

INTERSECTIONALITY THEORY, THE ANTICASTE PRINCIPLE,
AND THE FUTURE OF *BROWN*

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The purpose of this Essay is to celebrate the important professional life of Professor Martha Morgan, my wonderful, talented colleague and great friend, who has dedicated herself to researching, understanding, writing, and teaching about status inequality around the world throughout her impressive career.¹ A true international and bilingual comparativist, Morgan has been especially interested in chronicling the roles of women in constitutional reform movements, especially in Central and South America.² In addition to the Americas, Morgan’s work has been influenced by

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1. Professor Morgan joined the faculty in 1979, after clerking for a federal judge and working for the Equal Employment Opportunity Commission. She has served on the national and Alabama boards of the ACLU and is a founding board member of Equal Justice Initiative, Inc. Professor Morgan’s teaching and research interests are broad and have taken her to conferences and teaching posts around the world. For a more extensive biographical sketch, see Morgan’s faculty listing at <http://www.law.ua.edu/directory/view.php?user=50>.

2. Alda Facio, Rodrigo Jiménez Sandoval, & Martha I. Morgan, *Gender Equality and Interna-*

reform projects in Asia, Africa, Europe, and Australia, where she has traveled and taught. She has convinced me that there is tremendous wisdom to be learned from mining international sources of law³ for new theories of law reform in the United States.⁴

My charge for this Symposium Essay is to frame the diverse writings of the various presenters through the lens of intersectionality theory.⁵

tional Human Rights in Costa Rican Constitutional Jurisprudence, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 99 (Beverly Baines & Ruth Rubio-Marin eds., 2005); Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution*, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 75 (Beverly Baines & Ruth Rubio-Marin eds., 2005); Ruth Rubio-Marin & Martha I. Morgan, *Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearside of the Bridge*, in GENDER AND HUMAN RIGHTS: THE COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW SERIES (Karen Knop ed., 2004); Martha I. Morgan, CEDAW's Impact on the Drafting, Reform and Judicial Interpretation of Constitutions and Overview: Using CEDAW in Domestic and International Tribunals, Address at the Bellagio Center Conference on Using International Human Rights Agreements as a Tool for Redressing Violations of Women's Human Rights (Bellagio, Italy, Nov. 4–9, 2007); Martha I. Morgan & Mónica María Alzate Buitrago, *Founding Mothers and Contemporary Latin American Constitutions: Colombian Women, Constitution-Making, and the New Constitutional Court*, in GLOBAL CRITICAL RACE FEMINISM 204 (Adrien Katherine Wing ed., 2000); Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253 (1999); Martha I. Morgan, *The Bitter and the Sweet: Feminist Efforts to Reform Nicaraguan Rape and Sodomy Laws*, 26 U. MIAMI INTER-AM. L. REV. 439 (1995); Martha I. Morgan & Mónica María Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Columbian Constitution*, 4 YALE J.L. & FEMINISM 353 (1992); Michelle A. Saint-Germain & Martha I. Morgan, *Equality: Costa Rican Women Demand 'The Real Thing'*, 11 WOMEN & POL. 23 (1991); Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1 (1990).

3. For example, see Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295/Annex (Sept. 13, 2007); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/46 (Dec. 18, 1979) [hereinafter CEDAW]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

4. In recent years, members of the U.S. Supreme Court have sparred over the relevance of international law to the resolution of domestic disputes. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The lead opinions in both the high-profile cases *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) refer to international law norms in explaining the reasoning of the Court. I expect this trend to continue. See Justice Antonin Scalia, *International Law in American Courts*, Address at the American Enterprise Institute (Feb. 21, 2006) (transcript available at <http://www.joink.com/homes/users/ninoville/aei2-21-06.asp>).

5. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping*]; see also Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991) (illustrating that too often law reform projects fail because they fail to see the myriad forms of discrimination and oppression at work in discrimination claims); see generally BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (2d ed. 2000); Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7 (1996) [hereinafter WILDMAN, *PRIVILEGE REVEALED*]; Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other Isms)*, in WILDMAN, *PRIVILEGE REVEALED*, supra at 85; WILDMAN, *PRIVILEGE REVEALED*, supra at xi; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). International scholars have embraced intersectionality as well. For international perspectives on intersectionality, see Barbara G. Bello, *Intersectionality: An Approach to Empower Women at the Crossroads*, http://www.salto-youth.net/static/downloads/toolbox_downloads.php/642/Barbara_Bello.doc; Marsha J. Tyson Darl-

Then, my goal is to move forward from the key insights of intersectionality, to suggest that the anticaste equality principle should inform a new reform discourse to dismantle multidimensional caste.⁶

I have divided this Essay in three primary parts. First, in Part I, I briefly recount the enormous personal impact Morgan has had on my career since I decided to join the faculty at Alabama in 1991. If you know Professor Morgan, you know she is an extraordinary person, one who is always seeking new ways to help others through law reform. She has been an inspiration to me for many years.

In Part II, I seek to unpack two essential themes in Professor Morgan's work: understanding intersectionality and theorizing antisubordination.⁷ I argue that Professor Morgan has displayed a deep understanding of the axes of legal privilege and caste, and she has sought to lay them bare through her teaching, research, and service. I borrow from Professors Kimberle Crenshaw, Mari Matsuda, Marsha Darling, and Stephanie Wildman, among others, to illustrate how Professor Morgan has employed an expansive, generative understanding of constitutional equality as she has sought to expand the rights and protections of women, people of color, persons with disabilities, the working poor and their children, and other marginalized individuals or groups.

Finally, in Part III, I recall the trenchant work of Kenneth Karst and Cass Sunstein, seeking to overlay the anticaste, equal citizenship principle with the chief insights of intersectionality theory, explaining why intersectionality theory alone does not dismantle educational caste and arguing for a more expansive, anticaste reading of the Equal Protection Clause.⁸ Given Professor Morgan's commitment to equal educational opportunity,⁹ I return to the recent school integration cases to render visible the obscure

ing, Human Rights for All: Understanding and Applying Intersectionality to Confront Globalization, presented at Association for Women's Rights in Development 9th International Forum (Oct. 5, 2002), available at <http://www.awid.org/eng/content/download/19296/211674/file/intersectionality.ppt>.

6. See generally Bryan K. Fair, *After Katrina: Laying Bare the Anatomy of American Caste*, in HURRICANE KATRINA: AMERICA'S UNNATURAL DISASTER 35 (Jeremy I. Levitt & Matthew C. Whitaker eds., 2009); JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000); BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION (1997) [hereinafter FAIR, NOTES]; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1994); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381 (1999) [hereinafter Fair, *Anatomy*].

7. See *supra* note 2.

8. See *infra* pp. 17–31 and accompanying notes.

9. See generally Martha I. Morgan, *The Alabama Constitution's Right to Public Education: A Background Paper on the First Clause of the 1901 Alabama Constitution's Education Article*, 33 CUMB. L. REV. 387 (2003) [hereinafter Morgan, *Alabama Constitution's Right to Public Education*]; Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559 (1995); Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77 (1982).

contours of American caste.¹⁰ Like Professor Matsuda,¹¹ I seek to ask the other questions that the Supreme Court fails to ask about educational caste. Borrowing from intersectionality theory, my critique is that the Court's antidiscrimination discourse is too often framed more to address the needs of socially dominant groups and not so much the needs of those most marginalized persons who endure American caste, in one form or another, everyday. The school integration cases are a recent example of the inability of some members of the Court to examine more closely segregation and its legacy of educational caste.

bell hooks was correct when she wrote, "Looking at the interlocking nature of gender, race, and class was the perspective that changed the direction of feminist thought."¹² It has been my sense that Professor Morgan, too, has sought to teach, write, and do law with an aim towards not only identifying the myriad markers of caste, but also to employ a constitutional interpretative theory that permits, if not requires, government to eliminate all forms of caste. Unfortunately, to date, only four members of the Court are prepared to dismantle educational caste.

I. TAKING ACADEMIC LIFE SERIOUSLY: A PROFESSOR FOR ALL SEASONS

Professor Martha Morgan is far too modest to permit me to give her career appropriate praise in these few pages. Yet, I would be completely remiss not to acknowledge her material and substantial influence on my teaching, research, and service.¹³ There is simply nothing that I do as an academic that has not been touched in some way by my observations of Martha for nearly two decades. She has been a patient and dedicated teacher, a mentor to her students and to junior colleagues, a role model for academic citizenship, and a prolific and rigorous scholar/lawyer. She has also been a reliable friend to me and many others.

When I came to The University of Alabama for my first visit in 1990, I joined Morgan and her seminar students for a lively dinner and discussion of civil rights. I was immediately impressed by her openness, her clarity of thought, and her commitment to social justice. Her students adored her and appreciated the way she respected them. What I learned from Martha is that one can be a caring teacher and respect students; that teaching is not about terrorizing students or destroying their self-confidence. I learned from her that students learn best in an environment built on high expectations, trust, and mutual respect. They also learn from

10. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

11. See Matsuda, *supra* note 5.

12. HOOKS, *supra* note 5, at xii.

13. For most of my teaching career at Alabama, Professor Morgan has been my most frequent consultant on constitutional issues, organizing class materials, and engaging students. From selecting books, drafting exams, to assigning grades, Morgan has been my chief advisor.

participating in the teaching and analysis, so Martha had her students take part in their learning by doing law problems individually and in small groups.

In each of her classes, Martha established such an environment, even when she personally did not share basic viewpoints or values with some of her students. She demonstrated for me that the classroom was not a place for bullying, but instead a place for discussing competing ideas. Martha's model of openness helped me design a similar approach in my classes and to enjoy greater success than I might have without her keen insights.

Martha has also been my mentor, guiding me through the intricacies of constitutional doctrine. As with her students, she was gentle and patient with me as I tried to read broadly to gain some perspective on U.S. constitutional law and history. She has always worked long hours, reading and preparing into the night, seeking innovative, dynamic ways to exchange ideas with her students and to deepen their understanding of law and policy. Through her example, she aided me almost every day. Day or night, she was always there when I needed her to help me understand confusing texts or competing constitutional visions.

Martha has also been a prolific scholar and rigorous lawyer throughout her career.¹⁴ She has seen law as a tool to advance social justice and she has spent hundreds of hours fighting for equal justice and equal opportunity for various disadvantaged groups, including securing for a time a right to equal and adequate educational opportunity for children in Alabama.¹⁵ Martha has been the consummate scholar activist, seeking to do justice through law teaching and lawyering. Martha's work also illustrates that we in the United States might benefit enormously by looking elsewhere in the world for law reform strategies under international human rights charters and other national constitutions, such as Canada, Switzerland, or South Africa.¹⁶ She taught me that there is value in exposing our students to laws, customs, and judicial and academic writing from around the world. Over time, it also has become my practice to ask my students how other countries resolve similar legal problems and to encourage them to consider what legal canons from other jurisdictions might be available.

14. See *supra* note 2.

15. Just one example of her scholarly advocacy is apparent from the prominent role she played in Alabama's equity funding lawsuit which sought to prove on state and federal grounds that Alabama's funding scheme was unconstitutionally inequitable and inadequate. Although she and her colleagues prevailed at trial, the Alabama Supreme Court has not been willing to read the Alabama Constitution as broadly as it might be read. See Morgan, *Alabama Constitution's Right to Public Education*, *supra* note 9; Martha I. Morgan & Neal Hutchens, *The Tangled Web of Alabama's Equality Doctrine After Melof: Historical Reflections on Equal Protection and the Alabama Constitution*, 53 ALA. L. REV. 135 (2001).

16. Professor Morgan regularly invited her students to examine international charters and foreign constitutions by excerpting key provisions relevant to a case under consideration. She demonstrated for her students through comparison how the same issue would be resolved applying different principles.

Martha has been one of my greatest influences in terms of my regard for the importance of international law.¹⁷

The great bonus has been that I have worked closely with Martha as a colleague for eighteen years and she has become a true friend. As in all aspects of her life, collegueship and friendship with Martha are rich, life-affirming experiences. As my colleague and friend, she has been steady and generous over so many years, even in our disagreements, which, for me, is the ultimate test. At times, Martha and I have been on opposite sides of important decisions, but she has never been vitriolic or demeaning. She has cared enough to speak to me privately and publicly, explaining her differences and listening to my counterpoints. And we have often left those moments of difference with a stronger bond and greater respect. Martha is simply no fair weather colleague or friend. Even in our storms, she has always recognized my humanity and dignity; she always has given me her goodwill.

For all these and other reasons, the Law School has been a much better place for me because Martha has been here. She is truly rare. Personally, I will always be in her debt.

II. CONSTITUTIONAL THEORY AND PRAXIS: PROFESSOR MORGAN'S VISION OF EQUALITY

I am delighted to join this august symposium of leading international scholars on discrimination and the law. My own writing on discrimination law has largely focused on racial caste in the United States.¹⁸ I have not been as keen a student of international discriminatory practices and reform movements as Professor Morgan and others.¹⁹ Indeed, it is accurate to say Morgan has been one of my principal teachers regarding how extensive caste-producing discrimination is around the world. Through her many journeys, as well as her work on United Nations projects, I have learned

17. I have also been influenced by visits to Tuscaloosa from students and colleagues at the University of Fribourg, in Fribourg, Switzerland, and The Australian National University in Canberra, Australia, our principal international exchange partners, where Alabama students and faculty travel each year for comparative law courses.

18. See *infra* pp. 28–31 and accompanying notes. See also Fair, *After Katrina, in HURRICANE KATRINA*, *supra* note 6; FAIR, NOTES, *supra* note 6; Bryan K. Fair, *Re(caste)ing Equality Theory: Will Grutter Survive Itself By 2028?*, 7 U. PA. J. CONST. L. 721 (2005) [hereinafter Fair, *Re(caste)ing Equality Theory*]; Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843 (2004) [hereinafter Fair, *Taking Educational Caste Seriously*]; Fair, *Anatomy*, *supra* note 6.

19. I have taught comparative courses on race and law and gender and law in Switzerland at the University of Fribourg and a course on the rights of indigenous peoples at The Australian National University in Canberra. Thus, I also have an important debt to the outstanding scholars at those fine schools who have collaborated with me over the years, especially Jennie Clarke, with whom I have co-taught several times and who taught me about Australia's history of white racial privilege and aboriginal caste.

so much about the extent of poverty, exploitation, and status inequality, and violence around the world. Professor Morgan has taught me to think internationally about caste.

Consider, for example, that, according to the United Nations: Nearly three billion people in the world live on less than \$2 per day, and more than a billion live on \$1 per day.²⁰ For almost half the world's population, poverty confines their lives to hardship and despair; to diseases which have been preventable or treatable for decades; to illiteracy; to physical violence and abuse; and to enormous exploitation.²¹

The United Nations also reports that one billion people still use unsafe sources of drinking water.²² More than forty percent of the world's population, 2.6 billion people, does not have basic sanitation.²³ Some six million children die from malnutrition every year, before the age of five.²⁴ Every thirty seconds an African child dies of malaria.²⁵ Millions go to bed hungry around the world, most are children.²⁶

According to CARE, some countries still give educational preferences to boys over girls.²⁷ Millions of children have never been to school, and some two million children are believed to be exploited through the commercial sex trade.²⁸

These caste conditions are not natural or inevitable. They are unjust. And, despite changes in law and practice, these conditions are self-reinforcing and inescapable for all but a limited few. Thus, we need a broad international coalition to declare war on global poverty, discrimination, violence, and exploitation. And we need a theory of law that places on government an affirmative duty to dismantle all these forms of caste. Current antidiscrimination paradigms will not eliminate caste and current discourse fails to even recognize intersectional forms of caste. Thus, I agree with Stephanie Wildman that “[a]ttacking discrimination alone cannot result in an end to subordination, because systems of privilege regenerate the discriminatory patterns that maintain existing hierarchies of oppression.”²⁹

20. Millennium Project, *Facts: The Faces of Poverty*, http://www.unmillenniumproject.org/resources/fastfacts_e.htm (2006).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Anup Shah, *Poverty Facts and Stats*, <http://www.globalissues.org/article/26/poverty-facts-and-stats>; Children's Defense Fund, *The State of America's Children*, <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-children-2008-report-moments-each-day.pdf> (2008).

28. *Id.*

29. WILDMAN, *PRIVILEGE REVEALED*, *supra* note 5, at 5.

A. Reforming Intersectional Caste, Root and Branch

The two questions that I want to discuss briefly are: (1) why has law reform failed to dismantle American caste? and (2) what additional reforms or strategies might help us eliminate caste? Implicit in these questions are several premises. I do not think that antidiscrimination law has been effective.³⁰ I am convinced a different theory of equality is required to eliminate caste. Scholars and activists have been wrestling with these questions for decades, and I want to use this essay to suggest my own tentative answers.

To answer these questions, I want to borrow first from the brilliant work of Kimberle Crenshaw and others who framed intersectionality theory in critical race scholarship.³¹ Critical race scholarship reminds us that existing antidiscrimination theory is ineffective because it does not see multidimensional, layered bias. It sees gender, race, class, sexual orientation, disability, but not how these characteristics overlap or intersect, forming different subjects and requiring different reform strategies.³²

Second, I offer a soft critique of intersectionality theory, asserting that despite its key insights, it alone does not eliminate caste.³³ What has been missing is a theory of constitutional equality that holds government has an affirmative duty to eliminate caste. I discuss that duty more fully in Part III, relying on Professors Karst and Sunstein to recall principles of equal citizenship and on my own work on the anticaste moorings of equality theory to offer an interpretive way forward from deeply embedded, intersectional caste.³⁴

B. The Key Insights of Intersectionality Theory

Professor Crenshaw explained that although “identity-based politics has been a source of strength, community, and intellectual development,”

30. FAIR, NOTES, *supra* note 6, at 168–75.

31. See sources cited *supra* note 5.

32. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing*] (illustrating that many of the experiences that Black women face are not subsumed within the traditional boundaries of race and gender discrimination, and that the intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race and gender dimensions of the experiences separately).

33. Laying bare the taxonomy of discrimination has tremendous value, so I am personally indebted to critical outsider scholarship. Yet, in addition to its key insights, I have concluded that we also need a theory of constitutional equality that permits or commands government to undo caste. I have used Karst’s equal citizenship principle or Sunstein’s anticaste principle to frame an anticaste theory of constitutional equality. See Fair, *Anatomy*, *supra* note 6, at 396–412.

34. Here, I use intersectional caste to describe the marginalized status experienced by many Americans because legal discourses are not shaped to respond to intersectional identities or their castes. See Crenshaw, *Mapping*, *supra* note 5, at 1242–45.

ignoring differences within groups has contributed to tension within and among them.³⁵ Crenshaw's thesis was that because contemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of color, women of color are marginalized by discourses that are shaped to respond to only racism or sexism.³⁶

Professor Crenshaw also reminded us that "intersectional subordination," whether structural or political, "need not be intentionally produced; in fact," she asserted, "it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment."³⁷ In its structural aspect, "[w]omen of color are differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged."³⁸ Thus, one key insight of intersectionality theory is that uniform standards of need presumptions may hinder the ability of government agents to address the unique needs of nonwhite and poor women.³⁹ Intersectionality theory seeks to center and render multidimensional caste visible so that all forms of caste can be interrogated.

Moreover, Crenshaw illustrated the importance of political intersectionality, highlighting "the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas."⁴⁰ And the result most often is that women of color benefit the least from race or gender reforms which most often serve the interests of politically privileged whites or men. Crenshaw wrote:

The problem is not simply that both discourses fail women of color by not acknowledging the "additional" issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.⁴¹

Thus, Crenshaw concludes that "[t]he failure of feminism to interrogate race means that the resistance strategies of feminism will often repli-

35. *Id.* at 1242; see also Crenshaw, *Demarginalizing*, *supra* note 32, at 140.

36. See Crenshaw, *Mapping*, *supra* note 5, at 1242-1245; see also Matsuda, *supra* note 5, at 1191.

37. Crenshaw, *Mapping*, *supra* note 5, at 1249.

38. *Id.* at 1250.

39. See *id.*

40. *Id.* at 1251-52.

41. *Id.* at 1252.

cate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women.”⁴²

For Crenshaw, another common problem is that “the political or cultural interests of the community are interpreted in a way that precludes full public recognition of the” underlying problems (for example, domestic violence) especially for communities of color.⁴³ As a result of their subordinate status and the failure to recognize fully their caste, people of color must navigate between “distorted public perceptions” of them and their conditions, on the one hand, and “against the need to acknowledge and address intracommunity problems,” on the other.⁴⁴ Thus, another benefit of intersectionality theory is that those mired in caste become engaged with their status inequality and they can critique it as outsiders and insiders.

C. The Goals of Intersectionality Theory: Laying Bare the Axes of Marginalization

Crenshaw’s work describes well how race and gender are potential axes of discrimination for women of color, often combining to produce a compounded form of gendered racism. She and other theorists have pointed out that men and women experience discrimination differently because of their multiple identities. Likewise, different women experience subordination differently. Thus, one of the goals of intersectionality analysis has been to lay bare the many different identities or human characteristics that may trigger disadvantage from the attitudes or actions of socially dominant groups. And even though Crenshaw’s principal subject was intersectionality and women of color, other scholars have borrowed from her work to articulate similar claims on behalf of others marked by multiple, layered identities.⁴⁵

Marsha Darling has set out a list of factors which might mark one for intersectional caste: skin color; caste; descent; accent and language; age; religion; disability; immigration status; refugee status; trafficked and migrant status; sexual orientation; national/ethnic origin.⁴⁶

Likewise, Stephanie Wildman has described how racial privilege reinforces the existing racial status quo, and overlaps and interacts with other systems of privilege, including those based on gender, sexual orientation, class, physical ability, and religion. Wildman concludes, “[j]ust as the

42. *Id.*

43. *Id.* at 1256.

44. *Id.*

45. Bello, *supra* note 5, at 1–4; WILDMAN, PRIVILEGE REVEALED, *supra* note 5, at xi–xii.

46. *See* Darling, *supra* note 5, at slide 5.

systems [of privilege] themselves are made invisible by our language, the interaction between the systems is also masked;”⁴⁷ and “[a]nalyzing systems of privilege could give a new direction and energy to jurisprudence about inequality.”⁴⁸

Part of the project for theorists like Crenshaw, Darling, and Wildman has been to illustrate how intersectionality theory “can help reveal privilege, especially when we remember that the intersection is multidimensional, including intersections of both subordination and privilege.”⁴⁹

Herein, I use the term intersectional caste to describe the compounded forms of marginalization one might experience because one is female, colored, non-Christian, gay, disabled, poor, etc.

While I embrace the important insights of intersectionality theory about the inadequacy of existing reform discourse, I want to go further to describe a new discourse that may dismantle intersectional caste. Given Professor Morgan’s personal and professional commitment to equal educational opportunity, I next turn to the Court’s recent school integration cases to illustrate the shortcomings of the analysis. The Court seems incapable of seeing the myriad, dynamic ways that people experience educational caste and offers no substantive reform proposals which are likely to eliminate educational caste rather than reinforce it. Thus, I continue to agree that sometimes to treat people equally, you must treat them differently, specifically taking account of the various ways they experience American caste.⁵⁰

III. ELIMINATING EDUCATIONAL CASTE

Recently, a sharply fractured Court struck down two voluntary integration plans in Seattle and Louisville as violative of the equality guarantee of the Fourteenth Amendment.⁵¹ The decision has sent shock waves across the country as school officials seeking to integrate public schools try to understand what is permissible and what is proscribed. My real concern, however, is the battle within the Court over the soul of *Brown*. I am deeply troubled that Chief Justice Roberts’s plurality opinion and Justice Thomas’s concurrence seek to claim that their views are consistent with *Brown*’s mandate. It seems unequivocally clear to me that they are simply wrong in their reading of the most important legal decision of the twentieth century. Below, I reclaim *Brown*’s anticaste moorings and Justice

47. WILDMAN, PRIVILEGE REVEALED, *supra* note 5, at xi–xii.

48. *Id.* at 5.

49. Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in WILDMAN, PRIVILEGE REVEALED 7, *supra* note 5, at 22.

50. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (holding that race may be one of a number of factors considered by schools in the application process).

51. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

Harlan's colorblindness declaration, asserting that, in my view, the dissenters are truest to *Brown's* promise of educational equality.

A. Competing Visions of Brown at 55

In the recent cases, the Court appeared flummoxed that Seattle school officials classified children as white or nonwhite and the Jefferson County schools classified children as black or other.⁵² Thereafter, both districts used their racial classifications to "allocate slots in over-subscribed high schools" or elementary schools.⁵³ The officials admitted that their goal was to maintain racial balance within their schools.⁵⁴

The Court divided 4-1-4, with five separate opinions.⁵⁵ The reasoning in the opinions is so divergent, it is difficult to declare winners and losers or to decide the final meaning of the cases.⁵⁶ However, we now know that Chief Justice Roberts and Associate Justices Scalia, Thomas, and Alito are opposed to governmental uses of racial classifications in almost every instance. For them, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁵⁷ And because racial classifications are so pernicious, school officials seeking to promote integration or racial balance must meet the standards of strict scrutiny by showing the school assignment plans are "'narrowly' tailored to achieve a 'compelling' government interest."⁵⁸

The Chief Justice framed the question before the Court as, "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."⁵⁹ One wonders why the plurality framed the matter as it did. Does it object to race labels? If so, the school cases seem like an odd place to condemn a practice as old as the English colonies. Or, if not the classifications, then did the Court really think that two school districts seeking to promote integration were acting invidiously when assigning students by race? Why was not the question whether either district acted invidiously when assigning students to schools?

The plurality's reasoning lacks any serious rigor, for surely no member of the plurality really believed that either school district was trying to promote racial privilege or racial supremacy similar to the pre-*Brown*

52. *Id.* at 2746.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See generally* Marks v. United States, 430 U.S. 188 (1977).

57. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).

58. *Id.* at 2752.

59. *Id.* at 2746.

practices. The plurality implies that all school assignments by race are constitutionally equivalent, whether the goal is to promote, for example, historic white privilege, or to advance diversity, integration, or equal educational opportunity.

Moreover, the Court seems to believe there is something talismanic, something cleansing, about findings of unitary status, when in fact such judicial decrees say nothing about the extent of current segregation in schools. Thus, there is an *Alice in Wonderland* quality to the Court's framing of the relevant issues. The Court could just as well have asked whether the Constitution permits school officials to promote integration and to eliminate racial isolation by maintaining racial balances within schools. For me, the answer is an obvious yes. Indeed, in my view of the Constitution and in light of our national history, including the history in Seattle and Louisville, I think the Constitution should be read to impose on government officials an affirmative duty to promote integration and to eliminate racial isolation in our schools and elsewhere.

According to the plurality, there are only two possible exceptions to this ban on uses of racial categorization: when government seeks to remedy its own past discrimination or when government seeks to achieve the benefits of a diverse educational environment in higher education.⁶⁰ The plurality rejected each interest in these cases, declaring that the school boards could not meet the compelling interest or narrowly tailored prongs of strict scrutiny.⁶¹

Thus, we know that for the plurality, “the Constitution is not violated by racial imbalance in the [public] schools, without more.”⁶² But we do not know if the plurality will take account of even the two factors it mentioned: “remedying the effects of past intentional discrimination” or promoting diversity.⁶³ The plurality gave short shrift to both. It concluded that neither Seattle nor Jefferson County could rely on either rationale because there had been no showing that Seattle schools were ever intentionally segregated and Jefferson County had attained “unitary status;”⁶⁴ and the diversity rationale was inapposite because here “race, for some students, is determinative standing alone.”⁶⁵

The plurality seemed offended that the school districts had sought to achieve racial balance for its own sake and concluded that “outright racial balancing is patently unconstitutional.”⁶⁶ For them, at the heart of the equal protection guarantee lies the simple command that the “Government

60. *Id.* at 2752–53.

61. *Id.* at 2752–54.

62. *Id.* at 2752 (quoting *Miliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

63. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752–53 (2007).

64. *Id.* at 2752.

65. *Id.* at 2753.

66. *Id.* at 2757.

must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”⁶⁷ Of course, if the Court had been true to this substantive interpretation from the beginning, there might well be no need today to protect racial, religious, sexual, or national minorities. Thus, it seems the plurality turns the equal protection clause into a shield, protecting those Americans the Court almost always protects and leaving those Americans most vulnerable to educational disadvantage without the Constitution’s chief weapon against caste. That result is hard to reconcile with *Brown*.

Associate Justice Thomas joined the plurality in full, but wrote separately to contest that resegregation is occurring in Seattle or Louisville;⁶⁸ he found neither district had a “present interest in remedying past segregation;” and he felt that neither plan was justified by a compelling government interest; thus, both plans were unconstitutional.⁶⁹ It seems ironic that the sole African American member of the Court seems most doubtful of the potential educational benefits of integration.⁷⁰ For Justice Thomas, the social science research is, at best, inconclusive⁷¹ and, at worst, racially paternalistic.⁷² Beyond racial paternalism, Thomas asserted that his view of the cases was closest to Justice Harlan’s pledge on colorblind constitutionalism.⁷³ Thomas concluded that “[w]hat was wrong in 1954 cannot be right today:” “the government may not make distinctions on the basis of race.”⁷⁴

Associate Justice Kennedy concurred in the judgment to strike down the desegregation plans, but he refused to join the entire plurality opinion, declaring that it was too restrictive in its assessment of the permissibility of race-conscious policies.⁷⁵ He also found the dissents in “fundamental conflict with basic equal protection principles.”⁷⁶

Kennedy wrote:

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities

67. *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

68. *Id.* at 2768–88 (Thomas, J., concurring).

69. *Id.* at 2768.

70. *Id.* at 2776–79.

71. *Id.* at 2777.

72. *Id.* at 2775–79.

73. *Id.* at 2782–86.

74. *Id.* at 2786. I have previously rejected Thomas’s vision of colorblindness. See FAIR, NOTES, *supra*, note 6, at 109–13.

75. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2788–89 (2007) (Kennedy, J., concurring).

76. *Id.*

are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.⁷⁷

For Kennedy, school officials could adopt various race-conscious strategies, such as: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”⁷⁸ Notably, Kennedy seems prepared to apply rational basis review to such general race-consciousness by government.⁷⁹

What appeared to trouble Justice Kennedy the most was the government’s use of crude race labels. He wrote: “Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”⁸⁰ Thus, Kennedy has indicated he recognizes a constitutionally significant distinction between race-conscious measures and rigid racial categorization.

However, the most important aspect of Kennedy’s concurrence may be what he wrote at the end:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.⁸¹

With these words, Kennedy seemed to mark a pathway for school officials to continue their efforts to integrate public schools.

What is unclear is how Kennedy’s advice will apply in the real world. Justice Kennedy appeared to say that in the real world, Justice Harlan’s promise of colorblindness “cannot be a universal constitutional prin-

77. *Id.* at 2792.

78. *Id.*

79. *Id.*

80. *Id.* at 2797.

81. *Id.*

ciple.”⁸² Some race-consciousness is permitted, but it remains unclear how much. I read Kennedy to mean government must justify its race-consciousness, but Kennedy should have been much more forthcoming in explaining how schools could eliminate racial isolation or promote diversity, without relying too much on race.

Can school officials use racial classifications at all? Kennedy reminds us that application of strict scrutiny enables the Court to determine “‘what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics,’”⁸³ but he does not explain what was invidious or illegitimate about what school officials did in these cases. Instead, Kennedy relies on the old precedents which distinguished *de jure* and *de facto* segregation, imposing an affirmative duty in cases involving the former condition.⁸⁴ Of course, given the same chance, I would have taken the Court much further, interpreting the equal protection guarantee not just to permit government to seek to eliminate racial isolation and to promote diversity, but to impose an affirmative duty to dismantle all aspects of unequal and inequitable educational opportunity. I suspect this is what Professor Morgan would have done as well.

In two dissents, Justices Stevens, Breyer, Souter, and Ginsburg argued that both the Seattle and Louisville plans were constitutional.⁸⁵ Justice Stevens noted the “cruel irony” in the plurality’s reliance on *Brown*.⁸⁶ In a sense, Stevens’ critique is that the plurality’s analysis is unsophisticated because they fail to ask the other question, namely, what was really at issue in *Brown*? For Stevens and the other dissenters, *Brown* had an important context. It was about white majorities organizing schools to advantage white children and to disadvantage black and colored children. It was about the stigmatic injury to those colored children, unlikely ever to be undone. It was about school assignment practices designed to harm colored children.⁸⁷ Stevens rejects a “wooden reading of the Equal Protection” guarantee, insisting that the plurality’s opinion is flatly inconsistent with *Brown* and with numerous cases decided contemporaneously.⁸⁸

Justice Breyer’s opinion for the four dissenters rests on the simple proposition that *Brown* promised integrated schools and that, at least for a time, the Court either required, permitted, or encouraged local officials to undertake actions similar to those employed in Seattle and Louisville.⁸⁹

82. *Id.* at 2792.

83. *Id.* at 2789 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

84. *Id.* at 2795.

85. *Id.* at 2800.

86. *Id.* at 2797–2800 (Stevens, J. dissenting).

87. *Id.* at 2798.

88. *Id.* at 2798–2800.

89. *Id.* at 2800 (Breyer, J. dissenting).

For the dissenters, the plurality's opinion "undermines *Brown's* promise of integrated primary and secondary" schools and "cannot be justified in the name of the Equal Protection Clause."⁹⁰

Breyer's dissent is a painstaking recounting of what *Brown* and its progeny stood for and the results in local schools. Almost completely segregated schools did achieve some desegregation but that progress has been reversed in the past twenty-five years.⁹¹ Another distinct aspect of Breyer's dissent is his thorough re-telling of the local histories of school segregation, desegregation, and resegregation in Seattle and Louisville, histories the plurality simply glossed over.⁹²

For the dissenters, the legal question was does the federal constitution prohibit school boards from using "race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it"?⁹³ Breyer found his answer in *Swann*:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.⁹⁴

Justice Breyer recalls precedent after precedent in which the Court endorsed race-conscious desegregation efforts, in both *de jure* and *de facto* segregation cases.⁹⁵ He concludes that "the basic objective of those who wrote the Equal Protection Clause" was to "forbid practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the nation had previously held in slavery."⁹⁶ Thus, for the dissenters, there are legal and practical differences between race-conscious efforts to keep the races apart and race-conscious efforts to bring the races together.⁹⁷ Justice Breyer further stated that "[a]lthough the Constitution always forbids the former, it is significantly more lenient in respect to the latter."⁹⁸ I read this part of the dissent to mean that four members of the Court have implicitly adopted the anticaste principle as the

90. *Id.* at 2800-01.

91. *See id.* at 2801-02.

92. *See id.* at 2802-09.

93. *Id.* at 2811.

94. *Id.* at 2811-12 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S 1, 16 (1971)).

95. *Id.* at 2812-15.

96. *Id.* at 2815.

97. *See id.*

98. *Id.*

central meaning of the equal protection guarantee. What is now needed is a reliable fifth vote, which Justice Kennedy partially provides.

But in the end, here the dissenters could not move Kennedy. Nonetheless, they concluded that the plans at issue served “compelling interests” and were “narrowly tailored,” that “the distinction between *de jure* . . . and *de facto* segregation . . . is meaningless” in this context, and that the Constitution could not “plausibly” be read to prohibit “means that are ‘conscious’ of the race of individuals.”⁹⁹

In the short term, school officials seeking to integrate schools will want to follow Justice Kennedy’s guideposts and his concurrence will likely be at the center of a new round of school integration litigation.

Like Justice Lewis Powell thirty years earlier in *Bakke*, Kennedy now stands in the middle of the Court. He rejects the view that all government race consciousness is constitutionally impermissible and he rejects the view that government can use racial classifications in school assignments where the goal is educational integration. The question now is whether Justice Kennedy’s opinion will gain the stature that Justice Powell’s did, and then, whether it will suffer the same jurisprudential fate.

Nearly fifty-five years since *Brown v. Board of Education*¹⁰⁰ was first argued, the promise of equal educational opportunity remains one of the most elusive guarantees and most vexing issues in American life. None of the opinions say enough about educational equality and educationally effective schools for all children. Because of its colorblindness, the plurality fails to see the relationship between racial discrimination in almost every aspect of American life for most of our history and current racial segregation in schools, housing, and elsewhere.

For all of his concerns about the messages implicit in racial classifications, Chief Justice Roberts fails to recognize that parents would not need to compete for school assignments if schools were academically comparable rather than vastly different within the same districts. The majority ignores reality; it ignores that, on average, throughout the United States, white children have regular access to better public educational resources throughout their most formative years than colored children. In my view, under a constitutional regime that prohibits caste, government may not permit white children to enjoy such advantages without violating the central holding of *Brown*.

The plurality would use *Brown*, but render it sterile by ignoring the context in which its proponents argued that children should be assigned on a nonracial basis.¹⁰¹ I understood *Brown* to mean that white school officials violated the constitution when they directly or indirectly organized and

99. *Id.* at 2802.

100. 347 U.S. 483 (1954).

101. *Parents Involved*, 127 S. Ct. at 2797–98, (Stevens, J., dissenting).

assigned colored children to segregated, inferior schools. But it blinks reality to assert that either Seattle or Louisville promoted segregation in any way when they adopted policies to promote integration.

B. Brown's Anticaste Moorings and the Authorization of Race-Conscious Remedies

Chief Justice Roberts' plurality and Justice Thomas' concurrence would place form over substance and ignore the reality of current educational resegregation and disadvantage. They claim to be the heirs of Sumner, Harlan, Houston, and Marshall. Using language from the appellants' briefs in *Brown*, Roberts claims that his plurality is consistent with *Brown*: "The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."¹⁰² He continued from the briefs invoking Robert Carter, "We have one fundamental contention . . . that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."¹⁰³ And, finally, citing *Brown II*,¹⁰⁴ Roberts concludes that school officials must assign children to schools on a nonracial basis.¹⁰⁵

Justice Thomas also claims that his position is traceable to Justice Harlan's view in *Plessy v. Ferguson*,¹⁰⁶ and to *Brown* and Thurgood Marshall.¹⁰⁷ Thomas asserts that Justice Breyer's dissenting views are consistent with the *Plessy* majority, not the dissent.¹⁰⁸ He claims that just like the segregationists in *Plessy* and *Brown*, the dissent is willing to defer to local experience and practicalities.¹⁰⁹ For Thomas, "no . . . collection of contextual details . . . can 'provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.'¹¹⁰

For all of the reasons stated earlier, I am convinced that the plurality opinion of the Chief Justice and the Justice Thomas opinion are wrong about the meaning of the Justice Harlan dissent in *Plessy* and about the meaning of *Brown*. In *Brown*, I am reminded of Justice John Marshall Harlan's majestic declaration in his *Plessy* dissent: "There is no caste here. Our Constitution is color-blind and neither knows nor tolerates

102. *Id.* at 2767 (plurality opinion).

103. *Id.* at 2767-68.

104. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955).

105. *Parents Involved*, 127 S. Ct. at 2768.

106. 163 U.S. 537, 559 (1896).

107. *Parents Involved*, 127 S. Ct. at 2782-83.

108. *Id.* at 2783-86.

109. *Id.* at 2783, 2785.

110. *Id.* at 2786 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995)).

classes among citizens.”¹¹¹ Of course, Harlan was stating his aspiration, not the facts. He knew and said *Plessy* meant blacks were inferior by law. He dissented. His words had an important context. And it is galling that Chief Justice Roberts and Justice Thomas would claim Justice Harlan and *Brown* to turn back the plans adopted in Louisville or Seattle. In his declaration of the anticaste principle, he presented a constitutional pathway up from and out of cumulative racial caste.

Brown's result rested on a theory of equal citizenship and dignity of all persons. This is what the Equal Protection Clause commanded in 1868; it should issue the same command today. *Brown* held that separate educational systems for white and colored children were “inherently unequal,” violating the Equal Protection guarantees of the Constitution.¹¹² The Court underscored the importance of equal educational opportunity in the life of every child and the permanent status injury to colored children from state-sponsored segregation.¹¹³ The Court recognized the implicit stamp of inferiority imposed on colored children in a system which declared they were unfit to associate with white children.¹¹⁴ Most of all, the Court imposed on school officials an affirmative duty to remedy their constitutional violations, every root and branch.¹¹⁵ This aspect of *Brown* reaffirms Justice Harlan's anticaste declaration. I submit that neither Seattle nor Louisville sought to impose caste on any child. The plurality opinion misses this most salient feature of *Brown*.

This anticaste principle pledges corrective justice no matter how long delayed. It insists that the law can do for educational equality what it did so effectively and long for educational inequality.

I seek to re-center *Brown*'s anticaste moorings by heralding its equal citizenship values. In *Brown*, the Court reminded the nation that colored children deserved what white children took for granted: to be treated by the government as equal citizens with equal status, including equal educational opportunity. The Court said the exclusion of colored children implied their civil inferiority, their caste.¹¹⁶ Surely, the Court was correct that such a message by the government is inconsistent with the equality guarantee of the Constitution.

Brown was a declaration against educational caste. It repudiated *Plessy* and embraced Justice Harlan's dissent. *Plessy* had instantiated colored disadvantage and white supremacy and gave the force of law to black

111. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

112. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. at 495.

113. *Id.* at 493–94.

114. *Id.* at 494.

115. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

116. *See Brown I*, 347 U.S. at 494–95.

caste. *Brown* was understood to overturn that caste, in all its forms. Nonetheless, it is inescapable that *Brown*'s potential to dismantle educational caste in the United States has not been fully realized at any grade level. Racialized performance gaps are persistent and from early education through graduate or professional training, there are huge racial disparities in opportunities and significant gaps in achievement and attainment.¹¹⁷ Many colored children receive neither an adequate nor equitable education, leaving them with little means to compete in the future. Moreover, performance gaps on standardized tests are used against colored children to track them into second-caste schools or classrooms throughout their training. And the nation's flagship colleges and universities remain closed to all but a handful of colored students.¹¹⁸

With so many working against *Brown* for so long, it is no wonder why so little substantive progress has been made. The Court could have used *Brown*'s anticaste principle to impose a similar affirmative duty on government officials to dismantle caste for constitutional violations in voting, employment, and housing, as well. The Court could have held that the government had an affirmative obligation to dismantle every form of caste that it helped create, wherever it exists and in whatever form it might take. There is no coherent constitutional reason to distinguish one form of caste from the others. The Court could have stated all forms of caste violate the equal protection guarantee of the Constitution.

My goal remains to restore and reclaim *Brown*'s anticaste moorings, reminding readers of the five centuries it has taken to produce caste across the globe.¹¹⁹ I seek to use the law to undo caste. I propose to re-assert the anticaste principle, contextually, and to use it for as long as it takes to dismantle every shade of caste, even if it takes another five centuries. I seek to persuade five members of the U.S. Supreme Court that the anticaste principle offers the most coherent reading of the constitution's equality guarantee, whether the axis of caste is race, gender, age, disability, sexual orientation, wealth or another common basis for invidious discrimination. Specifically, I seek to replace the antidiscrimination equality theory with a broader anticaste equality theory. I continue to rely on the important work of scholars such as Kenneth Karst and Cass Sunstein, who eloquently frame the equal citizenship/anticaste principle.¹²⁰

Unlike the antidiscrimination principle employed by the Court, which operates only prospectively in search of bad actors, the anticaste principle looks in both directions, contextually, at our past and its legacy, assigning

117. See GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 174–204 (2002).

118. See generally FAIR, NOTES, *supra* note 6; Fair, *Re(caste)ing Equality Theory*, *supra* note 18; Fair, *Taking Educational Caste Seriously*, *supra* note 18.

119. See generally Fair, *Anatomy*, *supra* note 6.

120. See generally SUNSTEIN, *supra* note 6; KARST, *supra* note 6.

to all agents of government remedial obligations for violating the equal citizenship principle, no matter how ancient. The anticaste principle says the government cannot render some citizens insiders and some outsiders. And where it has done so, it has a *continuing* affirmative duty to dismantle such caste, every root and branch. And when government undertakes this constitutional duty, it cannot be said to violate anyone's constitutional rights, since no provision of the constitution gives any person a right to compel that government maintain caste in violation of the equal citizenship principle.

The anticaste principle is countermajoritarian, protecting colored people from the tyranny of the majority and every judge, legislator, and public school official is oath-bound to resist their worst impulses to establish caste. And when they fail, as so many have done, the anticaste principle compels that those excluded be lifted up to equal citizenship immediately and fully. Justice Harlan was right: *there is no caste permitted here*.

The Equal Protection Clause shall remain an empty promise, so long as the Court refuses to honor the majestic anticaste moorings of *Brown*. And we shall not overcome, through *Brown* or otherwise, until the Court replaces its stale, ineffectual antidiscrimination discourse with the anticaste principle.