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Change-Agents: Beating Back the Dark Caste of the Law Fred Gray Civil Rights Symposium Articles

Bryan K. Fair
University of Alabama - School of Law, bfair@law.ua.edu

CHANGE-AGENTS: BEATING BACK THE DARK CASTE OF THE LAW

Bryan K. Fair[*]

It was a personal honor to speak at the Fred Gray Civil Rights Symposium. I was privileged to share the panel with two outstanding lawyers, Judge Theodore McKee, Chief Judge of the United States Court of Appeals for the 3rd Circuit and Ted Shaw, a professor of law at Columbia School of Law and former Director General of the NAACP LDF.[1] I am grateful to my friends at Thomas Goode Jones School of Law and the members of the Faulkner Law Review for this opportunity to share these remarks.

First, Mr. Gray is one of my heroes and he is worthy of your recognition through this important annual Symposium. Part I of this essay is my tribute to Mr. Gray. I acknowledge the significant progress made through the herculean efforts of legal giants and change-agents like Mr. Gray, but also note that equality and justice remain elusive to most Americans, including most Alabamians. I think Mr. Gray would agree that the state and nation must address enormous economic disparities and widespread discrimination still gripping so many. The tremendous need for courageous and determined change-agents has not past.

Second, I want to discuss two deeply troubling undercurrents of American law. One is the Supreme Court's remarkable jurisprudence of White Supremacy, what I shall call the "Dark Caste of the Law." The other related theme is the Court's war over the legacy of *Brown v. Board of Education*.[2] In Part II, I discuss each concern, explaining why we must not let the Court, led by Chief Justice Roberts and Justice Thomas, impose a revisionist understanding of *Brown*, which was the Court's unanimous declaration against the inherent racial inequality advanced by segregated

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[*] Thomas E. Skinner Professor of Law, University of Alabama School of Law. The Author wishes to thank his co-panelists for their important insights, the members of the Faulkner Law Review for their careful edits, and Mr. Gray for his distinguished life of service to advance equal justice under law.

[1] NAACP Legal Defense and Educational Fund, Inc.

[2] 347 U.S. 483 (1954).

schools.[3] As I explain, there is some light in the words of Justice Kennedy in his opinion in *Parents Involved in Community Schools* (PICS).[4]

PART I. THE RIGHT TO BE VISIBLE

My topic is "The Right to be Visible," which I define as the right to belong to the nation and be treated as an equal citizen with equal status under law.[5] Every American must enjoy equal citizenship and those who have been systematically denied it must be made whole by a full remedy for the constitutional violation. Lawyers and other change-agents must undertake this important project, fashioning whole remedies for Americans who have suffered under the dark caste of the law.

I have titled this essay *Beating Back the Dark Caste of the Law* to denote my sense that the nation has failed to honor this equal citizenship principle from its inception, and millions of Americans are still suffering the social, civil, political, and economic consequences for our national failure. The United States is a weaker and poorer nation than it could be because some Americans have believed and still believe they are superior to others and entitled to more benefits and advantages than others. They have used the law to enshrine their advantages and the disadvantage of others. This great sin has poisoned human relations in the U.S., and it is difficult to be optimistic that the nation can overcome the deep chasms caused by extant discrimination.

Contrary to American myths, the law has not provided shelter for all Americans. It has a dark caste! Here, I am reminded of the prophetic words of Reverend Martin Neimoller, the German cleric who was sent to prison for his defiance against Nazism. He wrote:

> In Germany, first they came for the Communists and I was not a Communist, so I did nothing; then they came for the Jews and I didn't speak because I

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[3] *Id.*

[4] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) [hereinafter *PICS*].

[5] *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

> wasn't a Jew; then they came for the trade unionists and I stood silent, and then they came for the Catholics, but I was a Protestant, and then, finally, they came for me and there was no one left to stand up.[6]

Fred Gray decided to devote his life to fighting against segregation. The nation is better because of his lifetime commitment to fighting the scourge of segregation – wherever he found it.

Gray was born into a society that did not value his humanity and that relegated all people like him to multiple forms of castes. He and other African Americans were invisible to the command of equal justice under law. He grew to abhor laws that protected discrimination and segregation. Mr. Gray stood up, over and over, using his enormous legal talent to advance the equal citizenship principle and to challenge the misuse and abuse of law. The question is: Will more of us follow his glorious example as we face new obstacles to equality for all?

In preparation for this presentation, I considered trying to explain the harms the Supreme Court caused in its opinions in *Dred Scott v. Sanford*[7] and *Plessy v. Ferguson*,[8] decisions which instantiated racism into the Court's equality jurisprudence. I shall return to those cases later. I also considered that what might be most valuable is retracing the road from *Plessy* to *Brown v. Board* and the noble service of the exemplary change agents, Charles Houston and Thurgood Marshall, and their many colleagues within and outside the NAACP LDF, to undo the separate but equal principle and challenge segregation itself. I decided that by recalling part of Mr. Gray's majestic story, I could cover some of the same issues as they existed in Alabama.

For background, I revisited my personal copy of Gray's tome, *Bus Ride to Justice*,[9] one of the finest books on the Civil Rights Movement generally, and the struggle for equality and justice in Alabama specifically. It is an honest and candid book, re-

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[6] MARTIN NIEMOLLER & HUBERT G. LOCKE, EXILE IN THE FATHERLAND: LETTERS FROM MOABIT PRISON (1986).

[7] 60 U.S. 393 (1857).

[8] 163 U.S. 537 (1896)

[9] FRED D. GRAY, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM: THE LIFE AND WORKS OF FRED D. GRAY, PREACHER, ATTORNEY, POLITICIAN (New South Books 1995).

vealing Mr. Gray's emergence into one of the great lawyers in our history. Gray modestly gives ample credit to many others who helped him kill Jim Crow in Alabama. If you have not read Mr. Gray's book, you have missed a classic and I encourage you to read it as soon as possible. If you are currently in law school, it will inspire you and enhance your legal and moral education.

What can one say about the inimitable, the incomparable Mr. Gray? One can say he came from humble beginnings. The laws of his state and nation were against him, his parents, and other African Americans because of the color of their skin.[10] His father, Abraham Gray, was a carpenter, but he died when Gray was only two.[11] His mother, Nancy Jones Gray Arms, lived until 1992; she was 98![12] She worked as a domestic, particularly a cook, in several homes of white families around Montgomery.[13] He is the youngest of five.[14] They lived in a shotgun house, in Washington Park, with no running water, no inside sanitation, and no paved streets.[15] Under the dark caste of the law, they were denied equality of opportunity solely because of their racial classification.[16] They were deprived of basic necessities of life, of education, of employment, of fair wages, of political power, and excluded from the traditional paths to achieving the American Dream.[17] Importantly, the nation and the state have never given a remedy for such an enormous violation of human rights. Gray's mother's goal was for him to become a preacher, and by seventh grade she arranged for him to attend the Nashville Christian Institute (NCI), in Tennessee.[18] The racial caste laws even penetrated his church schooling. He could not attend the Church of Christ School in his home because the state required segregation.[19]

Fortunately, the Church of Christ operated NCI for African American students.[20] Because of his exceptional educational and

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[10] *Id.* at 5.
[11] *Id.* at 6.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 8.
[15] GRAY, *supra* note 9, at 7-8.
[16] *See Id.*
[17] *Id.*
[18] *Id.* at 10-12.
[19] *Id.* at 8.
[20] *Id.* at 10-12.

religious training, along with his outstanding performance at NCI, Gray was selected by the school's head to serve as a boy preacher, which allowed him to travel around the country helping to raise money for the school.[21] Gray formed life-long friendships at NCI, and he has been a Church of Christ minister ever since.[22] Those challenging experiences changed the trajectory of Gray's life, and they raise the question: What if this nation was committed to give every child an equal education? What if the law provided a fundamental right to right to education? Why isn't such a right even more important than the right to bear arms or freedom of speech? How many change agents like Mr. Gray could the nation produce?

One could also say that Mr. Gray worked his way through college at Alabama State University and through law school at Western Reserve University, in Cleveland, Ohio, often studying in the morning and then working full-time in the afternoon and evening.[23] Under the dark caste of the law, Gray could not attend the best flagship schools in his own state.[24] Those schools did not admit African Americans solely because of the color of their skin.[25] Instead, the state followed a policy to encourage African Americans to attend schools for blacks, or, in the case of law school, to go out of state.[26] The message was clear: whites had the power to declare that African Americans were unfit to associate with whites and the power to relegate blacks to educational caste.[27] Mr. Gray fought on, never believing he was inferior to whites and pledging to devote his professional career to destroying segregation wherever he found it.[28]

One could say he was the lawyer for Rosa Parks or for Rev. Dr. Martin Luther King, Jr., and many other unknown heroes who asked Gray to help them fight against inequality. Those in power resisted these challenges to White Supremacy, using the justice system against Mr. Gray, for example, seeking to draft him although he was a minister and accusing him of representing clients

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[21] GRAY, *supra* note 9, at 11-12.
[22] *Id.* at 11.
[23] *Id.* at 14-27.
[24] *See id.*
[25] *Id.*
[26] *Id.*
[27] GRAY, *supra* note 9, at 25-26.
[28] *Id.*

without permission, a felony under law.[29] Again, Mr. Gray stood firmly committed to his mission to destroy segregation.[30]

One could also say that Gray filed landmark civil rights cases in state and federal courts on behalf of thousands of well known and unknown African Americans, challenging segregation and the abusive white power structure throughout Alabama that sought to maintain white supremacy under the law. Mr. Gray started this assault on segregation at the tender age of 23.[31] And what one locates in all of Mr. Gray's extraordinary work is humility, temerity, and perseverance.

For nearly 60 years, Mr. Gray has been working to destroy everything segregated he could find. There is no area of Alabama life that his cases have not touched. You know the names of some of his cases. Each case was a battle against the dark caste of the law. Of course, there was *Browder v. Gayle*,[32] which sought to establish a right for all to be treated with dignity. There was *Gomillion v. Lightfoot*,[33] wherein the basic right of one person, one vote in municipal elections was asserted. There was *New York Times v. Sullivan*,[34] which asserted the right to protest/criticize government officials. Gray also filed *Malone v. University of Alabama* for the integration of the University of Alabama and *Franklin v. Auburn University*[35] for the integration of Auburn University. Both cases challenged the exclusion of African Americans from Alabama's flagship colleges. There was also *NAACP v. Alabama*,[36] which protected the NAACP's membership list from disclosure and asserted a right to associational privacy. Gray filed *Lee v. Macon County Bd. of Education*[37] alleging a right to attend desegregated public schools. In *Mitchell v. Johnson*,[38] Gray challenged racial bias in juror selection. In *Pollard v. U.S.*,[39] Gray as-

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[29] *Id.*

[30] *See id.* at 35.

[31] *Id.* at 32.

[32] 352 U.S. 950 (1956) (integrated the busing system in the City of Montgomery, Alabama).

[33] 364 U.S. 339, 81 S. Ct. 125 (1960) (laid the foundation for the concept of "one man, one vote").

[34] 376 U.S. 254 (1964) (libel suit against several black ministers).

[35] 223 F. Supp. 724 (M.D. Ala. 1963).

[36] 357 U.S. 449 (1958).

[37] 283 F. Supp. 194 (M.D. Ala. 1968) (integration of K-12 public schools).

[38] 240 F. Supp. 117 (M.D. Ala. 1966) (eliminated racial bias in juror selection).

[39] 384 F. Supp. 304 (M.D. Ala. 1974) (Public Health Syphilis Experiment at Tuskegee).

serted a legal right to the ethical practice of medicine. Mr. Gray also filed *Knight v. Alabama*,[40] alleging a right to equal allocation of resources at historically white and historically black universities and colleges.

The list is much longer. In some ways, all of his cases were landmark because each sought to destroy another leg of segregation and other forms of abuse primarily targeting blacks. Gray's legal victories would establish precedents that would change laws throughout the entire country, not just Alabama. And as I reflected on his life and works, I was struck by his unwavering faith in God, his love and commitment to family and friends, his unfaltering service to others, his rigorous preparation of every client's case, and his courage under fire.

Mr. Gray is a change agent who has stood up repeatedly to make the nation better. I know I stand on the shoulders of Gray, and other change agents, like Arthur Shores, Oscar Adams, Orzell Billingsley, Charles Lankford, Solomon Seay, Earnestine Sapp, Delores Boyd, Vanzetta McPherson, Morris Dees, Constance Baker-Motley, Robert Carter, Derrick Bell, James Nabritt, Oliver Hill, and Jack Greenberg, among others, who worked against the dark caste of the law, and my life is much better than it would otherwise have been through their noble work. But for Gray's work, I could not have become a tenured professor of law at the University of Alabama, where Governor George Wallace declared, "Segregation Now, Segregation Forever!"

Mr. Gray would be the first to tell you he had important help along his path, from black and white people; from his family and friends; from his law partners; from Clifford Durr, an early mentor; from Arthur Shores; Charles Lankford, and the help of Dr. Solomon Seay, Sr., in opening his first office in Montgomery.[41]

The Bible tells the story of David and Goliath in the first book of Samuel, Chapter 17. Many of you know this moving story of how the young, inexperienced but faithful David, who without fear, and risking his life, took on and took down the giant Philistine, Goliath, not with a sword, spear, or armor, but rather with his staff, five smooth stones, and his sling in his hand.

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[40] 787 F.Supp. 1030 (N.D.Ala.1991) (higher education lawsuit).

[41] GRAY, *supra* note 9, at 32-35.

For me, Mr. Gray is a modern-day David, one who has dedicated his life and used his own five smooth stones of *faith*, *family*, *service*, *preparation*, and *courage*, along with his legal tools, to destroy everything segregated he could find. We are a better state and nation for his life and work. I hope you will join me in saluting Mr. Fred David Gray and in asking President Obama to honor Gray with the Presidential Medal of Freedom for his extraordinary service to Alabama and to our nation.

To Mr. Gray I say thank you sir. And in the words of Matthew 25, we can hear the Lord's future exclaim: *Well done, my good and faithful servant!*

PART II

Like Mr. Gray, I love this country and Alabama, my adopted home for the past 21 years. It is such love that allows me to see how great this country and this state might be if both would finally abandon their commitment to inequality for so many and privilege for so few. This nation will die unless we expunge from its soul the disease of White Supremacy and the misuses of the law to preserve caste.

In all of its grandeur, the Supreme Court has been a chief architect in the maintenance of White Supremacy and colored caste. Its rulings have often instantiated white privilege under law. Consider the Court's handiwork in *Johnson v. McIntosh*,[42] where the Court said of Native Indians that, because the tribes inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest, it was appropriate for Whites to take possession of Indian lands under the principle of discovery, which was followed by all the nations of Europe.[43] The Court wrote, "the character and religion of its inhabitants afforded an apology for considering [the Indians] as a people over whom the superior genius of Europe might claim an ascendency."[44] On the one hand, the Court announced the principle that discovery gave title to the government by whose subjects or by whose authority it was made against all other European gov-

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[42] 21 U.S. 543 (1823).
[43] *Id.*
[44] *Id.* at 573.

ernments.[45] On the other, it declared native peoples inferior and incapable of transferring title to private individuals.[46] The Court declared that Indians tribes were domestic dependent nations "in a state of Pupilage. Their relation to the United States resembles that of a ward to his guardian."[47]

The Court would announce a similar philosophy of White Supremacy regarding persons of African descent, whether slave or free, in *Dred Scott v. Sanford*.[48] There, the Court framed the question simply: Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, privileges, and immunities, guaranteed by that instrument to the citizen?[49] The Court answered no, saying persons of African ancestry had among Europeans been universally regarded as beings of an inferior order, unfit to associate with Whites, and so far inferior that "they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit."[50] Here, the Court said more than that African Americans were not citizens and could not sue in the courts of the United States. It declared their constitutional inferiority to Whites.

Even after the enactment of new constitutional amendments, the Court was undeterred in its commitment to White Supremacy. Despite the new equal protection clause of the Fourteenth Amendment, the Court ignored racial discrimination in *Plessy v. Ferguson*.[51] There, the Court seemingly acceded to the notion that the reputation of belonging to the white race was a form of property, but it refused to declare unconstitutional a Louisiana law providing for separate railway cars for the white and colored races.[52] With the Plessy decision, the Court endorsed the principle of separate but equal as the core meaning of the equal protection clause. The Court was unsympathetic to Justice John Marshall

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[45] *Id.*
[46] *Id.*
[47] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
[48] 60 U.S. 393.
[49] *Id.* at 400.
[50] *Id.* at 407.
[51] 163 U.S. 537.
[52] *Id.* at 549.

Harlan's views in dissent, that the real meaning of the law was that blacks were unfit to associate with whites.[53] The majority of the Court reasoned that if the colored race were the dominant race and enacted a similar law, the white race would not assume it was inferior to blacks.[54] The Court wrote, "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences."[55] Of course, the underlying fallacy in the *Plessy* Court's logic is obvious: there would be no need for laws banning interracial marriage, prohibiting integration in transportation, or forbidding integrated schools if racial instincts were as the Court pronounced. And hidden beneath its quixotic logic, is the Court's unequivocal endorsement of White Supremacy. It would take another half century for change agents like Houston, Marshall, and Gray to show that separate but equal was a white fantasy. It was surely separate, but certainly not equal.

Then the Court decided *Brown v. Board of Education*[56] and it promised a new day for equal protection of the law. The Court set the question: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprived the children of the minority group of equal educational opportunities?[57] The Court's answer was a deafening and unanimous: We believe that it does.[58]

The Court wrote that education is perhaps the most important function of state and local government and that education is the very essence of good citizenship.[59] The Court noted that it is doubtful that any child will succeed if he is denied the opportunity of an education.[60] The court wrote, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[61] Further, the Court cited the opinion of one of the lower courts: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of

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[53] *Id.* at 563-64 (Harlan, J., dissenting).
[54] *Id.* at 551.
[55] *Id.*
[56] *Brown*, 347 U.S. at 493.
[57] *Id.* at 493.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 493.

the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group."[62] Therefore, the Court held that, in the field of public education, the doctrine of separate but equal has no place and that such policies deprived colored children of the equal protection of the laws guaranteed by the Fourteenth Amendment.[63] The Court overruled any contrary findings in *Plessy*.[64]

Brown was a majestic decision, marking a path away from the Court's commitment to White Supremacy. Yet, within a single generation, the Court would, in the words of Peter Irons, abandon *Brown's* children.[65] It seems unmistakable now that Brown's remedy, and the Court's commitment to dismantling caste, was tepid.[66] Principally, this is because the Court was unwilling to fashion a remedy as broad as the constitutional violation.[67] The nature of the violation went well beyond separating children by color.[68] Colored children were denied equal educational inputs. They attended schools that were inferior in every respect.[69] The results impacted every aspect of African American life. Discrimination in education meant African Americans were intentionally undereducated.[70] They faced discrimination in other areas of life as well, but their lack of education made them even more vulnerable to discrimination in employment, in housing, in voting, and other aspects of their lives. Thus, the Court's construction of the injury and the remedy was inadequate from the outset. A great debt remains and new change agents must illuminate the nature of the violation and the scope of the necessary remedy.

In the remaining portion of this essay, I want to discuss a recent decision of the Supreme Court, *Parents Involved in Community Schools v. Seattle School District No. 1*,[71] and its implications on the future meaning of *Brown*. In *PICS*, the Supreme Court

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[62] *Brown*, 347 U.S. at 486.
[63] *Id.* at 495.
[64] *Id.*
[65] PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION (2004).
[66] *Id.* at 352.
[67] *Id.* at 243.
[68] *Id.*
[69] *Id.* at 136.
[70] *Id.* at 297.
[71] *PICS*, 551 U.S. 701 (2007).

struck down two public schools' voluntary integration plans adopted by school officials in Seattle and Louisville as violative of the equal protection clause of the Fourteenth Amendment.[72] At the center of the Court's division is the meaning of *Brown v. Board of Education*.[73] One part of the Court read *Brown* to prohibit the any use of race in school assignment, even where race is used to promote integrated schools.[74] Those Justices asserted that race cannot be used in government decision-making.[75] Another part of the Court read *Brown* to permit the use of race in school assignment plans promoting integration.[76] Those justices see a fundamental distinction between government efforts to advance educational diversity and those in *Brown* which were directed to advancing inferiority of nonwhite children and the superiority of white children. The Court was divided 4-1-4.

Associate Justice Kennedy was squarely in the middle, partially concurring and partially dissenting from the two larger factions led by Roberts and Breyer.[77] Kennedy wrote:

> In the administration of public schools by the state and local authorities it is permissible to consider the racial make up of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, *they are free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race*.[78]

Justice Kennedy wrote that school officials could adopt certain race conscious strategies, such as:

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[72] *Id.*
[73] *See generally Brown*, 347 U.S. 483.
[74] *See PICS*, 551 U.S. 701 (plurality).
[75] *Brown*, 347 U.S. 483.
[76] *See id.* (Breyer, J., dissenting).
[77] *Id.* at 781-82.
[78] *Id.* at 788 (Kennedy, J., concurring in part and dissenting)

- Strategic site selection of new schools

- Drawing attendance zones with general recognition of the racial demographics of neighborhoods

- Allocating resources for special programs

- Recruiting students and faculty in a targeted way.[79]

Kennedy added another salient admonition:

> *This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that insures equal opportunity for all its children.* This is the heart of the right to be visible for it is with education that one can transform the trajectory of life. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.[80]

With these guiding principles, Justice Kennedy has illuminated how school officials might continue their efforts to integrate public schools, without relying solely on crude racial categorization.

One major question remains: How will the lower courts read *PICS*? For the answer, we must apply the *Marks* Doctrine. In *Marks v. U.S.*,[81] the Court announced principles to guide lower courts seeking to interpret plurality opinions.[82] When a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five justices, "the holding of the Court may be

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[79] *Id.*
[80] *PICS*, 551 U.S. at 788-89.
[81] *Marks v. United States*, 430 U.S. 188 (1977).
[82] *Id.*

viewed as the position taken by those members who concurred in the judgments on the narrowest grounds."[83] Therefore, the challenge under *Marks* is to determine the "position taken by those members who concurred in the judgments on the narrowest grounds."[84] My goal here is to speculate, applying *Marks*, regarding the narrowest common grounds of agreement in PICS. I locate two salient points:

1. Kennedy agreed with Roberts, Alito, Scalia, and Thomas that both the Seattle and Louisville plans were invalid. Kennedy's concurring opinion provides a narrower ground of decision. He objected to the school districts over reliance on crude racial categorization and their lack of narrow tailoring in their policy to achieve potentially legitimate goals, such as eliminating racial isolation. This ground is narrower than Roberts' broad ban on the use of racial classifications. Thus, I argue that under *Marks*, Kennedy's concurrence should control.

2. Kennedy also agreed with Breyer, Souter, Ginsburg, and Stevens that achieving student diversity is a compelling state interest, so long as reference to racial demographics is one of several factors, other demographics, special talents, and needs.

Again, Kennedy's concurrence seems to provide a narrower ground for judgment than Breyer's dissent, which would permit broader uses of racial classifications to advance diversity and integration. Thus, under *Marks*, I think lower courts should be guided by Justice Kennedy's opinion and school districts should take Kennedy's directions. Those that wish to adopt educationally diverse schools may do so. Those that wish to eliminate racial isolation and racial poverty in their schools may do so.[85] There is more work to do if we are to build on the work of Gray and beat back the dark caste of the law.

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[83] *Id.* at 193-94 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

[84] *Id.*

[85] *See* J. Harrie Wilkinson III, *The Seattle and Louisville Cases: There is No Other Way*, 121 HARV. L. REV. 158.