Parents Involved and the Struggle for Historical Memory

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In 2014, Harvard Law School sponsored a symposium honoring Justice Stephen Breyer for his twenty years of service on the United States Supreme Court. Faculty members at the Law School prepared brief essays dealing with opinions by Justice Breyer that we thought particularly interesting or important.[1] At the conclusion of the presentations, Justice Breyer was invited to comment. In addition to saying something about the essays as presented, he noted a striking omission: no one had chosen to write about his dissenting opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,[2] which he said was, in his own mind, his most important opinion.[3] And, though Justice Breyer did not say so, the fact that the commentators did not mention *Parents Involved* shows that Chief Justice Roberts may have successfully seized *Brown v. Board of Education*[4] for the anti-integrationist side in the struggle for *Brown*'s legacy.

The issue before the Supreme Court in *Parents Involved* was whether it was constitutionally permissible for a school district to use race as a basis for assigning public school children to schools for the purpose of achieving a greater degree of racial integration than would otherwise have occurred under, for example, a program assigning children to the schools nearest their homes.[5] That was the issue, but, as Chief Justice Roberts wrote in an opinion joined by three of his colleagues, an important "debate" in the case was over "which side is more faithful to the heritage of *Brown*."[6] When lawyers deal with such matters, we tend to think of them as raising questions about the meaning of precedent, but for historians they are part of the struggle for historical memory—contests among people today over the proper interpretation of events in the past. As one historian puts it, "The word 'memory' [or 'heritage'] becomes a metaphor for the fashioning of narratives about the past when those with direct experience of events die off."[7] Writing of physical locations where such memories are fashioned, he continues, "Sites of memory are places where local politics happens."[8]

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1. The essays were published as Symposium, *Essays in Honor of Justice Stephen G. Breyer*, 128 HARV. L. REV. 416 (2014).

2. 551 U.S. 701 (2007).

3. Justice Breyer's remarks were not recorded, as far as I know, but I report my recollection of what he said.

4. 347 U.S. 483 (1954).

5. *Parents Involved,* 551 U.S. at 711.

6. *Id.* at 747 (Roberts, C.J., plurality opinion).

7. Jay Winter, *Historians and Sites of Memory*, MEMORY IN MIND AND CULTURE 252, 254–55 (Pascal Boyer & James V. Wertsch eds., 2009).

8. *Id.* at 256. The leading work in the legal literature on the politics of memory is SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998), which focuses not on law as a site for memory but on disputes over monuments and similar

Chief Justice Roberts's opinion in *Parents Involved* suggests that constitutional law is, again metaphorically, a site of memory as well, especially insofar as we have what David Strauss calls a common-law Constitution in which the interpretation—and therefore the construction—of precedents is an important component of developing ongoing constitutional doctrine.[9] What mattered in the Justices' rhetoric in *Parents Involved* was not the Fourteenth Amendment but the positions taken by the litigants who prevailed in *Brown*. This Article examines the politics of memory in *Parents Involved*. After describing the memories of *Brown* offered by Chief Justice Roberts and Justices Stevens and Breyer, I turn to the local politics of memory in constitutional law. I argue that politics has two dimensions: one involving race, the other jurisprudence or judicial method. I conclude with some speculations about the connections between those dimensions.

According to Chief Justice Roberts, "the position of the plaintiffs in *Brown* . . . could not have been clearer: '[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.'"[10] The programs at issue in *Parents Involved* were exactly that, he continued: "[They] accord differential treatment on the basis of race."[11] Two children, one white, the other African American, were to be assigned to different schools solely because one was white, the other African American. The Chief Justice quoted the oral argument of Robert Carter, one of the National Association for the Advancement of Colored People's (NAACP) attorneys and later a federal judge: "We have one fundamental contention . . . that no State has any authority under the equal-protection clause . . . to use race as a factor in affording educational opportunities among its citizens."[12] "There is no ambiguity in that statement," the Chief Justice wrote.[13] The programs at issue in *Parents Involved* did "determine admission to a public school on a racial basis."[14] And, quoting from the Court's decision on remedy in *Brown*, the Chief Justice emphasized that the remedy was to achieve "admission to the public schools *on a nonracial basis*," and that "the racial classifications . . . in these cases . . . determine admission to a public school on a racial basis."[15]

The surviving lawyers, by then elderly, who participated in the *Brown* litigation immediately responded. Judge Carter said, "All that race was used for at that point in time was to deny equal opportunity to black people. . . . It's to stand that argument on its head to use race the way they use it now."[16] Jack Greenberg, another lawyer who worked on *Brown* and later headed the NAACP Legal Defense Fund, said that

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artifacts.

9. DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010). I use the term "construction" as the noun form of the verb "construe," and not to evoke the distinction drawn in recent discussions of originalism between interpretation and construction.

10. *Parents Involved*, 551 U.S. at 747 (Roberts, C.J., plurality opinion).

11. *Id.* (quoting Brief for Appellants in Nos. 1, 2, and 4 for Respondents in No. 10 on Further Reargument at 15, Brown v. Board of Education, 347 U.S. 483 (1954)).

12. *Id.* (quoting Transcript of Oral Argument at 7, Brown v. Board of Education, 347 U.S. 483 (1954) (Robert L. Carter, Dec. 9, 1952)) (internal quotation marks omitted).

13. *Id.*

14. *Id.*

15. *Id.* (internal quotation marks omitted) (emphasis in original).

16. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

Chief Justice Roberts's characterization of the plaintiffs' position in *Brown* was "preposterous."[17] The plaintiffs "were concerned with the marginalization and subjugation of black people."[18] And William T. Coleman, Jr., who as a young lawyer had assisted in preparing the arguments in *Brown*, called the opinion "dirty pool" and "100 percent wrong."[19]

Justice John Paul Stevens's dissent similarly drew on personal recollection in describing the "cruel irony" of the Chief Justice's "reliance" on *Brown*.[20] After describing as "more faithful to *Brown*" an earlier decision in which the Court had upheld the use of race to achieve integration, Justice Stevens ended, "It is my firm conviction that no Member of the Court I joined in 1975 would have agreed with today's decision."[21] Among those members were Justice William Rehnquist and Justice Lewis Powell, neither of whom was in the forefront of the fight to achieve integrated public schools.

Justice Breyer's dissent also sought to draw the "lesson of history."[22] The racial classifications used in the segregated South "did not simply tell school children 'where they could and could not go to school based on the color of their skin'; they perpetuated a caste system."[23] For Justice Breyer it was "a cruel distortion of history . . . to equate the plight" of African Americans forced to attend segregated schools and whites "forced" to attend integrated ones.[24] *Brown* did not merely articulate a rule, but "held out. . . . the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. . . . It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live."[25] Achieving integration entailed "complexities and difficulties"—not least, one might infer, in developing legal doctrine suitable both for challenging segregation and promoting integration.[26] Justice Breyer's concluding paragraph reverted to "the promise of *Brown*": "The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret."[27]

I do not want to engage in a dispute over what *Brown* "really" meant. Doing so would be an intervention in the politics of memory rather than an analysis of that politics. One point, though, seems essential: neither Chief Justice Roberts nor the dissenters were plainly wrong in what they extracted from *Brown*.[28] Struggles over

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17. *Id.*
18. *Id.*
19. *Id.*
20. *Parents Involved,* 551 U.S. at 798 (Stevens, J., dissenting).
21. *Id*. at 803.
22. *Id.* at 867 (Breyer, J., dissenting).
23. *Id.*
24. *Id.* (citation omitted).
25. *Id*. at 867–68.
26. *Id.* at 868.
27. *Id.*
28. That observation, though, does indicate that the Chief Justice was wrong to find "no ambiguity" in Robert Carter's oral argument.

historical memory can take place only where both sides are contending over history—over what actually happened, to use the phrase associated with the development of historical studies in Germany in the nineteenth century.[29] Demonstrating that something never happened—or, in the present context, demonstrating that either Chief Justice Roberts's view or that of the dissenters cannot plausibly be located in the relevant historical materials—converts a struggle over historical memory into something else, perhaps worth examining in its own right—for example, as the development of folk lore—but not a contest over history.

Memory has many layers in *Parents Involved*. Most obvious are the claims from 2007 about what happened in 1954, but in 2007 Justice Stevens also asks us to remember 1975, when he joined the Court, and then to remember what the justices sitting in 1975 remembered about 1954.[30] The personal note is clear: *he* can remember 1975, and from those memories he can remember 1954. And of course countering Chief Justice Roberts's invocation of Robert Carter in 1954 with Robert Carter himself in 2007, merely raises the question of historical memory: should we privilege statements made today by participants in events a half century ago over our own understanding of those events? The idea that memory and heritage are where "local politics happens"[31] seems confirmed by the opinions in *Parents Involved*.

I begin not with the race dimension of *Parents Involved* but with the jurisprudential one. An important—though not always consistently pursued—theme in the development of modern conservative constitutional theory has been a strong preference for rules over standards. Rules produce consequences when a judge determines that a small number of criteria are satisfied, and those criteria are such that nearly everyone would agree that one was or was not satisfied; standards, in contrast, require judges to exercise judgment about a larger number of criteria and, in exercising that judgment, decide whether a criterion is satisfied to a "sufficient" degree.[32] So, for example, in *Parents Involved*, Chief Justice Roberts invoked the rule that policies using race as a criterion for decision are unconstitutional unless they are strongly justified by one of a small number of possible justifications.[33] Determining whether a policy uses race as a criterion typically only requires an almost entirely nondiscretionary inspection of the policy's terms.[34] In contrast, Justice Breyer would have applied a more standard-like approach, in which a policy could be justified if it were designed and administered to achieve integration without imposing excessive burdens on school children. Nearly every term in *that* formulation requires the exercise of judgment: For example, is a race-based policy that is defended as designed to promote integration really so benignly motivated? Or, for example, is it a guise for some less attractive goal, perhaps, assuaging the

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29. The phrase is Leopold von Ranke's, "*wie es eigentlich gewesen*."

30. *See Parents Involved,* 551 U.S at 803 (Stevens, J., dissenting).

31. *See supra* note 5 and accompanying text.

32. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–58 (1992).

33. This is my statement of what "strict scrutiny" entails; *see also Parents Involved,* 551 U.S at 702.

34. I omit consideration here of wrinkles introduced by the possibility that the racial criterion might be masked by seemingly non-racial ones.

consciences of high-income parents while burdening low-income children without actually accomplishing much integration?[35]

The contemporary conservative preference for rules over standards is the product of history, not jurisprudence.[36] A generation or two ago, constitutional conservatives defended "balancing," a standards-like approach, against the more rule-like absolutism defended by liberals like William O. Douglas and Hugo Black. And legal scholars have shown that there is no necessary connection between rules and conservatism or standards and liberalism.[37] Why then did contemporary conservative constitutional jurisprudence come to assert a preference for rules over standards? Reva Siegel and Robert Post have shown that the preference resulted from a strategic choice about the best way to present to the public a larger framework within which specific criticisms of the liberal Warren Court's decisions fit.[38] Such a framework was needed, they argued, to provide the basis for pointing out to their audiences that conservatives were not merely disagreeing with some specific Warren Court decisions on simple political or policy grounds but had a larger constitutional vision within which those specific criticisms fit.[39] Conservatives began with the judgment that criticism of liberal decisions as simply embodying the policy preferences of liberal justices was an effective way to package their own policy-based objections to those decisions. For conservatives, the liberals' "living Constitution" was liberal policy dressed up as constitutional interpretation. The conservative alternative was to present the conservative way of doing constitutional law as one that avoids making policy decisions—to use Chief Justice Roberts's now famous metaphor of simply calling balls and strikes.

Conservative constitutional jurisprudence came up with two methods of denying that today's justices make policy decisions. One was to locate policy making in the past, by means of some sort of originalist constitutional interpretation. Constitutional *law* did require policy making, but the relevant policies had already been chosen, and the judges' only job was to determine what those choices were. The other was to use rules rather than standards.[40] Originalism and rules-based decision making are justified within conservative constitutional jurisprudence as methods that constrain judges and eliminate discretionary and policy-based constitutional interpretation.[41]

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35. A particularly troublesome aspect of *Parents Involved* was the apparently random administration of the policy. *See* 551 U.S. at 786–87 (Kennedy, J., concurring) (describing how the policy was administered). The policy as administered in a companion case was perhaps even more troubling. *See id.* at 784–86.

36. Reva Siegel and Robert Post have done the best work on this topic. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

37. *See, e.g.*, Sullivan, *supra* note 32, at 60–62.

38. Post & Siegel, *supra* note 33, at 555–57.

39. *Id.*

40. It is worth noting that originalism and rules-based decision making are alternatives that need not always point to the same result. It is striking, for example, that originalism plays no overt role in Chief Justice Roberts's opinion in *Parents Involved*. It is possible, though I think quite implausible, to contend that originalism enters *Parents Involved* indirectly: *Parents Involved* relied on *Brown*, and *Brown* was justifiable on originalist grounds (even though *Brown* itself expressly disclaimed originalist justification for its result).

41. Conservative constitutional theorists have defended originalism on essentially two

A brief note about the liberal response to the conservative critique of judicial judgment: if the association between rules and conservatism is merely contingent, why have liberals fought to preserve judgment, balancing, and the like[42] rather than offering their own set of rules as alternatives? Doing so might be politically effective in countering the conservative charge that rules are all that keep judges from enacting their policy preferences into constitutional law. Liberal rules would show that the rules offered by conservatives are no less policy based than the Warren Court's decisions.

I suggest two reasons for the liberal commitment to standards rather than rules. The first is suggested by one strand in the liberal response to originalism. Occasionally liberals have taken originalism on, attempting to show that the conservative claims about original understandings, meanings, or whatever are no more strongly founded than liberal claims and that the decisions conservatives assert were made by the Constitution's authors are actually being made by today's conservative justices.[43] The most effective liberal version of this argument has been made in connection with the very issue involved in *Parents Involved*: the constitutional permissibility of race-based decision making aimed at improving the conditions of life for African Americans. Liberals have shown, at least to their own satisfaction, that legislatively adopted affirmative action programs are entirely consistent with the original understanding, or original public meaning, of the Fourteenth Amendment[44] and that a constitutional rule banning school segregation is not consistent with that understanding.[45]

Liberal originalism as a critique of conservative originalism has made virtually no headway in undermining the conservative claims about originalism as a nondiscretionary method. The reason, I think, is that everyone—liberals and conservatives alike—knows that the liberal commitment to originalism is merely strategic.[46] In contrast, conservatives were able to present their commitment to

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grounds. One is conceptual, treating interpretation by definition as the determination of original meaning or understanding. The other is that originalism, better than any alternative, provides significant limits on a judge's ability to treat her policy preferences as embedded in the Constitution. Here, I have dealt only with the latter defense.

42. I discussed this point in connection with Justice Breyer's work, in Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508 (2014).

43. The best recent judicial examples of this sort are the dissenting opinions in *District of Columbia v. Heller*, 554 U.S. 570, 636–723 (2008).

44. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (arguing that the framers of the Fourteenth Amendment did not intend that it place affirmative action under a constitutional cloud).

45. *See, e.g.,* Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); Earl M Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223 (1996).

46. Suppose, for example, that a Democratic president had the opportunity to nominate replacements for Justices Scalia, Kennedy, and Thomas. I personally believe that most liberals would thereupon abandon originalism as the core of constitutional interpretation, though of course they would retain it as a relevant consideration (as it has always been).

originalism as principled.[47] Or, put another way, the historical conditions, whatever they might be, for a contemporary liberal originalism have not yet presented themselves (and, I believe, are quite unlikely to present themselves) in a way that the conditions for conservative originalism presented themselves. A slightly different way of making this point is to observe that liberals are halfhearted about originalism, whereas conservatives have succeeded in presenting themselves as committed to it full bore. We can be pretty confident in predicting the outcome of a conflict between halfhearted and full-bore originalists. If the liberal approach to originalism had succeeded, perhaps they would have generated nondiscretionary liberal originalist rules. But it has not.

I now turn to the second reason that liberals have not offered their own counter rules. Two generations ago, when *Brown* was decided, liberals might have defended the rule that laws expressly relying on racial classifications to disadvantage African Americans are unconstitutional in the absence of exceedingly strong justifications while laws expressly relying on such classifications to benefit African Americans are constitutionally permissible except in extreme cases. When *Brown* was decided and for a while thereafter, the need to articulate such a rule did not present itself because there were no state laws in the latter category—which is one reason that both sides in *Parents Involved* could claim the heritage of *Brown*. By 2007, precedent on affirmative action had accumulated to the point where a simple pro-affirmative-action rule was not plausibly available.[48] The Court had ruled out the rectification of societal discrimination as a ground for affirmative action, and any liberal defense of affirmative action that respected precedent—that was true to judicial history—had to accept that limitation. The effect was to drive liberals in the direction of standards rather than rules as a way of indirectly getting into constitutional law considerations that precedent made difficult to embody in rules.[49]

Parents Involved fits into the contemporary conservative jurisprudence of rules. That, though, would not account for the struggle within the decision over *Brown*'s meaning. Here, the racial dimension of contemporary conservatism must play its role. The standard account focuses on the Republican Southern strategy, which was aimed at achieving national political dominance by capturing the votes of Southern

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47. As I and others have argued, the conservative commitment to originalism was strategic at its roots, but those roots became so overgrown that today conservatives can successfully present their position as entirely principled.

48. The Court's liberals responded to conservative anti-affirmative-action arguments by taking them on and trying to show that they were defective on their own terms, rather than rejecting them outright and articulating an alternative vision in which affirmative action was constitutionally required. In my view, it was not until Justice Sotomayor dissented in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1651–83 (2014), that a liberal dissent came close to offering such an argument.

49. I think it worth noting that white liberals, and some African American liberals, were uncomfortable with race-based classifications from quite early on. Nervousness about "quotas" ran deep from nearly the beginning, particularly among liberal Jews who remembered—and some of whom had experienced—the use of quotas especially to limit the opportunities of Jews in higher education. Liberals, therefore, would have had a principled difficulty in articulating a rule authorizing the use of race in public decision making in some circumstances or for some purposes.

(and Northern) whites by focusing on their perceived displacement in politics and the economy resulting from Democrats' commitment to racial equality. This account needs some modification as an overall account of political developments in the late twentieth century. I believe the account has begun to receive such modifications, but I also believe that the core of the modified account will remain as an essential component of our understanding of how and why conservative constitutional thought developed as it did. For all practical purposes, most of the Warren Court decisions that became the heart of the conservative critique were either directly concerned with race—such as decisions dealing with transportation remedies for violations of the non-segregation rule—or had strong racial overtones—such as the Warren Court's decisions on criminal procedure—which for liberals were responses to the racially biased administration of justice and for conservatives were important causes of the increases in crime the nation experienced.[50]

The Southern strategy and its implications for conservative constitutional thought about race provide a decent explanation for the outcome supported by Chief Justice Roberts. Voluntarily adopted by a political majority in the city, Seattle's integration program nonetheless placed the same kinds of burdens on some children as had the court-ordered busing remedies. Conservative constitutional thought focused on the "court-ordered" part of that but was motivated by the burdens. This, though, does not explain why Chief Justice Roberts thought it important to claim the heritage of *Brown* for his position.

The answer must be, I think, that *Brown* had become what we might call a fixed point in contemporary constitutional thought. No version of constitutional law or theory is acceptable if it casts doubt on *Brown*'s correctness.[51] The other side of the coin is that any version of constitutional law and theory gains some credibility if it can claim *Brown*'s authority. The politics of memory in *Parents Involved* is thus a struggle not simply over what *Brown* "meant" but, more importantly, over the merits of contending positions in today's constitutional law. It would count as a reason against the outcome in *Parents Involved* that Robert Carter's argument in *Brown* was inconsistent with it. And, for the politics of memory to work, there must be "no ambiguity" about what Carter argued. For, as I have suggested, ambiguity about his argument would make it plain that the discussion is not about what he said in 1954 but about what today's justices should do.[52]

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50. The conservative critique of Warren Court decisions was firmly in place by the time that *Roe v. Wade* was decided, so that decision could not be a reason for developing the conservative critique, although of course it was fuel for the fire.

51. This point is commonly made in the literature on conservative attempts to justify *Brown* on originalist grounds. *See, e.g.*, Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.")

52. I have not surveyed the literature on the politics of memory carefully, but it is my general sense that flare-ups occur around those politics. This occurs in connection with inscriptions on historical monuments, for example, when someone seeks to introduce ambiguity about a memory—an interpretation of the past—that theretofore had gone unchallenged.

To the extent that *Parents Involved* is about *Brown*'s heritage, though, one must mention one jarring note in Chief Justice Roberts's presentation. The figure most associated with *Brown* is not Robert Carter but Thurgood Marshall, who does not play an overt role in the Chief Justice's opinion. Part of the reason is rhetorical and artifactual: Marshall argued *Briggs v. Elliott*, the South Carolina desegregation case that was decided along with *Brown*.[53] In 1954, people familiar with the litigation generally understood *Briggs* to be the more important case because it came not from the border state of Kansas but from the heartland of Jim Crow. The relative significance of the two cases is shown by the choice of advocates by both sides. Marshall and John W. Davis, a former Solicitor General and presidential candidate, argued *Briggs*; the Supreme Court had to ask Kansas's attorney general whether he intended to present an argument in *Brown*, and the attorney general dispatched Paul Wilson, an assistant attorney general who had never before argued a case in *any* appellate court, to do so. Chief Justice Roberts constructed his opinion around *Brown*, which allowed him to quote Carter and ignore Marshall.[54] Yet, had he so desired, the Chief Justice could readily have extracted quotations from Marshall's oral presentation in *Briggs* to the same effect as Carter's.

Why then use Carter rather than Marshall as the vehicle for articulating the Chief Justice's rule against the use of race in student assignments? I suggest that the reason draws upon memory, both personal and historical. Four members of the Court in 2007 had served with Justice Marshall, and one, Justice Anthony Kennedy, provided the fifth vote to overturn Seattle's program. These justices knew Marshall in a way that they did not know Robert Carter, and they knew—insofar as anyone could know—what Marshall would have thought about the constitutionality of Seattle's program had he been presented with it before he left the Court. He had written enough opinions dealing with the related issue of voluntary affirmative action programs to make it clear that he would have found Seattle's program constitutionally permissible (and, in his more expansive moments, perhaps even constitutionally required). Claiming *Marshall*'s authority for the result in *Parents Involved*, even if it could have been done with the same kind of evidence from the *Briggs* oral argument that the Chief Justice used from *Brown*, would have been an insult to Marshall's memory in a way that using Carter's words was not quite insulting to Marshall. For that reason, it would have weakened the Chief Justice's opinion.

The struggle to claim *Brown*'s heritage does raise a final question. As I have suggested, the Chief Justice treats *Brown* as the foundation for the rule he applies—*Brown*, not the Fourteenth Amendment. Looking backward, we see *Brown* with the Fourteenth Amendment obscured behind it. What that means, though, is that (even for conservatives) the Constitution is a living document.[55] A decision made more than eighty years after the Fourteenth Amendment became law

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53. Brown v. Bd. of Educ., 349 U.S. 294, 296 (1955) (noting that Thurgood Marshall argued Briggs v. Elliott).

54. In contrast, Justice Breyer's opinion is sprinkled with quotations from Justice Marshall. *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 832–33, 842, 863, 864 (2007) (Breyer, J., dissenting).

55. I note that, to my knowledge, Chief Justice Roberts has not identified himself as committed to originalism as a general or overriding approach to constitutional interpretation.

is the source of the constitutional law we apply today. The "living Constitution" aspect of *Parents Involved* is made even clearer still by the authority the Chief Justice seeks to gain by claiming the heritage of *Brown*. Those who wrote the briefs and presented the oral arguments in *Brown* became as authoritative as—and perhaps even more authoritative than—those who adopted the Fourteenth Amendment.

Parents Involved thus reveals some tension between the two components of contemporary conservative constitutional thought. Its orientation to rules produces an opinion that is best understood as embodying a "living Constitution" view rather than an originalist view. Seeing law as a site for struggles over historical memory, we should not be surprised at discovering such a tension. Such struggles are conducted today with an eye to the past, and contemporary audiences are unlikely to have the kinds of fully coherent ideologies favored by political theorists. The local politics of a struggle over historical memory, then, will almost inevitably reflect tensions and incoherencies.

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What of the future of *Brown* in legal memory? When I began to think about *Parents Involved* with the literature on historical memory in mind, I initially thought that there was a difference between struggles for historical memory conducted in the law and those conducted, for example, in discourse about museums and the inscriptions to be placed on memorial structures. The law, I thought, had an institutional structure—in particular, a commitment to precedent—that would give a distinctive shape to struggles over historical memory. So, for example, the next time we find it important to fight over *Brown*'s meaning in some legal setting, we have to take account of the meaning *Parents Involved* gave *Brown*. We have a repertoire of techniques for doing so, including complete disregard of the Chief Justice's use of *Brown*, a disregard a future Court might say was justified because *Parents Involved* was "not correct when it was decided," as the Court put it in overturning *Bowers v. Hardwick.*[56] More interesting, we could set aside the meaning given *Brown* in the Chief Justice's opinion because it was merely the meaning given by a plurality of the Court. Justice Kennedy concurred in the result in *Parents Involved*, but did not join the part of the Chief Justice's opinion dealing with *Brown*.[57]

The need to deal with precedent, I had initially thought, distinguished struggles for historical memory in law from analogous struggles in other venues. On reflection, though, I came to think that this institutional difference may be less significant than it might appear. For, in the local politics of historical memory, history has its claims. That is, how a community has dealt with an issue in the past matters in the discourse it uses about some contemporary questions regarding museums and monuments. Sometimes, for example, the issue is replacing one historical inscription on a memorial with another. The mere fact that there had been an earlier inscription

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56. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today.").

57. Justice Kennedy's dispositive opinion can be given a quite narrow reading, that Seattle's program was unconstitutional because it was administered in such an incoherent way as to cast doubt on the claims that the city actually had a program reasonably aimed at achieving integration in the city's schools.

ordinarily carries some weight in the discussion of what to do today, in about the same way that a precedent carries some weight in the law.[58] Even erecting a new monument brings to the fore the fact that the community had previously decided, at least implicitly, not to memorialize something, and the community will have to decide whether the reasons for its neglect remain good ones or are overridden by other considerations. Law understood as a site for struggles over historical memory through the construction of a precedent's meaning may not be that different from the other institutional locations where such struggles occur, except perhaps for having an institutional structure that brings to the fore matters that are addressed only indirectly in other discourses.

I return in conclusion to Justice Breyer's observation that none of the scholars at the symposium marking his years on the Court discussed his dissent in *Parents Involved*. This Article can be taken as my apology to him. But, perhaps the erasure of *Parents Involved* from the symposium indicates that, as of 2014, Chief Justice Roberts has won the contemporary political struggle over *Brown*'s memory.[59] That judgment, though, is necessarily tied to the moment—a moment that might extend for quite a while, but still only a moment in our history. The Supreme Court cannot definitively determine *Brown*'s meaning because politics—the local politics of historical memory conducted in the law—cannot provide anything more than a temporary resolution of the differences among us. But, it is important to emphasize, the next time a struggle over *Brown*'s meaning occurs in the law it will probably not occur in connection with an effort to integrate the schools. History moves on. *Brown* will matter, if it does, because we will come to think that it has some bearing on a political issue that agitates us at the moment. No one can tell what that issue will be, if indeed there is one.[60] But, we can be sure, the meaning given to *Brown* by the Chief Justice in *Parents Involved* will be no more than one of many items of discourse when, once again, we struggle over *Brown*'s meaning—unless, of course, somehow *Parents Involved* becomes a monument itself.

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58. Consider, for example, the structure of conversations about the question of public displays of the Confederate battle flag.

59. As L. Michael Seidman pointed out to me, a lot here turns on the word "perhaps." Perhaps all that the erasure shows is something about the mentality of a selected group of legal academics.

60. My guess, but it is only that, is that the issue will have something to do with some legal rule addressing some aspect of multiculturalism.