From Louisville to *Liddell*: Schools, Rhetorical Neutrality, and the Post-Racial Equal Protection Clause

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TABLE OF CONTENTS

INTRODUCTION 153
I. RHETORICAL NEUTRALITY, THE PROCESS THEORY, AND THE FORMALIZATION OF *BROWN* 160
A. Parents Involved*, Inversion, and Neutrality* 168
B. The Emergence of "Choice" 170
II. THE POLITICAL COMMUNITY 171
III. LIBERAL INDIVIDUALISM AND THE CONCEPTUAL FALLACY OF NEIGHBORHOOD SCHOOLS 174
A. Kentucky Revised Statute § 159.070 and Rhetorical Neutrality 175
B. Louisville and St. Louis: Closing Propositions 179
CONCLUSION 180

INTRODUCTION

As we commemorate the inspiring legacy of Minnie Liddell[1] and countless liberation activists who struggled for substantive equality in

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1. "In 1972, Minnie Liddell, her son Craton, and several other black students and parents initiated the St. Louis school desegregation case by filing suit against the Board of Education of the City of St. Louis." D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971, 975 (1987) [hereinafter *The Special Master's Tale*]. "After eight years of litigation, on May 21, 1980 the district court held that both the Board and the State were liable for the de jure segregation of the public schools of the City

education for generations,[2] it is appropriate to reflect on the current state and future of urban education. The school desegregation (integration)[3] movements in Louisville, Kentucky and St. Louis, Missouri can best be understood as two distinct permutations of the Process Theory.[4] In Louisville, the process-orientation tilts toward

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of St. Louis." *Id.* Initially, the district court held that neither the State nor the Board of Education had unconstitutionally segregated the St. Louis public schools; this decision was later reversed by the Eighth Circuit. *See* Liddell v. Bd. of Educ., City of St. Louis, State of Mo., 469 F. Supp. 1304, 1309–12 (E.D. Mo. 1979), *rev'd sub nom.* Adams v. United States, 620 F.2d 1277, 1281–84 (8th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 826 (1980); *see also id.* at 1316 n.4. This was only the beginning of over twenty years of struggle to implement the voluntary interdistrict student transfer program. *See* D. Bruce LaPierre, *Voluntary Metropolitan School Desegregation in St. Louis—An Opportunity Lost or A Second Chance?*, 2 ST. LOUIS U. PUB. L. REV. 69 (1982); Dale Singer, *Education Trends Could Jeopardize Gains Won by Liddell Case, Speakers Say*, ST. LOUIS BEACON (Mar. 23, 2012, 11:29 AM), https://www.stlbeacon.org/#!/content/23595/wash_u_symposium_on_liddell_case.

2. *See generally* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (Norton 2004).

3. In this Essay, desegregation and integration are used interchangeably. However, it should be noted that while both terms connote the removal of official barriers of caste-based oppression, desegregation is more "procedural" (the eradication of the doctrine of "separate but equal") and integration is more "substantive" (the dismantling of dual school systems and maintenance of fully integrated schools). *See* Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future,* 47 HOW. L.J. 795, 797 (2004). Dr. Martin Luther King, Jr. offers an eloquent summary of the conceptual distinction between the two terms:

> The word segregation represents a system that is prohibitive; it denies the Negro equal access to schools, parks, restaurants, libraries and the like. Desegregation is eliminative and negative, for it simply removes these legal and social prohibitions. Integration is creative, and is therefore more profound and far-reaching than desegregation. Integration is the positive acceptance of desegregation and the welcomed participation of Negroes in the total range of human activities . . . Thus, as America pursues the important task of respecting the "letter of the law," i.e., compliance with desegregation decisions, she must be equally concerned with the "spirit of the law," i.e., commitment to the democratic dream of integration.

john a. powell & Marguerite L. Spencer, Brown *is not* Brown *and Educational Reform is not Reform if Integration is not a Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE 343, 344 (quoting Rev. Dr. Martin Luther King, Jr., *The Ethical Demands for Integration*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR 117, 118 (James Melvin Washington ed., 1991)).

4. The Process Theory is inherently neutral because it adopts an ahistorical approach that diminishes the significance of the present day effects of past discrimination, defines discrimination so narrowly that it must be identified with exacting particularity, and disaggregates any group-based discrimination claims in favor of liberal individualism: without a historical perspective, which focuses on the present day effects of past discrimination, the forward-looking approach is severely limited in its efficacy. The forward-looking approach is doctrinally compatible with the Process Theory espoused by Professor John Hart Ely. *See* JOHN

individual choice—neighborhood schools are at the core of all of the discussions about student assignment plans.[5] Conversely, in St. Louis, the seminal process initiative is charter schools.[6] Neither processual outcome addresses the present day effects of past discrimination,[7] so there remain substantial systemic inequalities that

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HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). The Process Theory, or representation-reinforcement rationale, does not address the present day effects of past discrimination—there is no substantive conception of equality because the Process Theory's primary focus is on those "rare" process malfunctions that impede access to the political process. Professor Hutchinson describes the representation-reinforcement rationale:

> Ely accepts the proposition that judicial activism can present a countermajoritarian dilemma, as courts replace legislative judgment with their own values. Nevertheless, according to Ely, there are certain circumstances in which the democratic process operates unfairly, or where there is a "process failure." Of particular significance to Ely are laws that impede rights closely connected to the political process, like speech and suffrage. Ely, however, also argued that a malfunctioning political process—particularly legislative action tainted by bald prejudice—likely explains why laws burden certain politically vulnerable classes. Under such circumstances, courts should apply a more probing analysis to "reinforce" the political representation of these despised classes.

Cedric Merlin Powell, *Rhetorical Neutrality, Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEVE. ST. L. REV. 823, 827 n.15 (2008) [hereinafter *Rhetorical Neutrality Colorblindness*] (quoting Darren Lenard Hutchinson, "*Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence,* 2003 U. ILL. L. REV. 615, 634 (2003)).

> The Process Theory is a pluralist conception of polity—the democratic process generally works well because most groups have access to the process—which seeks to provide a rationale for the countermajoritarian impact of judicial review on the democratic process. Courts should not function as "super legislatures," but there are instances where the process malfunction is so severe that judicial intervention is essential to a full representational polity. While not as optimistic as the traditional pluralist conception of polity, see ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 1–8 (2d ed. 2005), Ely's process theory rests in the middle of the optimism of pluralism and the inherent skepticism of the process in anti-pluralism. See GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 3–8 (Knopf 1966).

Id. (some internal citations omitted).

5. Mike Wynn, *Kentucky Senate Panel Passes Pill Mill Legislation with Change*, COURIER-J. (Mar. 28, 2012, 2:54 AM).

6. *See* Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y 117 (2012).

7. This is because disparate impact is irrelevant to Process Theorists. *See* Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 964 (1994).

> The intent requirement is consistent with a process-oriented approach to constitutional interpretation, because it purports to regulate inputs to processes of government

have not been addressed.[8] This is the quintessential problem with neutrality—it preserves the status quo.

John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review* posits the Process Theory, or representation-reinforcement rationale,[9] to reconcile the counter-majoritarian difficulty of an unelected federal judiciary exercising the power of judicial review over legislative judgments.[10] Ely attempts to advance a neutral argument for judicial review; yet, it is impossible to do so. Even "neutral" judgments about process are substantive judgments.[11] So, process-based arguments about polity and judicial review are unsatisfactory in advancing a substantive conception of equality. This Essay advances a critique of neutrality by unpacking the Process Theory and *Brown v. Board of Education*[12] within the contexts of Louisville and St. Louis.

Louisville and St. Louis have turbulent racial histories complete with violence, resistance, incremental progress, and regression.[13]

> decisionmaking, rather than outcomes. In short, the process perspective and colorblindness rule converge with regard to the manner in which disparate impact cases are to be adjudged; both militate in favor of the requirement of discriminatory intent.

Id. See also Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, XXXI ST. LOUIS U. PUB. L. REV. 255, 264 n.43 (2012) [hereinafter *Harvesting New Conceptions of Equality*].

8. Charles R. Lawrence III, *On Democratic Ground: New Perspectives on John Hart Ely* 114 YALE L. J. 1353, 1380 (2005).

9. ELY, *supra* note 4, at 101–03.

10. *Id*. at 102–03 (describing process malfunction and noting when judicial intervention is appropriate).

11. Flagg, *supra* note 7, at 956; Lawrence, *supra* note 8, at 1383–85; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1070–71 (1980); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory,* 77 VA. L. REV. 721, 742 (1991) ("Any attempt to identify process imperfections ultimately must employ substantive judgments.").

12. 347 U.S. 483 (1954).

13. TRACY ELAINE K'MEYER, CIVIL RIGHTS IN THE GATEWAY TO THE SOUTH: LOUISVILLE, KY 1945–1980 47–61, 251–84 (2009) (chronicling racial unrest and violence over court-ordered busing in the border city of Louisville, Kentucky). While Louisville has a dual racial identity of a Midwestern and Southern city, *id.*, Missouri and St. Louis are at ground zero for race relations in the United States from the pre-Civil War period through the end of the twentieth century:

> For two centuries, Missouri has been a stage on which the tragedy and triumph of race have played out for the whole nation. The Missouri Compromise held off the Civil War. The *Dred Scott* case helped precipitate it. A Jefferson City inn's refusal to serve

Certainly, both cities have made significant progress since *Brown*, but that progress has been limited by the race jurisprudence of the United States Supreme Court and the systemic limitations inherent in each city. Litigation proved to be the catalyst for school desegregation in Louisville.[14] Dramatically, the litigation and policy initiatives in Louisville shifted from the eradication of the de jure segregated school system to individual choice and neighborhood schools. This contrived neutrality, premised on colorblind liberal individualism, has significantly stalled efforts to maintain integrated schools.[15]

School desegregation was achieved through the collaborative efforts of the city school board, the NAACP, the State of Missouri, and suburban school districts in St. Louis.[16] This nationally

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> blacks was one of the legal cases that resulted in *Plessy's* separate but equal doctrine. Lloyd Gaines of St. Louis won one of the landmark desegregation lawsuits that preceded *Brown*. After the University of Missouri built a separate "law school"; however, Gaines mysteriously disappeared. The Supreme Court decision that outlawed enforcement of racial real estate covenants, *Shelly v. Kraemer*, arose in St. Louis, a few blocks from where the school desegregation case later began. When the Court upheld a Reconstruction statute as a bar to housing discrimination in *Jones v. Mayer*, it was again a St. Louis case. And, when the Court brought down the curtain on court-ordered school desegregation in the 1995 case of *Missouri v. Jenkins*, the dispute it chose was from Kansas City, with the deciding vote cast by Justice Clarence Thomas, who got his legal training in the Missouri attorney general's office.

William H. Freivogel, *St. Louis: Desegregation and School Choice in the Land of* Dred Scott, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 209, 210 (Century Foundation 2002); Justin D. Smith, Note, *Hostile Takeover: The State of Missouri, the St. Louis School District, and the Struggle for Quality Education in the Inner-City*, 74 MO. L. REV. 1143, 1147–52 (2009).

14. Newburg Area Council v. Bd. of Educ., 510 F.2d 1358, 1361 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) (court-ordered interdistrict desegregation plan).

15. Gary Orfield & Erica Frankenberg, *Diversity and Educational Gains: A Plan for a Changing County and Its Schools, A Report to the Jefferson County Public Schools*, THE CIVIL RIGHTS PROJECT 14–16 (Sept. 2011), http://www.jefferson.k12.ky.us/board/student.assignment/ (noting that neighborhood schools would produce "intense segregation" and that 40 percent of schools are falling below their diversity goals in Louisville under the current student assignment plan). *See generally* Enid Trucios-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race, and Public Schools in Louisville, Kentucky*, 112 PENN. ST. L. REV. 947 (2008); Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 386–412, 429–32 (2008).

16. *The Special Master's Tale*, *supra* note 1, at 972 (St. Louis is "the only city in the United States that had resolved interdistrict school desegregation issues through a process of compromise and consent").

recognized approach was a success on some levels and less so on others.[17] Paradoxically, even within the context of this success, there is an underpinning of interest convergence.[18] The threat of an interdistrict remedy led to a communitarian approach to school desegregation, but this approach had doctrinal and practical limitations. *Milliken v. Bradley*[19] seems to work in reverse in St. Louis; integration efforts do not stop at the district line because there is identifiable discrimination in the St. Louis school system.[20] Yet, the voluntary transfer program left some of the African-American student population in the St. Louis school district behind with the promise of quality education.[21]

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17. Parker, *supra* note 6, at 120 n.9 and accompanying text (noting that "extreme segregation persists" in the St. Louis school district); Freivogel, *supra* note 13, at 221 (concluding that "[t]he biggest failure of the [voluntary transfer program] was the portion of the program that was supposed to improve the quality of education for the students left behind in all-black city schools").

18. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."). Derrick Bell applies the interest convergence theory to the school desegregation efforts of officials in St. Louis, illustrating how the primary interest of whites was to create a metropolitan school system, thereby avoiding an interdistrict remedy that would link city schools with suburban county schools:

> Professor Monti reported that for many years, St. Louis school officials staunchly resisted any liability for segregation in their schools. Then, after court orders were finally entered, the same individuals used school desegregation mandates to achieve educational reforms, including magnet schools, increased funding for training, teacher salaries, research and development, and new school construction. According to Monti, school officials accomplished all these gains for the system without giving more than secondary priority to redressing the grievances of blacks. They told him candidly that they used desegregation to create a metropolitan school system, the only sensible way to deliver educational resources across the St. Louis area.

DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 124 (2004). *See generally* DANIEL J. MONTI, A SEMBLANCE OF JUSTICE: ST. LOUIS SCHOOL DESEGREGATION AND ORDER IN URBAN AMERICA (1985); *accord* William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badge and Incidents of Slavery,* 71 MD. L. REV. 21, 23 (2011).

19. 418 U.S. 717, 744–45 (1974) (holding that "the scope of the remedy is determined by the nature and extent of the constitutional violation," and that there can be no interdistrict remedy in the absence of an interdistrict violation and effect).

20. BELL, *supra* note 18, at 117.

21. Freivogel, *supra* note 13, at 221 ("The biggest failure of the 1983 agreement was the portion of the program that was supposed to improve the quality of education for the students left behind in all-black city schools.").

Desegregation in St. Louis was not premised on a structural interdistrict remedy but on voluntary choice to transfer from the city schools to county schools. By contrast, Louisville's court-ordered desegregation was governed by a consent decree which produced diversity in the school system.[22] Advancing its post-racial jurisprudence, the United States Supreme Court essentially disintegrated the efforts of the political community in Louisville to preserve integrated schools.[23]

It is interesting to note that whether desegregation is achieved through political compromise and collaboration, as in St. Louis, or by court order, as in Louisville, the outcomes focus on process-based values like access (or choice), not substantive equality. On some level, the power of "choice" is overvalued. So, while there is "access," this means something dramatically different when city and suburban schools are compared. This is the classically neutral rationale of access, which is at the heart of the Process Theory.[24]

Part I of this Essay posits the concept of Rhetorical Neutrality and sets the context for the Court's race jurisprudence in *Brown* and its progeny. Building upon this critique of neutrality, Part II references the Process Theory and unpacks it to critique the process-based outcomes in Louisville and St. Louis. Part III concludes with a critique of a Kentucky statute that preserves the "right" to attend neighborhood schools and the limited success of the St. Louis voluntary school assignment plan. Louisville and St. Louis represent the current state of urban education in America.

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22. GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? THE CIVIL RIGHTS PROJECT 31 (Harvard Univ., Jan. 2004).

23. Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 604 (2008) ("In the *Resegregation* case [*Parents Involved in Community Schools v. Seattle School District No. 1*], the Supreme Court went out of its way to recognize a cause of action allowing disappointed white parents to trump the integration interests of minority school children. And it did so even though the Court's jurisdiction to entertain the claims of those white parents was questionable.").

24. *See supra* notes 4, 7, 9, and 11 and accompanying text.

I. RHETORICAL NEUTRALITY, THE PROCESS THEORY, AND THE FORMALIZATION OF *BROWN*

In *Rhetorical Neutrality, Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, I describe the narrative devices employed by the Court to preserve the status quo:

> Rhetorical Neutrality is the linchpin of the Court's colorblind jurisprudence. Three underlying myths—historical, definitional, and rhetorical—all serve to shift the interpretative (doctrinal) framework on questions of race from an analysis of systemic racism to a literal conception of equality where the anti-differentiation principle is the guiding touchstone. "The traditional fonts of Fourteenth Amendment jurisprudence—the anti-subjugation and anti-caste principles—have been effectively replaced by an anti-differentiation principle." Literal equality, without regard to context or history, is the unifying principle of the Court's race jurisprudence.[25]

Inequality and discrimination become "natural" because history is ignored, discrimination is defined so narrowly that it does not exist, and neutral rhetoric explains the permanence of inequality.[26] In the school context, resegregation is rationalized as a natural occurrence after formal segregation is eradicated.[27] Indeed, the discussion has shifted from substantive equality to the neutral rhetoric of choice (neighborhood schools, charter schools, and the marketplace model of educational reform). It should not be surprising that the "success" achieved in Louisville and St. Louis has been episodic with the ever-present threat of resegregation on the horizon. We should reject the allure of neutrality and again embrace a theory of substantive rights.[28]

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25. *Rhetorical Neutrality Colorblindness*, *supra* note 4, at 831.

26. *Id.* at 831 nn.31–33.

27. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 750 (2007) (Thomas, J., concurring) ("At most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation.").

28. Neil Gotanda, *Reflections on* Korematsu, Brown*, and White Innocence*, 13 TEMP. POL. & CIV. RTS. L. REV. 663, 673–74 (2004).

The Process Theory defines how judicial review is exercised and how the political system functions, with an emphasis on participatory access, and it describes the rare blockages that undermine such access.[29] A series of Fourteenth Amendment decisions offer striking examples of Rhetorical Neutrality and how process is at the center of the Court's decision-making so that there inevitably will be inherent limitations on what cities like Louisville and St. Louis can accomplish in fully integrating schools. Virtually all of the Court's race decisions are incomplete[30]—they do not address, in any meaningful way, the continuing affects of structural inequality.[31] Thus, even a landmark decision like *Brown* is incomplete; there is a duality in the opinion of substance and process:

> [T]he Court has focused on the process underpinnings of *Brown*. The Court embraces integration as a process value, but the hard work of implementation, monitoring, and enforcement was left to the equitable powers of federal courts. Over the years, the Court has hastily retreated from the substantive mandate of *Brown.* The substantive contours of *Brown* are conspicuously absent in all of the Court's race decisions.[32]

This retreat from the substantive mandate of *Brown* is evident not only in the Court's school desegregation decisions but in state and local school board decision-making as well. "*Brown* is about the tension between process (equal educational *opportunity* through desegregation) and results (dismantling dual school systems and substantively integrating schools)."[33] The school systems of Louisville and St. Louis have had mixed success in achieving the goal of fully integrated school systems.[34] This is because the meaning

29. ELY, *supra* note 4, at 103.

30. *Rhetorical Neutrality Colorblindness*, *supra* note 4, at 824–88 (discussing neutrality as the doctrinal fulcrum of the Court's race jurisprudence and critiquing colorblind constitutionalism).

31. Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1757 (2001) (discussing how "the law functions to actually promote and entrench subordination"); Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1996).

32. *Rhetorical Neutrality Colorblindness*, *supra* note 4, at 876.

33. *Harvesting New Conceptions of Equality*, *supra* note 7, at 275 (emphasis in original).

34. Parker, *supra* note 6, at 135–42; Orfield & Frankenberg, *supra* note 15, at 14–16.

of *Brown* has changed in the fifty-eight years since the Court proclaimed that "separate educational facilities are inherently unequal."[35] It is striking that both school systems ultimately reached process-oriented outcomes whether there was a court-ordered consent decree, as in Louisville, or the threat of a court-imposed remedy, as in St. Louis. This suggests that the systems are predisposed to "neutral" process-based outcomes and that the prospect of transformative racial justice is limited:

> The fact that the process orientation aims at targets other than racial justice has been apparent from the time of Brown v. Board of Education, when some process theorists were among the ruling's most vocal critics, generally in spite of their personal approval of the decision. As post-Brown constitutional doctrine has unfolded, the pattern has been repeated: processual considerations operate to counteract the evolution of doctrines that might genuinely benefit non-whites, though proponents of process values continue to express approval of the substantive goal of racial justice. Process principles consistently have been elevated above the measures that promise to address the continuing reality of racial inequality.[36]

In the aftermath of the Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,[37] which dismantled the Louisville political community's good faith efforts to maintain integrated schools through a voluntary school assignment plan,[38] there was a dramatic shift from a substantive remedial focus to liberal individualism in the form of neighborhood schools.[39]

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35. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

36. Flagg, *supra* note 7, at 937; *see supra* note 4 and accompanying text.

37. 551 U.S. 701 (2007).

38. "There is no credible argument that either the text or the original intent of the Constitution requires the Supreme Court to invalidate integration programs that are voluntarily adopted by politically accountable, white majoritarian, government policymaking officials." Spann, *supra* note 23, at 628.

39. Chris Kenning & Antoinette Konz, *JCPS has Learned that Families Want to Make the Choice on Their Preferred School . . . whether it is down the street or across town*, COURIER-JOURNAL.COM (June 24, 2012), http://www.courier-journal.com/article/20120624/news0105 (discussing distinction between neighborhood schools and choice; and, stating that while 53

Likewise, in St. Louis, the shift is from quality education in the city schools[40] to individual choice (access) to charter schools. Racial justice becomes a secondary concern because neutrality and process are the dominant factors in constitutional interpretation and policy implementation. These process-based results are inevitable when viewed in light of the formalization of *Brown*.

From its colorblind jurisprudence to its post-racial jurisprudence,[41] the Court consistently articulates a process view of polity so that substantive considerations of race are ignored. The Court's decisions are all process-oriented decisions which conceptualize federal power as inherently anti-democratic and intrusive; federal power should be limited in the name of local control.[42] This is the first step in re-

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percent of 8,100 kindergarten applications chose the schools closest to their homes, 47 percent chose a different school even if it meant a longer bus ride). Of course, this does not address the problem of the impact of segregated housing on school choice. Certainly, parents can choose to attend their neighborhood school or one farther away, but integration will be severely limited if these choices are exercised in the context of segregated housing.

40. In St. Louis, there were a substantial number of black students left behind in the city schools as a component of the settlement that was the foundation of the voluntary interdistrict student transfer program. "The drafters of the Settlement Agreement recognized that, even after full implementation of both the voluntary inter-district transfer and magnet school programs, approximately 10,000–15,000 black students would remain in all-black city schools." *The Special Master's Tale, supra* note 1, at 1005. This compromise acknowledges the existence of some segregation in the schools, but "quality" education will somehow mitigate the impact of segregated educational opportunities. "In short, despite the money spent on the quality of education in the all-black schools, neither the schoolhouses nor what was taught inside was equal to the suburban schools." Freivogel, *supra* note 13, at 222; Smith, *supra* note 13, at 1153.

41. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2009) (discussing post-racialism as an ideology).

42. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 100–03 (1995) (holding that interdistrict remedy of increased spending to bring whites into the school district was invalid in the absence of an interdistrict violation); Freeman v. Pitts, 503 U.S. 467, 490–91, (1992) (holding that federal courts should return supervisory control to local authorities as soon as possible; indeed, federal control may be withdrawn completely or partially based on good-faith compliance with the desegregation decree); Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (explaining that based on a good-faith finding of compliance, a district court may dissolve a desegregation order where the vestiges of de jure segregation had been eradicated "to the extent practicable"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976) (stressing a temporal limit on federal court intervention, the Court concluded that once a court implemented a racially neutral attendance plan, in the absence of intentional racially discriminatory actions by the school board, the court could not adjust its desegregation order to address population shifts in the school district); Milliken v. Bradley, 418 U.S. 717, 745, 752 (1974) (holding that interdistrict remedies must be specifically tailored to address interdistrict violations). It appears that the Court exercises its power of judicial review to preserve neutral process values except when a community chooses a substantive, race-conscious remedy. Then the Court will

conceptualizing *Brown,* which ultimately leads to its post-racial incarnation and the emergence of neutrality at the state and local levels. There are several doctrinal developments that lead to the formalized conception of equality that is the touchstone of the Court's school desegregation jurisprudence: (i) the Court initially adopts a structural view of inequality in segregated school systems; (ii) this conception is replaced by a narrow view of federal power in eradicating the present day effects of past discrimination; and (iii) ultimately, neutrality becomes the guiding principle in school cases through the formalistic conception of equality adopted by the Court in *Parents Involved*. These doctrinal boundaries impact communities like Louisville and St. Louis when they implement integration plans. Moreover, Louisville and St. Louis serve as paradigmatic examples of the shift from substance to process.

In 1968 and 1971, the Court rejects neutrality and adopts a structural view of inequality in *Green v. County School Board*[43] and an expansive conception of federal judicial power in dismantling dual school systems in *Swann v. Charlotte-Mecklenberg Board of Education.*[44] These decisions represent the epoch of judicial efforts to integrate schools. Within only three years of the highpoint that was *Swann*, the Court orders an abrupt end to these efforts in *Milliken v. Bradley*.[45]

In *Green,* the Court advances a structural conception of inequality and rejects an early incarnation of school "choice." Rejecting an ostensibly neutral "freedom-of-choice" plan, "which allows a pupil to choose his own public school,"[46] the Court held that school boards had an affirmative duty "to convert to a unitary system in which racial discrimination would be eliminated root and branch."[47] Essentially, the Court discards neutrality and focuses on the systemic

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intervene to overturn such a result even if it means preserving de facto segregation in the schools. *See* Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 533–34 (2009); Spann, *supra* note 23, at 628–30.

43. 391 U.S. 430 (1968).

44. 402 U.S. 1 (1971).

45. 418 U.S. 717 (1974); *Harvesting New Conceptions of Equality*, *supra* note 7, at 279–85.

46. *Green*, 391 U.S. at 431–32.

47. *Id.* at 438.

and structural nature of discrimination—formalistic notions of equality will be rejected where it is obvious that the plan does not "[promise] meaningful and immediate progress toward disestablishing state-imposed segregation."[48] It is no small irony that "choice" is at the forefront of our efforts to "improve" our schools with integration as a secondary goal.[49] We have come full circle, embracing the very arguments that maintained segregated schools decades ago. The neutral allure of process obscures the devastating impact of the purportedly neutral policies grouped under the category denoted as "choice."

In Louisville, neighborhood schools, which are the result of an updated version of the freedom-of-choice plan held unconstitutional in *Green*, are at the center of policy and legislative initiatives. In St. Louis, the charter school movement dominates the policy debate. All of this is the result of how the Court neutralized substantive efforts at eradicating the present day effects of past discrimination.

Following *Green*, the Court in *Swann* articulates a broad conception of federal equitable judicial power. Building upon its structural conception of inequality as a condition that must be eliminated "root and branch," the Court concludes that "[i]f school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad."[50] *Green* and *Swann* are seminal decisions because they explicitly acknowledge the significance of race in dismantling dual school systems and that remedial efforts must be broad.[51] This is a rejection of neutrality and processual outcomes. History is an integral part of the analysis in *Green*: the Court's admonition to eliminate segregated schools "root and branch" is a response to fourteen years of delay following *Brown*.[52] *Swann*'s

48. *Id.* at 439, 439–41.

49. Parker, *supra* note 6, at 135 (noting that St. Louis charter schools are "hyper-segregated").

50. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

51. John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1733–34 (2000).

52. *Green*, 391 U.S. at 438–39 (emphasis in original) ("The time for mere 'deliberate speed' has run out . . . The burden on a school board is to come forward with a plan that

broad conception of federal equitable power to eradicate segregated school systems is an acknowledgement of the structural nature of inequality referenced in *Green*.

Segregation (or discrimination in school assignments) is defined broadly so that the scope of the remedy is broad—race-conscious remedies are embraced, and neutral rationales that support the existing patterns of segregation are rejected. This period of substantive approaches to the eradication of segregated schools was short lived. Once the Court adopts a process-oriented view of school desegregation, cities like Louisville and St. Louis would be affected in terms of the remedial policies implemented to preserve diversity in the schools. This is because decisions like *Milliken v. Bradley*[53] and *Washington v. Davis*[54] redefine discrimination and narrowly circumscribe race-conscious remedial measures to fully integrate schools. From 1974 on, the Court retreats from an expansive view of substantive equality to a processual conception of equality.[55] This ultimately leads to the Court's decision declaring the Louisville school assignment plan unconstitutional and the process-based approach to choice that is the hallmark of the St. Louis voluntary student transfer program.

Milliken v. Bradley marks the beginning of the Court's retreat from substantive equality to a process-based conception of individual rights. Rejecting an interdistrict remedy, which would have unified the segregated inner-city schools in Detroit with the outlying white suburbs, the Court holds that "[w]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[56] "The Court literally ignores evidence of systemic racial discrimination in order to preserve suburban school districts and insulate them from the burden of urban integration."[57]

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promises realistically to work, and promises realistically to work *now*.").

53. 418 U.S. 717 (1974).

54. 426 U.S. 229 (1976).

55. *See supra* note 41 and accompanying text; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Anti-Discrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 105 (Kimberlé Williams Crenshaw et al. eds., 1995) (discussing the restrictive view of equal opportunity which treats equality as a process).

56. *Milliken*, 418 U.S. at 745.

57. *Harvesting New Conceptions of Equality*, *supra* note 7, at 279 n.146.

Only three years after the majestic remedial mandate in *Swann*, the Court, for the first time, overrules a desegregation decree and "rationalized a segregated result in a case where a constitutional violation had been found to exist."[58] *Milliken* narrowly defines discrimination: remedial efforts must stop at the district line in the absence of an interdistrict violation (a form of system-based intent) and interdistrict effect. There must be identifiable, district-wide segregation. The implicit intent requirement referenced in *Milliken* is formalized in *Washington v. Davis*.[59]

Invalidating the claims of disproportionate failure rates of African-American applicants for the Washington, D.C. police department, the Court holds that disproportionate impact was insufficient to establish a Fourteenth Amendment violation.[60] "The decision also references the school desegregation cases for the proposition that there must be discriminatory intent."[61] There is a bright line distinction between de jure (intentional) and de facto (in fact) discrimination.[62]

The meaning of *Brown* was transformed though three rhetorical themes in the Court's race decisions: (i) history is conceptualized as neutral, so it does not have to be acknowledged, and there is no attention to the present day effects of past discrimination; (ii) discrimination is defined so narrowly that it either does not exist (disproportionate impact is irrelevant), or, if it does, it has to be identified with particularized specificity in the form of an intent requirement;[63] and, finally, (iii) equality itself is neutralized so that *Brown* is not about transformative racial justice at all. Formalistically, *Brown* is about *individual* school choice unencumbered by race.

These themes are at the core of the Process Theory. The Process Theory is inherently forward-looking, so history is inconsequential;

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58. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16–19, at 1495 (2d ed. 1988) (footnotes omitted).

59. 426 U.S. 229 (1976).

60. *Id.* at 244.

61. *Harvesting New Conceptions of Equality*, *supra* note 7, at 283–84.

62. *Id.* at 284.

63. Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1566–68 (2004).

and because the system is generally well-functioning, individuals can organize themselves into groups to advance their discrete interests. So, any systemic discrimination is aberrational and must be identified through a finding of intent (state action).[64] This means that a substantial portion of structural inequality, racial disparities, and unconscious racism is left unchecked and intact.[65] It also means that the neutral allure of such remedial "innovations" as choice, charter schools, and neighborhood schools will have a disconcerting appeal—it is much easier to pursue process-based neutrality than substantive racial equality.[66] "Like freedom-of-choice plans in the 1960s, charter schools today are designed not only to allow segregation, but to facilitate segregation."[67] Thus, in St. Louis, there is a "continuing pattern of hyper-segregated schools at both the traditional and charter schools, with charter schools slightly more hyper-segregated by race."[68] In Louisville, the "appeal" of neighborhood schools will ultimately lead to resegregation.[69] This neutral appeal can be traced directly to *Parents Involved*.

A. Parents Involved*, Inversion, and Neutrality*

Under the post-racial Equal Protection Clause, *Brown* is not about race at all—it is about individual school choice without the result-oriented politics of race. The emphasis is on access and opportunity, not substantive equality.[70] *Parents Involved* is one of the Roberts Court's first post-racial decisions. It is a seminal decision because it marks the transformation of the Court's race jurisprudence from colorblind constitutionalism to post-racialism:[71]

> In *Parents Involved*, the Court shifts course and invalidates *voluntary* plans adopted by the Louisville and Seattle school

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64. Lawrence, *supra* note 8, at 1378–79.
65. *Id.* at 1379–81; Flagg, *supra* note 7, at 967.
66. john a. powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 691–92 (2001).
67. Parker, *supra* note 6, at 122.
68. *Id.* at 136.
69. Orfield & Frankenberg, *supra* note 15, at 14–15.
70. *Harvesting New Conceptions of Equality*, *supra* note 7, at 267–74.
71. Cho, *supra* note 41, at 1593.

> boards. The Court rejects local decision-making because the sole purpose of both plans was racial balancing. . . . Racial balancing is unconstitutional because it guarantees a *result*—a specified quantum of racial proportionality in the schools—based on race. The Court advances four distinct doctrinal strands to form the post-racial decision in *Parents Involved*: (i) it elevates the de jure-de facto distinction as a standing requirement that essentially eliminates any consideration of race in the absence of specific discrimination;[72] (ii) it promotes liberal individualism as the touchstone of Fourteenth Amendment analysis so that an *individual's* school choice is commodified and the anti-subordination principle is fundamentally displaced;[73] (iii) the spectra of racial politics is employed to emphasize the "illegitimacy" of local decision-making premised on race;[74] and (iv) the protection of the interests of innocent whites is an unifying theme under all of the rationales discussed here.[75]

Parents Involved is obviously a decision deeply rooted in process—the entire analytical and rhetorical structure of the decision is constructed to preserve the status quo. The Fourteenth Amendment is inverted so that the anti-subordination principle is turned inside out.[76] "The Process Theory, rather than providing a rationale for principled judicial review, becomes a justification for leaving entrenched systems of discrimination in place."[77] All of the components of Rhetorical Neutrality[78] are present in *Parents Involved:*

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72. Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21, 736–37 (2007).

73. *Id.* at 742–43.

74. *Id.* at 744–48.

75. *Harvesting New Conceptions of Equality*, *supra* note 7, at 286 (emphasis in original) (footnotes omitted); Flagg, *supra* note 7, at 976 ("In sum, the process perspective is thoroughly white. It was formulated by white people, and it has had a significant and systematically adverse impact on the fortunes of non-whites in the development of race discrimination doctrine."); *see supra* notes 17, 18, 21 and 39 and accompanying text.

76. Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 199–220 (1997).

77. *Rhetorical Neutrality Colorblindness*, *supra* note 4, at 858.

78. *See supra* Part I.

> 1. Since the consent decree was lifted in 2000 in Louisville, there is no constitutionally cognizable discrimination to remedy; therefore, any use of race is constitutionally suspect;[79]
>
> 2. The de jure-de facto distinction means that there will be some inequality that is unreachable—de facto discrimination is "natural" because it is not caused by state action;[80]
>
> 3. Liberal individualism is a normative constitutional principle, so individual school choice displaces the constitutional mandate to eradicate dual schools systems and preserve fully integrated schools;[81] and
>
> 4. Housing segregation is viewed as a natural occurrence premised on voluntary choices made by individuals, so profound racial imbalance is rationalized as something other than segregation.[82]

All of these process-based propositions serve to insulate the process from substantive change and shift the focus to neutralized claims.

B. The Emergence of "Choice"

The notion of "choice" is quite appealing; it is rooted in process and liberal individualism and derives its analytical appeal from the marketplace model of an open process, accessible to all. Of course, this has not been the experience of Louisville or St. Louis. Louisville is embroiled in a contest over the validity of neighborhood schools,[83]

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79. Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. at 720–21, 732–33.

80. *Id.* at 736–37.

81. *Id.* at 743.

82. *Id.* at 750 (Thomas, J., concurring) (citations omitted) ("Racial imbalance is not segregation. Although presently observed racial imbalance might result from *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.").

83. *See infra* Part III.A; powell, *supra* note 66, at 692 ("From the perspective of the modern integrationist, neighborhood schools are troubling because they do not promote numerical desegregation nor equivalency in student outcomes. The radical integrationist problematizes this reform structure as well because the reversion to residence-determined attendance means a return to pre-*Brown* isolation of students of color from democracy-promoting structures.").

and St. Louis is grappling with the efficacy of charter schools.[84] The issue of race has been neutralized, and the focus is on process. The appeal of neutrality is dangerous because it gives us the assurance of moving forward without addressing the seminal problem of race and structural inequality:[85]

> Choice is presently constructed in this society as an unfettered good. As such, we implicitly assume that the more choice the better, and that a world with unlimited choice would be ideal. Choice is also seen as an individual act based largely on personal preference unmediated through social space and institutions. Therefore, autonomy is closely associated with choice. This view of choice would also make discussion of other values such as justice and equality unnecessary. That is, whatever is produced by choice is necessarily good. This view of choice is used in our society as a justification for continued racial subjugation and to obscure the way in which structure and systems reproduce racial inequality in our schools and larger society.[86]

Choice, then, fits squarely within the Process Theory and Rhetorical Neutrality: choice is directly compatible with the representation reinforcement theory because its emphasis is on access to the process without any consideration of the continuing effects of past discrimination. So, substantive integration of the schools is merely a secondary concern or not a concern at all. The concern now is individual choice, and this affects the policy choices of the political communities in Louisville and St. Louis.

II. THE POLITICAL COMMUNITY

It is ironic that, in Louisville, the actions of African-American parents who wanted their children to attend a neighborhood school

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84. Parker, *supra* note 6; Smith, *supra* note 13, at 1144 ("[I]n 2007 the state of Missouri unaccredited the St. Louis school district and transferred control from the St. Louis school board to a 'Transitional School District.'").

85. *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814 (2011).

86. powell, *supra* note 66, at 672.

ultimately led to the litigation that would overturn the voluntary school assignment plan. In *Hampton v. Jefferson County Board of Education,* African-American plaintiffs moved to dissolve a consent decree that they claimed had "outlasted its utility."[87] "The district court dissolved the desegregation decree, concluding that '[t]o the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects.'"[88] "There is a certain inevitability about the plaintiffs' claim—the formerly injured parties are now asserting a claim from 'relief'—since there is no identifiable discrimination to remedy, so a race-conscious remedy is inherently suspect and constitutionally invalid."[89] This assertion of an individual right to attend a neighborhood school would ultimately lead to the post-racial decision of the Court in *Parents Involved* and the neighborhood school movement that would follow in its wake:

> *Hampton* sets the stage: It is much easier for the Court [in *Parents Involved*] to advance its disturbing rationale that discrimination no longer exists in the wake of a previously successful challenge, advanced by African-American parents, which embraced liberal individualism and colorblind constitutionalism. Since there was no de jure discrimination to eradicate, the voluntary integration program of the Jefferson County Public Schools was constitutionally invalid.[90]

What is particularly striking about the Louisville experience is that even after the consent decree was lifted, the community implemented a voluntary school assignment policy that fully embraced integrated schools and diversity. Notwithstanding the process-based rhetoric of *Hampton*, the political community of Louisville rejected liberal individualism and choice which was

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87. 102 F. Supp. 2d 358, 363 (W.D. Ky. 2000).

88. Trucios-Haynes & Powell, *supra* note 15, at 957 (quoting Hampton v. Jefferson Cnty. Bd. of Educ., 102 F. Supp. 2d at 360).

89. *Id*. at 952. *Hampton,* 102 F. Supp. 2d at 359 ("[U]sually, it is the school board trying to shed its obligations under a desegregation order . . . [n]ever before have the plaintiffs been African-Americans, for whose supposed benefit such decrees were entered.").

90. Trucios-Haynes & Powell, *supra* note 15, at 952 n.24.

disconnected from maintaining integrated schools.[91] "[T]here is no reason to deny school districts the ability *voluntarily* to adopt integration plans that seek to prevent *de facto* resegregation."[92] Once the Court intervenes and disrupts the efforts of the political community in Louisville, there is a pronounced shift from a substantive (race-conscious) remedial approach to a process-oriented approach that protects white interests. As Professor Spann observes:

> In recent years, however, the Supreme Court has taken it upon itself to protect the white majority from minority advances even when the white majority *itself* has authorized those advances in the form of affirmative action or integration plans. The Court has done this by concluding that such programs deny the equal protection rights of the white majority, despite the fact that it is the white majority who has chosen to adopt those plans. Stated differently, the white majority decided that it was in its own best interest to reduce the continuing effects of white privilege in our racially pluralist culture. But the Supreme Court, nevertheless, told the white majority that the Constitution *required* white privilege to persist.[93]

This is the essence of the post-racial Equal Protection Clause—structural inequalities are preserved through neutrality, formalistic definitions of equality, and a presumption in favor of non-substantive results.

By contrast, in St. Louis, there was a collaborative-communitarian[94] approach to school integration, but the outcome was again limited by a presumption in favor of process over substance. Again, the interests of African-American students were secondary to

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91. From 1975 to 2000, the school district in Louisville operated under a consent decree. "The decree was dissolved in 2000, when the District Court held that Louisville had achieved unitary status. Nevertheless from 2001 to the present, Louisville operated under a voluntarily adopted integration plan that was designed to maintain the level of integration achieved under the previous desegregation decree." Spann, *supra* note 23, at 569–70.

92. *Id.* at 596 (emphasis in original).

93. *Id.* at 607–08 (emphasis in original).

94. Aderson Bellegarde François, *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN. STATE L. REV. 985, 1015–22 (2008) (arguing for an individual right to *community* rooted in integrated schools and a rejection of liberal individualism).

the overall process-oriented interests of the system.[95] A 1983 settlement provided for voluntary interdistrict transfers from city to suburban county schools, magnet schools, capital improvements, and quality education for those African-American students who remained in the city schools.[96] Each component of the 1983 settlement had varying degrees of success,[97] but the quality of education component was the least successful.

It appears there were problems with this aspect of the settlement from the beginning. Indeed, a decision was made that there would be some schools that were not fully integrated, ten thousand to fifteen thousand students would remain in all-black city schools, and these students were guaranteed a "quality education" however that was defined.[98] In St. Louis, the political community avoided a full-blown interdistrict remedy[99] and instead focused on voluntary interdistrict transfers—the students who remained in the city schools did not receive a substantive remedy.[100] They received "access" to a process that was not fully funded, did not provide effective instruction for college, and lacked academic rigor.[101] This illustrates the limitations of a process-based policy choice.

III. LIBERAL INDIVIDUALISM AND THE CONCEPTUAL FALLACY OF NEIGHBORHOOD SCHOOLS

De facto school segregation is directly traceable to segregated housing;[102] therefore, it is quite disturbing to see the arguments for neighborhood schools in Louisville. However, these arguments are inevitable when they are placed in the context of *Hampton*, *Parents Involved*, and the preference for process-based neutrality over

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95. *See supra* Part I.
96. *The Special Master's Tale*, *supra* note 1, at 1001–06.
97. Freivogel¸ *supra* note 13, at 219–23.
98. *The Special Master's Tale*, *supra* note 1, at 1005.
99. Freivogel, *supra* note 13, nn.17–21 and accompanying text.
100. Smith, *supra* note 13, at 1153 ("Of 100 black ninth-grade students attending city schools, statistically only six would graduate and attend a four-year college.").
101. Freivogel, *supra* note 13, at 221–23.
102. Spann, *supra* note 23, at 656.

substantive equality.[103] Neighborhood schools offer parents a false and illusory choice:

> Neighborhood schools are another "innovation" and are antagonistic to the goal of racial and economic integration. Although they have the benefit of potentially allowing parental involvement, in communities and families where poverty is high, it is often impossible for parents to become involved at target levels. In addition to producing inconsistent results as regards parental involvement, neighborhood schools reinforce racial and economic isolation by leaving residential segregation untouched. Neighborhood schooling is a detrimental reform type, also, in that its implementation masks the fact that racial hierarchy has been inscribed into residential patterns—allowing, instead, families to believe that they have exercised a choice in housing and, therefore, a choice as to which schools their children will attend. This falsity attaches strongly to the reform of neighborhood schools.[104]

Given the neutral allure of this false choice, it is no surprise that substantive integration of Louisville's public schools has taken the proverbial back seat to individualized claims to attend neighborhood schools. Since formal de jure segregation has been "cured" by the lifting of the consent decree,[105] any race-conscious remedial approach is antithetical to neutral process values. This leads to a narrow, formalistic interpretation of equality. A recent Kentucky case provides a graphic example of this legal formalism.

A. Kentucky Revised Statute § 159.070 and Rhetorical Neutrality

Advancing a statutory right to attend neighborhood schools, the parents of Louisville Jefferson County Public School (JCPS) students recently brought suit in circuit court.[106] The language of the statute,

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103. *See supra* Parts I–II.

104. powell, *supra* note 66, at 691–92.

105. Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 ("Once Jefferson County achieved unitary status, it has remedied the constitutional wrong that allowed race-based assignments.").

106. Fell v. Jefferson Cnty. Bd. of Educ., No. 2010-CA-001830-MR, 2011 WL 4502673

Kentucky Revised Statute (KRS) § 159.070, provides in relevant part: "Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children in the public school nearest their home."[107] Construing the language of the statute, the circuit court held there was no statutory right to attend neighborhood schools. "The circuit court concluded that the term *enroll* means to 'register' and not to attend the school."[108]

Reversing the circuit court, the Kentucky Court of Appeals concluded there was a legislative mandate to enroll students in schools nearest their home: "[T]he legislature has declared the right of every parent or legal guardian to enroll his or her child in the school nearest his or her home."[109] In many ways, this decision is the doctrinal descendant of *Hampton* and *Parents Involved*. It crafts a statutory right to attend neighborhood schools through liberal individualism, it neutralizes the history of KRS § 159.070 by focusing on the formalistic distinction between "enroll" and "register" rather than the historical *purpose* of the statute, which was to function as a "freedom-of-choice" plan akin to the one held unconstitutional in *Green*,[110] and it disconnects the present day effects of past discrimination, in the form of segregated housing, by literally erasing discrimination based on the lifting of the consent decree in 2000.[111] Racial imbalance is not "segregation" because the

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(Ky. Ct. App. Sept. 30, 2011).

107. *Id*. at *1. "This provision originally provided that 'within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children *for attendance* in the public school nearest their home." *Id*. at *5 (emphasis added). The words, "for attendance," were deleted when the statute was amended in 1990. *Id*. at *6.

108. *Id*. at *5 (emphasis in original). This conclusion is supported by the language and legislative intent of the statute itself: "Without that modifying phrase ['for attendance'], *enroll* now undoubtedly connotes the mere act of registering at a neighborhood school without the mandate, assurance, or even the implication that attendance at that same school should be guaranteed." *Id*. at *12 (emphasis in original) (Combs, J., dissenting from the Court of Appeals' reversal of the circuit court opinion).

109. *Id.* at *8.

110. *Id*. at *7–8.

111. *Id*. at *2 (noting that when the federal district court, in *Hampton*, lifted the consent decree, it rejected concerns about resegregation by stating that "[t]he constitutional purpose of all this was never to change housing patterns.").

absence of a consent decree means that formal discrimination has ended.[112] This is the process-based effect of *Parents Involved*.[113]

There is a substantial amount of inequality that cannot be remedied because the court refuses to acknowledge structural inequality and the continuing effects of past discrimination. Since there is no longer any de jure segregation, parents have the right to send their children to the neighborhood school.[114] This false choice simply reinforces existing patterns of residential segregation, yet the court relies on the facile notion that "[t]he benefit of children attending neighborhood schools is obvious."[115]

What is striking about the Court of Appeals' decision in *Fell v. Jefferson County Board of Education* is that it neutralizes the history of state-mandated segregation in Louisville in order to create an individualized right to attend neighborhood schools. Specifically, JCPS was exempt from KRS 159.070, with its initial legislative purpose to circumvent federal court-ordered desegregation,[116] because it was under a consent decree.[117] Once the consent decree was lifted, the Court of Appeals reasoned that:

> Logically, if KRS 159.070 still requires that parents and legal guardians have the right to choose for their children to attend their neighborhood school, JCPS, no longer being under federal supervision and direction to desegregate, must comply with the statute.[118]

It seems counterintuitive that an exemption from a statutory provision designed to preserve (segregated) neighborhood schools, like the constitutionally discredited freedom-of-choice plans,[119] could now be cast aside in the name of "compliance." In other words, before the consent decree was lifted, the exemption

112. Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729–32.

113. *See supra* Part I.A.

114. Fell v. Jefferson Cnty. Bd. of Educ., No. 2010-CA-001830-MR, 2011 WL 4502673, *8-10 (Ky. Ct. App. Sept. 30, 2011).

115. *Id.* at *9; *see* powell, *supra* note 65, at 691–92.

116. Fell v. Jefferson Cnty. Bd. of Educ., No. 2010-CA-001830-MR, 2011 WL 4502673, at *5.

117. *Id*. at *8.

118. *Id*.

119. *See supra* notes 46–49 and accompanying text.

took JCPS out of the scope of the anti-desegregation (neighborhood schools) statute. Thus, JCPS could comply with the federally mandated consent decree, not the statutory neighborhood school policy. Under the Court of Appeals' inverted reading of compliance, since the consent decree had been lifted, JCPS "must comply with the statute," notwithstanding the significant possibility of resegregated schools.[120] Fortunately, on September 20, 2012, this reasoning was rejected by the Kentucky Supreme Court.[121]

Upholding the JCPS school assignment plan and reaffirming the autonomy of local school boards to chart their own course in maintaining integrated schools, the Kentucky Supreme Court concluded that "Kentucky public school students have no statutory right to attend a particular school."[122] Rejecting the contention that the statute explicitly authorized neighborhood schools, the court concluded that "Kentucky law does not grant a statutory right for schoolchildren to attend the school nearest their home."[123] Concluding that student assignment is within the sound discretion and institutional competence of the local school board,[124] the 5–2 majority opinion, authored by Justice Abramson, reverses the formalistic and ahistorical interpretation of the statute advanced by the Court of Appeals.[125]

This is certainly a hopeful note upon which to end the Louisville story. Yet, the judicial conclusion to this case shifts its resolution to the political arena where fifteen candidates will compete for three seats on the Jefferson County school board.[126]

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120. *See* Spann, *supra* note 23.

121. Jefferson Cnty. Bd. of Educ. v. Fell, No. 2011-SC-000658-DGE, 2012 WL 4243659 (Ky. Sept. 20, 2012).

122. *Id.* at *1.

123. *Id.* at *12.

124. *Id.*

125. *Id.* at *1.

126. Antoinette Konz, *Neighborhood School Advocates Look To Fall School Board Elections After Kentucky Supreme Court 'Disappointment'*, COURIER-JOURNAL.COM (Sept. 20, 2012), http://www.courier-journal.com/article/20120920/NEWS0105/309200077/Neighborhood-school-advocates-look-fall-school-board-elections-after-Kentucky-Supreme-Court-disappointment-.

Neighborhood schools will be the centerpiece of half of the candidates' campaign platforms.[127]

B. Louisville and St. Louis: Closing Propositions

Louisville and St. Louis are uniquely linked in the annals of school integration jurisprudence; both cities have struggled with the problems of segregation in education for over forty years. Several themes emerge from the preceding discussion:

> 1. Louisville and St. Louis share a common doctrinal thread: both cities began the process of integrating their schools in the context of the United States Supreme Court's shift from a substantive approach to a process-oriented approach;[128]
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> 2. Both cities embraced process-based outcomes through a distinct course of events: in Louisville, the substantive interest in integration was displaced when African-American plaintiffs brought suit to lift the consent decree, and the Court would base its ruling invalidating Louisville's voluntary school assignment plan on the fact that there was no de jure segregation to remedy;[129]
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> 3. In St. Louis, a settlement, buttressed by the threat of an interdistrict remedy, resulted in a voluntary transfer plan that ultimately left some African-American students behind in the city with the illusory promise of a "quality education";[130]

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127. *Id.* On November 6, 2012, David Jones, Jr., Chuck Haddaway, and Chris Brady won election to the school board in Louisville. "None of the candidates seeking to end the current school assignment plan in favor of one emphasizing neighborhood schools was victorious." Antoinette Konz, *Jones, Haddaway, Brady will be panel's new faces; neighborhood school advocates shut out; lawyer vows suit on Jones' eligibility*, COURIER-JOURNAL.COM (Nov. 7, 2012), http://www.courier-journal.com/article/20121106/NEWS0106/311060025/JCPS-school-board-jones?nclick_check=1. Brady's victory was particularly noteworthy because it came at the expense of the named plaintiff in the school assignment case, Christopher Fell. Brady stated that "[n]eighborhood schools were not as big of an issue as some thought it would be," and that his focus would be on closing the achievement gap. *Id.*

128. *See supra* note 42 and accompanying text.

129. *Parents Involved*, 551 U.S. at 721.

130. *See* Freivogel, *supra* note 13; BELL, *supra* note 18; MONTI, *supra* note 18.

4. Despite years of innovation, both cities face challenges providing education in a fully integrated school system;[131] and

5. Neutral or individualized claims of equal opportunity have made substantive race-conscious remedies irrelevant in both cities—neighborhood schools are the focus in Louisville and charter schools in St. Louis.[132]

It should be obvious that neutral, process-based approaches to the problem of resegregation are limited in their efficacy. If political communities agree on race-conscious remedial approaches to the eradication of inferior and unequal schools, those policies should be accorded full deference.

CONCLUSION

The demographics of race are exploding in every facet of American life. America has become more inclusive, which is progress. However, this progress has been mixed: we have litigated, compromised, settled, embraced diversity and integration, and rejected inclusiveness to advance neighborhood schools in the name of individual choice. We have voluntarily integrated while leaving substantial numbers of students behind. Like much of our racial history, our triumphs are episodic. It is no coincidence that the Roberts Court will address affirmative action this term.[133] The Court has been openly hostile to race-conscious remedial efforts to eradicate the vestiges of discrimination.

We must continue to advance and implement the ideas that we explore here today because schools are at the very core of American democracy[134]—they are the gateway to America's future. Minnie Liddell's legacy calls to us to continue the struggle for substantive equality.

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131. *See supra* notes 15, 17, 18, 40, 42 and accompanying text.

132. *See supra* Parts III.A-B and notes 6, 49.

133. Fisher v. Univ. of Texas at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012).

134. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J. L. & PUB. POL'Y 45 (2011).