city-1471521.html>.

¹²³ See generally Ronald F. Ferguson & Jal Mehta, *Why Racial Integration and Other Policies Since Brown v. Board of Education Have Only Partially Succeeded at Narrowing the Achievement Gap*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL, CONFERENCE SUMMARY* 184 n. (2002), (noting that the achievement gap between Black and White children declined by 40 percent between 1973 and 1990 – shortly after the period integration peaked), <https://nap.nationalacademies.org/read/10256/chapter/12>

growing non-White diversity predicted for the-public school student population,¹²⁴ the habits of structural containment of poverty and of wealth in public education will likely continue unless localities choose to pursue different, inclusive policies.

In his masterful 1935 book, *Black Reconstruction*, W.E.B. Du Bois coined the term “abolition democracy” to explain the new politics, institutions and social practices required to create a society in which Black Americans enjoyed the same freedoms as Whites.¹²⁵ Our nation’s first attempt at such transformation began with the Reconstruction Amendments to the Constitution, which sought to end slavery and render Black people American citizens.¹²⁶ This Second Founding was powered by the vision of radical abolitionists.¹²⁷ They sought to end racial caste for individuals and create a democracy that ensured caste would stay dead.

That Reconstruction was destroyed, and civil rights soldiers had to revive it a century later is not a failure but a warning. The project of Reconstruction and of perfecting our democratic union never ends. Each new generation must choose whether and how to enter the fray of fighting to perfect abolition democracy, that is a multiracial democracy in which popular will and the common good prevail. The values of equal citizenship embodied in the Reconstruction Amendments and in *Brown* depend on it.

Given the current 6-3 strongly conservative majority on the Roberts Court, and its above-described retreat from the Warren Court’s more capacious, anti-caste vision of equal protection, it will be a while or a lifetime before the Supreme Court puts any pressure on localities to affirmatively seek inclusion in public education or housing. As I have suggested throughout this essay, the Court in many ways has been an enabler of residential caste, and residential segregation, in turn, has been deployed to evade *Brown* and avoid school integration. The Court’s main response to caste in its prior manifestations was either to engage in social dominance narratives to justify them or engage in legal fictions to pretend they didn’t exist. The formalism of *Plessy* is the most obvious example.

Other examples of doctrinal choices of the Supreme Court that undermine racial integration and reify residential caste include: (1) applying the *de facto* versus *de jure* distinction in ways that completely ignore state intention in constructing and reifying

¹²⁴ See JENNIFER VAN HOOK ET. AL., UCLA CIVIL RTS. PROJECT, THE CHANGING RACIAL AND ETHNIC COMPOSITION OF THE SCHOOL-AGE POPULATION IN THE U.S. 6 (2023).

¹²⁵ W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 163-71 (Transaction Publishers 2012) (1935).

¹²⁶ See U.S. CONST. amends. XIII-XV.

¹²⁷ See *generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

exclusionary jurisdictional boundaries;¹²⁸ (2) demanding intentional discrimination versus disparate impact under the equal protection clause;¹²⁹ (3) declaring extreme partisan gerrymandering non-justiciable;¹³⁰ (4) equating modest, plus-factor consideration of race in college admissions with intentional racial discrimination;¹³¹ and (5) cynically applying originalism when it serves the conservative majority's ends¹³² but ignoring it in the context of the 14th Amendment, where there is plenty of evidence of race-consciousness on the part of the Republican coalition that drafted it and created race-conscious Freedman's Bureau programs.¹³³

I applaud scholars who have recently argued for reinterpreting the Reconstruction Amendments based upon legal theories and values offered by abolitionist lawyers before the Civil War.¹³⁴ If scholars don't do this work of theorizing abolitionist constitutionalism, the vacuum will continue to be filled by formalist doctrines that ignore systemic racial inequalities propagated through facially neutral means. That said, the work toward building and perfecting abolition democracy must continue.

For now, I place my hope in local political mobilization toward inclusion, as I have described in the examples of Louisville and Medellin. The radical, inclusive vision of *Brown* is not impossible. There are communities trying now, they just don't receive much help or encouragement from state or federal actors. But a national network of civil rights organizations and university-based research centers — the National Coalition on School Diversity — champions and supports local coalitions that promote school diversity and is a source for best practices in this work.¹³⁵

The greatest weapon against drawing exclusionary boundaries is to build up a civic culture and majoritarian politics in favor of inclusion and equitable distribution of resources. In 2018, for example, Minneapolis repealed its single-family home zoning, enabling duplexes and triplexes to be built in any neighborhood throughout the city.¹³⁶ Advocates laid the groundwork for this sea change, which passed by a vote of 12-1 in the city council, through widespread education about the city's history of redlining and

¹²⁸ See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹²⁹ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

¹³⁰ See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

¹³¹ See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2168-69 (2023).

¹³² See, e.g., *New York State Rifle & Pistol Ass'n., Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

¹³³ Brief of Professors of History and Law as Amici Curiae in Support of Respondents, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707).

¹³⁴ See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022).

¹³⁵ See *About NCSA*, THE NAT'L COAL. ON SCH. DIVERSITY, <https://www.school-diversity.org/> (last visited Mar. 2, 2024).

¹³⁶ Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequality, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html>.

intentional racial segregation.¹³⁷ The city also adopted “inclusionary zoning” requiring that 10 percent of new apartments go to moderate-income people and increased funding to combat homelessness and subsidize low-income renters.¹³⁸

With more democracy and mobilization, there will be better possibilities for a winning, national multiracial politics. This, in turn could lead to judicial nominees that favor a constitutionalism that supports rather than undermines inclusion. So let local laboratories of democracy continue. Admittedly they can also become laboratories of despotism, but that is the enduring American dilemma.

¹³⁷ *See id.*

¹³⁸ Sheryll Cashin, *Where MLK’s Vision is Starting to be Realized*, POLITICO (Jan. 1, 2022), <https://www.politico.com/news/magazine/2022/01/17/martin-luther-king-day-city-governments-527214>.