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## Integration Reclaimed: A Review of Gary Peller's Critical Race Consciousness Book Review

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## Book Review

### Integration Reclaimed: A Review of Gary Peller's *Critical Race Consciousness*

MICHELLE ADAMS

*Integration occupies a contested and often paradoxical place in legal and public policy scholarship and the American imagination. Today, more Americans are committed to integration than ever before. Yet this attachment to integration is hardly robust. There is a widespread perception that integration has failed. A vanishingly small percentage of social and economic resources are spent on integration. At the same time, some progressives and those who would otherwise consider themselves on the "left" criticize integration as insufficiently attentive to economic equality and dismissive of black identity and culture. Scholars from across the political spectrum have sought to explain this disconnect and to assess the possibilities of integration as a political program, moral ideal, and social agenda.*

*In his recent book, Critical Race Consciousness: Reconsidering American Ideologies of Racial Justice, Professor Gary Peller joins this robust and ongoing conversation. Peller's central claim is not that integration has had too little influence over the shape of racial equality and social policy, but that it has had too much. One must give him credit for intervening in this important discussion. Peller's intervention is to argue for a muscular, nuanced, and sophisticated understanding of black nationalism as it posed an ideological alternative to integration. His central achievement is to add value to the scholarly discussion about a critical issue: What is the meaning of racial justice, and did (and does) integration help us achieve it?*

*Ultimately, however, Peller's argument was not convincing. His capture of integration as having footing solely in individualistic race neutrality is problematic for at least three reasons. First, it misses the*

*structural dimensions of the integration ideology. Instead, integration is actually quite radical because of its laser-like focus on racial segregation, which structures, maintains, and perpetuates inequality across virtually every indicia of social, political, educational, and economic well-being. Second, it misconstrues the extent to which integration has been accepted as a goal in the United States. Third, it mischaracterizes the extent to which integration, as distinguished from an ideology of individualistic race neutrality, has led to current views of equal protection law. In this Book Review, I support my critique of Critical Race Consciousness, and my affirmative claim about the virtues of integration by referencing history, legal analysis, and current debates about how best to achieve racial equality.*

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# Integration Reclaimed: A Review of Gary Peller's *Critical Race Consciousness*

MICHELLE ADAMS\*

## I. INTRODUCTION

Integration occupies a contested and often paradoxical place in legal and public policy scholarship and the American imagination. It often is characterized as “[t]he nation’s official civil rights policy”<sup>1</sup> and as the “ultimate definition of racial justice.”<sup>2</sup> Most whites (and blacks) embrace the principle of racial equality and integration.<sup>3</sup> Thus, the “norm holds that black Americans deserve the same treatment as whites, and in addition, that racial integration in all public spheres of life is a desirable goal.”<sup>4</sup> Today, more Americans are committed to integration than at any time in the past.<sup>5</sup>

Yet, this attachment to integration is hardly robust. While blacks support integration, they do not “crave” it.<sup>6</sup> There is a widespread perception that integration has “failed.”<sup>7</sup> A vanishingly small percentage of social and economic (including federal budgetary) resources are spent

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<sup>1</sup> ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 1 (1996).

<sup>2</sup> GARY PELLER, *CRITICAL RACE CONSCIOUSNESS: RECONSIDERING AMERICAN IDEOLOGIES OF RACIAL JUSTICE*, at xiv (2011).

<sup>3</sup> Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 243, 245 (2009).

<sup>4</sup> HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 311–12 (1997).

<sup>5</sup> SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 11–12 (2004).

<sup>6</sup> *Id.* at xii.

<sup>7</sup> See, e.g., BROOKS, *supra* note 1, at 1 (“For all of its moral and political appeal, however, racial integration has been an unsuccessful civil rights strategy.”); Eric Foner & Randall Kennedy, *Reclaiming Integration*, *NATION*, Dec. 14, 1998, at 11, 11 (“Books continue to appear with the word [integration] in their titles, but most seem resigned to integration’s failure, treating it as an ongoing ‘ordeal’ or seeking to allocate blame for the nation’s departure from integrationist principles.”).

on integration,<sup>8</sup> and the Obama Administration's record on integration has been mixed.<sup>9</sup> Conservatives recently have urged the repeal of laws that provide funding to integrate public schools and have provided significant financial support to elect school board members who oppose integration.<sup>10</sup> At the same time, some progressives and those who would otherwise consider themselves on the "left" criticize integration as insufficiently attentive to economic equality and dismissive of black identity and

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<sup>8</sup> Integration is the public policy solution that dare not speak its name. See Bob Herbert, Op-Ed., *Separate and Unequal*, N.Y. TIMES, Mar. 21, 2011, at A27 (arguing that while integration is "[o]ne of the most powerful tools for improving the educational achievement of black and Hispanic public school students . . . [i]t has become a political no-no"); see also NAT'L COALITION ON SCH. DIVERSITY, FEDERAL SUPPORT FOR SCHOOL INTEGRATION: A STATUS REPORT 1 (2012), available at <http://www.school-diversity.org/pdf/DiversityIssueBriefNo4.pdf> (reporting that while "[t]he Secretary of Education has expressed strong support for school diversity and reduction of racial isolation in speeches . . . support for school integration is not yet reflected in the requirements and point systems of many key [departmental] competitive grant programs, where it might make the most difference"); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 142 (2007) ("[I]ntegration has not been seriously pursued in most [public school] districts for over two decades."); Steve Bogira, *Separate, Unequal, and Ignored*, CHI. READER (Feb. 10, 2011), <http://www.chicagoreader.com/chicago/chicago-politics-segregation-african-american-black-white-hispanic-latino-population-census-community/Content?oid=3221712> (stating that segregation has "largely disappeared from the nation's agenda").

<sup>9</sup> See Richard Kahlenberg, *Does Obama Believe in School Integration?*, TAKING NOTE (Nov. 17, 2009), <http://takingnote.tcf.org/2009/11/does-obama-believe-in-school-integration.html> (asserting that after ten months in office, the Obama Administration had not shown a significant commitment to school integration); *When Will the Government Actually Fight "The Battle of Westchester?,"* ANTI-DISCRIMINATION CTR. (May 15, 2012), <http://www.antibiaslaw.com/westchester-false-claims-case/when-will-government-actually-fight-battle-westchester> (reporting on a recent federal district court decision finding Westchester County in breach of a historic consent decree that requires it to end residential segregation and existing patterns of racial exclusion throughout the county, and asserting that "the federal government is still failing to treat the consent decree as the binding federal court order that it is, and has yet to hold Westchester to account for its continuing violations of each and all of its consent decree obligations"); see also NAT'L COALITION ON SCH. DIVERSITY, *supra* note 8, at 1 (stating that the Secretary of Education's support for diversity in schools has not yet been reflected in competitive grant programs). On the other hand, the Obama Administration has issued important new guidance on integration to local school districts. This new guidance embraces diversity and indicates that school districts may use race in student assignment plans in order to promote diversity. U.S. Dep't of Educ. & U.S. Dep't of Just., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> (last updated Jan. 3, 2012).

<sup>10</sup> See *Minnesota Senate Republican: Integration 'Destroyed' Minneapolis*, WASH. INDEP. (Apr. 1, 2011), <http://washingtonindependent.com/107369/minnesota-senate-republican-integration-%E2%80%98destroyed%E2%80%99-minneapolis> (reporting "a move by Minnesota Republicans to repeal school integration laws" that "would take funding from integration and desegregation programs . . . and shift them to statewide programs for literacy"); see also Jane Mayer, *State for Sale*, NEW YORKER, Oct. 10, 2011, at 90 (reporting that "conservative board members, elected [to the Wake County School board] with the support of [a conservative multimillionaire] and Tea Party activists, overturned a program that used busing to achieve economic diversity in schools—a program that the *Washington Post* had called 'one of the nation's most celebrated integration efforts'").

culture.<sup>11</sup>

Given integration's prominence as the ideological centerpiece of the Civil Rights Movement, these crosscutting tensions prompted scholars and commentators to explain the disconnect and to assess the possibilities of integration as "a political program, moral ideal and social agenda."<sup>12</sup> Some scholars have argued that integration holds significant transformative potential.<sup>13</sup> They assert that integration should be resurrected and again occupy the center of any meaningful program for racial and social justice.<sup>14</sup> Other scholars have suggested that because racial integration "is not the right answer for most African Americans,"<sup>15</sup> that a policy of limited separation is preferable.<sup>16</sup>

In his recent book, *Critical Race Consciousness: Reconsidering American Ideologies of Racial Justice*, Professor Gary Peller joins this robust and ongoing conversation about integration and its role in facilitating racial equality. Peller's central claim is not that integration has had too little influence over the shape of racial equality and social policy, but that it has had too much.<sup>17</sup> Thus, Peller asserts that in the ideological struggle between black nationalists and integrationists over the meaning of racial justice, victory should have gone to the nationalists—not the integrationists.<sup>18</sup> From there, the die was cast. For Peller, there is no need to "reclaim" integration, because the ideology of "integrationism" that emerged from this conflict was fatally flawed from the start.<sup>19</sup> Integrationism was conservative, apologetic, and unduly focused on the

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<sup>11</sup> See ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 1 (2010) ("One might have expected civil rights activists to press harder for integration. But by the late 1960s, left political movements were shifting priorities from 'redistribution' to 'recognition'—from socioeconomic equality to equality of respect and esteem for identities and cultures."); Foner & Kennedy, *supra* note 7, at 11 ("Many leftists feel that as a political goal, integration fails to address deeply rooted economic inequalities. Many African-Americans criticize it for implying the dismantling of a distinctive black culture and identity.").

<sup>12</sup> Foner & Kennedy, *supra* note 7, at 11.

<sup>13</sup> See Eric Foner, Editorial, *The Great Divide*, *NATION*, Oct. 30, 1995, at 488 (arguing that "integration has meant not the absorption of blacks into the pre-existing white social order but the transformation of American society so as to give real meaning to the principle of equality").

<sup>14</sup> See ANDERSON, *supra* note 11, at 1 ("This book aims to resurrect the ideal of integration from the grave of the Civil Rights Movement."); Foner, *supra* note 13, at 488 ("The time has come to reintroduce integration into our political vocabulary . . .").

<sup>15</sup> BROOKS, *supra* note 1, at 104.

<sup>16</sup> See *id.* at 199 (defining "[l]imited separation" as "any racial or gender classification that promotes individual opportunity but that does not unnecessarily subordinate or trammel the interests of individuals inside or outside the group").

<sup>17</sup> See PELLER, *supra* note 2, at xvi (asserting that the predominance of integrationism in the 1960s and 1970s ultimately stifled reform and legitimated already existing social practices).

<sup>18</sup> *Id.* at xii.

<sup>19</sup> *Id.* at xiv–xv.

narrow aim of overcoming prejudice and discrimination.<sup>20</sup> The ideology of integrationism was inconsistent with meaningful reform.<sup>21</sup>

Thus, in Peller's analysis, the integrationists' triumph set the stage for the marginalization of black nationalism; helped to "legitimate and perpetuate the existing racial distribution of power and prestige;"<sup>22</sup> facilitated conservatives' ability to co-opt and ultimately undermine progressive racial reforms;<sup>23</sup> undermined the Court's ability to adopt a de facto, rather than de jure, standard for proving violations of the Equal Protection Clause; and finally made it more difficult for progressive whites and others to critique more recent neo-black nationalist discourse that undermines racial equality.<sup>24</sup>

One must give Professor Peller credit for intervening in this important discussion. Professor Peller's project takes black nationalism seriously as an ideological and political worldview. He wants to resuscitate black nationalism from the one-dimensional perspective from which it is often viewed.<sup>25</sup> Consequently, Professor Peller's intervention is to argue for a muscular, nuanced, and sophisticated understanding of black nationalism as it posed an ideological alternative to integration.<sup>26</sup> *Critical Race Consciousness* is useful because it distills two iconic approaches to achieving racial justice and shows how black nationalism provided a thick, substantive critique of integration.<sup>27</sup> The book succeeds in showing how these two philosophies were in continual dialogue during the height of the Civil Rights Movement.

But ultimately, Professor Peller's argument is not convincing. *Critical Race Consciousness* woefully underestimates integration and mischaracterizes integrationism. Peller conflates integration with "integrationism," and then defines integrationism as an individualistic, race-neutral notion of antidiscrimination.<sup>28</sup> Peller defines "integrationism" as a set of beliefs that locates "racial oppression in the social structure of prejudice and stereotype based on skin color and that identifies progress with the transcendence of a racial consciousness about the world."<sup>29</sup> According to Peller, integrationism was concerned primarily with

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<sup>20</sup> See *id.* at xiv (arguing that since "integrationism" was a conservative movement, it reinforced social and institutional norms which perpetuated white dominance rather than bringing about meaningful reforms).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at xiv–xv.

<sup>24</sup> *Id.* at 113.

<sup>25</sup> *Id.* at xv.

<sup>26</sup> *Id.* at xii.

<sup>27</sup> See *id.* at xv (stating that he will analyze black nationalism and integrationism and show that they are not bipolar world views).

<sup>28</sup> *Id.* at 4–5.

<sup>29</sup> *Id.* at xii.

eradicating racial prejudice and advancing individual equal treatment.<sup>30</sup> As part of its commitment to individual equal treatment, integrationism privileged race neutrality, equal opportunity, and the elimination of discrimination.<sup>31</sup> From Peller's perspective, integrationism is deeply problematic because it converts the complex practice of social subordination into a narrow problem of discrimination.<sup>32</sup> At the same time, integrationism's focus on equal treatment and the evils of racial discrimination made it possible to equate black racism with white racism.<sup>33</sup>

What Peller misses is that integration neither was nor should be seen simply as an exercise in attempting to reform whites' prejudicial views. I have argued that integration is actually quite radical because of its laser-like focus on racial segregation, which "structures, maintains, and perpetuates inequality across virtually every indicia of social, political, educational and economic wellbeing."<sup>34</sup> Nor is integration necessarily in tension with black culture and identity formation.<sup>35</sup> Thus, I offered the concept of "radical integration," where the goal of integration is to ensure that "previously separate environment[s] actually facilitate instrumental equality for the purposes of facilitating black empowerment."<sup>36</sup> Radical integration encompasses a strong structural component and takes black identity formation within newly integrated environments seriously.

Properly understood, integration is a tool for undermining established power structures. Integrationists attacked segregation because they understood segregation for what it was: a systematic regime structured to disenfranchise and disinvest in the black community and dishonor and stigmatize individual African Americans.<sup>37</sup> Accordingly, much of the integrationist approach was an attempt to gain access to white-dominated resources. The integrationist approach, like the nationalist approach, was oriented toward redressing a power imbalance.<sup>38</sup> Neither approach was perfect, but it goes too far to assume that if nationalism had achieved

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<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 4–6.

<sup>32</sup> *Id.* at 6–7.

<sup>33</sup> See *id.* at 7 ("[W]ithin the integrationist ideology, a Black person who stereotypes whites is racist in the same way as a white person who harbors prejudice against Blacks. And Blacks who discriminate against whites are guilty of the same kind of racism as whites who discriminate against Blacks. Anyone can engage in racism because we can identify racism from a vantage point of race neutrality, of not making someone's race count for anything. The symmetry of the integrationist picture is rooted in the idea that racism consists of possessing a race consciousness about the world, in thinking that race should make a difference in social relations.")

<sup>34</sup> Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 275 (2006).

<sup>35</sup> See *id.* at 297–311 (arguing that racial identity can be formed in a variety of contexts, not just in geographically black communities; that black individuals can construct post segregation identities; and that narrow notions of "authentic" black identity are incorrect).

<sup>36</sup> *Id.* at 274.

<sup>37</sup> PELLER, *supra* note 2, at 4.

<sup>38</sup> *Id.* at 7.

sustained dominance in the black community, everything, including the trajectory of equal protection doctrine after the *Brown v. Board of Education*<sup>39</sup> decision, would have been different.

*Critical Race Consciousness* is not simply a work of social or political history of how black power adherents responded to calls for school integration in 1967. Instead, *Critical Race Consciousness* makes a normative argument about how one should think about integration as a goal.<sup>40</sup> Peller argues that integration as a goal was flawed from the start because it was bound up with a fundamental commitment to race neutrality that focused on correcting whites' cognitive error and universalism.<sup>41</sup> Peller's claims tap into the view that integration served the narrow interests of racially insecure black folk who sought a form of race reform that corresponded with white interests. A common view of integration—which *Critical Race Consciousness* supports and advances—is that integration has been accommodationist and lacking in any fundamental structural critique of the vast power imbalances between blacks and whites.<sup>42</sup> In this Book Review, I reclaim integration from Peller's integrationism and show how integration has important structural roots and potential for achieving racial justice. The review is organized in two parts.

In Part II, I describe Professor Peller's definition of "integrationism," his critique of integrationism, and his vision of modern black nationalism. In Peller's view, integrationism triumphantly emerged from the ideological confrontation between integrationists and black nationalists in the 1960s and 1970s.<sup>43</sup> For Peller, the wrong ideology triumphed because integrationism mistakes the practice of social domination for discrete instances of cognitive irrationality.<sup>44</sup> At the same time, integrationism rejects race consciousness.<sup>45</sup> Thus, integrationism could never provide a sustained critique of (or a serious solution for) the massive power imbalance between blacks and whites. Peller asserts that, on the other hand, modern black nationalism was poised to "revitalize and transform the struggle against racial oppression."<sup>46</sup> But black nationalism's potential

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<sup>39</sup> 349 U.S. 294 (1955).

<sup>40</sup> Cf. PELLER, *supra* note 2, at xi–xii (critiquing the fact that integrationist ideology has played a limiting role in race reform over the last several decades).

<sup>41</sup> See *id.* at 8 (arguing that this movement has become "the struggle against 'race,' thus appear[ing] natural and inevitable . . . and simply another part of the teleological progression toward the liberation of social life").

<sup>42</sup> See *id.* at 3 (describing integrationism as a social resistance movement of hundreds of thousands of people from different cities who, under the same banner, employed mass protests, economic boycotts, civil disobedience, sit-ins, and strikes).

<sup>43</sup> *Id.* at xii.

<sup>44</sup> *Id.* at 6–7.

<sup>45</sup> See *id.* at 4 (explaining the ideal was to "transcend stereotypes in favor of treating people as individuals, free from racial-group identification").

<sup>46</sup> *Id.* at xiv.

was never realized because a coalition of liberal whites and black moderates joined forces to “equate Black nationalists with white supremacists,” bringing forth the consensus view of black nationalism.<sup>47</sup>

In Part III, I present my critique. I argue that Professor Peller has improperly converted integration into “integrationism,” which he associates with an individualistic, race-neutral notion of antidiscrimination. I contest Peller’s definition of integrationism then and now, and I explain why his bending of integration to race neutrality is problematic. As I explain in Part III.A, integration, when properly understood, has radical transformative potential. In this Part, I show how prominent proponents of integration, as well as many of the architects of the litigation that culminated in *Brown v. Board of Education*, asserted a structural view of integration. They attacked segregation and favored integration because they believed it was the best way to secure equal opportunity and full citizenship for all black people.<sup>48</sup> Legal and social science research and literature support the view that segregation is an exceedingly powerful form of exclusion, which facilitates systematic disinvestment and retreat from black communities and resource hoarding in white communities. Because of integration’s “laser-like” focus on the harms associated with racial segregation, it is incorrect to characterize integration as being premised primarily on race neutrality and little else, as *Critical Race Consciousness* suggests.<sup>49</sup>

In Part III.A, I argue that Professor Peller’s view is problematic for another reason: it mischaracterizes the extent to which integration has been accepted as a goal by Americans. Peller accurately observes that our reigning racial ideology is the commitment to individualistic race-neutrality in the provision of governmental services and functions, in public accommodations, and in some areas of private life. This is a huge advance over a *de jure* regime, but it is not integration. Peller defines integration as integrationism and then conflates integrationism with our society’s commitment to individualistic race-neutrality.<sup>50</sup> The better definition of integration is as a set of beliefs that recognizes the limitations of our society’s equality norm (a commitment to enforcing race-neutral, antidiscrimination in governmental decision-making), but presses for the fullest possible enforcement of that norm notwithstanding its inherent limitations. From this perspective, integrationists’ demands are clearly structural. Integrationists insist that our race-neutral antidiscrimination

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<sup>47</sup> *Id.*

<sup>48</sup> PELLER, *supra* note 2, at 5.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 4.

regime breaks down “barriers to entry” to formerly closed white spaces.<sup>51</sup>

In Part III.B, I argue that Professor Peller’s capture of integration as having footing solely in individualistic race neutrality is also problematic because it mischaracterizes the extent to which integration, as distinguished from an ideology of individualistic race-neutrality, has led to current views of equal protection law. On Peller’s account, integrationism’s rejection of race consciousness and its embrace of race neutrality and colorblindness facilitated the Court’s narrow interpretation of the Equal Protection Clause and its disdain for affirmative action.<sup>52</sup> I reach a different conclusion. I explore *Keyes v. School District No. 1, Denver, Colorado*<sup>53</sup> and *Parents Involved in Community Schools v. Seattle School District*<sup>54</sup> and conclude that the equal protection doctrine is malleable. The trajectory of the equal protection doctrine since the Court’s decision in *Brown v. Board of Education* has had more to do with the complex interaction of social movements, electoral results, court appointments, and white backlash than with integrationists’ ideological “capture” of racial discourse.

## II. CRITICAL RACE CONSCIOUSNESS: THE CRITIQUE

### A. Integrationism: Definition and Critique

In *Radical Integration*, I argued against narrowly dichotomizing integration on the one hand and black identity and culture on the other.<sup>55</sup> In *Critical Race Consciousness*, Professor Peller takes a different approach. For Peller, “integrationism” “locates racial oppression in the social structure of prejudice and stereotype based on skin color and . . . identifies progress with the transcendence of racial consciousness about the world.”<sup>56</sup> In Peller’s view, integrationism, essentially a discourse or set of beliefs about racial relationships, is the ideology that triumphantly emerged from the ideological confrontation between integrationists and black nationalists in the 1960s and 1970s.<sup>57</sup> For Peller, that triumph carried a high price: “[T]he dominant conception of racial justice [integrationism] was framed to require that Black nationalism be equated with white supremacy and that race consciousness on the part of either whites or Blacks by marginalized as beyond the good sense of

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<sup>51</sup> See *id.* at xii (explaining the structural aspects of integrationism and how it seeks to forge race-neutrality).

<sup>52</sup> See *infra* Part II.B (describing Peller’s view of black nationalism).

<sup>53</sup> 413 U.S. 189 (1973).

<sup>54</sup> 551 U.S. 701 (2007).

<sup>55</sup> See Adams, *supra* note 34, at 267, 302 (asserting that there is a false dichotomy between integration and black identity formation).

<sup>56</sup> PELLER, *supra* note 2, at xii.

<sup>57</sup> *Id.*

‘enlightened’ American culture.’<sup>58</sup>

In order to understand Peller’s vision of integrationism, it is important to focus on Peller’s description of the structure of integrationist ideology. The integrationist ideology forms the analytic components of integrationism.<sup>59</sup> As Peller describes the integrationist ideology, or vision, racial inequality is caused by irrational thinking or prejudice, which leads whites to believe in white supremacy and take harmful actions toward blacks based upon those beliefs.<sup>60</sup> For Peller’s integrationists then, the individual, rather than the group, is the baseline unit of measurement.<sup>61</sup> Skin color is simply a phenotype, nothing more. Consequently, whites’ discriminatory actions toward blacks are the actual manifestations of a flawed cognitive process.<sup>62</sup>

At the core of Peller’s integrationism is the problem of discrimination, “the disparate treatment of whites and Blacks that the irrational attribution of difference is supposed to justify.”<sup>63</sup> Thus, integrationists see racism as a deviation from neutrality.<sup>64</sup> They imagine the ideal of a race-neutral world where discrimination on the basis of race no longer occurs because irrational prejudice has been rooted out.<sup>65</sup> Thus, the integrationist wants to get beyond race, transcend it, and achieve a world where individuals are seen as individuals, not as numbers of racially defined groups.<sup>66</sup> Universalism, objectivity, rationalism, and a commitment to liberalism in the classical sense are all sacrosanct.<sup>67</sup>

Peller’s integrationists are committed to a narrative of progress, where once “we remove prejudice, reason will take its place; once we remove discrimination, neutrality will take its place; once we remove segregation, integration will take its place.”<sup>68</sup> Obviously, segregation is inconsistent with the integrationist worldview. Indeed, segregation and the Jim Crow regime are perhaps the ultimate manifestation of whites’ distorted mental process. From Peller’s perspective, the integrationists’ problem with segregation is not fundamentally structural. Instead, to the integrationist, segregation is a manifestation of the “distortion of reason through the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.* at 4–5.

<sup>62</sup> *See id.* (discussing how, under the integrationist ideology, racism is manifested in the social context when the consciousness distorts prejudice and that is translated into practice).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* at 4–5.

<sup>66</sup> *Id.* at 5–6.

<sup>67</sup> *See id.* at 6–8 (discussing the integrationist view as one that connects a commitment to universalism, objectivity, rationalism, and a liberal society).

<sup>68</sup> *Id.* at 6.

prism of myth and ignorance.”<sup>69</sup>

According to Peller, the central problem with integrationist ideology is that it fundamentally misdiagnoses the nature of racism and racial inequality. First, integrationism, as Peller understands it, mistakes the practice of social domination for discrete instances of cognitive irrationality.<sup>70</sup> In other words, integrationism mistakes power for irrationality. Second, integrationism views all forms of race consciousness as equally pernicious.<sup>71</sup> Thus, from the integrationist perspective, “a Black person who stereotypes whites is racist in the same way as a white person who harbors prejudice against Blacks.”<sup>72</sup> That is, integrationist ideology rejected *all forms of race consciousness*, including calls by blacks for “black power” during the 1960s.

Peller argues that integrationists rejected “Black Power” because of a fundamental disagreement about the nature of racial inequality.<sup>73</sup> First, as discussed above, because integrationists were ideologically committed to race neutrality and ending racial segregation, they rejected the race-conscious nature of calls for “Black Power.”<sup>74</sup> Second, and perhaps more importantly, integrationists rejected black power because of a fundamental disagreement about the nature of white supremacy and how racial equality could be achieved. Peller argues that the “Black Power concept troubled integrationists because it assumed that *power* determined the distribution of social resources and opportunities, rather than reason or merit.”<sup>75</sup> Thus, the integrationists’ commitment to universalism made it impossible to accept a black power philosophy. Integrationists and black power advocates did not just disagree about strategy; they possessed wholly different worldviews.<sup>76</sup>

Thus, in Peller’s view, integrationism’s focus on prejudice, discrimination, rationality, and liberal individualism meant it could never provide a sustained critique of (or a serious solution for) the massive power imbalance between blacks and whites. For Peller, integrationism was “accommodationist and conservative.”<sup>77</sup> It was inherently conservative since it did not demand a “radical transformation of social practices.”<sup>78</sup> In

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<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Id.* at 6–7.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.* at 7.

<sup>73</sup> *Id.* at 22.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* (“Through the ideological filters of integrationism, Black nationalism and white supremacy appear essentially the same because both are rooted in race consciousness. . . . Integrationists saw nationalists as regressive because, in the integrationist view, progress meant transcending race as a basis of social decision-making.”).

<sup>77</sup> *Id.* at 59.

<sup>78</sup> *Id.* at 10.

Peller's view, integrationist practice is also too limited because it seeks only a "change in the rules of social decision-making."<sup>79</sup>

### B. Peller's Vision of Modern Black Nationalism

Peller views black nationalism through the lens of integration during the 1960s and early 1970s.<sup>80</sup> For Peller, this period was both black nationalism's heyday and its dénouement. It was in this period that Peller argues:

Black nationalism had its most complete and sophisticated theoretical development, as well as its greatest mass appeal, . . . when it was articulated as an alternative world view to integrationism and as part of a program of radical social transformation by Malcolm X, Eldridge Cleaver, Kwame Ture, Amiri Baraka, Harold Cruse, the Black Panthers, [and others.]<sup>81</sup>

Peller describes the modern black nationalist approach as focusing on black subordination and "the hierarchy of the white community over the black community."<sup>82</sup> For black nationalists, race, rather than the individual, is the meta-organizing principle.<sup>83</sup> Thus, the starting point for black nationalists was the assertion that black Americans occupy a distinct social community.<sup>84</sup> According to the black nationalist view, blacks are a nation within a nation that is subjected to a form of colonial domination within their own country.<sup>85</sup> From this perspective, racial equality can be achieved only by strengthening the core components of the black nation: black churches, black schools, black businesses, black families, and black neighborhoods.<sup>86</sup>

As Peller describes it, modern black nationalism as an ideology had

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 20. I use the term "modern black nationalism" to mean black nationalism during the 1960s and 1970s and to distinguish it from earlier incarnations of black nationalism. Peller also discusses the term "Black Power" as it relates to the development of modern black nationalism. *Id.* at 20–22. I use the term modern black nationalism to be inclusive of the phrase "black power." *See id.* at 22 (declining to define the meaning of "black power" but stating that it "is clear that, for most, the 'Black Power' slogan represented the beginning of repudiation of integrationist/civil rights ideology in favor of some form of nationalism").

<sup>81</sup> *Id.* at 20.

<sup>82</sup> *Id.* at 37.

<sup>83</sup> *See id.* at 24 ("In contrast to the integrationist premise that Blacks and whites are essentially the same, the idea of race as the organizing basis for group consciousness asserts that Blacks and whites are different, in the sense of coming from different communities, neighborhoods, churches, families, histories, and of being in various ways foreigners to each other.")

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 24–25.

<sup>86</sup> *See id.* at 37 ("[N]ationalists sought to strengthen and develop the institutions in the Black community that would serve African Americans.")

achieved a level of sophistication and maturity that distinguished it from prior iterations of nationalist belief within the black community.<sup>87</sup> The core components of modern black nationalism during this period were invocation of a colonialism model to describe race relations, rejection of accommodation with the white power structure, and a recognition that the black community's future laid within the geographical borders of the United States as opposed to outside of them.<sup>88</sup> Consequently, Peller makes the following claim: modern black nationalists, led by Malcolm X, could *for the first time* provide an essential critique that “combined militant engagement with the white power structure with the racial solidarity and anti-assimilationism traditionally associated with nationalism.”<sup>89</sup>

Thus, for Peller, modern black nationalism was poised to provide a thoroughgoing and muscular critique of white hegemony. Moreover, according to Peller, by the late 1960s, the modern black nationalists were winning: “[A]fter decades of marginality within the African-American community, Black nationalism achieved mass appeal and arguably overtook integrationism as the dominant ideology of racial liberation.”<sup>90</sup> But in Peller's view, modern black nationalism's potential was never realized because a coalition of liberal whites and black moderates joined forces to “equate Black nationalists and white supremacists” and the consensus view of black nationalism was born.<sup>91</sup>

This struggle was not just ideological. Peller asserts that integrationists rejected nationalism because of the threat that it posed “to the cultural self-identity of both the Black, middle-class moderates and white, liberal supporters of civil rights.”<sup>92</sup> Faced with the conflict between an ideological and political commitment to integration on the one hand and allegations of racial betrayal on the other, Peller asserts that the black middle class solution was to de-racialize white space.<sup>93</sup> Consequently, black integrationists emphasized that the newly open institutions, spaces, and places were race neutral, rather than subject to white racial domination.<sup>94</sup> Thus, for Peller, integrationists' commitment to rationality, individualism, and race neutrality was not just ideological; it also signaled

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<sup>87</sup> *Id.* at 58.

<sup>88</sup> *Id.* at 58–59.

<sup>89</sup> *Id.* at 59.

<sup>90</sup> *Id.* at 54.

<sup>91</sup> *Id.* at xiv.

<sup>92</sup> *Id.* at 53.

<sup>93</sup> *See id.* at 61 (“In the nationalist analysis, the very success of the Black middle class . . . betrayed the aspirations of the Black community because it reflected gains granted by a white power structure in exchange for Black administration of white interests.”).

<sup>94</sup> *See id.* (“Integrationism, in the particular, universalist form it took in the 1960s, responded to this anxiety by denying that the world to which the Black middle class aspired was racially identifiable as a particularly white world, rather than a realm of universal, culturally neutral social practices.”).

a deep-seated anxiety about racial self-identity.<sup>95</sup>

Peller asserts that black integrationists feared race consciousness because of insecurity about their racial self-identity. The black nationalists' charges hit home for black integrationists who "worried [that] they were assimilating to a white world" and that their presence in white institutions accommodated rather than frustrated white interests.<sup>96</sup> Thus, black integrationists experienced racial anxiety. White integrationists feared race consciousness because of insecurity about their own culture and a deep-seated need to suppress any hint of white supremacist ideology.<sup>97</sup> For Peller, these twin anxieties had devastating consequences. Integrationists "closed ranks" in rejecting black nationalism specifically and race consciousness more generally. The result was that the "dominance of this integrationist ideology helped establish the particular and narrow manner in which racial power would be understood, and thereby helped to legitimate and perpetuate the existing racial distribution of power and prestige, even as it recommended marginal reform."<sup>98</sup>

Thus, for Peller, integrationists and modern black nationalists were working at cross purposes, with integrationists emphasizing the importance of race neutrality while black nationalists stressed the importance of race consciousness. What makes this so problematic from Peller's perspective is that this debate was not simply an intra-group ideological squabble. Instead, Peller sees integrationism as driving black nationalism from appropriate public discourse.<sup>99</sup> Indeed, Peller asserts the integrationists' rejection of black nationalism delegitimized black race consciousness *for all time* by equating it with white supremacy. Thus for Peller:

Through the ideological filters of integrationism, Black nationalism and white supremacy appear essentially the same because both are rooted in race consciousness, in the idea that race matters to one's perception and experience of the world. Integrationists saw nationalists as regressive because, in the integrationist view, progress meant transcending race as a basis of social decision-making, and in the long term, replacing power with reason as the basis for the distribution

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<sup>95</sup> See *id.* at 62 ("Black integrationists gravitated toward a particularly universalist interpretation of racial justice to help resolve anxiety that nationalists raised about their self-identity.").

<sup>96</sup> *Id.* at 53, 61–62.

<sup>97</sup> See *id.* at 66–67 ("Black nationalism, particularly in the machismo and Africanist forms it took in the late 1960s, specifically exposed the deepest inner anxieties whites as a cultural group possessed—anxieties that white liberals and progressives have worked hard to repress.").

<sup>98</sup> *Id.* at xiv.

<sup>99</sup> See *id.* at 52 ("We should understand the dominance of integrationism as at least in part an effect, as well as a cause, of the marginalization of nationalism—as a discourse created to justify the rejection of nationalism, as well as a discourse that simultaneously informed the way nationalism was perceived.").

of resources. With the centering of integration as the mainstream ideology of American good sense, nationalism became marginalized as an extremist and backward worldview, the irrational correlate in the Black community to the never-say-die segregationists of the white community.<sup>100</sup>

In summary, Peller's argument combines a sustained critique of integration, while juxtaposing and dichotomizing "conservative" integration against modern "radical" black nationalism. Integrationists sought access to white dominated institutions. Integrationists actively formed coalitions with progressive whites to eradicate segregation, which necessarily domesticated integration's racial reform project. Integrationists' essential unit of measurement was the individual rather than the community. While the integrationists spoke for the black middle classes and the black elite, the nationalists spoke for the masses. Eradicating racial discrimination, as opposed to developing the community, was the sine qua non of the integrationist project. Integrationists spoke in terms of race neutrality instead of race consciousness. The integration approach was grounded not just in ideological commitments or pragmatism, but in deep-seated anxieties about racial identity. For Peller, given this provenance, integration could neither have ended American apartheid nor meaningfully transformed racial relationships in American society. Perhaps most importantly, as I discussed in Part II.B, Peller argues that the success of integrationism meant equal protection law would ultimately be ineffective.

### III. INTEGRATION RECLAIMED

#### A. *Integration as a Radical Approach to Racial Inequality*

Professor Peller's view of integrationism as having footing solely in individualistic race neutrality is problematic because it misses the structural dimensions of integration. Instead, integration was a strategy for structurally undermining and ultimately defeating white supremacy. Elsewhere, I have described the concept of "radical" integration which builds on this understanding.<sup>101</sup> Racial integration focuses on the importance of desegregation in order to foster blacks' resource acquisition, but only under conditions which foster associational equality.<sup>102</sup> Thus, radical integration has both a structural aspect (facilitating access to resources) and an identity or cultural aspect (promoting the assumption that

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<sup>100</sup> *Id.* at 22–23.

<sup>101</sup> Adams, *supra* note 34, at 275.

<sup>102</sup> *Id.* at 272.

black individuals can form meaningful identities in multiracial spaces).<sup>103</sup> The concept of radical integration draws on the work of Dr. King and other Civil Rights era activists.<sup>104</sup>

At the height of the Civil Rights Movement, prominent integrationists believed that integration and the coalition building with progressive whites that came with it was the best way to eradicate white supremacy and improve the educational, economic, and social opportunities, not just for middle-class blacks, but for all blacks. Take, for instance, Bayard Rustin's thoughtful response to the rise of the black power movement. Rustin was one of the key architects of the Civil Rights Movement and an avowed integrationist.<sup>105</sup> Writing in 1966, Rustin rejected black power because he believed black power "diverts the movement from a meaningful debate over strategy and tactics, . . . it isolates the Negro community, and it encourages the growth of anti-Negro forces."<sup>106</sup> Rustin saw the rise of black power as an understandable, if misguided, response to the harms associated with white supremacy.<sup>107</sup> Indeed, Rustin explicitly rejected any "equivalence" between black power and white racism. In his view, it was "both absurd and immoral to equate the despairing response of the victim with the contemptuous assertion of the oppressor."<sup>108</sup> Contrary to Peller's suggestion, integrationists like Rustin did not view all forms of race consciousness as equally pernicious.

For Rustin, black power was born out of frustration with the pace of change and a growing sense of nihilism in the black community.<sup>109</sup> Rustin argued that black power was utopian "for the by now obvious reason that one-tenth of the population cannot accomplish much by itself."<sup>110</sup> Black power was reactionary because it "would give priority to the issue of race precisely at a time when the fundamental questions facing the Negro and American society alike [were] economic and social."<sup>111</sup> Thus, Rustin rejected the idea of black power because *it lacked a structural component*; black power traded in the rhetoric of race but it lacked a realistic program for achieving racial equality.<sup>112</sup> Consequently, Rustin debated black power

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<sup>103</sup> *Id.* at 275–76.

<sup>104</sup> *Id.* at 273–76.

<sup>105</sup> See JOHN D'EMILIO, *LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN I* (2003) (describing Rustin as a visionary and as one of the most important figures in the Civil Rights Movement).

<sup>106</sup> See Bayard Rustin, "Black Power" and Coalition Politics, 42 COMMENTARY 35, 35 (1966), available at <http://www.thekingcenter.org/archive/document/black-power-and-coalition-politics#>.

<sup>107</sup> *Id.* at 39. Professor Peller cites to Rustin twice in footnotes, but does not provide any sustained treatment of his work. PELLER, *supra* note 2, at 158 n.9, 170 n.29.

<sup>108</sup> Rustin, *supra* note 106, at 39.

<sup>109</sup> *Id.* at 1.

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 36.

<sup>112</sup> *Id.* at 35.

adherents on which approach would most likely yield political power, increase economic power, reduce black unemployment, raise wages, and improve housing conditions for blacks.<sup>113</sup> Rustin argued for a “liberal-labor-civil rights coalition which would work to make the Democratic Party truly responsive to the aspirations of the poor, and which would develop support [for such programs].”<sup>114</sup> This integration approach was confined neither to a narrow critique of whites’ cognitive processes nor a single-minded focus on discrimination.

To be sure, integrationists sought an end to prejudice and discrimination. But when we look at the movement for school desegregation we see a much more muscular vision of integration than the characterization in *Critical Race Consciousness* allows. For instance, Peller points to the conflict between integrationists and modern black nationalists over public school integration as a key example of the distinction between the two worldviews.<sup>115</sup> Peller describes why modern black nationalists thought public school integration undesirable. First, modern black nationalists such as Malcolm X, Kwame Ture, and Charles Hamilton argued that public school integration undermined the black community’s control of public schools, which meant a loss of social power and the ability of the black community to shape black children’s education.<sup>116</sup> Second, modern black nationalists asserted that public school integration necessarily entailed cultural assimilation, which undermined the integrity of black culture more generally.<sup>117</sup>

As Peller describes it, the conflict over public school integration exemplified the difference between integrationism and black nationalism; the integrationists focused on eradication of segregation, and the nationalists focused on resource redistribution.<sup>118</sup> According to Peller, because “integrationists had no conceptual category with which to comprehend African Americans as a separate national group, they largely ignored the possibility of understanding racial justice in terms of transfer of resources and power to the Black community as an entity.”<sup>119</sup>

But integration and integrationism are different. Real integration, as opposed to integrationism, calls for structural rather than cultural assimilation.<sup>120</sup> Real integration seeks to allow black individuals to have access to significant resources: “Integration values equal access to

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<sup>113</sup> *Id.* at 35–36.

<sup>114</sup> *Id.*

<sup>115</sup> PELLER, *supra* note 2, at 27.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 23.

<sup>119</sup> *Id.* at 28.

<sup>120</sup> John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 *HAMLINE J. PUB. L. & POL’Y* 337, 353 (1996).

educational [and other social and economic] opportunity not ‘whiteness.’”<sup>121</sup> Real integration requires “transformations of institutions, communities and individuals.”<sup>122</sup> Real integration “involves fundamental change, among whites and Blacks, as people and communities.”<sup>123</sup> Real integration is radical in that it demands desegregation under conditions of true equality.<sup>124</sup>

Indeed, the architects of the litigation strategy that culminated in *Brown v. Board of Education* did not pursue desegregation because of some abstract commitment to universalism or “‘neutral’ social practices.”<sup>125</sup> Instead, they pursued that strategy because they thought it was the best way to secure equal educational opportunity and full citizenship for black children under conditions of grotesque inequality.<sup>126</sup> It is easy to forget that the architects of the school desegregation litigation tried a black “nation-building” approach before moving on to confronting de jure school segregation directly.<sup>127</sup> Those architects litigated the “equal” portion of the “separate but equal” equation as it pertained to the enormous discrepancies in school funding for black versus white schools in the South.<sup>128</sup> But the effort to equalize school funding in state-mandated racially separate schools failed.<sup>129</sup>

Those architects then moved to a direct attack on state-mandated segregation in the public schools.<sup>130</sup> For those architects and many others,

<sup>121</sup> *Id.* at 354.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Adams, *supra* note 34, at 272–76.

<sup>125</sup> PELLER, *supra* note 2, at 29.

<sup>126</sup> See Robert L. Carter, *The NAACP’s Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1095 (1988) (reviewing MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987)) (asserting that the NAACP’s “real agenda” in its litigation strategy attacking school segregation “was the removal of the basic barrier to full and equal citizenship rights for blacks in this country”).

<sup>127</sup> See PELLER, *supra* note 2, at 26–31 (exploring the competing interests of nationalists and integrationists in school desegregation).

<sup>128</sup> JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 27 (2010).

<sup>129</sup> See *id.* (“More often than not, however, school officials would make a token gesture to improve education facilities in an attempt to paper over a system that was fundamentally unequal. This included, at times, constructing hastily built, flimsy facilities that some blacks derided as ‘Supreme Court schools.’”); see also Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1526 (2005) (reviewing DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004)) (asserting that an equalization strategy failed “because of costly data collecting and plaintiff buy-offs, leaving minority and white schools still severely unequal and compelling NAACP lawyers to abandon such strategy in part because of costs and in part because they recognized that Whites would only protect the school system if they were in it” (footnote omitted)).

<sup>130</sup> See RYAN, *supra* note 128, at 28 (“Lawyers challenging segregation became more aggressive toward the end of the 1940s, a product of their disappointment over equalization suits and their hope that the country might be ready for a more direct challenge to *Plessy*.”).

the purpose of that attack was to obtain better educational opportunities for black students.<sup>131</sup> Consequently, the strategy underpinning the school desegregation litigation reflected an effort to tie or link the fates of blacks and whites, so that whites could not ignore the educational needs of black students. It was a response to the social and political domination of blacks by whites. As James Ryan describes it, this black-white “tying strategy” was primarily structural in nature:

The best and perhaps only way for blacks to receive an education equal to whites was to attend the same schools. That way, white-dominated legislatures and school officials could not benefit white students without also benefiting black ones, or harm black students without also harming whites. Desegregation, from this perspective, was not so much an end in itself as a means to an end. It was a tying strategy, essentially, where black students would tie their fates to white students because, as the saying went, green follows white.<sup>132</sup>

If the architects of the school desegregation litigation erred, it was in underestimating “how effective white power could be in preventing full implementation” of the *Brown* mandate.<sup>133</sup> At least one of the major architects of the school desegregation litigation believed that the basic barrier to blacks’ full equality in American society was racial segregation.<sup>134</sup> As it turned out, of course, the core barrier to blacks’ full equality was white supremacy in all of its manifestations.<sup>135</sup>

But the idea that eradicating state-mandated racial segregation could lead to full citizenship for blacks was not far-fetched. Racial segregation and white supremacy are inextricably linked. As John W. Cell explained

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<sup>131</sup> See Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L. L. REV. 615, 617 (1979) (asserting that the rationale for the *Brown* strategy was to obtain equal education); see also RYAN, *supra* note 128, at 28 (“As long as blacks were in separate schools, many believed, they would always be shortchanged. Separate was never going to be equal, and the equalization suits tended to confirm this impression.”); GARY ORFIELD & CHUNGMEI LEE, HARV. UNIV. CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 8 (2005), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/?searchterm=%22why%20segregation%20matters%22> (“The civil rights movement was never about sitting next to whites, it was about equalizing opportunity.”).

<sup>132</sup> RYAN, *supra* note 128, at 28; see also Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1570 (2004) (“The NAACP pushed for integration because it sought to force white-controlled state and local governments to provide a quality education and equal educational opportunity to black schoolchildren.”).

<sup>133</sup> Carter, *supra* note 126, at 1095.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* (“[N]or did [the lawyers] realize at the time that the basic barrier to full equality for blacks was not racial segregation, a symptom, but white supremacy, the disease.”).

in his seminal work on the origins of segregation in the United States and in South Africa, segregation was more than just a set of laws requiring the separation of the races.<sup>136</sup> Instead, segregation was “a conscious policy, a process (by definition never completed), a system, and an ideology.”<sup>137</sup> Segregation in the American South was “the highest stage[] in the evolution of white supremacy.”<sup>138</sup> The integrationists may have been overly optimistic about their ability to achieve desegregation, but they had a structural diagnosis of the problem. They understood that state-mandated segregation rationalized and legitimated a caste system, which simultaneously demeaned and disenfranchised blacks while facilitating the ability of whites to monopolize political, social, and economic power.<sup>139</sup>

Indeed, voluminous legal and social science scholarship provides a sophisticated explanation of the harms associated with segregation.<sup>140</sup> Scholars provide a structural account of how segregation assists dominant

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<sup>136</sup> See JOHN W. CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* 2 (1982) (describing segregation as a policy, process, and ideology).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 3.

<sup>139</sup> *Id.* at 14–20.

<sup>140</sup> See JOHN R. LOGAN, *US2010 PROJECT, WHOSE SCHOOLS ARE FAILING?* 12 (2011), <http://www.s4.brown.edu/us2010/Data/Report/report5.pdf> (2011) (finding large and deeply entrenched racial disparities in schools attended by white and minority children and asserting that “it is hard to imagine how the disadvantages in schools attended by black and Hispanic children can be redressed unless there are major changes in the segregation of schools by race and class”); ORFIELD & LEE, *supra* note 131, at 14 (“[S]egregation by race is systematically linked to other forms of segregation, including segregation by socioeconomic status, by residential location, and increasingly by language.”); Elijah Anderson & Douglas S. Massey, *The Sociology of Race in the United States*, in *PROBLEM OF THE CENTURY: RACIAL STRATIFICATION IN THE UNITED STATES* 3, 10–11 (Elijah Anderson & Douglas S. Massey eds., 2001) (referring to the social and economic effects of different forms of segregation that persist to this day); David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. PUB. ECON. 2158, 2180 (2007) (“[B]oth school and neighborhood segregation have negative effects on black relative achievement.”); David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. ECON. 827, 828 (1997) (“Using a variety of economic and social outcomes, we find strong, consistent evidence that black outcomes are substantially worse (both in absolute terms and relative to whites) in racially segregated cities than they are in more integrated cities.”); Douglas S. Massey & Mary J. Fischer, *The Effect of Childhood Segregation on Minority Academic Performance at Selective Colleges*, 29 ETHNIC & RACIAL STUD. 1, 20 (2006) (“[B]lack and Latino students who grew up under conditions of segregation were less prepared academically than those coming from majority-dominant settings.”); Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157, 191 (2006) (“[S]chool and classroom racial composition have direct effects on SAT test performance.”). See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (discussing the importance of race in American society and the persistence of residential segregation); GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996) (outlining the events following the Supreme Court’s decision in *Brown*); SEGREGATION: THE RISING COSTS FOR AMERICA (James H. Carr & Nandinee K. Kutty eds., 2008) (demonstrating how discrimination continues to produce residential segregation, which affects access to good jobs, education, home ownership, and asset accumulation).

groups and systematically disadvantages others.<sup>141</sup> This literature articulates a vision of integration that does, in fact, seek to radically transform social practices.<sup>142</sup> From this perspective, the appropriate frame for understanding racial inequality is inclusion and exclusion, rather than race consciousness per se. Segregation is a very powerful form of exclusion that allows the dominant group to hoard valuable social, economic, and political resources while systematically disinvesting and disassociating from the non-dominant group. On this view, integration calls for inclusion into white-dominated space in order to gain access to the valuable assets associated with that group.<sup>143</sup> Consequently, this view of integration *is* race conscious in that it has a structural critique of the power relationships of racially-defined groups.

For instance, Douglas Massey explains how spatial boundaries such as residential segregation, whether de jure or de facto, enhance the social process of stratification.<sup>144</sup> According to Massey, stratification is the social process wherein:

[I]ndividuals form categorical mental representations of in-groups and out-groups through framing; translate these

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<sup>141</sup> See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 18–19 (2007) (describing the role that spatial segregation plays in maintaining categorical inequality and stratification); Adams, *supra* note 34, at 278–85 (exploring how residential segregation structures racial inequality across a variety of domains); John A. Powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 CLEV. ST. L. REV. 209, 212 (2009) (“We find many of the conditions that perpetuate and maintain segregation from opportunity, including credit, not just in the conscious animus of individuals, but deeply embedded in our institutional practices as well as our unconscious attitudes.”).

<sup>142</sup> See, e.g., Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 1042–43 (2010) (finding that “for the vast majority of mathematics learners, integrated schools could be added to the list of ‘what works’” in education); Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 376 (2012) (articulating “a constitutional right to equal access to middle-income peers that operates most directly at the school district level”); Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 603 (2011) (explaining the benefits of racial diversity to white parents and arguing that “[w]hite children’s future careers and earnings hinge on educating them in diverse classrooms today”).

<sup>143</sup> See Douglas S. Massey, *Why Housing Segregation Still Matters*, 3 J. CATH. SOC. THOUGHT 97, 107 (2006) (linking residential integration with access to social resources). As Massey argues:

[T]he residential integration of most ethnic groups has been achieved as a by-product of broader processes of socioeconomic attainment, not because group members sought to live among native whites per se. The desire for integration is only one of a larger set of motivations, and not necessarily the most important. Some minorities may even be antagonistic to the idea of integration, but for spatial assimilation to occur, they need only to be willing to put up with integration in order to gain access to socioeconomic resources that are more abundant in areas where white families predominate.

*Id.*

<sup>144</sup> MASSEY, *supra* note 141, at 18–19.

representations into social categories through boundary work; and then establish institutional structures for exploitation and opportunity hoarding that correspond to categorical boundaries, thereby generating unequal access to resources such as financial capital, human capital, social capital, and cultural capital.<sup>145</sup>

The stratification process structures the power relationships between in-group and out-group members. And indeed, race is a form of social stratification.<sup>146</sup> Stratification is most salient when social, cultural, economic, and spatial boundaries are consolidated.<sup>147</sup> Conversely, when in-groups and out-groups are spatially integrated, stratification and strategic disinvestment become more difficult.<sup>148</sup>

But beyond recognizing how segregation facilitates stratification, integrationists have also recognized how whiteness itself is a tool of exclusion. As John Powell and Caitlin Watt have explained, the concept of whiteness has morphed and shape-shifted since the fall of Jim Crow.<sup>149</sup> They argue that the concept of whiteness now signifies “a system of privilege and exclusion related to non-whites.”<sup>150</sup> That is, whiteness is not a phenotype, but rather is “functionally defined . . . as the right to exclude and dominate others.”<sup>151</sup> Watt and Powell do not ascribe bad acts or anti-black animus to all white people. Their view is exactly the opposite. It is that race is inherent within the structure of American social, political, and economic arrangements.<sup>152</sup> Thus, individual animus is not necessary to perpetuate a discriminatory system.<sup>153</sup> But systematic exclusion is necessary.<sup>154</sup> And these imbedded structures create what white and black

<sup>145</sup> *Id.* at 18.

<sup>146</sup> Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1027 (2010).

<sup>147</sup> See MASSEY, *supra* note 141, at 19 (“[W]hen social parameters are consolidated—when social, economic, and spatial characteristics correlate strongly with one another—the process of stratification become sharper and more acute.”).

<sup>148</sup> *Id.* This is why “whenever the powerful have sought to stigmatize and subordinate a particular social group, they have endeavored to confine its members to specific neighborhoods by law, edict, or practice.” *Id.*

<sup>149</sup> See John A. Powell & Caitlin Watt, *Negotiating the New Racial & Political Environment*, 11 J.L. SOC’Y 31, 38–40 (2009) (“Whiteness has morphed . . . . White is now the inward, private, and isolated individual.”).

<sup>150</sup> *Id.* at 34.

<sup>151</sup> *Id.* at 45.

<sup>152</sup> *Id.* at 57.

<sup>153</sup> See *id.* at 47, 58 (suggesting that while individual animus is a factor, there are other extrinsic influences to a discriminatory system).

<sup>154</sup> See *id.* at 44 (“Whiteness was created as an exclusionary space.”).

*mean*.<sup>155</sup> This view of whiteness as exclusion takes us far beyond a static *colonial* contest between the *black* nation and the *white* nation.

Professor Peller's capture of integration as having footing solely in individualistic race-neutrality is problematic for yet another reason: it mischaracterizes the extent to which integration has been accepted as a goal. As a country, we are committed to individualistic race-neutrality in the provision of governmental services and functions, in public accommodations, and in some areas of private life.<sup>156</sup> What this means is that we have a general societal agreement that the government usually should not take account of an individual's race in making decisions or providing services. This view, which we might also call "race-neutral antidiscrimination," is perfectly captured by Chief Justice Roberts's admonition in *Parents Involved*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>157</sup> This commitment is a huge advance beyond a *de jure* regime, but it is not integration properly understood. American civil rights law and policy is committed to individualistic race-neutrality, not the enforcement of real integration.<sup>158</sup> Integration, in other words, remains an unreached goal.

Peller defines integration as integrationism and then conflates integrationism with our society's commitment to individualistic race-neutrality.<sup>159</sup> The better view is that integrationists recognize the limitations of our society's equality norm (a commitment to enforcing race-neutral, antidiscrimination in governmental decision-making), but press for the fullest possible enforcement of that norm notwithstanding its inherent limitations.<sup>160</sup> From this perspective, integrationists seek *effective and full enforcement* of the antidiscrimination mandate under conditions of

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<sup>155</sup> See *id.* at 45 ("In our society race has been about exclusion, power and belonging. It might be more accurate to say that is what *white* has meant in our society. Whiteness has been functionally defined as the right to exclude and dominate others.").

<sup>156</sup> This is perhaps best exemplified by the striking success of Title II of the Civil Rights Act of 1964, which prohibits racial and other types of discrimination in privately-owned public accommodations. 42 U.S.C. §§ 2000a–g (2006).

<sup>157</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>158</sup> See Stefanie DeLuca, *What Is the Role of Housing Policy? Considering Choice and Social Science Evidence*, 34 J. URB. AFF. 21, 23–24 (2012) (arguing that in the context of federal housing policy, the United States Department of Housing and Urban Development does not have a mission of enhancing housing mobility and racial integration). Integration is enforced unenthusiastically, if at all, and in an uncoordinated and piecemeal fashion. Even in the context of school desegregation, which is most closely associated with integration, coordinated, sustained enforcement of the desegregation mandate by all three branches of the federal government lasted for only six years (1968–1974). See generally Gary Orfield et al., *Deepening Segregation in American Public Schools*, 19 S. CHANGES 11, 13–14 (1997) (discussing the changes to school segregation policies, which are detracting from prior integration efforts).

<sup>159</sup> PELLER, *supra* note 2, at 3–5.

<sup>160</sup> See, e.g., Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 770–72 (explaining that "the integrationist cure for discrimination is equal treatment" and how this view is highly abstract).

equality. On this view, integrationists demand that law and policy break up and redistribute some of whites' "ill gotten gain" by facilitating black individuals' access to whites' resources.<sup>161</sup> From this perspective, integrationists demand that our race-neutral, antidiscrimination regime break down "barriers to entry"<sup>162</sup> to formerly closed white spaces and provide members of minority groups access to certain markets, i.e., education, marriage, housing, and employment, which had been restricted under the previous de jure system.<sup>163</sup>

Peller argues that by the late 1960s, black nationalists led by Malcolm X had developed a sophisticated approach to white supremacy that "combined militant engagement with the white power structure with the racial solidarity and anti-assimilationism traditionally associated with nationalism."<sup>164</sup> In his view, nationalism's potential was never reached because of a tragic compromise:

Along with the suppression of white racism . . . the dominant conception of racial justice was framed to require that Black Nationalism be equated with white supremacy and that race consciousness on the part of either whites or blacks be marginalized as beyond the good sense of 'enlightened' American culture.<sup>165</sup>

*Critical Race Consciousness* did not convince me that black nationalism was poised to provide either an ideological critique or a coherent affirmative program to achieve racial equality that was superior to the one advanced by the leaders of the Civil Rights Movement, such as Martin Luther King, Jr., Bayard Rustin, and James Farmer, who are most closely associated with integration.<sup>166</sup> But even granting that black nationalism provided a sophisticated critique of white power and

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<sup>161</sup> See Adams, *supra* note 34, at 275–76 (“[E]quality is defined not just as equity with respect to facilities and resources under conditions of segregation, but as access to the structures of opportunity associated with success and upward mobility.”).

<sup>162</sup> In antitrust law, a barrier to entry is defined as “some factor in a market that permits firms already in the market to earn monopoly profits, while deterring outsiders from coming in.” HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 39 (2d ed. 1999).

<sup>163</sup> See Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–21 (2002) (exploring racial discrimination as a “barrier to entry”).

<sup>164</sup> PELLER, *supra* note 2, at 59.

<sup>165</sup> *Id.* at xii.

<sup>166</sup> Professor Peller’s revisionist attempt to separate Dr. King from integration only demonstrates that Peller’s vision of “integrationism” is too impoverished to include him. See *id.* at 43–45 (“King has become more of an ‘integrationist’ in death, however, than he was in life.”) If King was not an integrationist, then no one was. See Randall Kennedy, *Imagining Malcolm X*, AM. PROSPECT (June 9, 2011), <http://prospect.org/article/imagining-malcolm-x> (asserting that Malcolm X did not have a coherent program for achieving racial equality and that “during black America’s most rousing decade . . . Malcolm X allowed himself to be largely confined to the sidelines”).

domination, it was never going to achieve ideological dominance in a more open society. One of the reasons that the nationalist approach failed was because it was premised on a vision of racial solidarity that could not be sustained once de jure segregation was prohibited. The nationalist approach was too static to deal with the mobility that a race-neutral, antidiscrimination regime represented and the fluidity that a multiracial society promised.

A race-neutral, antidiscrimination regime tends to increase racial fragmentation and undermine racial solidarity.<sup>167</sup> Ironically, racial fragmentation is a sign of the *success* of our civil rights laws. Where access is more open we would expect to see more racial fragmentation and less racial solidarity.<sup>168</sup> Today, there is even more fragmentation in the black community.<sup>169</sup> Commentators have suggested that there are at least two, and as many as four, discrete black “communities.”<sup>170</sup> These communities are not just geographically separate, but experience racism that is “different in kind—not just in degree—from the racism that plagued the underclass.”<sup>171</sup> Not only do these disparate black communities experience racial discrimination differently, their interests are often divergent.<sup>172</sup> Once there was a widespread commitment to race-neutral antidiscrimination, the concept of a black “nation” was inherently unstable, and increasingly incoherent.

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<sup>167</sup> See generally EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* (2010) (arguing that the black community has splintered into four groups as prospects have improved for the race as a whole).

<sup>168</sup> In 1987, William Julius Wilson famously observed that as de jure discrimination eased, many middle and working class blacks left black neighborhoods, leaving behind a group of “truly disadvantaged” blacks who were poorly situated to take advantage of the open access regime provided by our civil rights laws. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* 7 (1987).

<sup>169</sup> See ROBINSON, *supra* note 167, at 1–5 (arguing that to the extent there was ever one unified black community, contemporary black America has fragmented into separate communities with different interests and often inconsistent worldviews).

<sup>170</sup> See *id.* at 5 (arguing that there are four black Americas: the mainstream middle-class majority, a large abandoned minority, a small transcendent elite, and a newly emergent group comprised of mixed raced individuals and recent black immigrants); Richard Thompson Ford, *Barack Is the New Black: Obama and the Promise/Threat of the Post-Civil Rights Era*, 6 DU BOIS REV. 37, 47 (2009) (examining the divide between the underclass and middle-class blacks who are “well positioned to improve their social and economic status by moving into well-paid jobs and into better neighborhoods”).

<sup>171</sup> Ford, *supra* note 170, at 45.

<sup>172</sup> See James Forman, Jr., *The Black Poor, Black Elites, and America’s Prisons*, 32 CARDOZO L. REV. 791, 796 (2011) (arguing that in “the criminal context . . . different portions of the black community have interests that are often in direct tension”); see also PEW RES. CTR., *OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS* 3 (2007), available at <http://pewsocialtrends.org/files/2010/10/Race-2007.pdf> (“By a ratio of two-to-one, blacks say that the values of poor and middle class blacks have grown more dissimilar over the past decade. In contrast, most blacks say that the values of blacks and whites have grown more alike during this same time period.”).

### B. *Reassessing the Effect of Integration on Equal Protection Law*

Professor Peller's capture of integration as having footing solely in individualistic race neutrality is also problematic because it mischaracterizes the extent to which integration, as distinguished from an ideology of individualistic race-neutrality, has led to current views of equal protection laws. *Critical Race Consciousness* argues that "a conservative, integrationist approach to race frames American race discrimination doctrine."<sup>173</sup> For Peller, the story goes something like this: once middle-class blacks and liberal whites coalesced around the integrationist ideal as the appropriate approach to achieving racial equality, integrationist ideology became part and parcel of "mainstream American legal discourse about race."<sup>174</sup> This was problematic because the integrationist ideology embraced colorblindness and rejected race consciousness.<sup>175</sup> Most pointedly, Peller asserts that it was the integrationists' rejection of race consciousness that facilitated the Court's narrow interpretation of the Equal Protection Clause.<sup>176</sup>

In particular, Peller points to the Court's resolution of the question of what standard should be applied to determine a violation of the Equal Protection Clause. In *Washington v. Davis*,<sup>177</sup> the Court held that a plaintiff must establish that the government acted with discriminatory intent or purpose in order to state a claim under the Equal Protection Clause.<sup>178</sup> To support this conclusion, the Court distinguished its treatment of de jure versus de facto discrimination in the school desegregation context.<sup>179</sup> The Court observed that it had always required a showing of governmental intent or purpose to segregate or discriminate, that is discrimination by law or in order to state a claim under the Equal Protection Clause.<sup>180</sup> Conversely, the Court rejected evidence of de facto segregation, segregation that could not be traced to a racially discriminatory governmental purpose, as a sufficient evidentiary basis to support an equal protection claim.<sup>181</sup> Thus, the Court pointedly refused to allow plaintiffs to establish a violation of the Equal Protection Clause using the more relaxed disparate impact standard, i.e., evidence that a

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<sup>173</sup> PELLER, *supra* note 2, at xvi.

<sup>174</sup> *Id.* at 71, 94–95.

<sup>175</sup> *Id.* at 72.

<sup>176</sup> *Id.* at 95.

<sup>177</sup> 426 U.S. 229 (1976).

<sup>178</sup> *Id.* at 240–41.

<sup>179</sup> *Id.* at 240.

<sup>180</sup> *Id.*

<sup>181</sup> *See id.* ("That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.").

particular government action had a racially discriminatory effect.<sup>182</sup>

Peller argues that the commitment to integration in legal discourse made it difficult for proponents of a disparate impact standard to fully articulate the value of that standard as a constitutional norm.<sup>183</sup> Peller asserts that the choice between the two standards, *de jure* versus *de facto* integration, entailed a value judgment about “the nature of the status quo of race relations.”<sup>184</sup> Peller also asserts that the best argument in favor of a disparate impact or a *de facto* standard in the *Davis* case would have required reference to race consciousness, which was an anathema to the integrationist approach.<sup>185</sup> Consequently:

Liberal equal protection arguments were defensive and apologetic because the race consciousness necessary to apply the *de facto* standard violated the foundational beliefs in the rationality of colorblindness, and because the strongest arguments for a *de facto* standard—the distributive justice claims of minority communities to proportional participation in American life—could not be articulated within the confines of integrationist ideology.<sup>186</sup>

Peller’s argument recognizes how close the Court came to actually adopting a *de facto* standard in *Keyes v. School District No. 1, Denver, Colorado*.<sup>187</sup> In fact, the Court effectively did adopt a *de facto* standard for enforcing violations of the *Brown* desegregation mandate in the South.<sup>188</sup> Like Peller, I wish the Court had adopted the *de facto* approach Justice Powell proposed in *Keyes*, which would have relieved plaintiffs of the burden of establishing discriminatory intent and allowed them to demonstrate a violation of the Equal Protection Clause “where segregated

<sup>182</sup> *Id.* at 247–48. The Court approved the use of a disparate impact standard for showing violations of Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>183</sup> PELLER, *supra* note 2, at 94.

<sup>184</sup> *Id.* at 92.

<sup>185</sup> *See id.* at 94 (“In the context of *Davis*, for example, the best argument against continued use of a test that disproportionately screened out black applicants for police positions might have been the black *community’s* interest in having its members serve on the armed force that would be patrolling their neighborhoods . . .”).

<sup>186</sup> *Id.* At another point in the book, however, Peller seems to contradict this assertion by observing that “[i]n the school context, progressives argued for a *de facto* test that would make constitutional requirements turn on the actual achievement of integration, rather than merely a cessation of intentional segregative practices on the part of the government.” *Id.* at 115.

<sup>187</sup> *Id.* at 89.

<sup>188</sup> *See* Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. 1, 3 (2012) (“[T]he court has evidenced far more concern about *de facto* segregation . . . than many scholars and commentators recognize.”).

public schools exist within a school district to a substantial degree.”<sup>189</sup> But it is not clear that advocating from a “race consciousness perspective” would have guaranteed such a result, or that the price of obtaining such a result would have been worth paying. After all, the reason why Justice Powell does not speak for the majority in *Keyes* is because he failed to attract the more liberal Justice Brennan to his position. Why? Because Justice Brennan rejected Justice Powell’s quid pro quo agreement to reduce or eliminate the use of busing to enforce the *Brown* mandate.<sup>190</sup>

Now, one might take the position that this is just further evidence of the hegemonic influence of Peller’s version of the integrationist approach at work. After all, Brennan refused to join Powell because he favored busing.<sup>191</sup> Thus, Justice Brennan, “the integrationist,” was willing to forgo the more “race conscious” de facto interpretation of the Equal Protection Clause in order to forcibly integrate the schools. But as discussed above, the real integrationist approach is both structural in nature and has radical potential. Even if we ignore all of the benefits integration has for children of all races and for society more generally, social science research indicates that an integrated education *increases* achievement outcomes for minority youth.<sup>192</sup> Thus, one way of understanding Justice Brennan’s

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<sup>189</sup> *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 224. While I prefer the de facto to the de jure standard for establishing a violation of the Equal Protection Clause, I readily understand why, as discussed below, Justice Brennan might not have adopted that approach.

<sup>190</sup> See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 940–41 (5th ed., 2006) (explaining the “deal” between Justices Brennan and Powell in *Keyes*). The proposed deal in *Keyes* was that:

Justice Powell, the conservative Democrat from Richmond, Virginia, offered the liberal majority headed by Justice Brennan. . . . to eliminate the de jure/de facto distinction, which, as a practical matter, would make it much easier to establish that school systems were in violation of the Fourteenth Amendment by operating systems with “racially identifiable” schools . . . . In return, liberals would have to agree to rein in the use of busing as a remedy. Justice Brennan rejected this offer, preferring to maintain the requirement that plaintiffs must show intent to maintain a segregated school system, buttressed by various presumptions.

*Id.* at 940–41; see also William Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2101 n.171 (2002) (“Brennan offered to redraft his opinion to discard the de facto-de jure distinction, but not at the cost of diluting *Swann*’s approval of busing. Because he was so opposed to busing for pragmatic reasons, Powell went his own way, and his attack on the distinction drew the support only of Justice Douglas in the end.” (citations omitted)).

<sup>191</sup> See BREST ET AL., *supra* note 190, at 941 (noting that Brennan rejected reining in the use of busing).

<sup>192</sup> See Roslyn Arlin Mickelson, Remarks to the Minnesota Education Commission Task Force on Integrated Schools: What Social Science Research from the Last 20 Years Says About the Effects of Integrated Education on Achievement Outcomes (Dec. 20, 2011), *available at* [http://www.school-diversity.org/pdf/Mickelson\\_Minnesota\\_testimony\\_12-20-11.pdf](http://www.school-diversity.org/pdf/Mickelson_Minnesota_testimony_12-20-11.pdf) (“When compared with their otherwise comparable peers who attend schools with high concentrations of low-income and/or disadvantaged minority youth, students who attend diverse schools are more likely [t]o achieve higher

approach in *Keyes* is not as an abstract commitment to race neutrality, but a constitutional remedy that imploded structural barriers and substantively benefited black children.

Similarly, Justice Powell, who advocated for a de facto approach, would seem an odd champion of race consciousness. Perhaps one explanation for his opinion, which accurately observed that the cause of segregated schools in metropolitan areas throughout the United States was residential segregation and individual migratory patterns,<sup>193</sup> is that legal doctrine is endlessly malleable and that a constitutional right can easily be divorced from a constitutional remedy.<sup>194</sup> Justice Powell's approach would certainly have "lowered the bar" with respect to the plaintiff's burden of proving a violation of the Equal Protection Clause. But then what? A close read of Justice Powell's opinion in *Keyes* indicates that the duty on the defendant (once a violation of the Equal Protection Clause had been established) was to operate an "integrated school system[.]"<sup>195</sup>

But it is not clear that Justice Powell's "integrated school system" meant actual racial integration of the public schools. Instead, the duty on the defendant under Justice Powell's de facto regime was to "take affirmative steps" to integrate the school system by integrating the faculties and administration; assuring quality facilities, instruction, and curriculum throughout the school district; drawing attendance zones to promote integration; and making school siting, closure, and student transportation decisions (i.e., busing) with integration in mind.<sup>196</sup> Indeed, Justice Powell made clear that "[a] school which happens to be all or predominantly white or all or predominantly black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."<sup>197</sup> Thus, the adoption of a de facto approach in *Keyes* (more relaxed standard

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test scores and grades; [t]o graduate from high school; [a]nd to attend and graduate from college[.] Attending a diverse school promotes achievement in mathematics, science, language and reading. . . . [These] findings undermine the *fiction* the integration efforts fail to improve academic achievement and that there is little value in pursuing school diversity.")

<sup>193</sup> *Keyes*, 413 U.S. at 223 (Powell, J., concurring in part and dissenting in part).

<sup>194</sup> See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (exploring the large rights-remedy gap in constitutional torts and arguing that it "fosters the development of constitutional law"); see also Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 877 (2010) (asserting that "although the Court insists on individualized injury as a prerequisite for invoking judicial intervention, the Court displays increasing indifference to providing individualized remedies for persons subjected to an important range of unconstitutional conduct").

<sup>195</sup> *Keyes*, 413 U.S. at 236 (Powell, J., concurring in part and dissenting in part).

<sup>196</sup> *Id.* at 241.

<sup>197</sup> *Id.* at 227; see also Eskridge, *supra* note 190, at 2100 (describing an amicus brief Justice Powell authored as an attorney on behalf of the state of Virginia in *Swann v. Charlotte Mecklenburg Board of Education* prior to his ascension to the Supreme Court, in which Powell expressed a pragmatic view of busing and argued that the trial judge should not have required the school district to engage in "massive busing").

of proof) would not necessarily have led to better or more radical outcomes for black children.

My point here is that legal doctrine is malleable. The adoption of an integrationist ideology in equal protection doctrine would not guarantee actual or true integration (although it would help). Similarly, the adoption of a race consciousness approach in interpreting constitutional law would not necessarily have guaranteed substantive equality for black people.<sup>198</sup> Instead, the ever-shifting meaning of the *Brown* decision and the trajectory of equal protection doctrine has had more to do with the complex interaction of social movements, electoral results, court appointments, and white backlash than with integrationists' ideological "capture" of racial discourse.<sup>199</sup>

Peller's discussion of the intent versus impact alternatives in equal protection doctrine is not just confined to his critique of the *Washington v. Davis* decision. *Critical Race Consciousness* argues that the integrationists' rejection of race consciousness facilitated the ability of the Supreme Court to strike down the voluntary student assignment plan at issue in *Parents Involved*.<sup>200</sup> Peller's argument is that the debates in legal discourse since the *Brown* decision took place entirely within the integrationist ideology: "that race is an arbitrary characteristic [and that] racial justice consists of equal treatment according to race neutral norms."<sup>201</sup> The problem was that once state actors stopped explicitly discriminating on the basis of race and obtained race neutrality, the only "work" that race neutrality and colorblindness could do was to undermine or otherwise thwart race conscious affirmative action plans.<sup>202</sup> From this perspective, the result in *Parents Involved* is not surprising because the voluntary, race-conscious student assignment plan involved in the case was

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<sup>198</sup> While the quest to equalize school funding in predominantly minority schools would seem to come closest to embodying a race consciousness approach in antidiscrimination law and policy, school finance reform is a poor substitute for racial and socioeconomic integration. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 256 (1999) (arguing that not only has "school finance reform . . . done little to improve the academic performance of students in predominantly minority districts, but also that it may be a costly distraction from the more productive policy of racial and socioeconomic integration").

<sup>199</sup> See Balkin, *supra* note 132, at 1574 ("[T]he U.S. Supreme Court[] tend[s], over time, to reflect the views of national political majorities and national political elites. Constitutional doctrine changes gradually in response to political mobilizations and countermobilizations. Minority rights gain constitutional protection as minorities become sufficiently important players in national coalitions and can appeal to the interests, values, and self-conception of majorities, but minority rights will gain protection only to the extent that they do not interfere too greatly with the developing interests of majorities.").

<sup>200</sup> See PELLER, *supra* note 2, at 89 (arguing that race consciousness in school assignment plans was explicitly rejected as a means to achieve racial integration in *Parents Involved*).

<sup>201</sup> *Id.* at 72, 95.

<sup>202</sup> See *id.* at 89–90 (arguing that *Parents Involved* is an example of modern "colorblindness" working against integration).

inconsistent with “legal liberal integrationist thinking in law.”<sup>203</sup> Thus, for Peller, the Court’s ruling in *Parents Involved* “completes an arc in the re-interpretation of *Brown* from a realist, functionalist case concerned about the real world impact of race policies on Black students to a ‘principled’ symbol of the evils of race consciousness in general.”<sup>204</sup>

Peller underestimates the possibilities for progressive outcomes even within the prevailing legal and ideological regime. The meaning of “equal protection” has been and continues to be contested, and the various opinions in *Parents Involved* demonstrate that fact.<sup>205</sup> In *Parents Involved*, the Court considered the meaning of equal protection. At issue in the case was the constitutionality of two voluntary student assignment plans adopted by two public school districts that were intended to reduce racial concentration in the schools and “ensure that racially concentrated housing patterns [did] not prevent nonwhite students from having access to the most desirable schools.”<sup>206</sup> Chief Justice Roberts, writing for the majority, ruled that the two plans violated the Equal Protection Clause.<sup>207</sup> Roughly, there were five votes for the proposition that the two student assignment plans violated “strict scrutiny” because they were not narrowly tailored to achieve a compelling governmental interest.<sup>208</sup> But the Court greatly disagreed with respect to the propriety of the school districts’ goal of achieving racial diversity in the public schools in the first instance.<sup>209</sup>

Justice Kennedy provided the critical fifth vote for the majority opinion striking the two plans down.<sup>210</sup> But he also wrote at length about the importance of racial diversity in the public schools and the need to eradicate de facto segregation.<sup>211</sup> Justice Kennedy described the school districts’ compelling governmental interest in a sweepingly broad fashion, suggesting that public school districts have a compelling interest in “avoiding racial isolation.”<sup>212</sup> And he provided examples of a variety of facially neutral yet race conscious mechanisms that school districts could use to eradicate racial isolation in the schools and achieve a diverse student

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<sup>203</sup> *Id.* at 94; *see also id.* (“While liberals acknowledge the white power structure’s dominance in society, they take the structure in which whites have been privileged as the fixed background against which race-conscious remedies are to be seen as exceptional. In this view, race-conscious state action can be appropriate, but only as a remedy for conscious racial bias.”).

<sup>204</sup> *Id.* at 89–90.

<sup>205</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 707 (2007).

<sup>206</sup> *Id.* at 725.

<sup>207</sup> *Id.* at 747.

<sup>208</sup> *Id.* at 720, 726.

<sup>209</sup> *See id.* at 760–761 (Thomas, J., concurring) (arguing that the dissent’s cited interest is “too amorphous,” has “no logical stopping point,” and requires “sheer speculation”).

<sup>210</sup> *Id.* at 707 (majority opinion).

<sup>211</sup> *Id.* at 788–89, 793–96 (Kennedy, J., concurring).

<sup>212</sup> *Id.* at 797.

population.<sup>213</sup> Justice Stevens was blunt in his dissenting opinion. He openly chastised the Chief Justice for relying on *Brown* to support a decision striking down public school districts' voluntary integration plans.<sup>214</sup> According to Justice Stevens, the "Chief Justice fail[ed] to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools."<sup>215</sup> Justice Stevens accused Chief Justice Roberts of rewriting history and twisting legal doctrine to support his position.<sup>216</sup> For Justice Stevens, *Brown* could *only* be understood from a race conscious perspective.

Finally, Justice Breyer's lengthy dissent hewed to traditional equal protection interpretation and yet was explicitly race conscious in its approach. In Justice Breyer's reading of precedent—the same precedent that moved the plurality to the opposite conclusion—"[a] longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals."<sup>217</sup> For Justice Breyer, the Equal Protection Clause permits school districts' voluntary race-conscious measures that intend to eradicate racial exclusion and guarantee full citizenship for African Americans.<sup>218</sup> The reason, according to Justice Breyer, was because there was a fundamental difference between racial classifications used to include and bring the races together, and those used to exclude and keep the races separate.<sup>219</sup> Justice Breyer's dissent is consistent with the core substantive claim of integration, which is that exclusion and segregation facilitate white supremacy and therefore must be eradicated. That the Equal Protection Clause could be open to differing interpretations is not inconsistent with that idea.

#### IV. CONCLUSION

As I suggested at the outset of this Book Review, one must give Professor Peller credit for intervening in this important discussion about integration. Professor Peller's central achievement is to add value to the scholarly discussion about a critical issue: What is the meaning of racial justice, and did (and does) integration help us achieve it? But as I have argued, Professor Peller paints an over-simplified, one-dimensional picture of integration. The integrationism versus nationalism framework tends to

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<sup>213</sup> *Id.* at 789.

<sup>214</sup> *Id.* at 798–99 (Stevens, J., dissenting).

<sup>215</sup> *Id.* at 799.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 823 (Breyer, J., dissenting).

<sup>218</sup> *Id.* at 843.

<sup>219</sup> *Id.* at 829.

associate the limits of race neutrality with an integrationist worldview by encouraging binary thinking. But the reality was always more complicated. Not only does fealty to this account invariably produce conflict, but it lacks the ability to provide either coherent explanations of or adequate solutions for racial inequality in a complex and changing world.

Along these lines, consider the debate about the “Moving to Opportunity” petition signed by almost two hundred social scientists urging the government to provide housing mobility assistance to individuals displaced by Hurricane Katrina.<sup>220</sup> The petition asserted that “[a]s the nation seeks to find housing for the many who have been left homeless, our goal for these low-income displaced persons, most of whom are racial minorities, should be to create a ‘move to opportunity.’”<sup>221</sup> The petition cited scientific research indicating that “moving to lower poverty, lower risk neighborhoods and school districts can have significant positive effects on the well-being and economic opportunity of low-income children and their families.”<sup>222</sup> The thrust of the petition was to link location to opportunity (or lack thereof) and to urge the government to provide housing assistance so that persons displaced by Katrina could relocate to lower poverty and implicitly less racially segregated neighborhoods.<sup>223</sup> The petitioners asserted that assisted housing mobility is “one of the nation’s most important and under-utilized tools for closing the gap between the haves and the have nots.”<sup>224</sup> Thus, they advocated that individuals displaced by Hurricane Katrina be given federal rental housing subsidies to facilitate a “move to opportunity.”<sup>225</sup>

The Moving to Opportunity petition was controversial. In 2008, David Imbroscio asserted that the petition was a classic example of the reigning “Dispersal Consensus” approach to eradicating urban poverty.<sup>226</sup> Calling such an approach hegemonic, Imbroscio argued that the petitioners have “coalesced around the central idea that the only way to make a serious dent in ameliorating the plague of urban poverty—not only in New Orleans but

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<sup>220</sup> Xavier de Souza Briggs, *After Katrina: Rebuilding Places and Lives*, 5 CITY & COMMUNITY 119, 121, 127–28 (2006).

<sup>221</sup> *Id.* at 128.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* In a follow-up op-ed piece, one of the main drafters of the petition called for “equitable redevelopment” of New Orleans, which would include an “assisted housing mobility program[.]” Xavier de Souza Briggs & Margery Austin Turner, *Fairness in New Orleans*, BOS. GLOBE (Oct. 5, 2005), [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2005/10/05/fairness\\_in\\_new\\_orleans/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/10/05/fairness_in_new_orleans/).

<sup>226</sup> David Imbroscio, “[U]nited and Actuated by Some Common Impulse of Passion”: *Challenging the Dispersal Consensus in American Housing Policy Research*, 30 J. URB. AFF. 111, 112 (2008).

throughout urban America—is to disperse (or deconcentrate) the urban poor into wealthier (usually suburban) neighborhoods.”<sup>227</sup> Imbroscio attacked the social scientists he identified for intentionally exaggerating the benefits of moving to opportunity while slighting “evidence suggesting the viability of alternatives to it,”<sup>228</sup> overestimating individuals’ desire to move from inner cities,<sup>229</sup> advocating “reeducation” in an attempt to persuade individuals to leave their neighborhoods and communities, and repressing real freedom of choice by restricting the use of housing assistance to “more affluent and possibly predominately white neighborhoods.”<sup>230</sup>

The debate about the Moving to Opportunity petition suggests a classic binary choice: Should we enrich or integrate? “Gild the ghetto,” or help people move out? Under this now standard account, the debate breaks down into another variation of the integrationism versus nationalism conflict. But the integrationism versus black nationalism frame ultimately detracts from the quest for racial equality; it erects a false dichotomy. As Xavier Briggs emphasized in his response to David Imbroscio’s critique, “[i]mproving the quality of life of the very poor and helping them escape poverty are two very different things, but both matter.”<sup>231</sup> Along these lines, Briggs’s and Margery Turner’s call for “equitable redevelopment” of New Orleans did not focus solely on housing mobility. Indeed, they defined equitable redevelopment to include housing mobility and:

[H]ousing affordable to families at a wide range of income levels, measurably better public transportation and other job links, schools that are on track to succeed, healthcare access, a smart retail mix, business linkages to the regional economy, a viable tax base, and more mixed-income communities that reflect how urban America can and should function.<sup>232</sup>

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 113–14, 121.

<sup>229</sup> *Id.* at 116–17.

<sup>230</sup> *Id.* at 118; see also Adolph Reed & Stephen Steinberg, *Liberal Bad Faith in the Wake of Hurricane Katrina*, BLACK COMMENTATOR (May 4, 2006), [http://www.blackcommentator.com/182/182\\_cover\\_liberals\\_katrina.html](http://www.blackcommentator.com/182/182_cover_liberals_katrina.html) (characterizing the petition as providing “liberal cover for those who have already put a resettlement policy into motion that is reactionary and racist at its core”).

<sup>231</sup> Xavier de Souza Briggs, *Maximum Feasible Misdirection: A Reply to Imbroscio*, 30 J. URB. AFF. 131, 136 (2008).

<sup>232</sup> Briggs & Turner, *supra* note 225. This discussion continues. This very same debate was ignited once more when Imbroscio published a piece linking housing mobility with the failures of liberalism and making many of the same claims he advanced in opposition to the *Moving to Opportunity* petition. See David Imbroscio, *Beyond Mobility: The Limits of Liberal Urban Policy*, 34 J. URB. AFF. 1, 14 (2011) (arguing that dispersal strategies and integrative mobility programs do not enhance economic opportunity); see *supra* text accompanying note 220. But see DeLuca, *supra* note 158, at 23–24 (arguing in the context of federal housing policy, that the Federal Department of Housing and Urban Development does not have a mission of enhancing housing mobility and racial integration); Gregory D. Squires, *Beyond the Mobility Versus Place Debate*, 34 J. URB. AFF. 29, 29 (2012) (arguing

To be sure, integration is often criticized and castigated. To a certain extent this is understandable, given the scope and complexity of the problem it attacks and the deep-seated emotional, political, and social underpinnings of that problem. *Brown v. Board of Education* raised expectations that were nearly impossible to meet.<sup>233</sup> But that does not mean that integration itself was a failed and bankrupt strategy from the start. Nor does it mean that integration is not a crucial approach for continuing the journey toward racial equality today. If *Critical Race Consciousness* demonstrates anything, it is that the burden on integration is too high. Over and over again, we have asked integrationists not just to fight but to win the war against white supremacy. But we place no such burden on any other strategy designed to achieve racial equality. Integration should be understood not as a set of tactical tools for merely changing prejudicial views, but rather as a systematic, thoughtful, and long-term approach for undermining established racially driven power structures. It envisions nothing less than redressing fundamental societal power imbalances, and given the audacity of that goal, we should not conclude it has lost the war while the battles are still raging.

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that “[i]t is time to move beyond the mobility versus place debate”).

<sup>233</sup> As Robert Carter remarked in his assessment of the Warren Court and desegregation, “*Brown* has promised more than it could give, and therefore has contributed to black alienation and bitterness, to a loss of confidence in white institutions, and to the growing racial polarization of our society.” Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968).