The Supreme Court's decision in last week's school desegregation cases represents the culmination of a 50-year-old debate about the meaning and content of Brown v. Board of Education. The conservatives have now taken over Brown, no question. Justices in the majority—like the new chief justice, John Roberts, and Justice Clarence Thomas—can invoke Brown for the proposition that the 14th Amendment to the U.S. Constitution prevents states from treating individuals differently on the basis of race. They invoke the mantra of the "color-blind Constitution" to strike down voluntary school desegregation plans in Seattle and Louisville, Ky.

In passionate dissents, justices John Paul Stevens and Stephen G. Breyer lament the conservatives' treatment of Brown. Stevens describes their reliance on Brown as "cruel irony." And Breyer describes their comparison of state-mandated racial segregation in the 1950s with contemporary voluntary desegregation plans as a "cruel distortion of history."

Stevens and Breyer are right. The offense they have taken at Roberts' and Thomas' treatment of Brown is entirely appropriate. The plurality and concurring opinions undermine and misinterpret decades of efforts to undo the long American history of racial segregation, discrimination, and inequality.

The question we need to ask is: How did the conservative justices manage to appropriate Brown so completely? How did they so easily convert Brown from an opinion championing racial equality into one that countenances—even requires—continuing racial inequality and segregation in the name of the Constitution? The answer is simple: through abstraction. They have abstracted a decades-long struggle for racial progress into a single formalistic harm: government classifications on the basis of race.

It seems almost too obvious to repeat that the racial classification in Brown targeted largely disfranchised African-Americans who were the victims of a racial caste system designed to promote white supremacy. The new harm of racial classification that the court's conservatives now fetishize is something that afflicts all Americans, regardless of race. This harm is not substantive; it is not about, in Justice Breyer's words, "true racial equality." Rather it is entirely about how people—often white people—feel when the government takes their race into account in decision-making.

But that transformation can only be accomplished by disparaging, eliding, and downright ignoring the actual inequalities that attended Jim Crow in 1954 and continue to afflict American society today. The fact that the conservative justices can so easily transfer this abstract concept of harm to whites shows that their jurisprudence has nothing to do with
actually remedying inequality. The equal protection clause is their supposed text, but inequality is not their real concern.

Unfortunately for the liberal justices, *Brown* may not have been the sturdiest reed on which to rely in rebutting this conservative constitutional vision. The truth is that although *Brown* did not invoke Justice Harlan's "color-blind Constitution" outright, the way it was structured, and the way it has often been read since, lends credence to the conservatives' modern interpretation. For *Brown* did, as the conservatives suggest, emphasize the formal problem of state-mandated segregation. It did, as they insist, suggest that the problem of de jure (legally sanctioned) segregation was more substantial and worthy of constitutional consideration than the problem of the myriad private segregations and discriminations and inequalities—what the court now calls de facto segregation—that also characterized Jim Crow.

The lawyers who directed the *Brown* litigation made several strategic choices that sowed the seeds of this modern tension. They intentionally set aside the actual inequalities between black and white schools in favor of a blanket prohibition—at least in the education context—on state-imposed segregation.

At the time, that strategy made a lot of sense. The main goal in *Brown* was to overturn *Plessy v. Ferguson*. In upholding segregation in 1896, *Plessy* had said that a governmental racial classification was not, in and of itself, constitutionally harmful. In order to argue that indeed a state racial classification could be unconstitutional, the lawyers in *Brown* (and the court, in turn) deliberately left problems of substantive equality to one side.

Thus—much as we might wish it otherwise—the conservatives' modern distortion of *Brown* is embedded in the case itself. Justice Breyer laments that "*Brown* held out a promise." That it did. But even then, and especially in the ways it has been read since then, that promise was already in some sense lost in 1954. By the time the Supreme Court decided the case, the question of material equality, of truly meaningful outcomes, had been sacrificed to formal nondiscrimination, and was thus already off the table in the legal imagination.

Before *Brown*, lawyers had attempted to challenge not only the stigma of state-mandated segregation, but also the public and private, racial, economic, political, and social harms that flowed from the massive and complex system of racial and economic subordination that was Jim Crow. The civil rights law they aimed to construct would have prohibited state-mandated segregation, to be sure. But that was only the starting point for a fundamental transformation of the American racial caste system.

Such a transformation required challenges to government policies in education, employment, voting, housing, and more, as well as to the policies adopted by private employers and business owners. The civil rights movement aimed to create true, substantive equality with integrated schools and workforces, with average incomes and academic achievement at the same level. Upending the clearly wrong premise of
Plessy—that governmental classifications passed by all-white legislatures in states where African-Americans could not vote placed no stigma on African-Americans—was certainly part of this process. But it was only a part.

No doubt, a single case would have been hard-put to tackle both state-mandated segregation and de facto segregation and inequality; to have undone Plessy and simultaneously decreed substantive rights to integration or material equality. And certainly, readings of Brown as portending actual integration and not simply an end to state-mandated segregation are still possible.

But once Brown was constructed as it was, Jim Crow became synonymous in popular understanding with state-mandated segregation. And the answer to Jim Crow became the "color-blind Constitution." If the Constitution is color-blind, goes the reasoning of today's conservatives, then the harm of classification is felt no less when intentions for racial progress are good than when they are bad; and no less by white schoolchildren than by black ones.

Of course, Justice Stevens is right to point out that none of his brethren in 1975 would have understood Brown and its progeny in the cramped way the court does today. Cases after Brown sought to address de facto segregation, too. And the Warren Court found ways to redress the material harms, and to facilitate actual integration. But that jurisprudence always fought against the canonical image that Brown had created; an image of Jim Crow as a problem of state classification and of civil rights as a solution to that problem. The court found ways—when it wanted—to circumvent and to expand the limited vision of civil rights Brown had led lawyers, laypeople, and judges to embrace. But that vision remained the constraint, just as it does today.

The fact that Brown itself offers up a formalistic vision of racial harm does not preclude it from offering up other visions. It does mean, however, that when the dissenters accuse the court of forsaking the promise of civil rights, to some extent they merely point out a promise that was, in fact, broken half a century ago.

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