The Promise of Justice
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I. Introduction

The hearts and minds of the American people have been won over on the issue of segregation.¹ Flash back over the fifty years since the landmark decision Brown v. Topeka,² which ended legal school segregation, and reflect on the long and arduous effort to convert attitudes away from the longstanding acceptance of race segregation. It took a monumental civil rights movement, marked by marches, sit-ins, hoses, billyclubs, beatings, dogs, bombings, murders, arrests and the myriad of memories and rememories we hold of the American Civil Rights Movement to achieve widespread acceptance of the ultimate wrongness of segregation.³

³. For a short but thorough documentary on the American Civil Rights Movement, see “A Time for Justice” produced by the Southern Poverty Law Center, Teaching Tolerance, and
Today, only the most extreme groups, residing on the very fringes of polite society, herald the ideology of segregation of the races. American corporations, in preparation for their role in the global marketplace with an increasingly multiracial consumer base, have been strong supporters of diversity for decades, and many submitted amicus briefs supporting affirmative action in *Grutter v. Bollinger* (*The University of Michigan*). Recently, in *The New York Times Magazine*, several corporations collaborated on a lengthy article designed to extol the virtues of diversity and integration. Integration has been embraced as an unassailable structure in our society.

The dilemma we confront as a society, is that while an overwhelming majority of Americans would cringe at the idea of a racially segregated America, America remains racially segregated and racial equality is more ideal than real. Even though there is almost no legal segregation in America, most Americans live in segregated neighborhoods, attend

4. Stephen E. Atkins, *Encyclopedia of Modern American Extremists and Other Extremists Groups* (Westport, CT: Greenwood Press, 2002) (providing the most up-to-date information on 275 of the most influential and significant homegrown extremists and extremist groups that have operated in the U.S. since 1950, and more than 75 percent of the coverage deals with the period since the 1980s, including subjects unavailable in other sources).


6. See Jason Forsythe, "Winning with Diversity," *The N.Y. Times Magazine*, Sept. 19, 2004, 93–132. The article is a paid advertisement by the corporations featured in the article, with the apparent motivation of promoting diversity among other corporations while building good will for employment, consumer, and marketing purposes.


8. See generally, Cashin, supra note 1. The Gallup Poll in 1999 showed that 60 percent of Americans believe more should be done for desegregation in public schools (K–12).


United Way of Central Ohio, *Racial Disparities Report* (2003). The residential segregation dissimilarity index, used to measure on the scale of 0–100 the degree to which two groups are spread evenly among census tracts in a given metropolitan area, demonstrates a high level of racial segregation for major cities throughout the country, as designated below:
segregated schools\textsuperscript{10} and churches,\textsuperscript{11} play on segregated beaches, vacation in segregated hotels and resorts, and many have segregated workplaces.\textsuperscript{12} There is an apparent theoretical disconnection in America between the evils of segregation and the virtues of integration. Our society accepts segregation as bad, but it also views forcing individuals to forego any personal liberty for the sake of integration and equity as unfair and illegal. Thus we have the “Big Disconnect”\textsuperscript{13} between the legal and social wrong of segregation and the means of achieving integration, whether that comes in the form of school integration plans or affirmative action.

This essay will take a look in broad strokes over the past fifty years at how America has progressed legally, ideally, and actually from the pre-	extit{Brown} society that accepted the legal segregation of the races, to the post-

\begin{center}
\begin{tabular}{l}
\textbf{Black/White Segregation* Selected Metro Areas, 2000} \\
Detroit–84.7 \\
New York–81.8 \\
Chicago–80.8 \\
Cleveland–77.3 \\
Cincinnati–74.8 \\
Indianapolis–70.7 \\
Pittsburgh–67.3 \\
Columbus–63.1 \\
San Francisco–60.9 \\
Minneapolis–57.8 \\
Seattle–49.6 \\
Phoenix–43.7 \\
\end{tabular}
\end{center}

(*Dissimilarity index, with 100 being most segregated. Ibid., 2–6)

10. Gary Orfield and Susan E. Eaton, “Back to Segregation,” \textit{The Nation}, March 3, 2003, 5 (stating that nearly 40 percent of black students in 2000 attended schools that were 90 to 100 percent black—up steadily from a low of 32 percent in 1988. In 2000, about one-sixth of blacks attended schools where 1 percent or less of their fellow students were white.).


12. It is the author’s observation in traveling that resorts, beaches, cruise ships, and hotels are racially segregated. Many local minorities use public beaches, while tourists and white people use beach fronts attached to hotel property. In most cases the beaches adjoining the hotels and resorts are public, but nonetheless they are managed as if they were private and therefore restricted.

Grutter society, which has sacrificed racial integration and accepted racial inequality in the process. The United States Supreme Court (The Court) decisions from the popular affirmative action battlegrounds of education, business, and employment will be used to demonstrate how the law and attitudes of the American people support the perpetuation of a segregated and unequal society, while extolling the virtues of integration. On several occasions in the past fifty years, the Court had opportunities to facilitate integration in schools, colleges, and universities; to promote equal employment opportunities; and to encourage the participation of excluded minorities in the nation’s economic growth. Instead, time after time, the Court forfeited that opportunity and rendered decisions that perpetuated a separate and unequal America. I contend that on the many occasions discussed in this article, the Court got it wrong.

II. Why Are Our Public Schools and Society Still Segregated and Unequal Despite the Mandate of Brown?

The battleground was set with Brown.14 Frankly, American society was not ready for desegregation in 1954, theoretically or realistically. Brown was the beginning of a revolution of thought that did not take root until the civil rights movement was in full force in the late sixties. It took over twenty years for Americans to digest and accept the idea that segregation was wrong, and it was not accepted without significant resistance. The American institution of slavery had been justified based upon the belief in the innate inferiority of African Americans, and that idea was part of the design of the American quilt in 1954. African Americans were still described using subhuman references, which failed to offend the sensibilities of the speaker or listener. It is hard to determine the exact moment of the transition, but minds were changed in the past fifty years and few Americans would openly and overtly resist integration of schools today because of their desire for segregation. Professor George Lipsitz, disagrees with this assertion in his book, The Possessive Investment in Whiteness where he argues,

14. See also Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951); Belton v. Gebhart, 32 Del. Ch. 343 (1952); Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952). (These cases were combined to form Brown and involved four school districts in Kansas, South Carolina, Delaware, and Virginia. All had challenged school segregation and lost. The lower-court decisions found segregation had a substantial negative impact on the education of African American children, but would not order desegregation as remedy due to Plessy.)
Whiteness has a cash value: it accounts for advantages that come to individuals through profits made from housing secured in discriminatory markets, through the unequal educations allocated to children of different races, through insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past racial discrimination, and especially through intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations.\(^{15}\)

While I agree with Professor Lipsitz that whiteness has economic value, I do not think the decisions that result in segregation in the twenty-first century are made for the purpose of promoting segregation. Rather, segregation is a consequence of decisions made for a variety of reasons that are not directly related to the decision maker’s desire to avoid integration. The Court has not found the benefit of integration sufficient to decide cases in a manner that promotes integration when individual decisions promote segregation.

**A. The Court will not interfere with the individual choices that result in segregation.**

Arguably, the pervasiveness of segregation is due to individual and group choices motivated by well-cloaked, unconscious racism.\(^{16}\) The charge of racism is as taboo as support for segregation. As a result, legally and socially, racism is denied until it raises its ugly head in the most overt form—such as use of the N word.\(^{17}\) Individuals are at liberty to make


choices that result in segregation, without supporting segregation or liv-
ing with the label of racist. Repeatedly, the courts have upheld the exer-
cise of individual liberty even when the result is increased segregation.
Dorothy Roberts labeled this legal phenomenon the “priority paradigm”
which recognizes that the American value of individual liberty takes
priority over racial equality in our laws.18 The result is that individual
choices that result in segregation are upheld when challenged legally, as
long as they are facially race neutral.19

For example, many white individuals choose to live in exclusive neigh-
borhoods, designed to segregate by economics, if not specifically by race.
Since whites earn more money than African Americans and Hispanics,
and can afford houses in exclusive, expensive, suburban communities,
the schools in those communities tend to be disproportionately white.
If individuals are asked their reasons for their choices of community,
the responses are facially race neutral. Whites choose to live in expensive
suburbs because the school system is better, the structure of house,
neighborhood, lot size, etc. was available in the suburb chosen and not in
the city, the suburb is safer, and other race-neutral reasons. Many whites
choosing the suburbs would be highly offended if their decision was
charged with the racist purpose of promoting segregation, even if that
is the effect of their choices. Sheryll Cashin made this statement about
neighborhood choices and upward mobility:

Choosing a neighborhood that separates one’s family and oneself
from “worse” elements farther down the economic scale has become
the critical gateway to upward mobility. Like it or not, this is the
established path to better schools, less crime, better services, and
stable property values. We seem to understand, if not accept, that
the opportunities and amenities available in a neighborhood, as well
as responsiveness of local government to its needs, are often closely
calibrated to its racial and economic makeup. We may not agree with
this system. We may even decry its unfairness. But when it comes to

363.
19. Ibid. For example, in Milliken v. Bradley, 418 U.S. 717 (1974), the Supreme Court
would not order an interdistrict remedy in the Detroit Metropolitan Area because the individu-
als who fled to the suburbs had not participated in the injury to the Detroit schoolchildren or
protected the right of white residents to live in the suburbs and avoid paying for desegregation
plans in the inner city schools.
our personal choices about where to live, our primary motive is to maximize benefits and comfort for ourselves and our families.\textsuperscript{20}

However, facially neutral choices are often cloaked racism. When \textit{Brown} ordered the schools desegregated, the national uproar was over quality of education, with most whites in agreement that integration would lower the quality of education. When whites first started making choices to move to the suburbs for better schools, in 1954, the new suburban schools had no track records. What measure was used to distinguish between the suburban school and the newly integrated city schools then? It is quite likely that white was perceived as “better” and integrated was perceived as “worse.” Fifty years after \textit{Brown}, urban schools are full of poor people who are less well educated, and there is little doubt that school districts can be compared qualitatively based upon quantitative factors such as test scores, graduation rates, and college matriculation, and it can be safely said that many suburban schools are better than many urban schools. Race may have been more of a factor fifty years ago than it is now in the choice of communities; nonetheless, it is highly likely that race-based choices led to the dual school systems of quality suburban schools and weak urban schools we now have.

Since Americans do not support segregation, and schools are segregated based upon a series of individual choices rather than intentional discriminatory acts by government actors, should Americans tolerate segregated schools? If they are just a consequence of random individual choices, surely we are not powerless to redress the problem? If Americans do not support segregation and segregated schools, we are well posited to design integrated schools and communities. The courts have made it clear that residential segregation without state action will not be sufficient to sustain an action based upon discrimination and result in an order requiring desegregation of schools.\textsuperscript{21} Furthermore, the Court of Appeals for the Sixth Circuit made it clear in \textit{Milliken} that suburban school districts could not be made to participate in the remedy for the segregation in the urban communities to which they are related unless the suburban school district also discriminated.\textsuperscript{22}

\textsuperscript{20} See Cashin, supra note 1, p.16.

\textsuperscript{21} For cases demonstrating that residential segregation provides insufficient basis for school desegregation order, see \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1 (1971) (holding that it must be found that state agents intentionally segregated schools in order for courts to intervene). See also \textit{Keyes v. Sch. Dist. No.1}, 413 U.S. 189 (1973) (holding intent to segregate by school officials is necessary for desegregation order).

\textsuperscript{22} \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).
based upon residential segregation stemming from individual choices, are not illegally segregated and cannot be forced to desegregate in Fourteenth Amendment actions. Since individuals who would not support segregation made decisions that resulted in segregated schools, it is up to the decision makers to devise plans to undo the unintended result of segregated schools. While the courts will not order desegregation, an enlightened community that does not support segregation could decide that diversity is important to education, just as corporations are promoting diversity in the twenty-first century because it is the right thing to do and because it is good for business. Colleges and universities fought for and retained diversity in their student bodies despite stiff opposition and legal battles challenging affirmative action.

Americans could decide that integration of schools is important to an excellent education in kindergarten through grade twelve, just as they have in other arenas, and make it happen because it is the right thing to do and better for the entire community.

B. There was no clear mandate in Brown.

While Brown overruled the sixty-year-old separate-but-equal rule of Plessy v. Ferguson, many agree Brown lacked a compelling mandate to the population to act, so it did not. When the issue of enforcement was brought before the court in Brown II, the Court used the nebulous language, “all deliberate speed” to define the time frame within which school districts had to desegregate their schools. Ralph Frazier, in a speech at The Ohio State University to Minority Graduate and Professional Students, said African Americans focused on the word “speed” and expected all the students who walked past the white school to get to the African American school to be reassigned to the closer white school in the fall of 1954.

23. See powell, supra note 13, pp. 20–21 (Professor John A. Powell discusses the potential of basing school desegregation cases on state constitutional actions, which are based upon “adequacy” not intent to discriminate).


27. Ralph Frazier, speech at The Ohio State University Minority Graduate and Professional Students’ Welcome Banquet (Sept. 24, 2004). Ralph Frazier and his brother integrated the University of North Carolina (UNC) in 1955 pursuant to court order after winning the discrimination lawsuit, Frazier v. Board of Education of the University of North Carolina, 134 F. Supp. 589 (Del
the other hand, white southerners designing and implementing desegregation plans focused on the word “deliberate,” which meant they took careful, un hurried, well thought-out action.

Dynamically, the will of the community to resist integration, and the lack of determination in the message from the Court, merged into an overriding attitude of laissez faire. Four years after the Brown decision, the Little Rock School District went back to court and sought a postponement of a plan for desegregation adopted by the board because the extreme public hostility in the community would render integration of the high school impossible. In Prince Edward County, Virginia, instead of desegregating schools, all public schools were shut down and public funds were used to support private schools for whites only. School districts all over the country maintained their segregated schools until they were specifically ordered to do otherwise. Every step in the process had to be litigated all the way to the highest court possible, and long delays were more common than immediate desegregation. That resulted in a series of lawsuits for the next fifty years challenging dual school systems all over the nation, or, in turn, challenging continued judicial oversight of prior court orders.

Columbus, Ohio, for example, maintained a dual and segregated school system for twenty-four years after the Brown decision. Nothing in the Brown decision made the school system feel compelled to integrate.

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30. See also Bradley v. Sch. Bd. of Virginia, 382 U.S. 103 (1965). (The Court noted litigation had been ongoing for several years and further indicated that further delays related to the desegregation of the schools would be intolerable.) There were other cases where the judicial system was strategically used to delay desegregation of the schools included.

31. After the Brown decision, Columbus changed its laws so that school districts were no longer changed whenever property was annexed to the city. Prior to Brown school districts and city limit lines were contiguous and when the city annexed land to the city, the school district lines were simultaneously changed to conform to the annexation. After Brown, the school district lines were a separate decision from the decision to annex property to the city. The result of this practice, over time, is that many Columbus communities have school districts that are part of a suburban school system. See Ohio Revised Code § 3311.06 (effective Sept. 29, 1955) (stating “When territory is annexed to a city which comprises a part but not all of the territory of a school district, the said territory shall become a part of the city school district only upon approval by the State Board of Education.”)

32. Gregory S. Jacobs, Getting Around Brown: Desegregation, Development and the Columbus Public Schools (Columbus: The Ohio State University Press, 1998), 15–51 (describing how the
The city had to be sued\textsuperscript{33} and in turn used significant public resources to wage a difficult legal battle to maintain a segregated school system. After only seven years of busing for desegregation, Columbus followed the course of similarly situated school districts and was declared a unitary school system and judicial oversight was withdrawn.\textsuperscript{34} Ten years later, the school board adopted a student reassignment plan that was hailed as an end to forced busing.\textsuperscript{35} Twenty-five years after \textit{Penick}, 85 percent of the students in Columbus attended schools that were predominantly African American, and public schools in Columbus were still segregated. If the Court had sent a clearer message, and if the named school district of Little Rock had in fact integrated the schools immediately, the response of the rest of the nation, including Columbus, Ohio, might have been different. For example, when the Court of Appeals for the Fifth Circuit (Fifth Circuit) said that race could not be used as a factor in admissions in \textit{Hopwood}, colleges all over the Fifth Circuit redesigned their admission practices immediately and the number of African American and Hispanic students attending those institutions declined dramatically in the incoming class following the decision. The dismantling of affirmative action happened as quickly in the states within the Fifth Circuit’s jurisdiction as Ralph Frazier expected the dismantling of segregation to occur all over the nation after \textit{Brown}. Apparently, the speed with which the system worked to implement the court orders depended upon whether white privilege was being infringed upon or preserved.\textsuperscript{36}

\textbf{C. The Court failed to include suburban school districts in the remedy for state supported segregation of urban schools.}

School desegregation could have taken on an entirely different character if suburban school districts would have participated in desegregation plans. Detroit attempted to include suburbs in the desegregation plan by order of the district court when the plans submitted were found woefully

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  \item \textsuperscript{33} The Columbus School desegregation case, \textit{Penick v. Columbus Board of Education}, 429 F. Supp. 229 (1977), was filed after years of effort by African American Board members and community to get the Columbus School Board to voluntarily formulate a desegregation plan.
  \item \textsuperscript{34} Judge Duncan said the city of Columbus was one of the most desegregated school systems in the country. \textit{Penick et. al. v. Columbus Board of Education et al.}, April 11, 1985, at 3.
  \item \textsuperscript{35} Ibid. at 204.
\end{itemize}
inadequate. The final plan submitted and approved by the district court included Detroit and fifty-three other school districts in surrounding suburbs.\textsuperscript{37} The Court of Appeals for the Sixth Circuit agreed the metropolitan plan was correct and that an interdistrict remedy could correct only the wrongful acts by the state.\textsuperscript{38} The Court reversed reasoning that since the disparate treatment of white and African American students occurred within the Detroit school system and resulted in no significant segregative effect in suburban school districts, the remedy had to be limited to the Detroit school system.\textsuperscript{39}

\textit{Milliken} proved disastrous to school desegregation, since, as the district court in \textit{Milliken} knew, an intradistrict plan would result in an all African American school system, a prophecy that came true in Detroit and all over the country when intradistrict plans were implemented.\textsuperscript{40} Later in \textit{Missouri v. Jenkins},\textsuperscript{41} the Court strengthened the message that the role of the court was not to ensure meaningful integration and certainly not to spend exorbitant amounts of money to achieve that end.\textsuperscript{42} Using the same logic as the \textit{Milliken} Court, the Court in \textit{Jenkins} reasoned that the improvements recommended were insufficiently related to past segregation and were therefore beyond the federal court’s discretion to implement.\textsuperscript{43} The message of \textit{Jenkins} was clear. Not only will we not force white suburbanites to participate in an interdistrict plan, such as the one proposed in \textit{Milliken}, but we will not unduly burden suburban taxpayers with the price tag for improving the quality of the illegally segregated schools, as proposed in the \textit{Jenkins} plan. After \textit{Jenkins}, the federal courts became even further removed from the solution to the school desegregation issue.

Why was \textit{Milliken}, and later \textit{Jenkins}, so devastating to school desegregation? The answer is evident in the district and appellate court’s reasons for first demanding, then supporting an interdistrict plan in \textit{Milliken}.

\textsuperscript{37} \textit{Milliken v. Bradley}, 418 U.S. at 732.
\textsuperscript{38} \textit{Milliken v. Bradley}, 484 F. 2d 215, 245 (6th Cir. 1973).
\textsuperscript{39} \textit{Milliken v. Bradley}, 418 U.S. at 747–52.
\textsuperscript{40} See Cashin, supra note 1, pp. 212–13.
\textsuperscript{42} See Cashin, supra note 1, pp. 215–16. (“In the \textit{Jenkins} case, the district court’s desegregation plan required every high school, every middle school, and half of the elementary schools in the school system to become magnet schools. The cost of making the schools attractive enough to retain white students had exceeded $200 million annually, and the state legislature that had been ordered to pay the bill was crying out for relief. The Supreme Court emphasized that the goal of district courts is to remedy desegregation to the ‘extent practicable’ and to restore local authority over the school system.”)
\textsuperscript{43} \textit{Jenkins}, 515 U.S. at 87.
The interdistrict remedy provides an opportunity for actual integration of public schools. The intradistrict remedy inevitably results in an even more segregated urban school system.

As noted earlier, individual choices result in residential segregation. Does that necessarily mean that schools should be segregated also? If schools were segregated by the illegal actions of city and state government actors, reasonable minds certainly could differ on the power of the state and the courts to use any means necessary, including a metropolitan plan or a costly magnet school program, to rectify the ills of such discrimination. The decision in *Milliken* was five to four, which definitely suggests there were persuasive arguments on both sides of the issue. The Court got it wrong and the result is the Detroit Public schools, far from being integrated, were over 90 percent African American in 2004, and the Kansas City schools are still failing their students academically and have not attracted suburban or higher-income students to the district. The decisions sewed the disparity in education received by the rich and the poor into our national quilt, and it has become an embarrassing part of our national legacy. One of the most powerful and richest nations in the world runs a segregated school system and fails to provide a quality education to an alarming number of its African American students who live in urban areas.

**D. The Court required intent to demonstrate discrimination.**

In *Washington v. Davis*, the Court established the doctrine of discriminatory purpose, which requires the plaintiffs challenging the constitutionality of a law or practice that is race neutral on its face to prove a racially discriminatory purpose on the part of the entity or individual responsible for enactment of the law or practice. For all practical applications, discriminatory purpose is a synonym for discriminatory intent, and the law was well established in 2004, that discriminatory intent is necessary to support the unconstitutionality of a facially neutral law, even if the law has a racially disproportionate impact.

44. *Washington v. Davis*, 426 U.S. 229 (1976). (Plaintiff’s arguments that disparate impact which is a foreseeable consequence of the action is sufficient to support a constitutional violation was rejected by the Supreme Court. See also *Columbus Bd. of Educ. v. Penick*, 443 U.S. at 464 stating “. . . disparate impact and foreseeable consequences, without more, do not establish a constitutional violation.”)

45. Lawrence, supra note 16, p. 318.
In Keyes v. School District No. 1, the Court dispelled any doubt that the discriminatory intent rule would be applied to school desegregation cases. Furthermore, the Court did not give any clear indicators of what actions would satisfy the “intent” requirement. As in Brown, when the Court used the nebulous language “all deliberate speed” as a guideline for implementing the school desegregation order, the Court in Keyes gave little direction to plaintiff’s lawyers on what would be required to prove intent. Instead the Court said that the necessary degree of state involvement is incapable of precise definition and as a result there are no per se answers to the question of what or how much action is required.

Fortunately, the Court did recognize that it might be difficult to prove “subjective” discriminatory intent given the unlikelihood that public officials would confess to discriminatory motives in the seventies, with the same liberty they would have been comfortable with in the fifties and before. Discriminatory intent can be inferred from objective evidence, which analyzes the totality of the relevant facts. Despite this concession, of sorts, these questions still need to be asked: “Why require a showing of intent at all? Why does the court need more than disparate impact which is the foreseeable consequence of the action?” It is not clear why intent is the mandate except as a further attempt to exculpate Americans from any guilt associated with racism and the racial inequity that results from it. If we legally define acts as nonracist, then society is free from the burden of the racial inequity that persists in our society today. If the law so narrowly defines racism that only the most overt conduct is included as culpable activity, and the law requires no redress unless intentional individual action is proven, then there is no personal or public responsibility for segregation or its effects. Denial of racism makes it easier to blame African Americans for poor schools, poor academic performance, poverty, unemployment, lack of wealth, and a host of other social ills for which society does not care to accept responsibility.

E. The Court failed to recognize benign discrimination.

University of California v. Bakke paved the way for affirmative action programs in institutions of higher education throughout the nation. Colleges and universities used the diversity rationale in the Bakke decision

47. Ibid. at 215.
to shape admissions programs that included race as one among many factors that contribute to establishing a diverse student body, and thereby promote the academic missions of the institutions. The assertion that the Court got it all wrong in *Bakke* might come as a surprise to many colleges and universities who utilize the decision to maintain the legality of their affirmative action plans designed to promote racial diversity.

The Court forfeited an opportunity to recognize benign discrimination in the *Bakke* case. The Court rejected the argument that strict scrutiny should only be used for racial classification when it disadvantages discreet and insular minorities.\(^{49}\) Instead of holding true to the intent of the drafters of the Fourteenth Amendment, which was adopted to protect the rights of the newly freed slaves, the Court used the law to protect the rights of the beneficiaries of overt legally sanctioned discrimination, and acknowledged the right of a white male to use the Fourteenth Amendment to defeat a program designed to benefit the intended beneficiaries of the Fourteenth Amendment.\(^{50}\) The Court emphasized,

> [T]he denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies a system of allocating benefits and privileges on the basis of skin color and ethnic origin.\(^{51}\)

The Court was more interested in the comfort, outrage, and perception of mistreatment of the white students than in providing opportunities to students who were members of a group that had been historically discriminated against by the institution and the society. In *Bakke*, integration took second fiddle to the hurt feelings of white students.

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49. Ibid. at 287–88.
50. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Justice Powell reiterated the view taken in *Bakke*, that the standard of review does not change when the challenged classification operates against a group who has suffered historical discrimination. Ibid. at 273. He emphasized that innocent people should not bear the burden of remedying past discrimination. Ibid. at 281.
The Court addressed the benign discrimination issue again in the *City of Richmond v. Croson* case.\(^5\) In *Croson*, the Court held that the standard of review in evaluating equal protection claims would not change when the race of those burdened or those benefited changes. The Court emphasized that it is impossible to evaluate which racial classifications are benign and which are motivated by illegitimate notions of racial inferiority or simple racial politics.\(^5\) It is hard to tell if the Court was concerned about the feelings of white people or minorities when it asserted that all racial classifications bring the threat of stigmatic harm and may promulgate racial hostility and ideas of racial inferiority unless they are only used for remedial purposes.

While I have often heard the “stigma” argument against affirmative action proposed by whites, I have rarely heard African Americans assert that they would rather not have an opportunity to be awarded a government contract, for example, than deal with the stigma of being given an advantage in the bidding process due to an affirmative action program. Although the Court recognized that a “sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs,”\(^5\) that sorry history was not enough to recognize benign discrimination and thereby uphold the constitutionality of minority business enterprise programs. Again, in *Adarand Constructors, Inc. v. Pena*,\(^5\) the Court rejected the idea of holding benign racial classifications to a lower constitutional standard of scrutiny. After *Adarand*, it was clear the Court would not recognize benign discrimination in local, state, or federal Fourteenth Amendment claims.

One hundred years after the Fourteenth Amendment was adopted to protect the rights of newly freed slaves, it was used to defeat programs designed to promote racial equity and social justice, because of the burden those programs placed on the majority group that benefited most from the discrimination. When South Africa adopted its equal protection clause, it had the history of affirmative action in the United States at its disposal. The South African constitution specifically provides that the equal protection clause will not be used to defeat programs designed to benefit groups that have been historically discriminated against.\(^5\) Hopefully, the experience of African Americans with the Fourteenth Amend-

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6. Ibid. at 493.
7. Ibid. at 499.
ment will not be repeated one hundred years from now when and if the South African equal protection clause is challenged based upon reverse discrimination.

**F. The Court made it impossible to prove racism and discrimination.**

*Bakke* also got it wrong because diversity was used as the compelling state interest that justified the use of race in the admissions process. The University of California discriminated against African Americans just as surely as the Court permitted such discrimination in *Plessy v. Ferguson*. Why should the foundation for the Fourteenth Amendment compelling interest be diversity instead of historical race discrimination? The *Bakke* Court rejected the use of race-conscious preferences as a means of remedying past societal discrimination in the absence of evidence of specific, race-based injuries to individuals. Instead, in a split decision, the Court determined that colleges and universities had a compelling interest in a diverse environment for education and race was one factor that could be considered in establishing diversity.

The diversity foundation for the decision has created a host of illogical results, such as the Fifth Circuit decision in *Hopwood*, in which in order to defeat affirmative action in Texas universities and consequently in all of the Fifth Circuit, the Court determined that race did not contribute to diversity. The result in *Hopwood* is as preposterous as the result in *Plessy v. Ferguson*. It is equally as obvious that “separate but equal” does not provide equal protection of the law, as it is that race contributes to diversity of thought. Racial groups, physically isolated by law for hundreds of years, and segregated for the past fifty years by individually protected choices, will necessarily develop different cultures and points of view as a result of the limited interaction with one another, if not for a host of other reasons. The diversity rationale in *Bakke* opened the window of opportunity for a court so inclined, like the *Hopwood* court,

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to aggravate the wrong of discrimination, by getting it even more wrong by defining race out of diversity.

One of the fortunate things about *Hopwood* is that it resulted in a race-neutral selection process in Texas that has been copied in other states. The ten percent rule guarantees the top ten percent of students, based upon grades, from high schools all over Texas admission into a state college or university. Many have declared the program a great success since the number of African American and Hispanic students has increased to their pre-*Hopwood* levels. Already, the ten percent system is under attack. Detractors claim that the ten percent rule is just a proxy for race and that many deserving Texans are going out of state for college because their places were taken by the students who were admitted with the ten percent rule. Such criticisms reek with overtones of white privilege and the assumption that white students are entitled to the seats currently taken by minorities.

*Hopwood* is not the only decision affected by the diversity rationale in *Bakke*. *Gratz v. Bollinger,* the companion case to *Grutter,* ultimately decided the undergraduate admissions program at the University of Michigan, which included a point system, was unconstitutional. The Citizens for Affirmative Action’s Preservation, defendant interveners in that case, argued that the undergraduate admissions program should pass constitutional muster because it is a narrowly tailored means of remedying past discrimination by the University of Michigan. The district court addressed the historical discrimination rationale of the interveners in a separate opinion devoted to that issue. The first hurdle the interveners had to jump was whether the admissions policy for the university was, in fact, motivated to redress historical and current discrimination with their policy. That proved difficult to do, because the University of Michigan had adopted the constitutionally safe, *Bakke* diversity rationale to support its admissions programs. Nowhere in their policy had the University of Michigan even mentioned historical or present discrimination. The court concluded that defendant interveners had not met the burden of demonstrating that the real or even shared justification for the admissions policy was discrimination. Most university admissions policies after *Bakke* used the *Bakke* diversity rationale as the justification for their programs. Discrimination was thereby divorced from the remedy. Ironically, throughout the nation, use of the *Bakke* diversity rationale

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62. Ibid. at 794–96.
made affirmative action in college admissions distinct from the pervasive historical discrimination that contributed to the need for affirmative action. The irony is even greater in Texas, where the challenged affirmative action plan did not mention the historical discrimination that surely could have been documented, and instead relied on the Bakke diversity test, and the Court found it unconstitutional to use race as a factor in establishing a diverse student body.

The interveners in the University of Michigan case produced significant evidence of historical discrimination. They provided evidence of the miniscule number of African Americans admitted to the university prior to 1969, the refusal to integrate dorms, racist exclusionary clauses in student organization charters, admonitions from the federal government regarding compliance with Title VI, and students’ concerns and charges of discrimination documented in several studies over the years. The long history of discrimination was discounted while the Court instead focused on proof of discrimination by the admissions department. The Court defined discrimination as “outright exclusion” and “discriminatory impact” by admissions policies. The Court pointed out that all of the discriminatory activities took place long before the challenged admissions policy was put into place, and further found statistical disparities in state high school graduation rates compared with university enrollment unacceptable as a means of demonstrating current effects of past discrimination based upon the rationale in the Croson case. The district court said, “As the Supreme Court has acknowledged, there is no doubt that the sorry history of both private and public discrimination in this country has contributed to the lack of opportunities for African Americans. That observation, however, by itself, is not sufficient to justify race-conscious measures.”

It is mind-boggling that it has become impossible to prove discrimination, historical or current, in a society when all agree discrimination was a stark feature in our history and that it still exists. In Croson, the Court said the city of Richmond could not admit to historical discrimination, it had to prove it in order to justify the use of race in a city minority business enterprise program designed to increase the number of city dollars spent with minority businesses. The Court went further to indicate that it was not enough to demonstrate a disparity in the racial makeup of the community when compared with the dollars spent with minority contractors. Instead the Court insisted the relevant comparison

63. Ibid. at 801 (citing Croson, 488 U.S. at 499).
was between the available pool of minority contractors and the dollars spent with minority contractors by the city. When that measure is considered from a practical perspective it makes no sense. Why would minority contractors make themselves available to do work for the city of Richmond when they are fully aware that the work is not available? How could a pool of contractors prepare themselves for such availability when the trade unions discriminated against minority apprentices which made entry into the industry impossible? By cutting discrimination into little isolated pieces and not connecting the various parts of the puzzle that could lead to lack of an available pool of minority contractors at any given point in time, the Court made it impossible to prove discrimination. It is not clear why any parent would encourage their child to go into contracting, with hopes of gaining work from the city of Richmond at a time when there was little hope of getting a contract because of racial discrimination. Without hope for obtaining work, the available pool of minority contractors would necessarily be nonexistent, which in turn makes discrimination impossible to prove under the *Croson* test.

With mountains of evidence of discrimination in the city of Richmond, the capital of the Confederacy, the Court rejected a finding of historical discrimination as a foundation for race-based affirmative action. With a boatload of evidence of discrimination on the part of the University of Michigan, the district court used the *Croson* rule to find there was insufficient evidence to find historical discrimination or current effects of historical discrimination at the University of Michigan. The courts have made historical discrimination impossible to prove by narrowly defining the wrongdoer so that most evidence is unrelated to the very particularized activity the court is scrutinizing. It was necessary to find discrimination on the part of the Admissions office, not the University as a whole. The city of Richmond must find discrimination in its procurement process, not in the city as a whole. Such narrow definitions of discrimination render using historical discrimination impossible as a foundation for race-based programs, and the court says, too bad, so sad, no remedy for you today.

What is the impact of making racism, known to exist, impossible to prove? Perhaps it eliminates racism altogether from our society. Since the Court says that the city of Richmond did not discriminate, that means it is not guilty. Furthermore, since racism is impossible to prove, all of America is not guilty for historical and continued discrimination, which means that African Americans must be responsible for their plight, not
the American society. Inoculation of society from responsibility for the ills of racism leads to arguments that inequities based upon race are because of defects in the race.

**G. The Court terminated federal court intervention in school desegregation cases.**

After a period of slow desegregation of schools throughout the country, a process that took over thirty years, levels of integration in public schools reached an all-time high in the 1980s. With the speed on full throttle and school districts all over the nation responding to court-ordered monitoring of desegregation plans, the court retrenched. Starting with the landmark case of *Oklahoma City School Board v. Dowell*, the Court ended federal court intervention in school desegregation. *Dowell* and the series of cases that followed it are appropriately called the resegregation cases. Once the district court found the school district had operated within the parameters permissible under the Fourteenth Amendment, the purpose of desegregation was fully achieved and there was no more need for Court intervention. *Missouri v. Jenkins* followed *Dowell* and together the cases sent a new message to school districts all over the nation. According to Sheryll Cashin:

> Within a year of the *Jenkins* decision, school districts across the nation were scrambling to get the benefit of the case’s relaxed standard; it was now much easier for school districts to get out from under desegregation orders and to weaken their integration efforts. . . . Researchers found that as federal courts eased oversight of school desegregation

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64. Margaret Graham Tebo, “Are Schools Returning to the 1950’s,” *American Bar Association Journal* (April 2004): 50–51. (Percentage of Black students in majority white schools rose from none in 1954 to 43.5% in 1988. After removal of court oversight only 30.2% of black students attended integrated schools in 2001.)

65. See Bell, supra note 1, pp. 125–27. See also Cashin, supra note 1, p.215 (the retreat from *Brown* started with *Dowell*).


68. In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Supreme Court decided the school system achieved unitary status even though it was still segregated upon a showing that racial imbalance was due to demographic changes. In *Missouri v. Jenkins*, 515 U.S. 70 (1995), the Supreme Court sent the clear message that schools did not have to overextend themselves economically to remedy the effects of past de jure segregation.
programs in the early 1990’s, the percentage of minority students in schools with a substantial white enrollment fell appreciably. 69

Once the oversight of a court is removed, after a school system has earned the status of unitary, the school district is then free to reassign students based upon neighborhoods, eliminate busing, and in some school districts, effectively resegregate the schools. After they achieved unitary status, school districts were free to take actions that resulted in resegregation, as long as those actions, when evaluated separately, would overcome a new challenge of constitutionality.

The theory supporting removal of court supervision of schools was that the unconstitutional effects that caused segregation had been cured and the supervision of the courts was no longer needed. A finding that the system was unitary washed the old wrong away. Any new action would have to sustain the Washington v. Davis and Keyes discriminatory intent standard in order to support a constitutional challenge. The discriminatory intent requirement was much more difficult to demonstrate in 2004 than it was in 1954. Few school districts that had gone through a desegregation lawsuit and years of judicial intervention would be likely to fall prey to a finding of discriminatory intent in the twenty-first century. Lawyers carefully scrutinize laws and actions to make sure they are facially neutral with race-neutral reasons supporting them. The combination of awarding unitary status to school districts and the requirement of finding discriminatory intent in order to support a Fourteenth Amendment violation, dovetailed with the narrow standards now applied to a finding of racial discrimination, means school districts can rest on their laurels after federal supervision is withdrawn. Schools can remain separate and unequal with little likelihood of successful legal challenge in the twenty-first century.

III. Conclusion

We deal here with the right of all of our children, whatever their race, to an equal start in life and to equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in

the future. Unless our children begin to learn together there is little hope that our people will ever learn to live together.\textsuperscript{70}

U.S. Supreme Court Justice Thurgood Marshall observed twenty-five years after \textit{Brown}, what was clear to him at the time he argued \textit{Brown} before the Supreme Court. There are many benefits of an integrated education, not the least of which is that people learn to live with each other. Fifty years after \textit{Brown}, seven out of ten minority students attend predominantly minority schools and most white students attend schools that are eighty percent white.\textsuperscript{71} Given the history of this country, whether school segregation caused residential segregation or vice versa is a chicken-and-egg argument. The roots of separation and the history of inequality run deep in America. In \textit{Brown}, an integrated education system was equated with an egalitarian system. Fifty years after \textit{Brown}, American schools are not integrated and the race of the child is largely determinative of the quality of education a child receives.

This essay began with the assertion that the hearts and minds of the American people have been won over on the issue of segregation. The body of this essay proceeded to describe a series of personal and U.S. Supreme Court decisions that have contributed to our schools and our society remaining segregated and unequal. It would be easy to challenge the sincerity of the first statement, given the series of decisions made by the American people that followed the \textit{Brown} decision. The dilemma is that while Americans truly oppose segregation and would not tolerate the forced separation of the races, Americans have no true dedication to integration. There is a “big disconnect” between segregation and integration. Only the extremists actually want to experience exclusively white or black facilities, whether public or private. On the other hand, individuals make choices that reap an immediate benefit to themselves and their families. Their decisions may not be inspired by a desire to segregate, but segregation is a result.

The reasons for segregative choices are dynamic. It would be too easy to suggest that the reasons are purely economic. For example, people choose homes in neighborhoods that offer qualities they think maximize their enjoyment of their homes. However, it is an understatement to say that white people are wealthier and thereby choose more expensive homes, which exclude African Americans who have less wealth and income as a group. Wealth is a factor in choice, but it does not explain

\textsuperscript{70} Thurgood Marshall, counsel in the \textit{Brown} case, wrote these words as a justice of the Supreme Court in his dissenting opinion in the \textit{Milliken v. Bradley} case.

\textsuperscript{71} Cited in Cashin, supra note 1, p. 218.
why African Americans who can afford homes in upper-middle-class white neighborhoods might choose instead to live in upper-middle-class African American neighborhoods, or why whites who can choose between upper-middle-class African American neighborhoods and similar white neighborhoods, choose the white neighborhood.\(^72\)

Furthermore, there is little explanation for why our governments allow economically exclusive neighborhoods to be developed in the first place, when developers and local governments are familiar with the benefits of fair housing and the burdens of poverty-stricken ghettos. Even equipped with knowledge, exclusive communities are being developed as I write these words, despite the detrimental social consequences.

There are a few things we can rely upon when assessing this problem. First and foremost is that the Court will not help us integrate our schools or promote racial justice. Second, forced integration will have limited success and will be met with resistance just as it was after Brown. If America is to achieve racial integration, a quality education for all children and racial justice, the people must decide they want those things. That does not mean giving lip service to an idea when a poll is taken. The public must “will” a quality education for all children. The public must “will” integration. The public must “will” racial justice.

Colleges and universities all over the country decided they wanted racial integration of their campuses in 1969. They made it happen through recruitment efforts, affirmative action policies in admissions, and whatever else worked. Nine years after integration began, when the Court let the nation down in the Bakke decision, colleges and universities remained steadfast in their resolve to maintain racial integration and adapted their admissions policies to conform to the diversity mandate in Bakke. Twenty-five years after Bakke, the University of Michigan fought with all its heart to retain the diversity mandate of Bakke and won. Even when the Fifth Circuit misinterpreted Bakke and common sense, and ruled that race was not a diversity factor, Texas adopted a race-neutral percent rule, which resulted in some level of racial integration. There is a commitment to racial integration in higher education because the entire industry has bought into the concept that it is good, right, just, and perhaps more fun.

Imagine what would happen if the average American citizen, school district, board of education, developer, local and state government actually bought into the concept of racial integration in the same way that

colleges and universities have. What if we had counties fighting with all their heart to provide the children in their districts with a racially diverse experience in kindergarten through grade twelve? Could we not develop metropolitan school districts that incorporated suburban and urban schools as was contemplated by the district court and school administrators in the *Milliken* case? If we really wanted to provide every student with a quality education, couldn’t we devise a system to pay for education that provided a more equitable distribution of resources than the school district property tax system?

The problem, obviously, is not that the issues are too complex for resolution, it is that we have not won the hearts and minds of the American people on the issue of integration. If Americans were convinced that integration was good for their children, that their children would receive a better education in an integrated environment, that children educated in a segregated environment are less creative, less able to adapt and achieve in an innovative and changing global environment, Americans would fight for integration. Colleges and universities were quick to catch on to the concept of racial integration and its benefits, even before they accepted the concept of diversity on many fronts. We now need to move that concept from higher education to all education, and then perhaps we can have “children who begin to learn together,” which provides hope that people will “learn to live together.”