ESSAYS

RACE-CONSCIOUSNESS AND BLACK HUMANITY:

REINTERPRETING THE *BROWN* FOOTNOTE 11 DOLL STUDIES

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INTRODUCTION

This year marks the 70th anniversary of *Brown v. Board of Education*,[1] but it is no basis for celebration. The anniversary comes on the heels of the U.S. Supreme Court ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"),[2] where the Court reversed almost a half century of precedent and struck down race-conscious university admissions policies.[3] *SFFA* was the centerpiece of a decades-long right-wing attack on race-conscious policies and ideas—one that has taken off in recent years and gained even more traction after *SFFA*.[4] And in biting irony, the right-wing attack on race-consciousness has employed *Brown* itself as its main weapon, arguing the landmark decision stood for colorblindness.[5]

Much has been written about *Brown* and the doctrinal conflicts between the anti-classification principle, which espouses colorblindness, and the anti-subordination principle, which allows race-consciousness under certain

[1] 347 U.S. 483, 692 (1954) (holding racial segregation in public schools is unconstitutional). For different legal and historical analyses of *Brown*, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Vintage Books 1977) (1975); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); JACK M. BALKIN ET AL., WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001); DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL FREEDOM (2004); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007); and MARGARET BEALE SPENCER & NANCY E. DOWD, RADICAL *BROWN*: KEEPING THE PROMISE TO AMERICA'S CHILDREN (2024).

Brown is also hard to celebrate because although it outlawed de jure segregation in public education, public schools remain quite segregated de facto. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES 1 (2022), https://www.gao.gov/assets/gao-22-104737.pdf [https://perma.cc/HH45-Z2PA].

[2] 600 U.S. 181 (2023) (holding race-conscious university admissions policies at Harvard College and University of North Carolina at Chapel Hill violate Equal Protection Clause of Fourteenth Amendment).

[3] *Id.* at 230. Although the Court did not explicitly state it was overturning *Grutter v. Bollinger*, 539 U.S. 306 (2003)—the key Supreme Court precedent that had permitted universities to use race-conscious policies—it effectively did so. *See* Vinay Harpalani, *Roberts Rules of (Dis)Order: Doctrinal Doublespeak on Affirmative Action and Stare Decisis*, 77 SMU L. REV. 61, 62-63, 65 (2024).

[4] *See, e.g.*, Sheryll Cashin, Opinion, *First Conservatives Came for Affirmative Action. Now They're Gunning for DEI Programs.*, POLITICO (Aug. 10, 2023, 4:30 AM), https://www.politico.com/news/magazine/2023/08/10/affirmative-action-gop-culture-war-00110558.

[5] Petition for Writ of Certiorari at 23, Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199) (contending that "[b]ecause *Brown* is right, *Grutter* is wrong").

circumstances.[6] But one aspect that is unexplored is how *Brown* Footnote 11 and reactions to it played a role in the Supreme Court's move away from race-consciousness. In Footnote 11, the Court cited social science evidence to establish the harm of segregation.[7] Footnote 11 is particularly known for the famous doll studies conducted by Professor Kenneth Bancroft Clark and Dr. Mamie Phipps Clark.[8] The *Brown* Court took the doll studies, which showed that young Black children prefer White dolls over Black dolls,[9] as evidence that segregation harmed Black children by creating feelings of inferiority among them.[10] What seems like a simple assertion, however, became a source of much debate, controversy, and misunderstanding.[11]

This Essay examines the legacy of the Footnote 11 doll studies for both Supreme Court jurisprudence on race-consciousness and for the understanding of Black children's psychological development. The Essay brings together

[6] *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1471-76 (2004); Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 203-09 (2008); Jeffrey D. Hoagland & Vinay Harpalani, *Original Intent, Racial Equality, and the Conundrums of "Colorblindness*,*"* 83 MD. L. REV. 231, 237-38 (2023).

[7] Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citing KENNETH B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950); TECH. COMM. ON FACT FINDING, PERSONALITY IN THE MAKING: THE FACT-FINDING REPORT OF THE MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (Helen Leland Whitmer & Ruth Kotinsky eds., 1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCH. 259 (1948); Isidor Chein, *What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. PUB. OP. & ATTITUDE RSCH. 229 (1949); Theodore Brameld, *Educational Costs*, *in* DISCRIMINATION AND NATIONAL WELFARE 37 (R. M. MacIver ed., 1949); E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES (1949); and GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944)).

[8] *See* CLARK, *supra* note 7, at 28-32, 35, 66-70 (citing Kenneth B. Clark & Mamie K. Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. SOC. PSYCH. 591 (1939)); Kenneth B. Clark & Mamie K. Clark, *Segregation as a Factor in the Racial Identification of Negro Pre-School Children: A Preliminary Report*, 8 J. EXPERIMENTAL EDUC. 161, 162-63 (1939); Kenneth B. Clark & Mamie K. Clark, *Skin Color as a Factor in Racial Identification of Negro Preschool Children*, 11 J. SOC. PSYCH. 159, 160, 162 (1940); Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, *in* READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947) [hereinafter Clark & Clark, *Racial Identification and Preference*]; Kenneth B. Clark & Mamie P. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 J. NEGRO EDUC. 341, 345 (1950).

[9] *See* CLARK, *supra* note 7, at 28-32, 35, 66-70.

[10] *Brown*, 347 U.S. at 494.

[11] *See* Vinay Harpalani, Ahmad Khalid Qadafi & Margaret Beale Spencer, *Doll Studies*, *in* 2 ENCYCLOPEDIA OF RACE AND RACISM 67, 68 (Patrick L. Mason ed., 2d ed. 2013) (noting "the doll studies were almost immediately subject to criticism").

several areas that scholars have analyzed separately but have not connected together: (1) Footnote 11's influence in *Brown* and the reaction to it;[12] (2) social science research after *Brown* which both replicated and reinterpreted the findings of the doll studies;[13] (3) the Supreme Court's post-*Brown* transformation of the constitutional harm associated with race;[14] and (4) use of *Brown* to support different theories of equal protection.[15] Thus, the Essay evaluates both legal doctrine and social science research on race-consciousness and integrates the two. Specifically, it analyzes the conflation of *stigma*—external negative social meanings ascribed to race—and *self-esteem*—internalized feelings and assessments about oneself, including one's racial group membership.[16] The Essay shows that in its use of the doll studies, the *Brown* Court conflated stigma and self-esteem by presuming that Black children's awareness of stigma automatically led them to develop low self-esteem. It argues that since *Brown*, facilitated in part by legitimate methodological and conceptual

[12] Many commentators have examined different aspects of *Brown* Footnote 11. *See, e.g.*, Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 38 (1959) (examining relevance and adequacy of social science research cited in *Brown* Footnote 11); Sanjay Mody, Note, Brown *Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 794 (2002) (arguing *Brown* decision "did not in fact rely on the footnote eleven studies in holding public school segregation unconstitutional"); Michael Heise, Brown v. Board of Education*, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 281 (2005) (arguing "one indirect impact flowing largely from *Brown*'s footnote 11 . . . [is] the empiricization of the equal educational opportunity doctrine"); Malik Edwards, *Footnote Eleven for the New Millennium: Ecological Perspective Arguments in Support of Compelling Interest*, 31 SEATTLE U. L. REV. 891, 894 (2008) (proposing "basis for a footnote eleven for the twenty-first century . . . . [based on] the psychological structure necessary to understand our current context").

[13] *See infra* Part IV.

[14] *See infra* Parts V, VI.

[15] *See* sources cited *supra* note 6.

[16] I emphasize stigma and self-esteem as related to racial identity and highlight the distinction between them. Merriam-Webster Dictionary defines *stigma* as "a set of negative and unfair beliefs that a society or group of people have about something" and "a mark of shame or discredit." *Stigma*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/stigma [https://perma.cc/522A-K6FZ] (last visited Sept. 8, 2024). My operationalized definition emphasizes the fact that, inherent in these definitions, stigma is externally imposed by negative societal biases and stereotypes of Blackness. Merriam-Webster defines *self-esteem* as "a confidence and satisfaction in oneself" and "self-respect." *Self-esteem*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/self-esteem [https://perma.cc/TA6R-X3F9] (last visited Sept. 8, 2024). My operationalized definition focuses on the fact that self-esteem reflects a person's internalized feelings about themself. While external societal biases can certainly affect internalized feelings, the two are distinct, and this distinction is key to my analysis. Additionally, some researchers use other terms, such as "self-concept," to denote what I call "self-esteem." *See generally* JOHN HATTIE, SELF-CONCEPT (1st ed. 1992).

critiques of the doll studies, the Court has adopted a largely abstract notion of racial stigma to delegitimize all forms of race-consciousness. But the Essay offers a reinterpretation of the doll studies rooted in newer social science, which underscores the importance of race-consciousness for human development. In doing so, it rebukes the Supreme Court's erasure of race-consciousness and argues that the current attacks on it are a step backward. Ultimately, the Essay underscores the importance of race-consciousness for the full recognition of Black humanity.[17]

Part I examines how the Supreme Court treated racial stigma in *Plessy v. Ferguson*.[18] It shows how *Plessy* set up a "dual conundrum" for opponents of racial segregation, by rationalizing segregation through Black inferiority but positing segregation itself did not create such inferiority. *Plessy* rejected the idea that segregation has an external social meaning which denotes Black inferiority, which left the *Brown* Court to define the link between segregation and inferiority.

Part II focuses on *Brown* and the doll studies. It illustrates how Chief Justice Earl Warren's opinion was careful to distinguish rather than overturn *Plessy*, and it illustrates the role of Footnote 11 in that cautious approach. But this is also where the *Brown* Court conflated racial stigma (external social meaning associated with segregation) and self-esteem (internal feelings of inferiority among Black children).

Part III reviews the doll studies in detail and lays out the conceptual and methodological critiques of them. These include critiques of reliance on social science itself; flaws in experimental design; assumptions about causal relationships between doll preference, segregation, and self-esteem; and adoption of a general deficit-oriented perspective on Black experiences.

Part IV lays out a reinterpretation of the doll studies, showing that they did not indicate that Black children had feelings of inferiority. Rather, the studies illustrated that preference for Whiteness is part of the children's emerging race-consciousness. This Part argues that in a society where Whiteness is the most valued racial status, preference for White dolls is part of the normal cognitive development of Black children. But later studies showed that preference behavior does not indicate low self-esteem, and that preference shifts as children's race-consciousness develops further.

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[17] *See* SPENCER & DOWD, supra note 1, at 103 ("Brown's mandate is clear: it is comprehensive equality expressive of the recognition and lived reality of common humanity."). This Essay highlights the importance of understanding race-consciousness for Black racial identity. For an overview on the significance of race-consciousness for White racial identity, see Monica McDermott & Frank L. Samson, White Racial and Ethnic Identity in the United States, 31 ANN. REV. SOCIO. 245 (2005). There is also an emerging body of related research on other groups, such as Asian Americans. See, e.g., Hyung Chol Yoo, Abigail K. Gabriel, Annabelle L. Atkin, Ronae Matriano & Safa Akhter, A New Measure of Asian American Racial Identity Ideological Values (AARIIV): Unity, Interracial Solidarity, and Transnational Critical Consciousness, 12 ASIAN AM. J. PSYCH. 317, 317 (2021).

[18] 163 U.S. 537 (1896).

Part V examines the Supreme Court's race jurisprudence in the aftermath of *Brown*, focusing on the how the Court transformed the nature of the harm articulated through Footnote 11. It argues that while the Court and legal scholars have unequivocally embraced *Brown*'s ruling, they have rejected Chief Justice Warren's legal reasoning and particularly the much-maligned Footnote 11. This created a void in defining the harm associated with segregation. The Court replaced *Brown*'s notion of tangible harm to Black children with an abstract "stigmatic" harm attributed to all racial classifications—thus rejecting race-consciousness altogether.

Part VI focuses on race-conscious university admissions—particularly *SFFA*. It illustrates that *SFFA* was the culmination in redefining the harm articulated in *Brown*, to reflect a colorblind ideal and reject race-consciousness. It lays out how the *SFFA* majority and concurring opinions defined all race-consciousness and even racial categories alone as stereotyping, without articulating tangible harms or effects. This Part also shows how the various *SFFA* opinions used the language of *Brown*, including that associated with Footnote 11, in ways that deviated from the original opinion.

The Conclusion comes back to the doll studies and their reinterpretation. It argues that in shunning race-consciousness, the Supreme Court voided consideration of an important and unavoidable aspect of cognitive and social development, going against *Brown*'s mandate.[19] And it contends that the ultimate lesson of the doll studies is that the acknowledgement and understanding of race-consciousness is necessary for full recognition of Black humanity.

I. RACIAL STIGMA AND *PLESSY*'S DUAL CONUNDRUM

The U.S. Supreme Court's treatment of racial stigma was the backdrop for *Plessy* and ultimately *Brown*. Racial stigma became embedded in the Supreme Court's race jurisprudence with the infamous 1857 case of *Dred Scott v. Sandford*,[20] which held that Black Americans could not be citizens under the Constitution.[21] In holding that Black Americans could not be citizens under the Constitution, *Dred Scott* emphasized that "the strongest mark of inferiority and degradation was fastened upon the African race."[22] The *Dred Scott* ruling was abrogated with the ratification of the Fourteenth Amendment, but its framing of racial stigma and rights influenced future equal protection jurisprudence.

The Fourteenth Amendment's Equal Protection Clause fashioned the scope and direction of the Supreme Court's view of racial stigma, and the Court's early interpretation of the Equal Protection Clause suggested that it might be applied

[19] *See* SPENCER & DOWD, *supra* note 1, at 14 ("*Brown v. Board of Education* requires the implementation of equality that ensures the perception *by* every child, and the perception *of* every child, *that their humanity is equally valued and supported*.").

[20] 60 U.S. (19 How.) 393 (1857) (enslaved party).

[21] *Id.* at 416.

[22] *Id.* The centrality of racial stigma to the *Dred Scott* decision should not be lost.

broadly to eliminate racial stigma. In *Strauder v. West Virginia*,[23] the Court granted Black Americans "the right to exemption from unfriendly legislation against them" and struck down a state law which prohibited Blacks from serving on juries.[24] *Strauder* underscored that "[t]he very fact that [Black] people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors . . . is practically a brand upon them affixed by the law, an assertion of their inferiority . . . ."[25] The Court thus deemed that equal protection was protection against racial stigma—laws that implied racial inferiority.

However, the scope of the Fourteenth Amendment was restricted considerably with the infamous "separate but equal" doctrine in *Plessy v. Ferguson*.[26] *Plessy* narrowed the broad principle espoused in *Strauder* by distinguishing between political and social equality and holding that the Fourteenth Amendment only applied to the former: "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality . . . ."[27]

Plessy deemed that even if segregation created social distinctions between the races, laws mandating segregation "do not necessarily imply the inferiority of either race to the other."[28] At the same time, however, *Plessy* maintained that "[l]egislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences . . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."[29]

However, despite acknowledging that social distinctions might reflect racial inferiority, *Plessy* purported to reject the "assumption that the enforced separation of the two races stamps the [Black] race with a badge of inferiority."[30] The opinion contended that any notion of inferiority associated with racial segregation occurred "not by reason of anything found in the act, but solely because the [Black] race chooses to put that construction upon it."[31] Thus, the *Plessy* Court upheld the Louisiana statute requiring racially segregated railroad cars.[32]

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[23] 100 U.S. 303 (1879).

[24] *Id.* at 308.

[25] *Id.*

[26] Plessy v. Ferguson, 163 U.S. 537 (1896).

[27] *Id.* at 544.

[28] *Id.*

[29] *Id.* at 551-52.

[30] *Id.* at 551.

[31] *Id.* at 552.

[32] *Id.* at 551-52. Ironically, to support its ruling, the *Plessy* majority cited *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), where the Massachusetts Supreme Judicial Court upheld school segregation in Boston. *Plessy*, 163 U.S. at 544.

These nuances of the *Plessy* ruling would prove significant six decades later in *Brown*, and they are key to understanding the role of Footnote 11. *Plessy* set up a dual conundrum for opponents of segregation. On one hand, the *Plessy* Court assumed that distinctions between Black and White Americans were real, and that Black Americans were the "socially" inferior group, or at least that it was reasonable to presume their inferiority. The Court found segregation to be rational because it reflected real differences.[33] On the other hand, however, *Plessy* held that segregation itself did not create or promote notions of Black inferiority—that it was not inherently stigmatizing. Thus, the *Plessy* Court espoused that Black inferiority might be an antecedent condition—a rational basis for separating the races—but it was not a consequence of segregation.

Justice John Marshall Harlan dissented in *Plessy*. Unlike the majority, Justice Harlan linked segregation to racial stigma, asserting that the true social meaning of the Louisiana statute and similar laws was "that [Black] citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[34] Harlan further asserted that this was common knowledge:

> Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by [Black people], as to exclude [Black] people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary.[35]

Harlan's dissent also famously stated that "[o]ur Constitution is color-blind,"[36] which later became a basis for conservative arguments for colorblindness and the anti-classification principle.[37] Ironically, Justice Harlan's dissent espoused notions of White supremacy and anti-Asian sentiments even more overtly than the *Plessy* majority.[38] Nevertheless, conservatives (and some liberals) attributed Harlan's analysis to the original meaning of the Fourteenth Amendment and have employed it as such.[39]

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[33] *Plessy*, 163 U.S. at 551.

[34] *Id.* at 560 (Harlan, J., dissenting).

[35] *Id.* at 557 (Harlan, J., dissenting).

[36] *Id.* at 559.

[37] *See infra* Parts V, VI.

[38] *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (affirming White race deems itself "the dominant race in this country" and "will continue to be for all time"); *id.* at 561 (Harlan, J., dissenting) (referring to Chinese as "a race so different from our own that we do not permit those belonging to it to become citizens of the United States").

[39] For critiques of Justice Harlan's formulation of colorblindness, see, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 53-62 (1991); and Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307, 1328-40 (2024).

II. FROM THE DUAL CONUNDRUM TO THE DOLL STUDIES

Thirteen years after *Plessy*, in 1909, W.E.B. Du Bois and other civil rights leaders founded the NAACP.[40] Within a few decades, the NAACP created its Legal Defense and Educational Fund, which brought cases to challenge *Plessy*'s "separate but equal" doctrine in education.[41] Originally, these cases focused on demonstrating unequal facilities in schools and obtaining declaratory judgments in favor of Black plaintiffs.[42] This left it to states to determine whether the remedy was to equalize the schools or desegregate them.[43]

The initial cases focused on graduate and professional schools, as many states did not provide such education for Black Americans, making it easier to prove inequality.[44] Even when graduate education was available for Black students, it was clearly inferior.[45] And while the NAACP continued to argue that educational facilities were unequal, it also introduced intangible factors into the litigation, slowly building the argument that legally sanctioned social distinctions were harmful and stigmatizing.

This was a successful strategy. In *Sweatt v. Painter*,[46] the Supreme Court ruled that the University of Texas Law School could not deny admission to Black students, even if Texas had a law school for them, because doing so would deny Blacks an equal education.[47] Among the factors that created this inequality, as cited by the Court, were "standing in the community, traditions and prestige,"[48] all of which reflect social reputation and thus relate to stigma. *Sweatt* noted the importance of social interaction with other students as central to

[40] *See Our History*, NAACP, https://naacp.org/about/our-history [https://perma.cc/NV27-FUTZ] (last visited Sept. 8, 2024) ("In 1908 . . . eruptions of anti-black violence – particularly lynching – were horrifically commonplace, but the Springfield riot was the final tipping point that led to the creation of the NAACP.").

[41] *See History*, NAACP LEGAL DEFENSE FUND, https://www.naacpldf.org/about-us/history/ [https://perma.cc/5GKY-7JCP] (last visited Sept. 8, 2024) ("In its first two decades, LDF undertook a coordinated legal assault against officially enforced public school segregation.").

[42] U.W. Clemon & Bryan K. Flair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama* 1940-1980, 52 ALA. L. REV. 1121, 1138-44 (2001).

[43] *See* TUSHNET, *supra* note 1, at 22.

[44] *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938) (holding Missouri had to provide law school for Black students within its boundaries).

[45] *See* Sweatt v. Painter, 339 U.S. 629, 635-36 (1950) (holding that Texas law school for Black students was not equal); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 641 (1950) (holding graduate school at University of Oklahoma may not segregate Black students).

[46] 339 U.S. 629 (1950).

[47] *Id.* at 633-36.

[48] *Id.* at 634.

educational equality,[49] an idea also cited in *Sweatt*'s companion case*, McLaurin v. Oklahoma State Regents*.[50]

This would be significant because in *Brown*, the Supreme Court stipulated that facilities and other "tangible factors" were equalized or being equalized among the Black and White public schools involved in the case.[51] The Court's opinion had to rest solely on the social distinctions created by segregation, rather than on material differences in resources. Moreover, the *Brown* Court had to proceed carefully, given the politically charged nature of the issue. Chief Justice Earl Warren wanted to give a comprehensive justification for going against *Plessy*'s precedent, but without squarely repudiating the *Plessy* Court.[52] To accomplish this aim, the *Brown* Court issued a 9-0 opinion and made several doctrinal moves to distinguish *Plessy*.

First, the *Brown* Court espoused a "living Constitution" theory of constitutional interpretation,[53] as opposed to an originalist view.[54] The *Brown* Court previously heard the parties' arguments about the original meaning of the Fourteenth Amendment, which "covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in

[49] *Id.*

[50] 339 U.S. 637, 641 (1950) (finding segregation impairs students' ability "to engage in discussions and exchange views with other students, and, in general, to learn [their] profession").

[51] Brown v. Bd. of Educ., 347 U.S. 483, 492 ("[T]he [Black] and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. . . . We must look instead to the effect of segregation itself on public education.") (citation omitted). *Brown* was a consolidation of four cases from Kansas, South Carolina, Virginia, and Delaware. *Id.* at 486. Additionally, *Bolling v. Sharpe*, 347 U.S. 497 (1954), struck down school segregation in the District of Columbia by applying the Equal Protection Clause to the federal government as well as the states. *Id.* at 500.

[52] *See* Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 157 (1958) ("Chief Justice Warren's unanimous opinion took pains to avoid an overruling statement."); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 65 (2001) (noting Chief Justice Warren strove to write opinion that was "short, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory").

[53] The phrase "living Constitution" was coined by political scientist Howard Lee McBain in his famous 1927 book. *See generally* HOWARD LEE MCBAIN, THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW (1927). Earlier commentators, such as Woodrow Wilson, had also discussed the concept. *See* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 57 (1908) ("Living political constitutions must be Darwinian in structure and in practice. Fortunately, the definitions and prescriptions of our constitutional law . . . are sufficiently broad and elastic to allow for the play of life and circumstance.").

[54] *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 24 (Grant Huscroft & Bradley W. Miller eds., 2011).

racial segregation, and the views of proponents and opponents of the Amendment."[55] With regard to school segregation, the Court concluded that these arguments were "[a]t best . . . inconclusive" and "not enough to resolve the problem."[56] Instead, the Court interpreted the Constitution in light of "contemporary circumstances and social values,"[57] rather than looking to original intent or meaning of the Fourteenth Amendment. Applying this notion of an evolving, living Constitution, the Court could justify revisiting the *Plessy* precedent without stating that it was wrong in 1896.

The espousal of a living Constitution set up the *Brown* opinion's second argument: the increasingly important role of education in society. First, the Court linked education and the "living Constitution": "In approaching this problem, we cannot turn the clock back to 1868 . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."[58] Next, the Court established the special role of education: "Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship."[59] Consequently, the Court concluded that the opportunity to have an education "is a right which must be made available to all on equal terms."[60] By establishing education as a special context, the Court further justified its deviation from *Plessy*: schools were more socially significant than railroad cars, and even more so in 1954 than at the time of *Plessy*.

Having set up its reasons for distinguishing *Plessy*, the *Brown* Court also subtly circumvented *Plessy*'s assumption that Black people may actually be inferior to White people. The Court noted that during the post-Reconstruction period of *Plessy*, education for Black Americans was "almost nonexistent" and illegal in some states, and that as a consequence, "practically all of the race were illiterate."[61] Conversely, the Court stated that "[t]oday . . . many [Black Americans] have achieved outstanding success in the arts and sciences as well as in the business and professional world."[62] By highlighting contemporary Black achievements, the Court aimed to illustrate that when given opportunities, Black people could achieve success. This was another move to bypass *Plessy*. The Court did not squarely repudiate *Plessy*'s assertion that in 1896, racial segregation was based on reasonable social distinctions. By 1954 however, perceived inferiority could not justify segregation.

[55] *Brown*, 347 U.S. at 489.

[56] *Id.*

[57] Mody, *supra* note 12, at 798.

[58] *Brown*, 347 U.S. at 492-93.

[59] *Id.* at 493.

[60] *Id.*

[61] *Id.* at 490.

[62] *Id.*

But there was still one looming ghost from *Plessy*: the idea that segregation itself did not denote Black inferiority and thus was not harmful. Footnote 11 was important to the *Brown* decision precisely to refute this point. The Court had to show that segregation harmed Black people, but Chief Justice Warren still wanted to resist flatly contradicting the *Plessy* Court's view that segregation did not convey racial stigma—a social meaning of inferiority. So, to distinguish *Plessy*'s holding on the effects of segregation, the *Brown* Court took a different path.

Building on its prior arguments regarding the special role of education, Chief Justice Warren added another contextual point: the particular vulnerability of young children. The Court referenced the intangible social considerations highlighted in *Sweatt* and *McLaurin*, asserting:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[63]

With this statement, the *Brown* Court makes an important but ultimately dubious turn. It goes beyond racial stigma (external social meaning associated with segregation) and adds the concept of self-esteem (internal feelings of inferiority among Black children). Before *Plessy*, equal protection cases had focused just on the social meaning of segregation, espoused through language such as "stigma" and "badge of inferiority," which referred to the external impairment White society placed on Black people. *Plessy* itself did briefly consider the internalized effect of segregation, but only to note that any inferiority associated with segregation occurs "solely because the [Black] race chooses to put that construction upon it."[64] And *Sweatt* and *McLaurin* could point to the social and professional impairments that came about because segregated facilities and activities for Black students were inferior to those for White students.[65] But now the *Brown* Court, dealing with a stipulation of equal facilities, added Black self-esteem—subjective "feeling[s] of inferiority" that Black people internalize due to the stigma associated with segregation.

The Court reinforced its position that racial segregation harms Black children by citing findings from the Kansas district court:

> Segregation of white and [Black] children in public schools has a detrimental effect upon the [Black] children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually

[63] *Id.* at 494.

[64] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[65] *See* Sweatt v. Painter, 339 U.S. 629, 633-34 (1950) (finding separate Black law school was inferior to the University of Texas Law School in terms of faculty, course variety, library resources, and extracurricular activities); McLaurin v. Okla. St. Regents, 339 U.S. 637, 640-41 (1950) (finding result of law school segregation "is that appellant is handicapped in his pursuit of effective graduate instruction").

> interpreted as denoting the inferiority of the [Black] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [stagnate] the educational and mental development of [Black] children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[66]

Here, the Court subtly linked the external social meaning of segregation (which "denot[ed] the inferiority" of Black Americans,[67] as Justice Harlan had long before stated in his *Plessy* dissent)[68] to the internal "sense of inferiority," which segregation purportedly created among Black Americans, thus negatively impacting their self-esteem. Beyond the external social meaning attached to segregation, the Court now highlighted segregation's psychological effects on the internalized self-esteem of Black children.[69]

Immediately thereafter, the *Brown* opinion supported this assertion with factual findings—social science evidence that the NAACP had presented:

> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.[11] Any language in Plessy v. Ferguson contrary to this finding is rejected. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[70]

Here, *Brown*'s Footnote 11—arguably the most famous footnote in any Supreme Court opinion—cited social science evidence to support the assertion that segregation itself was indeed harmful because it caused Black children to have feelings of inferiority. This evidence augmented the Court's conclusion that separate is "inherently unequal."[71]

Footnote 11 was intended to give the *Brown* opinion more stable footing. Rather than contradicting *Plessy* at its own behest, the Court had "modern authority" on its side—social science evidence that was not available to the *Plessy* Court. Thus, without squarely repudiating *Plessy*, the Court could posit that segregation led to individual harm—feelings of inferiority among Black children—that could not be readily dismissed as occurring "solely because the

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[66] *Brown*, 347 U.S. at 494.

[67] *Id.*

[68] *See Plessy*, 163 U.S. at 557, 560 (Harlan, J., dissenting).

[69] *See* Heise, *supra* note 12, at 294 ("[T]he Court identified state-sponsored school segregation as the cause of the inadequate self-esteem (the psychological harm)."). The connection between the external social meaning of segregation and internalized feelings of inferiority was not itself new. Over one hundred years earlier, when he represented the Plaintiff challenging school segregation in *Roberts v. City of Boston*, Charles Sumner had argued that segregated schooling "inflicts upon [Black children] the stigma of caste" and also "tends to create a feeling of degradation in [Black people]." 59 Mass. (5 Cush.) 198, 203-04 (1849).

[70] *Brown*, 347 U.S. at 494-95. The "11" is left in this quote because of its importance.

[71] *Id.* at 495.

[Black] race chooses to put that construction upon it."[72] The *Brown* Court here did reject part of *Plessy*'s reasoning, but again implied that the *Plessy* Court was not wrong per se, because it did not have access to "modern authority" in drawing its conclusions.

Footnote 11 included several academic articles and books which drew from psychology, sociology, history, and economics.[73] In addition to Kenneth Clark and other psychologists,[74] it included works by educational philosopher Theodore Brameld,[75] renowned Black sociologist E. Franklin Frazier,[76] and the economist and future Nobel laureate Gunnar Myrdal.[77] These studies all illustrated the harms of racism and segregation to Black people in America. But Clark's report was the first and most important source cited in Footnote 11,[78] and it included perhaps the most well-known social science research involving Black Americans: the doll studies.[79]

III. THE DOLL STUDIES AND THEIR DISCONTENTS

Kenneth Clark's report cited in Footnote 11 of *Brown* included more than the famous doll studies that he conducted with his wife, Mamie Clark. It was a literature survey and analysis on the existing body of research on racial prejudice.[80] Based on this research, Clark employed his knowledge and expertise to draw conclusions about the personalities and psychological well-being of Black children. Clark's report partially summarized the doll studies, which included children from a variety of Northern and Southern communities,[81] along with similar research by psychologists Marian J. Radke and Helen G. Trager.[82]

Clark's report noted that most of the Black children in these studies, from age three to seven, could distinguish between white and black/brown dolls,[83] could

[72] *Plessy*, 163 U.S. at 551.

[73] *See* Edwards, *supra* note 12, at 893 (noting Footnote 11 cited "psychological, sociological, historical, and economic research on the impact and causes of segregation" (footnotes omitted)).

[74] *See Brown*, 347 U.S. at 494 n.11 (citing CLARK, *supra* note 7).

[75] Brameld, *supra* note 7.

[76] FRAZIER, *supra* note 7.

[77] MYRDAL, *supra* note 7.

[78] Clark's report itself cited some of the other sources in Footnote 11, such as Myrdal's book and Max Deutscher and Isidor Chein's survey of social scientists on the psychological effects of segregation. *See* sources cited *supra* note 7. This may be how the *Brown* Court became attuned to those sources.

[79] CLARK, *supra* note 7, at 27-43.

[80] *See generally id.*

[81] *See* sources cited *supra* note 8.

[82] *See* CLARK, *supra* note 7, at 27-28, 39-40 (citing Marian J. Radke & Helen G. Trager, *Children's Perceptions of the Social Roles of Negroes and Whites*, 29 J. PSYCH. 3, 3 (1950)).

[83] *See id.* at 27-28. White, black, and brown are not capitalized in the main text here because they refer to color, not race.

identify which dolls represented their own racial group,[84] and most notably, would more readily attribute positive sentiments toward the white dolls—such as identifying the white dolls as the one they "like[] best."[85]

Additionally, the Clarks' 1947 article which was cited in the report found that more Black children participants identified the white dolls as having "a nice color," being a "nice doll," and being the doll they "like to play with"; and they were more likely to choose the black/brown doll as the one that "looks bad."[86] The *Brown* Court cited Clark's report to support its contention that young Black children had developed low self-esteem—feelings of inferiority—allegedly because of segregation.[87]

The actual impact of the doll studies on the *Brown* decision remains an issue of debate.[88] Chief Justice Warren's opinion broadly espoused living constitutionalism and highlighted the growing importance of education more than the social science studies. Footnote 11 was just that—a footnote, and one that addressed a relatively minor point in *Plessy*. And it contained other social science evidence besides the doll studies.

Nevertheless, it was the doll studies that most caught the eye of legal observers and the public. Clark had testified in three of the four cases that were consolidated in *Brown*,[89] and in 1952, he coauthored a statement about the harms of segregation that was signed by thirty-two prominent social scientists and was included as an appendix to the NAACP's Supreme Court brief for *Brown* and its companion cases.[90] The following year, that statement was also published in

[84] *Id.* at 28-29.

[85] *See id.* at 39-40. Richard Kluger also notes that Radke and Trager's study included Black and White children and gave them choices of dolls, clothing, and houses. KLUGER, *supra* note 1, at 318-19. The researchers found that:

> 57 percent of the [Black] children and 89 percent of the white children preferred the white cut-out doll; that 60 percent of the white children outfitted the brown dolls in shabbier clothing than they put on the white dolls; and that 82 percent of the white children and two-thirds of the [Black] children placed the [Black] doll in the tenement.

Id. at 319.

[86] *See* Clark & Clark, *Racial Identification and Preference*, *supra* note 8, at 169, 175. In 1951, one year after preparing the report, Clark testified to these results at trial in *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951), *vacated*, 342 U.S. 350 (1952), the South Carolina case which was consolidated as part of *Brown*. *See* KLUGER, *supra* note 1, at 353-57.

[87] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[88] *See* Mody, *supra* note 12, at 793-95.

[89] *See* Ludy T. Benjamin, Jr. & Ellen M. Crouse, *The American Psychological Association's Response to* Brown v. Board of Education*: The Case of Kenneth B. Clark*, 57 AM. PSYCH. 38, 40 (2002) (noting Kenneth Clark testified in South Carolina, Delaware, and Virginia cases that were consolidated into *Brown*).

[90] Kenneth B. Clark, Isidor Chein & Stuart W. Cook, *The Effects of Segregation and the Consequences of Desegregation*, 59 AM. PSYCH. 495, 499 (2004).

substance as a law review article.[91] Even before the *Brown* ruling, Clark and the doll studies were known to informed legal observers.[92]

The doll studies were thus ripe for critique. Some questioned the use of social science evidence generally. New York University law professor Edmond Cahn noted that social science was "very young, imprecise, and changeful"[93] and that he "would not have the constitutional rights of [Black Americans]—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records."[94] Yale Law Professor Charles Black concurred with Cahn, arguing that segregation should have been struck down not based on social science, but "on the ground of history and of common knowledge about the facts of life."[95] Black thus focused on racial stigma and the external social meaning of segregation, rather than on the internal psychological harm. Black's sentiment here hearkens back to Justice Harlan's dissent in *Plessy*.[96]

The methodological critiques were also salient. Some critical observers noted that the doll studies had relatively small sample sizes and did not employ standard experimental design.[97] Professors Margaret Beale Spencer and Carol Markstrom-Adams later questioned whether the white and black/brown dolls used in the doll studies were of equivalent aesthetic quality,[98] owing to the paucity of high-quality Black dolls available in early- and mid-twentieth

[91] *Minn. L. Rev.* Ed. Bd., *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 427 (1953) (republishing brief with "[o]nly the formal portions . . . omitted").

[92] *See, e.g.*, *id.*; *infra* note 105 and accompanying text. For a brief history of the immediate reaction to the *Brown* decision from legal commentators, see Mody, *supra* note 12, at 803-09.

[93] Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955).

[94] *Id.* at 157-58. For further discussion of Professor Cahn's analysis, see also Mody, *supra* note 12, at 805-06. Additionally, Kenneth Clark himself responded to Cahn's criticisms. *See* Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224, 226 (1959).

[95] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

[96] Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

[97] *See* Heise, *supra* note 12, at 294 ("Critics noted that Clark's study involved a small sample size and lacked anything remotely resembling a control group."). Part of the critique also came from a smaller replication of the doll study that Kenneth Clark conducted in Clarendon County, South Carolina, for his testimony in *Briggs v. Elliott*, with only sixteen children. *See* KLUGER, *supra* note 1, at 355 (noting small sample size, "fuzzy terminology," and sequencing of questions as potential confounding factors in Clark's Clarendon County study). However, while known to close observers of the desegregation cases, the Clarendon County study was not part of Clark's report that was cited in Footnote 11. *See generally* CLARK, *supra* note 7.

[98] Margaret Beale Spencer & Carol Markstrom-Adams, *Identity Processes Among Racial and Ethnic Minority Children in America*, 61 CHILD DEV. 290, 296 (1990) (asking whether "experimental stimuli of nonwhite groups [are] less attractive").

century.[99] Additionally, Professor Michael Heise notes that "[c]ommentators described Dr. Clark's methodology as 'primitive,' certainly by today's standards and even perhaps by social scientific standards existing in the mid-1950s."[100]

But the most significant critique was that the Clarks assumed causal relationships between segregation and children's racial doll preference, and between racial doll preference and feelings of inferiority. The findings of the doll studies did not directly link segregation to children's racial preference behavior,[101] or to feelings of inferiority,[102] much less demonstrate that segregation caused either of these.[103] In fact, the Clarks' data actually indicated that a greater percentage of Black children in their Southern samples attributed positive characteristics to the black/brown dolls than did Black children in their Northern samples.[104] This critique had been noted in the *Yale Law Journal* two years before the *Brown* ruling, referencing Clark's testimony in the South Carolina case.[105] Clark would later awkwardly try to explain this data by asserting that Southern children may have accepted their "inferior social status," while Northern children at least strove "to assert some positive aspect of the

[99] Alexis Dixon & Elaine Nichols, *Dolls Hold Significance and Break Cultural and Racial Barriers*, SMITHSONIAN, https://nmaahc.si.edu/explore/stories/dolls-hold-significance-and-break-cultural-and-racial-barriers [https://perma.cc/28NR-6APY] (last visited Sept. 8, 2024) ("Prior to the 1950s, dolls that were anthropologically correct in their depiction of African Americans were nonexistent or not widely marketed. Negative, exaggerated and unattractive categorizations of [Black people] were prevalent in media, including the toy industry."); Lisa Hix, *Black Is Beautiful: Why Black Dolls Matter*, MEDIUM (Feb. 23, 2015), https://medium.com/lisa-hix/black-is-beautiful-why-black-dolls-matter-75d2e4e1c91b [https://perma.cc/BJY3-S2KX] (noting in post-World War II era, black dolls "were most often white dolls painted brown or dipped in brown dye").

[100] Heise, *supra* note 12, at 294.

[101] Garfinkel, *supra* note 12, at 56 ("Clark had no rigorously obtained data whereby he could systematically connect the broad effects of discrimination on personality to the school segregation in these cases.").

[102] Spencer & Markstrom-Adams, *supra* note 98, at 296 (noting "studies [do] not make clear the sources of or reasons for the findings of misidentification"). Spencer and Markstrom-Adams suggest that rather than low self-esteem, Black children's preference for white dolls might be attributable to lower quality black/brown dolls, children's understanding of which racial group has power, and/or children's knowledge of social meanings and stereotypes associated with race and color. *Id.*; *see also infra* Part IV.

[103] *See* Heise, *supra* note 12, at 294 ("Important causation problems fueled additional technical criticism of the Clark study.").

[104] *See* CLARK, *supra* note 7, at 68; *see also* Garfinkel, *supra* note 12, at 56; KLUGER, *supra* note 1, at 355-56; Heise, *supra* note 12, at 295.

[105] *See* Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730, 737 (1952) ("The unhealthy symptoms revealed by the doll tests cannot . . . be traced with certainty to educational segregation. A North-South breakdown of the results fails to establish any statistically significant difference in the preference for the white doll or self-identification with it.").

self."[106] He was criticized for his tenuous conclusions on this point,[107] and the Clarks' doll studies never showed any link between psychological harm and segregation itself.

Additionally, the doll studies equated racial doll preference behavior with feelings of inferiority—low self-esteem.[108] They did not use independent measures of racial/color preference and self-esteem. Instead, researchers simply assumed that preference for the lighter dolls meant Black children had low self-esteem.[109] Professor William E. Cross analyzed all of the Clarks' studies on racial preference behavior of children.[110] Professor Cross found that the Clarks' own data indicated significant in-group preference—attribution of positive characteristics to black/brown dolls by Black children.[111] And notably, Kenneth

[106] KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 45-46 (1955). Clark notes:

> On the surface, [the Clarks'] findings might suggest that northern [Black] children suffer more personality damage from racial prejudice and discrimination than southern [Black] children. However, this interpretation would seem to be not only superficial but incorrect. The apparent emotional stability of the southern [Black] child may be indicative only of the fact that through rigid racial segregation and isolation [they have] accepted as normal the fact of [their] inferior social status. Such an acceptance is not symptomatic of a health personality. The emotional turmoil revealed by some of the northern children may be interpreted as an attempt on their part to assert some positive aspect of the self. *Id.*

Clark also cited data indicating that Black Americans born in the South were over four times more likely to be admitted to a psychiatric hospital than Black Americans born in the North (who were slightly less likely to be admitted than White Americans born in the North). *Id.* at 46 n.4.

[107] *See* Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 77 (1960) (concluding "Professor Clark misled the courts" because Southern children were less likely to prefer white dolls). *But see* WILLIAM E. CROSS, JR., SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY 36 (1991) (contending that Clark was "too ethical" to "have contrived evidence"). Professor Cross contends that "Kenneth Clark was predisposed to see [Black] life from a pathogenic perspective, and the opportunity to assist in the struggle to destroy legal racism through a careful delineation of the negative effects of racism reinforced his views." *Id.* at 35-36.

[108] Heise, *supra* note 12, at 294 ("When the African-American schoolchildren identified the white dolls as 'nicer,' Dr. Clark concluded that the children lacked adequate self-esteem.").

[109] *See* Margaret Beale Spencer, *Black Children's Race Awareness, Racial Attitudes and Self-Concept: A Reinterpretation*, 25 J. CHILD PSYCH. & PSYCHIATRY 433, 433 (1984).

> Eurocentric findings of race dissonance by young black children have led some theorists to suggest that black children may suffer from deflated self-esteem or general personality disorganization. However, few studies have empirically delineated the relationship between self-concept and racial attitudes in preschool children. Most have inferred self-concept from racial attitude data.

Id. (citation omitted).

[110] CROSS, *supra* note 107, at 16-38. Professor Cross's analysis included all of the Clarks' studies cited in *supra* note 8.

[111] *See id.* at 26-29.

Clark's report noted a developmental shift: while younger Black children in the samples preferred the white dolls, by age seven, a majority of both the Clarks' Northern and Southern samples preferred the darker dolls.[112] But Clark did not recognize the significance of this shift, possibly because he and Mamie Clark were trained as experimental social psychologists rather than developmental psychologists and thus were not attuned to interpreting the data through the theoretical lens of social and cognitive development.[113]

The doll studies and other research cited in Footnote 11 occurred during a time when most social scientists—including those who were well-meaning opponents of racism—tended to view Black American life from a pathological, deficit-oriented perspective.[114] Researchers often framed the entirety of Black experience through the lens of racism—as a "mark of oppression."[115] There was a singular focus on harm to Black people, with scant attention to the normal psychological and developmental processes that all humans encounter—which for Black people also occur in the context of racism.[116] The doll studies reflected this ethos,[117] evidenced by their underlying assumptions about Black children's self-esteem. Would one even conceive of measuring the self-esteem of White children by assessing the color of dolls they preferred? It was not until much later that research on Black children began to take a normal human development perspective rather than deficit-oriented approach.[118]

With so many shortcomings, the doll studies became an easy target for criticism. Yale Law School professor Alexander Bickel, who clerked for Justice

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[112] CLARK, *supra* note 7, at 32-33 (noting that Clarks, in their 1947 study, observed among Black children aged three to seven years old "a decrease in preference of the white doll, an increase in tendency to prefer the brown doll with increasing age").

[113] *See* Harpalani, Qadafi & Spencer, *supra* note 11, at 68-69.

[114] *See* DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE 1880-1996, at 17 (1997) (noting that "liberal experts" viewed and depicted "the black psyche as damaged" and "present[ed] [Black people] as damaged objects of pity rather than citizens whose rights had been violated").

[115] *See, e.g.*, ABRAM KARDINER & LIONEL OVESEY, THE MARK OF OPPRESSION: EXPLORATIONS IN THE PERSONALITY OF THE AMERICAN NEGRO, at xiii (1st ed. 1951).

[116] Dena Phillips Swanson et al., *Psychosocial Development in Racially and Ethnically Diverse Youth: Conceptual and Methodological Challenges in the 21st Century*, 15 DEV. & PSYCHOPATHOLOGY 743, 745 (2003) ("For youth of color, and particularly African American youth, normative developmental experiences are often ignored or misunderstood. The prevailing deficit-oriented perspective focuses on negative outcomes and ignores the resilience demonstrated by many youth of color.").

[117] CROSS, *supra* note 107, at 37.

> [The Clarks] produced an image of [Black people] dominated by feelings of inferiority. In a sense, they provided extraordinary insight into what happens when racism cripples the mind and spirit, but they offered no explanation for, and even came close to denying, the existence of [Black] identities that effected reasonable-to-average levels of self-esteem in the face of everyday negotiations with poverty and racism. *Id.*

[118] *See infra* Part IV.

Felix Frankfurter when *Brown* was argued before the Supreme Court, later offered that:

> Invoking Kenneth Clark was a mistake because of the vulnerability of the doll tests . . . . Yes, the Court was justified to have included such references as a Brandeisian move, but . . . . [t]he opinion . . . should have said straightforwardly that *Plessy* was based on a self-invented philosophy, no less psychologically oriented than the Court was being now in citing these sources to justify the holding that segregation inflicted damage.[119]

Despite their flaws, the Clarks' doll studies are still rightly regarded as pioneering research on racial identity and on the effects of racial prejudice.[120] Their theoretical limitations and methodological errors were not unique or unusual and reflected the limitations of most social science research in that era.[121] The studies can only be fairly viewed in the context of their time. But they also left several unanswered questions. Why did Black children prefer the white dolls in the first place? Did preference for white dolls indicate that Black children had low self-esteem and feelings of inferiority? And why were older Black children more likely to prefer the black/brown dolls than younger children?

Future research would bring about a reinterpretation of the doll studies and their implications for Black children and for American society more generally.

IV. REINTERPRETING THE DOLL STUDIES THROUGH A DEVELOPMENTAL LENS

After *Brown*, the doll studies became well known and other researchers attempted to replicate them, correcting some of the methodological flaws in the original research. For example, later research used black and white dolls or

[119] KLUGER, *supra* note 1, at 707.

[120] Margaret Beale Spencer, *Transitions and Continuities in Cultural Values: Kenneth Clark Revisited*, *in* AFRICAN AMERICAN CHILDREN, YOUTH, AND PARENTING 183, 183 (Reginald L. Jones ed., 1999) (noting Clarks' research "stimulated significant empirical and theoretical work in the areas of personal and group identity formation," and "represents important studies which raised the critical question about the relationship between environmental experiences and psychological outcomes for minority status children").

[121] *See supra* notes 114-17 and accompanying text; *cf.* Spencer, *supra* note 120, at 184 (asserting "[m]ore recent conceptual formulations demonstrate significant improvements and sensitivity" with regard to Black children's psychological development).

pictures that were aesthetically equivalent.[122] These studies still found that young children generally rated White dolls/pictures more positively.[123]

But fixing the major conceptual flaw—conflation of racial preference and self-esteem—proved to be informative. Beginning in the 1970s and 1980s, Professor Margaret Beale Spencer, a developmental psychologist, conducted a series of studies that demonstrated that for young children, racial attitudes and preference behaviors are independent of self-esteem.[124] For samples of Southern and Northern children,[125] Professor Spencer independently measured racial preference behavior and self-esteem. The former was measured with the "Racial Attitude/Preference Measure [which] tests for Eurocentric or majority-culture biased attitudes and preferences" and included pictures of Black and White girls and boys that "were identical except for hair texture and skin color."[126] Self-esteem ("Global Self-Concept") was measured with the Thomas Self-Concept Measure which involves the child's assessment of themself with reference to an individual photograph of the child taken just prior to the test.[127]

Professor Spencer found that overall, in her study: (1) 81% (132/163) of the Southern preschool children had a positive self-concept, even though 57% (93/163) of them had Eurocentric preferences;[128] (2) 93% (165/177) of the Southern primary school children had a positive self-concept, even though 66% (117/177) of them had Eurocentric or neutral preferences;[129] and (3) 87%

[122] *See, e.g.*, CNN, *Inside the AC360 Doll Study*, YOUTUBE (May 18, 2010), https://www.youtube.com/watch?v=DYCz1ppTjiM [https://perma.cc/W33K-N65A] (showing research using aesthetically equivalent pictures of Black and White children and finding most young children in study viewed White pictures in more positive light); WKYC Channel 3, *Re-examining the Baby Doll Study and Its Impact*, YOUTUBE (Sept. 2, 2021), https://youtu.be/h13Cvky9XoU [https://perma.cc/XQR8-278V]; *see also infra* text accompanying note 126.

[123] *See* sources cited *supra* note 122; *infra* notes 124-30 and accompanying text.

[124] *See* Margaret Beale Spencer, *Personal and Group Identity of Black Children: An Alternative Synthesis*, 106 GENETIC PSYCH. MONOGRAPHS 59, 61 (1982). In this study, "Eurocentric" refers to preferences for White, "Afrocentric" refers to preferences for Black, and "neutral" denotes no preference. *See id.* at 67.

[125] One study included: (1) a Southern city sample of 384 Black American boys and girls, ages 3 to 9 (grouped into "preschool" and "primary school" samples), who attended predominantly Black schools; and (2) a Northern sample of 130 Black American boys and girls, ages 4 to 6.5 (all "preschool" age), who attended predominantly Black schools. *See id.* at 65, 69. Data was not available for all psychological measures for the entire sample, which is why some of the numbers in the text accompanying *infra* notes 128-32 are less than the total sample sizes.

[126] *Id.* at 67.

[127] *See id.* at 69.

[128] *Id.* at 77 (calculated from Figure 4).

[129] *Id.*

(113/130) of the Northern preschool children had a positive self-concept, even though 73% (95/130) of them had Eurocentric preferences.[130]

Like the Clarks' doll studies, a significant majority of Black children in Spencer's study showed a preference for Whiteness. But contrary to the Clarks' interpretation of this preference, and to feelings of inferiority allegedly supported by Footnote 11's "modern authority" in *Brown*, Spencer's data indicated that a significant majority of Black children have high self-esteem. In the Southern sample, even among those who had Eurocentric preferences, 82% of the preschool children (76/93) and 93% of the primary school children (53/57) had positive self-concept.[131] And in the Northern sample, among those who had Eurocentric preferences, 86 % (82/95) had positive self-concept.[132]

Also like the Clarks' doll studies,[133] Professor Spencer's data showed a developmental trend. In her Southern sample, the older (primary school) Black children were much less likely to show Eurocentric preference. Only 32% (57/177) of the Southern primary school children had Eurocentric preference: this was less than the 34% (60/177) who had Afrocentric preference and the 34% (60/177) who had neutral preference.[134]

Professor Spencer's data, interpreted not just through the lens of racism, but also through the lens of normal social and cognitive development, shed light on the unanswered questions from the doll studies. Why did Black children prefer the white dolls/pictures in the first place? Professor Spencer argues that even very young Black children have learned "the connotations associated with color," namely that "the color white is valued and the color black is devalued."[135] Children impute that onto race and racial identification—and so they tend to prefer the white dolls, at least at a young age. This racial preference behavior reflects their growing awareness of racism and stigma—the social meaning of race.[136] Even very young Black children are aware of the external messages "denoting the inferiority" of Black people that Justice Harlan's *Plessy* dissent[137]

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[130] *Id.* at 76 (calculated from Figure 3).

[131] *Id.* at 77 (calculated from Figure 4).

[132] *Id.* at 76 (calculated from Figure 3).

[133] *See supra* note 112 and accompanying text.

[134] Spencer, *supra* note 124, at 77 (calculated from Figure 4).

[135] Harpalani, Qadafi & Spencer, *supra* note 11, at 69 (quoting Margaret Beale Spencer, *Cultural Cognition and Social Cognition as Identity Correlates of Black Children's Personal-Social Development*, *in* BEGINNINGS: THE SOCIAL AND AFFECTIVE DEVELOPMENT OF BLACK CHILDREN 215, 221 (Margaret B. Spencer, Geraldine K. Brookins & Walter R. Allen eds., 1985)).

[136] *See also* Spencer & Markstrom-Adams, *supra* note 98, at 296 (positing interpretation of racial preference behavior as "minority group children offering their knowledge of connotative meanings associated with specific groups as a function of their own level of cognitive development").

[137] *See supra* notes 34-35.

and Professor Charles Black's 1960 law review article[138] highlighted. They are race-conscious from an early age.

Nevertheless, the racial preference behavior of young Black children did not reflect their self-esteem: it did not indicate that they had feelings of inferiority, as the Clarks and the *Brown* opinion had presumed. Professor Spencer posited a reinterpretation of the doll studies research that is grounded in developmental theories of social and cultural cognition,[139] rather than in the deficit-oriented perspective that plagued earlier research.[140] She emphasized the need to understand children's race preference behavior in the same fashion as all other behavior—from a normal child development perspective,[141] not a pathological perspective. Black children, like all children, make meaning of the world they encounter, a significant aspect of which is racism and racial stigma. But like all other children, their social cognition skills develop gradually. During early childhood, they become aware of features and values of the external world, including the negative social meanings associated with race, and they model these by choosing the white dolls. But these negative social meanings do not affect their self-esteem, because children at that young age are "cognitively egocentric": they do not yet recognize how others are judging them.[142] And such recognition is necessary for external influences to affect self-esteem,[143] because as sociologist Charles Horton Cooley noted, "The thing that moves us to pride

[138] *See generally* Black, *supra* note 95.

[139] *See* Margaret Beale Spencer, *Preschool Children's Social Cognition and Cultural Cognition: A Cognitive Developmental Interpretation of Race Dissonance Findings*, 112 J. PSYCH. 275, 276-77 (1982).

[140] *See supra* notes 114-17 and accompanying text.

[141] *See* Spencer, *supra* note 139, at 276 ("Traditionally, researchers assessing children's cultural cognition (i.e., race awareness and racial attitudes) have most often ignored cognitive-developmental interpretations of this particular social phenomenon.").

[142] *See* Harpalani, Qadafi & Spencer, *supra* note 11, at 69.

> During early childhood, the social meanings that black children typically learn do not affect their self-esteem. The reason for this is that at this development stage, children are cognitively egocentric: that is, they lack awareness of how others view them and primarily just model the values and behaviors they observe. Thus, they do not apply the social meanings of color and race to their sense of self, as they might when they are older.

Id. (citation omitted).

[143] *See* Spencer, *supra* note 139, at 276.

> [P]ersonality theorists have often assumed that Eurocentric racial attitudes expressed by black children indicate negative self-concept or low self-esteem. But negative self-concept associated with cultural race dissonance ambiguity is possible only at the start of the developmental stage of concrete operational thinking, generally reached after the preschool age. Before the concrete operational stage, children lack the cognitive structures necessary for making complex associations.

Id. (citation omitted).

or to shame is not the mere reflection of ourselves, but an imputed sentiment, the imagined effect of this reflection upon another's mind."[144]

Thus, young Black children are race-conscious but not yet self-conscious. They recognize race and the social meanings associated with it, but they do not apply those social meanings to themselves, as they do when they are older. The Clarks missed this point because they approached the doll studies from the perspective of social psychology rather than developmental psychology.[145] In their interpretations of the doll studies, they did not evaluate the data from the perspective of young children. Rather, "they imposed adult interpretations on their observations of children's preferences."[146]

A normal human development perspective can also explain why older Black children are more likely to prefer the black/brown dolls/pictures than preschoolers. Children do not remain cognitively egocentric. Their social cognition skills develop as they grow older, and they become self-conscious and thus more aware of how others view them—the prerequisite for judgments of self.[147] And what happens as they develop self-consciousness? Both the Clarks' doll studies and Professor Spencer's studies found that older Black children have shifted their racial preference behavior: many more of them come to prefer the black/brown dolls. With their emerging self-consciousness and continually growing race-consciousness, older Black children are forced to resolve dissonance between their racial preference behavior and their evaluations of self. But rather than developing feelings of inferiority, the majority of Black children exhibit the more normal and healthy response: they maintain high self-esteem. And to reconcile their racial preference behavior with their sense of self, their racial preferences shift from Eurocentric to Afrocentric.

Many studies of "global self-esteem"—defined as "generalized feeling[s] of self-acceptance, goodness, worthiness, and self-respect"—have found that Black Americans had higher global self-esteem than White Americans.[148] But of course, there is tremendous within-group variation. Black children's experiences within their families and communities and with White people moderate and affect this process, and every child reacts differently to them.

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[144] CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 152 (1902).

[145] *See* Harpalani, Qadafi & Spencer, *supra* note 11, at 69.

[146] *Id.*

[147] *See supra* notes 142-46.

[148] *See* Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 PSYCH. REV. 608, 609 (1989). Crocker and Major distinguish between "global self-esteem" and "racial self-esteem," defining the latter as "evaluations of the worthiness or value of the social groups—such as racial, ethnic, or religious groups—of which one is a member." *Id.* They further note that "one may hold one's social group or category in low esteem, yet have high feelings of personal self-worth." *Id.* And they report that "those studies that have measured racial self-esteem, especially those conducted prior to the 1970s, have tended to find low self-esteem among [Black Americans]." *Id.* But those older studies of racial self-esteem tended to suffer from the same conceptual flaws noted above, *supra* notes 108-18 and accompanying text.

Some Black children are socialized early on, to varying extents, to be aware of racism and/or to embrace their own Blackness in different ways. Both the Clarks and Spencer found some Black preschoolers who preferred black/brown dolls or pictures.[149] Like all other groups, Black children of all ages vary significantly in their racial preference behavior, self-esteem, and other psychological traits.[150]

As they grow older, Black children also develop a more sophisticated race-consciousness: they learn more about the social meanings associated with Blackness, such as stereotypes of criminality, low intelligence, and athletic prowess.[151] Importantly, this gradual development of race-consciousness and self-consciousness does not occur in isolation from other aspects of their normal social and cognitive development—including puberty, social interactions with their peers, desire to fit in, rebellion against parents and elders, and other normal preteen and teenage dilemmas that all children encounter.[152] But Black children face an added burden of negotiating these normal dilemmas in conjunction with

[149] In an earlier study, Professor Spencer and Frances Degen Horowitz found that Black preschool children who preferred white pictures/puppets could be taught to prefer black pictures/puppets, by either Black or White experimenters. *See* Margaret Beale Spencer & Frances Degen Horowitz, *Effects of Systematic Social and Token Reinforcement on the Modification of Racial and Color Concept Attitudes in Black and in White Preschool Children*, 9 DEV. PSYCH. 246, 250-53 (1973). They also found "a suggestion in the data that the white experimenter had a greater influence on the learning acquisition than did the black experimenter both for black and for white experimental subjects." *Id.* at 251. This would be consistent with the notion that Black preschool children have learned that White is the most valued status and thus would react more positively to the White experimenter.

[150] One could also ask why the Black children in Clarks' Southern study (and to an extent in Spencer's study) were more likely to prefer the black/brown dolls than the Black children in the Northern sample. The answer is less definitive, but one possibility is that the former had greater exposure to a variety of Black professionals and role models who had no choice but to live in segregated communities, which exposed them to more positive connotations associated with Blackness (even if they still had an overall preference for Whiteness). Living under Jim Crow segregation, in an era before television expanded, they may have also had less exposure to White America. *See* Harpalani, Qadafi & Spencer, *supra* note 11, at 69. Spencer's research came after Jim Crow segregation and after the expansion of television and other media, so perhaps this effect was not as great in her study. But rather than segregation itself, Black children's awareness of racism and stigma, present throughout America, explained their racial preference behavior.

[151] *See* Vinay Harpalani, Racial Stereotypes and Achievement-Linked Identity Formation During Adolescence: An Investigation of Athletic Investment and Academic Resilience 150-51 (2005) (Ph.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania). Black teenagers react in complex ways to these stereotypes. *See generally id.*; Vinay Harpalani, *Counterstereotypic Identity Among High-Achieving Black Students*, PENNGSE PERSPS. ON URB. EDUC. 6 (2017), https://urbanedjournal.gse.upenn.edu/printpdf/356 [https://perma.cc/8UZB-26UH] (discussing children's counterstereotypic adaptive coping strategies as they "learn more complex ideas about race, including stereotypes").

[152] *See* Harpalani, Qadafi & Spencer, *supra* note 11, at 69.

racial stigma and stereotypes, and having to continually resolve the cognitive dissonance between their innate desire to maintain high self-esteem and their growing knowledge of the ways in which Blackness is devalued and Whiteness is accorded higher status. To cope with this cognitive dissonance, Black children may begin to reject values and institutions associated with the exaltation of Whiteness and devaluation of Blackness, as these can be threatening to the ego and sense of self. And this may lead them to shun entities and ideas associated with Whiteness.[153]

One notable instance of this rejection is the use of the term "acting White" by Black preteen and teenage youth, as an epithet against their own Black peers.[154] The tension between the doll studies and the "acting White" phenomenon has not been explicitly written about before, but it illustrates the developmental shift in racial preference behavior. While the doll studies show that young Black children view Whiteness as positive and superior, the "acting White" phenomenon indicates that by their preteen years, Black youth often see Whiteness in a negative light—something to be rejected, to the point where being accused of "acting White" is an insult.[155] How can we reconcile this tension? Precisely by understanding the development of race-consciousness and self-consciousness among Black children. As Black children simultaneously develop increased social cognition and learn about different manifestations of racism, they may go from valuing Whiteness to shunning it, so they can maintain their self-esteem in the process.[156] But the consequence here is that Black children, often during their preteen and teenage years, may come to reject school achievement and conformity to school rules as "acting White," if they view schools as racist institutions where they are marginalized and devalued.[157]

Professor Spencer's research thus offers a reinterpretation of the doll studies,[158] with implications for young Black children, adolescents, and ultimately adults.[159] For Black preschool children, the doll studies illustrated the

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[153] *See* Margaret Beale Spencer & Vinay Harpalani, *What Does "Acting White" Actually Mean?: Racial Identity, Adolescent Development, and Academic Achievement Among African American Youth*, *in* MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 222, 224-25 (John U. Ogbu ed., 2008).

[154] *Id.* at 226.

[155] *Id.*

[156] *See id.* at 231-35.

[157] *Id* at 235-36. Like the doll studies, the "acting White" phenomenon is widely misunderstood. *See generally id.*; Vinay Harpalani, *What Does "Acting White" Really Mean?: Racial Identity Formation and Academic Achievement Among Black Youth*, PENNGSE PERSPS. ON URB. EDUC. (2002), https://urbanedjournal.gse.upenn.edu/printpdf/123 [https://perma.cc/4CW4-F2FA].

[158] For descriptions of other related studies by Professor Spencer, see Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355-57 (2019); and SPENCER & DOWD, *supra* note 1, at 146-51.

[159] *See generally* Margaret Beale Spencer & Vinay Harpalani, *Nature, Nurture, and the*

early stages of race-consciousness, where they had learned the negative social meanings associated with Blackness without internalizing them. Older Black children who have developed self-consciousness show a shift in their race preference behavior, to reconcile their sense of self with their growing race-consciousness. And by early adolescence, some Black children may have negative attitudes toward Whiteness, based on ego-threatening experiences of racial prejudice within predominantly White institutions.[160]

Race-consciousness is thus inextricably linked to identity development,[161] but not in the simple way posited by the *Brown* Court. The Clarks' doll studies did demonstrate that children become aware of racism at an early age, but it was incorrect to presume, without any direct support, that this led to feelings of inferiority. The harms illustrated by the doll studies and other research cited in Footnote 11 were the harms of racism broadly, including but not limited to Jim Crow segregation. And the continuing harm to Black children is that of being forced to cope with racism and racial stigma as they mature, while simultaneously confronting all the normal developmental challenges of growing up. *Brown* was certainly correct to strike down school segregation as government sanctioning of racism and subordination of Black people. And if the doll studies had been interpreted properly, "the legal recognition of harm" espoused in *Brown* Footnote 11 would be "developmentally based"—as Professor Spencer and Professor Nancy Dowd argue—with a "developmentally defined" remedy.[162] Spencer and Dowd further contend that a "developmental framing" is needed to achieve the "common humanity" that *Brown* mandated.[163] And by implication, a developmental understanding of race-consciousness, such as that noted above,[164] with a concomitant race-conscious remedy that incorporates this understanding, is necessary for the full recognition of Black humanity.

Unfortunately, this nuanced understanding of child development in the context of racism did not exist in 1954. With many valid criticisms of Footnote 11 and the doll studies, future courts and legal commentators largely ignored the social science evidence as a legitimate component of *Brown*'s reasoning. This led to a remaking of *Brown* by both anti-classification proponents who favored colorblindness and anti-subordination advocates who favored race-

Question of "How?": A Phenomenological Variant of Ecological Systems Theory, *in* NATURE AND NURTURE: THE COMPLEX INTERPLAY OF GENETIC AND ENVIRONMENTAL INFLUENCES ON HUMAN BEHAVIOR AND DEVELOPMENT 53 (Cynthia García Coll, Elaine L. Bearer & Richard M. Lerner eds., 2004).

[160] *See* Spencer & Harpalani, *supra* note 153, at 232-33.

[161] Professor Cross also notes how healthy development of race-consciousness involves "bridging" to make connections in different ways with the larger non-Black world, with a particular focus on "white society, white organizations, and the reestablishment of white friendships." CROSS, *supra* note 107, at 218.

[162] *Cf.* SPENCER & DOWD, *supra* note 1, at 104.

[163] *Id.*

[164] *See supra* notes 124-63 and accompanying text.

consciousness. And while the doll studies and subsequent research which corrected their shortcomings found that race-consciousness prevails in real life,[165] colorblindness has prevailed in the courts.

V. THE TRANSFORMATION OF THE HARM IN *BROWN*

There is a peculiar irony to *Brown*. Its holding is highly revered, both in law and in society at large. But even as they embrace *Brown*'s result, legal scholars and jurists have generally abandoned Chief Justice Earl Warren's legal reasoning. The restored vitality of originalism,[166] fueled by conservative Supreme Court appointments, relegated Warren's living constitutionalism to the background. Instead of Chief Justice Warren's approach, both proponents and opponents of race-conscious policies have framed *Brown* as a conduit to the original meaning of the Fourteenth Amendment.[167] This is quite ironic given that the *Brown* opinion explicitly stated that the evidence on original meaning was inconclusive.[168] But proponents still argue that the Fourteenth Amendment itself, channeled through *Brown*, espoused an anti-subordination view of equal protection that allows government use of race under certain circumstances.[169] Conversely, opponents argue that *Brown* reflects the Fourteenth Amendment's originalist anti-classification principle and prohibits most government use of race.[170] Both proponents and opponents of race-consciousness have thus created narratives of *Brown*'s legacy that circumvent Chief Justice Warren's opinion—particularly Footnote 11.[171]

Footnote 11 remains well known because of the doll studies, and it prompted more use of social science in litigation.[172] Nevertheless, while the Supreme Court still references the relationship between segregation and inferiority, it treats this not as a social science finding, but rather as a principle derived from the original meaning of the Fourteenth Amendment. To the extent *Brown* relied

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[165] *See supra* notes 124-63 and accompanying text.

[166] *See* Solum, *supra* note 54, at 22-24 (charting rise of "the New Originalism" in which Justice Antonin Scalia played key role).

[167] *See* Hoagland & Harpalani, *supra* note 6, at 237 ("Today, debates over equal protection focus on conflicting interpretations of *Brown v. Board of Education*.").

[168] Brown v. Bd. of Educ., 347 U.S. 483, 489 (noting that "the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" were too indefinite to resolve constitutionality of racial segregation in public schools, and "[a]t best, they were inconclusive").

[169] *See generally* sources cited *supra* note 6.

[170] *Id.*

[171] It should be noted that for proponents of race-consciousness in particular, the emphasis on arguments involving original meaning may be a reaction to the conservative direction of the Supreme Court, rather than a preference for originalism over living constitutionalism.

[172] *See* Heise, *supra* note 12, at 296 (arguing *Brown* Footnote 11 "was influential" because it led to "empiricization of the equal educational opportunity doctrine" and "to an increasingly multidisciplinary law").

on social science, the conceptual and methodological flaws of the doll studies gave further reason to discard its reasoning.[173] But rejecting Footnote 11 meant there needed to be another way to define the constitutional harm of segregation—a harm commentators almost universally acknowledged even as they rejected Footnote 11 and the doll studies.

Justice Harlan's *Plessy* dissent,[174] along with Professor Charles Black's post-*Brown* commentary,[175] provided the first answer here. The harm from segregation came from its social meaning: racial stigma which was an external mark of Black inferiority. This harm did not draw on Footnote 11. Professor Paul Brest articulated the contrast between the social meaning harm and Footnote 11, when he discussed *Brown* in his foreword to the *Harvard Law Review* Supreme Court 1975 term issue:

> [T]he essence of *Brown v. Board of Education* lay in Chief Justice Warren's observation that the segregation of black public school pupils "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." As Charles L. Black noted, the Court could not properly have ignored "a plain fact about the society of the United States — the fact that the social meaning of segregation is the putting of [Black people] in a position of walled-off inferiority — or the other equally plain fact that such treatment is hurtful to human beings. Recognition of the stigmatic injury inflicted by discrimination explains applications of the antidiscrimination principle where the material harm seems slight or problematic. For example, it fully explains the harmfulness of de jure school segregation without the need to invoke controversial social science evidence concerning the effects of segregation on achievement, interracial attitudes, and the like, and thus explains the Supreme Court's casual extension of *Brown* to prohibit the segregation of public beaches, parks, golf courses and buses.[176]

Professor Brest contended that the social meaning of segregation, as denoting racial inferiority, was itself a "stigmatic injury," distinct from the "material harm" of segregation alleged by the social science evidence in Footnote 11.[177]

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[173] There was other evidence of the harm of segregation referenced in Footnote 11 besides the doll studies. *See* sources cited *supra* note 7; *supra* text accompanying notes 73-79 (providing social science evidence besides Kenneth Clark's report that *Brown* Court cited in Footnote 11 to demonstrate that separate was inherently unequal). But commentators, such as Professors Edmond Cahn and Charles Black, critiqued the use of social science generally. *See supra* notes 93-95 and accompanying text.

[174] *See supra* text accompanying note 35.

[175] *See supra* text accompanying note 95.

[176] Paul Brest, *The Supreme Court 1975 Term. Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9 (1976) (footnotes omitted).

[177] *Id.* Professor Brest did not necessarily reject the conclusion the *Brown* Court drew from the Footnote 11 social science evidence, as he noted that "school desegregation may inflict

And he suggested that the Court had already adopted this notion of harm by 1975, by striking down de jure segregation in contexts besides schools.[178]

But arguably, the harm articulated by Harlan and Black was itself a tangible, material harm: the negative consequences for Black people of being stigmatized by segregation.[179] Gradually, the Court transformed such stigmatic injury into a more abstract notion of "stigmatic harm": that government use of race was itself a harm, independent of its tangible, negative consequences for people. While the Court did not completely eschew tangible effects, this abstract notion of stigmatic harm became linked to the Court's anti-classification jurisprudence and its embrace of colorblindness over race-consciousness.

This transformation began in the 1970s, as the Court became more conservative. The constitutional void in defining the harm of segregation, which was created by the rejection of Footnote 11, was one more place where conservative Justices could mold equal protection doctrine to embrace colorblindness. But this process had many dimensions, and it was not a straight line. Different views of racial stigma were visible in the Justices' 1978 opinions in *Regents of the University of California v. Bakke*,[180] although the distinctions between them were far from clear. Justice Brennan's dissent, joined by Justices White, Marshall, and Blackmun, would have rendered unconstitutional any law that "stigmatizes any group . . . . because it is stigma that causes fatality."[181] But Justice Lewis Powell's controlling opinion criticized the relevance of racial stigma to constitutional law, stating, "The Equal Protection Clause is not framed in terms of 'stigma.' Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless."[182]

Justice Powell did not distinguish government use of race that has a "benign remedial purpose" from "a malevolent stigmatic classification."[183] This was

stigmatic harm and reinforce feelings of differential worth in children of both races." *Id.* at 18.

[178] *Id.* at 9. In *Loving v. Virginia*, the Supreme Court had also rejected the argument that "mere 'equal application'" of Virginia's ban on interracial marriage to Black and White people shielded the ban "from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8 (1967). While *Loving* found that equal protection applied to all racial classifications, it also highlighted prevention of "arbitrary and invidious discrimination" and did not consider benign uses of race. *Id.* at 10.

[179] *See* Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 207 (2023) (arguing Justice Harlan knew "the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system" (quoting Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 329 n.3 (2023) (Sotomayor, J., dissenting))).

[180] 438 U.S. 265 (1978) (holding racial set-aside programs in higher education were unconstitutional, but that colleges and universities could use race as plus factor in admissions).

[181] *Id.* at 361-62 (Brennan, J., dissenting).

[182] *Id.* at 294 n.34 (plurality opinion) (Powell, J.).

[183] *Id.*

because Powell believed that even race-conscious policies deemed to be "benign" could "reinforce common stereotypes holding that certain groups are unable to achieve success without special protection."[184] Thus, although Powell stated at one point that stigma did not have constitutional significance, his *Bakke* opinion actually espoused a notion of stigma—albeit one different from Brennan's—to support the anti-classification principle. Nonetheless, Powell did approve of race-conscious policies for limited purposes, including attainment of educational benefits of diversity in higher education.[185]

The Court adopted the anti-classification principle in its 1989 *City of Richmond v. J.A. Croson Co.* decision,[186] stating that there is no way to distinguish between "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[187] Justice Sandra Day O'Connor, who would soon become the Court's swing Justice and have tremendous influence on its jurisprudence, wrote the Court's opinion in *Croson*. She cited Powell's *Bakke* opinion in noting that "[c]lassifications based on race carry a danger of stigmatic harm."[188] But the constitutional harm espoused by Justice O'Connor here is distinct from both the harm in *Brown* Footnote 11 and the one articulated by Justice Harlan's *Plessy* dissent, because it is not a tangible harm. The psychological harms or other negative consequences to Black people or others are not relevant. Rather, the "stigmatic harm" that Justice O'Connor brought forth occurs when government action itself reinforces racial differences, *regardless of the tangible results of that action*. Justice O'Connor made this clearer in her 1990 dissent in *Metro Broadcasting, Inc. v. FCC*[189]:

> Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.[190]

Later, in her 1993 opinion for the Court in *Shaw v. Reno*,[191] Justice O'Connor's opinion that "an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an

[184] *Id.* at 298.

[185] *Id.* at 314-15 (noting "the interest of diversity is compelling in the context of a university's admissions program" if the "program's racial classification is necessary to promote this interest").

[186] 488 U.S. 469 (1989).

[187] *Id.* at 493.

[188] *Id.* (citing Bakke, 438 U.S. at 298 (plurality opinion) (Powell, J.)).

[189] 497 U.S. 547 (1990).

[190] *Id.* at 602 (1990) (O'Connor, J., dissenting).

[191] 509 U.S. 630 (1993).

individual's worth or needs."[192] Professors Richard Pildes and Richard Niemi argue that *Shaw* is rooted in the notion that:

> [T]he state has impermissibly endorsed too dominant a role for race. . . . [This result] might rest on the intrinsic ground that the endorsement is wrong, in and of itself [or] . . . on the instrumental ground that this state endorsement threatens to reshape social perceptions along similar lines.[193]

In *Shaw* and in the 1996 redistricting case of *Bush v. Vera*,[194] where Justice O'Connor also wrote the controlling opinion, the Court also recognized such stigmatic harm even when no individual actor can claim injury, because government use of race itself is the harm.[195]

Professors Pildes and Niemi note that the "stigmatic harm" articulated by Justice O'Connor:

> [R]esults from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. . . . [T]he *meaning* of a government action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.[196]

Professors Pildes and Niemi elaborate that the "harm is not concrete to particular individuals," but rather "lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values."[197]

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[192] *Id.* at 643 (quoting United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring)). O'Connor further asserted that government racial classifications could "balkanize us into competing racial factions." *Id.* at 657. *Shaw* held that there could be a valid Equal Protection claim if a state "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." *Id.* at 658. Justice David Souter dissented in *Shaw* and critiqued the majority for using *Brown*'s language of "segregation" in this context. *Id.* at 682 n.4 (Souter, J., dissenting).

> The majority's use of 'segregation' to describe the effect of districting here may suggest that it carries effects comparable to school segregation making it subject to like scrutiny. But a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other group characteristic) in districting does not, without more deny equality of political participation. *Id.*

[193] Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 509 (1993) (footnote omitted). Professors Pildes and Niemi refer to this as an "expressive harm." *Id.*

[194] 517 U.S. 952 (1996).

[195] *Id.* at 980-81 (holding gerrymandered districts "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial").

[196] Pildes & Niemi, *supra* note 193, at 506-07.

[197] *Id.* at 507.

The concept of stigmatic harm espoused here removes the notion of subordination and its tangible effects. Mere racial classification, regardless of purpose or any connotation of inferiority, is deemed as stigmatizing. And the use of race in any fashion is said to reinforce racial differences, which itself is deemed problematic, even if there is no demonstrable harm or tangible effect. The stigmatic harm of using race, as viewed by Justice O'Connor, decidedly reflected anti-classification values.[198]

Emergence of this abstract stigmatic harm did not mean that connotations of racial inferiority and tangible effects completely disappeared from the Court's race jurisprudence. In particular, Justice Clarence Thomas's concurring and dissenting opinions continued to discuss race classifications in terms of Black inferiority and alleged tangible consequences for Black people. But Thomas tends to reject these notions when they support race-consciousness and favor them when they promote colorblindness. In *Missouri v. Jenkins*,[199] Thomas rejected the lower court's finding that de facto school segregation presented a remediable constitutional violation, in part basing his view on the error of the Clarks' doll studies, stating, "[T]he theory that black students suffer an unspecified psychological harm from segregation . . . . not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."[200]

Ironically, in *Adarand Constructors, Inc. v. Pena*,[201] another opinion rendered on the same day as *Jenkins*, Justice Thomas stated that affirmative action programs "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[202] Here, Thomas made the same move for which he critiqued *Brown*: he links the social meaning of race ("badge of inferiority") with psychological tendencies (Black people may "develop dependencies" or feel "'entitled' to preferences"). Despite his critique of "questionable social science" in *Jenkins*, Thomas here seems willing to make this link without any evidence to offer.

Clashes between these different understandings of constitutional harm, and between anti-subordination and anti-classification principles, have most come to bear in the Supreme Court's consideration of race-conscious admissions.

[198] Professor Reva Siegel describes Justice O'Connor's race jurisprudence as "antibalkanization"—a third approach besides anti-subordination and anti-classification, which Professor Siegel describes as designed to "promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1299 (2011).

[199] 515 U.S. 70 (1995).

[200] *Id.* at 114 (Thomas, J., concurring).

[201] 515 U.S. 200 (1995).

[202] *Id.* at 241 (Thomas, J., concurring). In *Adarand*, which was authored by Justice O'Connor, the Court finally deemed explicitly that strict scrutiny applied to all racial classifications—benign or invidious, federal or state. *Id.* at 227.

Until *SFFA*, this was the one area where the Court had been most visibly tolerant of government use of race. Perhaps for that reason, *SFFA* itself became a rhetorical clash over the meaning of *Brown*.

VI. RACE-CONSCIOUSNESS AFFIRMED AND ABROGATED

In 2003, *Grutter v. Bollinger*[203] brought a different dimension to the Court's treatment of race-consciousness and to Justice O'Connor's race jurisprudence.[204] *Grutter* surprised many observers: it was the only case where Justice O'Connor voted to uphold a race-conscious policy. Paralleling *Brown*,[205] her majority opinion cited social science evidence to support the holding that the educational benefits of diversity in higher education were a compelling state interest which could justify race-conscious admissions policies.[206] In particular, O'Connor noted that having a "critical mass" of underrepresented students with a "variety of viewpoints" helps to break down racial stereotypes.[207]

University admissions was the one place where O'Connor was willing to posit that the tangible benefits of breaking down stereotypes in the real world, attained by enrolling a critical mass, outweighed that abstract stigmatic harm of using race-conscious policies. But the Court still subjected such policies to several limitations.[208] As with her prior opinions, O'Connor was particularly concerned about the government treating all members of a racial group in the same way, regardless of whether such treatment had tangible, negative effects.[209] That is why she preferred *Grutter*'s flexible, holistic plan which involved individualized consideration of race[210] over the fixed mechanical point system in *Gratz v.*

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[203] 539 U.S. 306 (2003).

[204] *See generally id.* Ironically, Justice O'Connor arguably became more known for *Grutter* than she did for her opinions where she rejected race-consciousness.

[205] For more on ironic parallels between *Brown* and *Grutter*, see Vinay Harpalani, *Simple Justice or Complex Injustice?: American Racial Dynamics and the Ironies of* Brown *and* Grutter, PENNGSE PERSPS. ON URB. EDUC. 1 (2004), https://urbanedjournal.gse.upenn.edu/printpdf/315 [https://perma.cc/E2HE-2YLH].

[206] *Grutter*, 539 U.S. at 330 (citing studies which found that diversity has benefits for learning outcomes). Justice O'Connor also references the broader societal benefits of diversity for the global economy, national security, and political leadership. *Id.* at 330-32.

[207] *Id.* at 319-20.

[208] *Grutter*'s narrow tailoring requirements put several limits on race-consciousness. Race had to be considered flexibly through individualized review of each applicant in a holistic admissions process. *Id.* at 337-39. Additionally, the use of race could not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Id.* at 341 (quoting Metro Broadcasting, Inc. v. FCC, 499 U.S. 547, 630 (1990)). And *Grutter* dictated a preference for race-neutral admissions policies: if a university could attain a sufficiently diverse student body without using race, they had to stop using it. *Id.* at 339-42.

[209] *Cf. supra* text accompanying note 190.

[210] *See* Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 493 (2012).

A flexible, holistic admissions process with individualized review creates less stigmatic

Bollinger[211] or the set-aside in *Regents of the University of California v. Bakke*.[212]

Almost immediately, the Court started backtracking even on its small exception in *Grutter*. In 2007, after Justice O'Connor had retired, the Justices struck down voluntary school desegregation programs in Seattle, Washington, and Louisville, Kentucky, which used race-conscious pupil assignment schemes.[213] Here, the Court cited *Brown* for the proposition that "government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954."[214]

But this part of *Brown*'s holding directly implicated Footnote 11—the finding that segregation itself specifically harmed Black children—an anti-subordination command. Conversely, Chief Justice Roberts's controlling opinion in *Parents Involved* framed the *Brown* Plaintiffs' argument as an anti-classification principle that the "Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[215] And in *Parents Involved*, Roberts famously articulated his anti-classification command for colorblindness: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[216]

The Court's 2013 ruling in *Fisher v. University of Texas at Austin*[217] ("*Fisher I*") was another cutback on race-conscious admissions. *Fisher I* was not a decision on the merits, but it did remand with instructions to review the University of Texas at Austin ("UT") race-conscious admissions policy more stringently.[218] And Justice Thomas's concurrence in *Fisher I* reiterated the anti-

> harm than a fixed-weight point system . . . because flexibility and individualized review ensure—to the greatest extent possible—that all applicants from a given group will not be treated exactly the same merely because of their race. *Id.*

[211] 539 U.S. 244 (2003) (striking down admissions policy which mechanically awarded same number of points to all underrepresented racial groups).

[212] 438 U.S. 265 (1978) (striking down set-aside program which reserved specific number of seats for underrepresented racial groups). Justice Thomas's *Grutter* dissent contended that race-conscious admissions policies stigmatize all admitted Black applicants who are "tarred as undeserving." *Grutter*, 529 U.S. at 373 (Thomas, J., dissenting); *see also id.* at 353 (Thomas, J., dissenting) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

[213] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[214] *Id.* at 746 (citation omitted).

[215] *Id.* at 747.

[216] *Id.* at 748.

[217] 570 U.S. 297 (2013).

[218] *Id.* at 314 ("[T]he Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain

classification stance and attributed it directly to *Brown*: "My view of the Constitution is the one advanced by the plaintiffs *in Brown*: '[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.'"[219]

Thomas's use of *Brown* here would portend the Plaintiff's argument in *SFFA*.[220] *Fisher II* contained no references to *Brown*, and it ultimately upheld the UT race-conscious admissions policy.[221] But the stage was set for *SFFA* to complete the Court's reframing of race-consciousness as a stigmatic harm and attribute its embrace of colorblindness to *Brown*. *SFFA* became the amalgamation of several gradual transformations in the Court's race jurisprudence from *Brown* to the present: from tangible, measurable harm to abstract, stigmatic harm; from the anti-subordination to the anti-classification view of race; from a living constitutionalist to an originalist discourse on the Fourteenth Amendment interpretation; and from the initial view of *Brown*—a bold but tenuous ruling based in part on questionable social science—to the redefined *Brown*, an unshakeable pillar of equal protection rooted in understandings (or misunderstandings) of the Reconstruction Amendments' Framers' intent and the practices of the Reconstruction Era. Additionally, *SFFA* linked racial categories themselves to racial stereotyping, albeit once again without referring to specific, tangible harms.[222]

Chief Justice John Robert's *SFFA* majority opinion held that Harvard and the University of North Carolina at Chapel Hill ("UNC") admissions policies violated *Grutter*'s tenets because they: (1) had not defined their diversity-related goals in concrete, measurable terms that courts can assess;[223] (2) had not articulated a connection between these goals and the use of race-conscious admissions;[224] (3) used race as a "negative factor" to the detriment of Asian

the educational benefits of diversity."); *see also* Vinay Harpalani, *Affirmative Action Survives — for Now*, CHI.-KENT FAC. BLOG (June 24, 2013), https://blogs.kentlaw.iit.edu/faculty/2013/06/24/affirmative-action-survives-for-now/ [https://perma.cc/S425-YX8N].

[219] *Fisher I*, 570 U.S. at 326-27 (Thomas, J., concurring).

[220] *See supra* note 5 and accompanying text.

[221] Fisher v. Univ. of Tex. at Austin ("*Fisher II*"), 579 U.S. 365, 388 (2016). *Fisher II* did note that universities had to continue to produce evidence that they needed to use race-conscious policies. *Id.* at 388; *see also* Shakira D. Pleasant, Fisher*'s Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 818 (2019) (emphasizing *Fisher II* Court's expectation that universities would "collect, scrutinize, and utilize data to evaluate and refine [their] race-conscious admissions process[es]").

[222] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 220-21 (2023) (holding racial classifications in admissions further "stereotypes that treat individuals as the product of their race" which in turn cause "continued hurt and injury")..

[223] *Id.* at 214 (viewing Harvard and UNC's goals difficult to measure and "not sufficiently coherent for purposes of strict scrutiny").

[224] *Id.* at 215 (noting Harvard and UNC's "admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue").

Americans;[225] (4) involved racial stereotyping and the assumption "that minority students always (or even consistently) express some characteristic minority viewpoint on any issue"[226]; and (5) could not put forth a logical end point for the use of race.[227] Although it gave the appearance of applying *Grutter*, the *SFFA* majority effectively overturned it,[228] abrogating its limited allowance of race-consciousness. Chief Justice Roberts framed the use of race as a "negative factor" if it reduced the admission of any group.[229] Consequently, under *SFFA*'s logic, any race-conscious policy which increased the admission of one group would be disallowed because as a mathematical certainty, it would decrease the admission of one or more other groups.[230]

The majority and concurring opinions also repudiated race-consciousness by linking it to stereotyping. Chief Justice Roberts claimed that Harvard and UNC's race-conscious admissions policies "tolerate the very thing that *Grutter* foreswore: stereotyping."[231] Concurring opinions by Justices Thomas and Gorsuch took this a step further and contended that racial categories themselves were rooted in stereotyping. Thomas asserted, "[A]ll racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. . . . Members of the same race do not all share the exact same experiences and viewpoints."[232]

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[225] *Id.* at 218-19 (concluding race is "negative factor" because Harvard and UNC's race-conscious admissions policies result in fewer Asian Americans being admitted than would be admitted absent use of race).

[226] *Id.* at 219 (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

[227] *Id.* at 221 (noting Harvard and UNC's "admissions programs also lack a 'logical end point'" (quoting *Grutter*, 539 U.S. at 342)).

[228] *See* Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, NOTRE DAME L. REV. REFLECTION 131 (Dec. 2024) https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1147&context=ndlr_online [https://perma.cc/Z7MD-T838] (arguing "[t]he majority in *SFFA* relied heavily on *Grutter* as authority . . . when, in fact, the sum of *Grutter*'s holdings required the opposite conclusion" (footnote omitted)); Harpalani, *supra* note 3, at 61 (arguing *SFFA* was "stealth overruling" of *Grutter*).

[229] *See supra* note 225 and accompanying text.

[230] One could view this disadvantage as a tangible harm. But generally, race-conscious admissions policies have only placed a small burden on any racial groups. *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002).

> [T]he perceived unfairness [of affirmative action] is more exaggerated than real. The perception is a distortion of statistical truth, premised on an error in logic. There is strong evidence . . . that minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action. But that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action. *Id.*

[231] *SFFA*, 600 U.S. at 220.

[232] *Id.* at 276-77 (Thomas, J., concurring).

Thomas thus channeled Justice O'Connor's articulation of constitutional stigmatic harm.[233]

Justice Gorsuch also claimed that racial categories rely on "incoherent" and "irrational" stereotypes,[234] noting that: "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb."[235]

Here, Gorsuch failed to understand that there are both commonalities and differences in the experiences of students with these backgrounds.[236] Roberts, Thomas, and Gorsuch all referenced stereotyping in the abstract: they did not discuss any tangible harms associated with it.

The various *SFFA* opinions also became a rhetorical war about the legacy of *Brown* and the original meaning of the Fourteenth Amendment—whether it espoused an anti-classification or anti-subordination principle. Chief Justice Roberts's majority, Justice Thomas's concurrence, and Justice Sotomayor's dissent all cited language from *Brown* and from Justice Harlan's *Plessy* dissent. Much of the discourse was about the original meaning of the Fourteenth Amendment and their relationship to *Brown*. But there were also subtle battles that indirectly referenced Footnote 11 and the doll studies. Chief Justice Roberts's majority opinion quoted *Brown*'s holding that "[s]eparate . . . is '*inherently unequal*'": the very principle supported by Footnote 11.[237] The majority opinion also directly quoted *Brown* for the specific proposition that was allegedly supported by the doll studies: that "[t]he mere act of separating 'children . . . because of their race' . . . itself 'generate[d] a feeling of inferiority.'"[238]

Nevertheless, like other cases after *Brown*, the *SFFA* majority shunned Footnote 11 and the doll studies, replacing them with originalist arguments devoid of the current realities of racism. Chief Justice Roberts quoted Justice Harlan's dissenting view in *Plessy* that "[o]ur Constitution is color-blind"—a view now taken by conservatives to reflect an originalist anti-classification view of the Fourteenth Amendment.[239] The Chief Justice also cited to the United

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[233] *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (asserting that "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think").

[234] *SFFA*, 600 U.S. at 291-92 (Gorsuch, J., concurring).

[235] *Id.* at 292.

[236] *See generally* Vinay Harpalani, *"Safe Spaces" and the Educational Benefits of Diversity*, 13 DUKE J. CONST. L. & PUB. POL'Y 117 (2017).

[237] *See SFFA*, 600 U.S. at 229.

[238] *Id.* at 204.

[239] *Id.* at 229.

States Supplemental Brief on Reargument in *Brown*,[240] which the *SFFA* Plaintiffs had contended was the best source to support this originalist anti-classification view.[241] But while *Brown* put forth concrete evidence for the harm of segregation on the ground, *SFFA* merely took language from *Brown*—including language related to the social science evidence in Footnote 11—and applied it to devise an abstract harm attributed to any race-conscious aims.

Justice Thomas's concurrence and Justice Sotomayor's dissent battled over the meaning of *Brown*. Both quoted *Brown*'s language, supported by Footnote 11, that separate is "inherently unequal."[242] But their opinions largely traded barbs about the original meaning of the Fourteenth Amendment. Five times in his opinion, Thomas quoted from Justice Harlan's *Plessy* dissent that "[o]ur Constitution is color-blind"[243]—as if he wanted to hammer home the prevailing anti-classification principle. He also cited the alleged best source for this argument—the Supplemental Brief for the United States on Reargument in *Brown*—four times.[244] While his focus was on originalism, Thomas did cite some social science studies suggesting that Black and Latina/o students who benefit from race-conscious policies are "mismatch[ed]" and underachieve compared to their peers.[245] He also reiterated the view that race-conscious admissions policies "stamp [Black and Hispanic students] with a badge of inferiority,"[246] now channeling Harlan and Black's view of the social meaning of race, but recast with an anti-classification sentiment. Justice Sotomayor challenged Thomas and retorted that "[s]tudies disprove this sentiment, which echoes 'tropes of stigma' that 'were employed to oppose Reconstruction

[240] *Id.* at 202 (citing Supplemental Brief for the United States on Reargument at 11, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1)).

[241] Transcript of Oral Argument at 5, Students For Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199) ("[I]n terms of the original meaning of the Fourteenth Amendment, the best source on this [SFFA Counsel Cameron Norris] ever read is the United States' brief on reargument in Brown. It painstakingly details the legislative history and how the framers of the Fourteenth Amendment saw it as a ban on all racial classifications."); *see also* Supplemental Brief for the United States on Reargument, *supra* note 240, at 11.

[242] *SFFA*, 600 U.S. at 265 (Thomas, J., concurring); *id.* at 327, 337 (Sotomayor, J., dissenting).

[243] *Id.* at 231, 233, 242, 264, 278 (Thomas, J., concurring).

[244] *Id.* at 233, 239, 241, 267 (Thomas, J., concurring).

[245] *Id.* at 269-70 (citing Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371-72 (2004)); Richard Sander & Robert Steinbuch, *Mismatch and Bar Passage: A School-Specific Analysis*, 71 J. LEGAL EDUC. 716 (2022); Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RSCH. HIGHER EDUC. 353 (2004); and THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 176-77 (1994).

[246] *SFFA*, 600 U.S. at 270 (quoting Adarand Constuctors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring)).

policies.'"[247] Her opinion cited numerous empirical findings, social science studies, and academic sources from a variety of disciplines.[248] Sotomayor also discussed the Reconstruction Amendments' Framers' intent and Reconstruction Era practices, along with *Plessy*, *Brown*, and subsequent cases.[249] Her discussion of *Plessy* also quoted Harlan,[250] but supported race-consciousness and anti-subordination principles. Additionally, Justice Ketanji Brown Jackson tag-teamed with Sotomayor in her discussion of the Reconstruction Amendments' Framers' intent and Reconstruction Era history, and with her citation of social science research—all in support of anti-subordination principles.[251]

It was all a rhetorical war though, as the outcome in *SFFA* was a foregone conclusion.[252] With *SFFA*'s abrogation of *Grutter*, the transformation from tangible and realistic to abstract and formalistic notions of race is essentially complete. The tangible effects of race-consciousness hardly matter in the Court's current jurisprudence. The consequence is an erasure of race-consciousness in law altogether, accomplished ironically by claiming *Brown*'s mantle. Chief Justice Roberts and the concurring Justices substituted selective interpretations of the Fourteenth Amendment and abstract notions of racial stereotyping for the real, lived experiences of people of color. Dean Angela Onwuachi-Willig of Boston University School of Law critiques the *SFFA* majority for, among other things, creating a legal narrative of "racial equality" without acknowledging the "substantive realities of life" for Black people, including the impact of racism on daily life.[253] She highlights how "race frequently shapes who a person is"—a point lost upon Chief Justice Roberts because his White privilege allows him to "think[] of himself as raceless."[254]

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[247] *Id.* at 372-73 (Sotomayor, J., dissenting) (citing Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1323 (2008)).

[248] *See generally id.* at 318-384 (Sotomayor, J., dissenting).

[249] *Id.* at 319-331 (Sotomayor, J., dissenting).

[250] *Id.* at 327 (Sotomayor, J., dissenting) (noting that "Justice Harlan thus announced his view that '[o]ur constitution is color-blind'" and "emphasized in *Plessy* [that] segregation perpetuates a caste system" (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

[251] *See generally SFFA*, 600 U.S. at 384-411 (Jackson, J., dissenting). Justice Jackson recused herself from the Harvard case, so her dissent applied only to the UNC case. *See id.* at 384 (Jackson, J., dissenting). She also did not explicitly mention racial stereotyping or stigma and she did not discuss *Brown* at any length. For those reasons, this Essay does not cover Justice Jackson's opinion at further length, although it is quite insightful and gives strong support for the anti-subordination principle. Also, Justice Kavanaugh's *SFFA* concurrence did not discuss *Brown*, stigma, or stereotyping and is not covered here.

[252] *See* Vinay Harpalani, *"With All Deliberate Speed": The Ironic Demise of (and Hope for) Affirmative Action*, 76 SMU L. REV. F. 91, 91-92 (2023) (reflecting observers' predictions that Supreme Court would strike down race-conscious admissions policies in SFFA).

[253] Onwuachi-Willig, *supra* note 179, at 207.

[254] *Id.* at 212.

Quoting Justice Sotomayor's *SFFA* dissent, Dean Onwuachi-Willig underscores that for many students of color, "to try to not see [their] race is to try to not see [them] simply because there is no part of [their] experience, no part of [their] journey, no part of [their] life that has been untouched by [their] race."[255]

What Dean Onwuachi-Willig and Justice Sotomayor are talking about here is the same lesson that undergirds the doll studies and their reinterpretation: the link between race-consciousness and the full recognition of humanity.

CONCLUSION

This Essay has examined the legacy of the *Brown* Footnote 11 doll studies: their influence, flaws, reinterpretation, and effect on post-*Brown* equal protection jurisprudence. The flaws of the doll studies left a void in defining the constitutional harm to be remedied by race-based equal protection, and over time, this void was filled by transforming the harm from a tangible entity with real world effects to an abstract, stigmatic notion divorced from real world consequences. *SFFA v. Harvard* was a culmination of that jurisprudence—a trend that has recast *Brown* in terms of "rules" rather than "realities" of race.[256] Consequently, in the Supreme Court's jurisprudence, *Brown* has gone from a call for justice to put an end to the dehumanization of Black people to a formal bar on using race-consciousness to address that same dehumanization.

But the reinterpretation of the doll studies offers a look at the true mandate of *Brown:* "[A] comprehensive equality expressive of the lived reality of common humanity. That mandate is *radical* because it requires disengaging from, healing from, and coming to grips with . . . practices and beliefs grounded on Black inferiority and White supremacy."[257] The Clarks' doll studies were essentially correct about the most important point: Black children learn early on that their race confers an inferior status within American society. And the reinterpretation of Kenneth and Mamie Clark's findings underscored that race-consciousness is an unavoidable facet of identity development for Black children, who do not have the privilege of ignoring their race. Whether it be through Justice Harlan's candid articulation of social meaning of segregation or through the doll studies' demonstration of young children's perception of racism, law should reflect the reality of human experience.[258] And although the *Brown* Court erred in its interpretation of the doll studies, the *SFFA* Court commits the far greater error by erasing race-consciousness from that experience.

Even with their shortcomings, the doll studies exemplified *Brown*'s promise on many levels. They demonstrated the contributions of social scientists to the

[255] *Id.* (quoting *SFFA*, 600 U.S. at 362 (Sotomayor, J., dissenting)).

[256] *See* Onwuachi-Willig, *supra* note 179, at 208.

[257] *See* SPENCER & DOWD, *supra* note 1, at 103.

[258] *Cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Harvard Univ. Press 2009) (1881) ("The life of the law has not been logic; it has been experience.").

desegregation effort.[259] They were a part of the widespread social movement that was necessary to break down Jim Crow segregation,[260] an undertaking that inspired future mass social justice efforts, such as Black Lives Matter.[261] And reinterpreted, together with subsequent studies, they ultimately demonstrated that race-consciousness is unavoidable because of encounters with racism, but that Black children are resilient and can still maintain a positive sense of self.

The doll studies also showed that law can be created far beyond its doctrinal and textual boundaries. At its core, law is a human endeavor with a social and a moral imperative. By emphasizing the vulnerability of young, innocent children, Footnote 11 presented segregation as a moral dilemma, not just a legal question. Whatever the flaws in its interpretation, the simple demonstration that Black children, at such a young age, are visibly affected by racism, brought a human element to the desegregation effort that no amount of legal reasoning or analysis could have produced. And in a world where Black people have often been viewed as a "problem,"[262] the greatest legacy of the Clarks' doll studies is their very recognition of Black humanity.

[259] *See* JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 136-39 (2001).

[260] *See generally* KLUGER, *supra* note 1; KLARMAN, *supra* note 1.

[261] Aldon Morris, *From Civil Rights to Black Lives Matter*, SCI. AM. (Feb. 3, 2021), https://www.scientificamerican.com/article/from-civil-rights-to-black-lives-matter1/ [https://perma.cc/W87M-ZJB6].

[262] W. E. B. DU BOIS, THE SOULS OF BLACK FOLK 2 (Henry Louis Gates, Jr. ed., 2007) (asking Black people "[h]ow does it feel to be a problem?" to understand their racialized experiences).