

AFTER BROWN: WHAT WOULD MARTIN LUTHER KING SAY?♦

by
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The occasion of the first Martin Luther King Jr. Day Speech at Lewis and Clark Law School, following on the heels of the Supreme Court's rejection of two voluntary racial school integration plans, warrants revisiting the conception of equality that called for school integration, the prospects for equal opportunity without education, and remaining arguments for integration. "Integration" here means more than terminating legally-enforced segregation, and more than sheer mixing of people with different races and identities in the same setting. As Dr. King described it, integration involves the creation of a community of relationships among people who view one another as valuable, who take pride in one another's contributions, and who know that commonalities and synergies outweigh any extra efforts that bridging differences may require. Before the disillusionment accompanying the apparent failure of judicially-mandated school integration, integration was inseparable from access to opportunity as a goal of civil rights reformers from the nineteenth century through the middle of the twentieth. W.E.B. Du Bois and Martin Luther King, Jr. separately emphasized that racially separate instruction by teachers who believe in their students' capacities would be better than racially-mixed instruction by teachers who disparaged African-American children—but integration would be still better. As even the good arguments for socioeconomic integration reveal, failure to pursue racial integration—including efforts to create truly inclusive communities of mutual respect—can recreate racial segregation through tracking, special education assignments, and students' own divisions in lunch tables and cliques. Racial integration is informed by demographic changes; making this a multicultural and multi-racial society remains a distinctive goal apart from other efforts to ensure equal educational opportunities. Justice Kennedy's separate opinion in Parents Involved in Community Schools v. Seattle School District No. 1 along with the four dissenters create a fragile majority that would permit school systems and housing developers to build local schools with the aim of encouraging racial integration, to develop

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programs designed to attract racially diverse groups of students, and to hold meetings and recruitment efforts to attract diverse groups of students and teachers. Contrary to the Court's majority opinion, pretending to have achieved color-blind as well as open opportunity—when we have not—disables individuals and communities from understanding what is going on and from becoming equipped to deal with it. In addition to the strategies for integration left open, families and students can choose integrated schools by their residential choices and by making their own lives look like the mass entertainment and ads celebrating integration.

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I. INTRODUCTION

A year after our nation first observed Martin Luther King Day, a movie called *Back to the Future* opened in theaters. The film, launching a popular trilogy, features Marty McFly, a teenager in 1985, who travels back in time 30 years by way of a mad scientist's contraption. He must come to grips with being in the 1950s and get his parents to fall in love in order to fix the damage his presence does to the events of the past.¹ Oddly, given the 1950s setting, the film pays little attention to racial segregation, and it bizarrely attributes the rise of hard rock'n'roll to the white teen time traveler. Nonetheless, this movie came to mind when the Supreme Court rejected two voluntary integration plans in the summer of 2007.

The plans were enacted by public school systems—one in Louisville, Kentucky, for elementary schools, and another in Seattle, Washington, for high schools.² As the first explicit refusal of voluntary efforts to promote racial integration in public schools, the Supreme Court's decision in *Parents Involved for Community Schools v. Seattle School District No. 1* constricted the options available to schools and reversed the more than

¹ BACK TO THE FUTURE (Universal Studios 1985).

² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746–49 (2007) (Roberts, C.J.) (plurality opinion).

50 years of legal endorsement of racial integration as the aspiration of American schooling.³ Back to the future, indeed.

I have wondered what Dr. Martin Luther King, Jr. would say about this moment. He offered the most stirring and ambitious vision of integration for this nation, beyond anything that the nation achieved even at the height of judicially-monitored school desegregation. Dr. King called not only for desegregation, but for integration. He summoned the vision of a “beloved community”: a completely integrated society, a community of love, justice, and brotherhood.⁴ Dr. King emphasized that desegregation—eliminating racial discrimination—would only produce “a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts apart. It gives us social togetherness and spiritual apartness. It leaves us with a stagnant equality of sameness rather than a constructive equality of oneness.”⁵ He held out a standard higher than one ever embraced by the Supreme Court—and now the Court has turned away from its own lower desegregation standard.⁶

In public discussions, legal fights, and political conflicts over the decades, we have lost the distinction between desegregation—the legal termination of official racial segregation—and integration, forging communities whose members continually ensure the rights of each person and advance the capacity of individuals and the collectivity to recognize human dignity and interdependence. In between is the mixing of people with different races and identities in the same setting, for the sheer act of ending official segregation does not necessarily produce a change in the composition of a school, a workplace, or a neighborhood if “private” preferences and economic and credential barriers preserve

³ *Id.* at 2768.

⁴ KENNETH L. SMITH & IRA G. ZEPP, JR., *SEARCH FOR THE BELOVED COMMUNITY: THE THINKING OF MARTIN LUTHER KING, JR.* 125 (University Press 1986) (1974); *SCLC and “The Beloved Community,”* in *CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE* 461, 463 (Jonathan Birnbaum & Clarence Taylor eds., 2000). Elaborated by the Southern Christian Leadership Conference (SCLC) with Dr. King as its first president, the “beloved community” would make “brotherhood . . . a reality,” and reject “black supremacy for this merely substitutes one kind of tyranny for another.” *SCLC and “The Beloved Community,”* *supra*, at 463. Segregation, in contrast, “does as much harm to the *segregator* as it does to the *segregated*. The *segregated* develops a false sense of inferiority and the *segregator* develops a false sense of superiority, both contrary to the American ideal of democracy.” *Id.*

⁵ Kenneth L. Smith & Ira G. Zepp, Jr., *Martin Luther King’s Vision of the Beloved Community*, *CHRISTIAN CENTURY*, April 3, 1974, at 361, *available at* <http://www.religion-online.org/showarticle.asp?title=1603>. Desegregation, even at its best, would only eliminate invidious treatment against blacks in education, public accommodations, and employment, but would not achieve integration, which requires welcoming the participation of blacks in “the total range of human activities.” *Id.*

⁶ *See infra* pp. 619-20 (discussing departure from the requirement to eliminate segregation “root and branch”).

separation. Racial and ethnic mixing, however, does not itself reach the vision of integration, for mixing can occur simply by moving people into the same setting, without shifting the attitudes, goals, and practices of the individuals and institutions, and without creating communities whose members continually ensure the rights of each person and advance the capacity of individuals and the collectivity to recognize human dignity and interdependence. In this broader vision, which I will refer to as “integration,” simply adding people who have been excluded is insufficient given the background experiences, assumptions, institutional design, and power arrangements.⁷ Instead, integration involves the creation of a community of relationships among people who view one another as valuable, who take pride in one another’s contributions, and who appreciate differences and know that commonalities and synergies outweigh any extra efforts that bridging differences may require. In integrated communities, people’s differences become a resource, opening avenues for learning, exchange, self-invention, and self-extension through connections, disagreements, and identifications with people sharing multiple lines of similarity and difference.

Our nation has retreated far from the process of racially desegregating schools that officials segregated; it has bowed out of the work of organizing and sustaining racially mixed schools. School enrollments are, in fact, more segregated in 2000 than they were in 1970.⁸ Now the Supreme Court has restricted “voluntary integration” plans that have pursued both racial mixing and the integration ideal. Government-backed remedies for racial inequality have largely halted except with regard to proven intentional racial discrimination—which any alert person now knows how to elude. People of all races attribute the patterns of residential segregation, disproportionate poverty, unemployment and incarceration at least in part to racism and its legacies.⁹ The racial gap in school achievement mirrors the gap in home ownership, occupation, education, and wealth differentiating whites from both African-Americans and Latinos.¹⁰

⁷ This accords with Dr. King’s own assessment: “White America must recognize that justice for black people cannot be achieved without radical changes in the structure of our society. The comfortable, the entrenched, the privileged cannot continue to tremble at the prospect of change in the status quo.” MARTIN LUTHER KING, JR., *A Testament of Hope*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 313, 314 (James M. Washington ed., HarperCollins 1991) (1986).

⁸ GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 29 (2001) (in 1988 a peak of 44% of southern black students attended majority white schools, dropping to 33% in 1998). *See also* PETER IRONS, *JIM CROW’S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* (2002).

⁹ MICHAEL B. KATZ & MARK J. STERN, *ONE NATION DIVISIBLE: WHAT AMERICA WAS AND WHAT IT IS BECOMING* 86–101 (2006).

¹⁰ *Id.* at 89–101.

Yet slices of Dr. King's vision of integration do appear in the rise of African-Americans as leaders in institutions and practices that once were entirely white, and in the proud support of multiracial constituencies for these leaders. Kenneth Chenault of American Express, Cathy Hughes of TV One, Alwyn Lewis of Sears, and Richard Parsons of Time Warner are the most visible African-American heads of major corporations.¹¹ Oprah Winfrey's daytime show regularly counts 7.3 million viewers, and no one has more influence in book publishing, film and television production, and philanthropy even before the launch of her television channel.¹² Many other talented African-Americans command large and racially diverse audiences in media, sports, and other entertainment industries. Blacks coach as well as play for major sports teams.¹³ By 2007, 11% of federal judges were African-American.¹⁴ The Broadway musical and Hollywood movie *Hairspray* is feel-good entertainment that condemns segregation and celebrates integration in its full sense: that of communities of relationships among people mutually committed to the dignity and rights of each, and relishing the freedom and creativity diverse groups of people can express together. At this very moment, a serious contender for the Presidency of the United States is an African-American man who has already desegregated the elite club of primary candidates.¹⁵ The race for the Democratic Party nomination began with an Hispanic governor and a white female senator as well as several white men, and early debates looked like a Benetton ad—or like America itself. Yet close attention to the racial and ethnic disparities in voting patterns indicates both the facts and perceptions of continuing divisions along these lines.

The contrast among desegregation, racial and ethnic mixing, and integration persists, even with the shift in predominant discussions from talk of race to talk of "diversity." Diversity offers the crucial inclusion of people of all races, ethnicities, and religions—as well as the inclusion of people of both genders, people with disabilities, and other notable traits

¹¹ Kenneth Meeks, *The 75 Most Powerful African Americans in Corporate America*, BNET.COM, http://findarticles.com/p/articles/mi_m1365/is_7_35/ai_n9485658. Parsons had been both CEO and Chairman of the Board; he is still Chairman of the Board but stepped down as CEO in 2007. See Time Warner: Richard D. Parsons, TimeWarner.com, http://www.timewarner.com/corp/management/corp_executives/bio/parsons_richard.html.

¹² See Sam Schechner, *Can't Get Enough Oprah? Wait a Few Years*, WALL ST. J., Jan. 16, 2008, at B1.

¹³ William C. Rhoden, *Sports of The Times; Power Is Colorblind in the New N.B.A.*, N.Y. TIMES, Feb. 4, 2004, at D1; Mike Pesca, *Day to Day: Black Coaches Rise to Top in NFL Poll*, (National Public Radio broadcast Dec. 30, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5076114>.

¹⁴ MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 197 (2007).

¹⁵ See Michael Cooper & Aron Pilhofer, *Democratic Candidates Keep Outraining Republicans*, N.Y. TIMES, Oct. 16, 2007, at A18.

of variation. Yet, as with racial justice, “diversity” as a public policy goal can obscure the contrasts among eliminating exclusions, producing inclusive environments, and forging communities of mutual and generative commitment to the rights and freedoms of each member. Simply ending exclusions does not create mixed groups of people, and mixed groups of people do not necessarily embrace the vision and practices of communities forged through relationships among people mutually committed to the dignity and rights of each, relishing the freedom and creativity diverse groups of people can express together.

Moreover, the focus on diversity can obscure or hinder efforts to desegregate, to produce racial mixing, and to create a community of mutual respect across lines of racial difference. Indeed, several of the justices in the *Parents Involved* decision made diversity in America a reason to condemn the voluntary integration plans in Seattle and Louisville—because those school plans focused on only two racial categories rather than the range of racial, ethnic, and linguistic identities of school-aged children.¹⁶ These communities worked through their elected school boards to pursue racial mixing, not just to end official racial segregation, and they were on their way toward the integration ideal, expressing commitments to the dignity and rights of each person. The districts embraced plans to guard against separation because they knew how racial separation—by official mandate and public practices—had denied dignity and freedom to members of minority groups in the past. Conceived as a goal, diversity should enrich the integration ideal, not curb it. Again, simply mixing children of different backgrounds would be a step, but not the full achievement of a community of respect. The rhetoric of diversity may go some distance toward inviting attitudes of respect and appreciation; it conveys richness and variety across equals, in contrast to the potentially divisive rhetorics of desegregation or affirmative action.

Diversity should enlarge the integration ideal to be fully inclusive and could embed racial mixing in the attitude of appreciation for different backgrounds and perspectives. The enlargement is much assisted by this fact: school-aged children in America can claim every possible racial, ethnic, and religious background. The number of U.S. residents who speak a language other than English at home increased by 47% during the 1990s.¹⁷ By 2000, people in 16.9% of households in Portland, Ore., 47.6% of households in New York City, and 57.8% in Los

¹⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2742 (2007).

¹⁷ James Crawford, *Census 2000: A Guide for the Perplexed*, <http://ourworld.compuserve.com/homepages/jWCRAWFORD/census02.htm>.

Angeles spoke a language other than English.¹⁸ In New York City, school-aged children speak 190 languages; in Los Angeles, they speak 90 languages.¹⁹ Immigration and birth rates combine to make Asians and Latinos an increasing presence, with the Hispanic population doubling between 1970 and 1990 and the Asian population tripling during that time frame.²⁰ As of 1998, the percentage of school-aged children in the United States who were Hispanic exceeded the percentage who were African-American.²¹

Reflecting this shifting demography, “diversity” is embraced and defended by the U.S. military and Fortune 500 companies as crucial to their own missions;²² the United Colors of Benetton proved to be an arresting and durable marketing campaign for a clothing line,²³ and a conservative Republican President, George W. Bush, appointed an African-American man and then an African-American woman to be Secretary of State, a Mexican-American man first as his White House Counsel and then as Attorney General of the United States, and two Asian-Americans to other cabinet posts.²⁴ Growing rates of intermarriage and romances produce enough multi-racial individuals who want to be so

¹⁸ Census: Quick Facts, <http://quickfacts.census.gov/qfd/states/06/0644000.html> (LA); <http://quickfacts.census.gov/qfd/states/36/3651000.html> (NYC); <http://quickfacts.census.gov/qfd/states/41/4159000.html> (Portland).

¹⁹ Harvard Graduate School of Education, Educators Must Focus on Immigrant Children in the Classroom, Oct. 26, 2006, http://www.gse.harvard.edu/news_events/features/2006/10/26_immigrant_children.html (citing Marcelo M. Suárez-Orozco).

²⁰ KLARMAN, *supra* note 14, at 203.

²¹ See Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1751 (2001) (citing Mary Ann Zher, *Un Dia Nuevo for Schools*, EDUC. WK., Nov. 8, 2000, at 39).

²² Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.military.pdf; Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.sixtyfive.pdf.

²³ Benetton: A History of Company that Fights for a Better World, <http://www.newterritoryfuerteventura.com/deborah/benetton.htm>.

²⁴ Joe Klein, *The Benetton-Ad Presidency*, TIME, Dec. 27, 2004, at 73. “A week after George W. Bush was re-elected president, he chose Alberto Gonzales, a Mexican American, to be the next Attorney General. A week later, he selected Condoleezza Rice, an African-American woman, to be Secretary of State and Margaret Spellings, a white woman, to be the next Secretary of Education. Then he selected Carlos Gutierrez, a Cuban American, as Secretary of Commerce. It took Bush a month before he named a standard-issue white male, Governor Mike Johanns of Nebraska, as Agriculture Secretary. Since then, Bush has announced that two Asian Americans, Norman Mineta at Transportation and Elaine Chao at Labor, will remain at their posts.” *Id.* at 73.

identified to modify how the census keeps track of individual racial identities.²⁵

The shift in legal and political rhetoric from racial integration to diversity enlarges the vision and potential beneficiaries of an inclusive society, and could embed the social mixing across racial lines within a full appreciation of the value and distinctiveness of each person. Yet, as employed in legal and political rhetoric, “diversity” erodes specific redress for exclusions experienced by African-Americans and Hispanics.²⁶ “Diversity” could be demonstrated in a school whose entire enrollment consists of non-whites—African-Americans, Hispanics, and South Asians, but no Caucasians; diversity can also be the boast of a school with students from the Balkans, Iran, South Africa, and Spain—without a nonwhite person among them. This is why “diversity” can erode attention to racial equality. In a nation that once enslaved Africans, with states that made white supremacy the law, the “color line” still matters.²⁷ There remains stigma associated with colored skin, evidenced in racial steering in residential housing, demeaning statements at workplaces, and

²⁵ KATZ & STERN, *supra* note 9, at 211–16 (discussing the Office of Management and Budget’s debate over a proposal for a new category of “multiracial” and its decision to compromise by allowing individuals the option of checking off more than one racial category). See David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 108 AM. HIST. REV. 1363 (2003).

²⁶ See Mitchell J. Chang, *Reconsidering the Diversity Rationale*, LIBERAL EDUCATION, Winter 2005, at 6, 9, available at <http://www.aacu.org/liberaleducation/le-wi05/le-wi05feature1.cfm> (arguing that the Supreme Court’s “diversity” reasoning “downgrades race as a signifier of inequity and fails to underscore the need for institutional intervention in order for a racially diverse student body to realize any benefits.”). In practice, the use of “diversity” does not necessarily undermine the social justice goals of racial integration if the latter remains the priority for those who implement diversity recruitment programs. See, e.g., Edgar F. Beckham, *Diversity at the Crossroads: Mapping Our Work in the Years Ahead*, presented at the Association of American Colleges and Universities’ Diversity and Learning: Education for a World Lived in Common Conference (October 27, 2002), available at http://www.aacu.org/meetings/diversityandlearning/DL2002/beckham_crossroads.cfm (Beckham, the former dean of Wesleyan University, commented: “For my part, I was annoyed by the substitution of the term ‘diversity’ for the goal of admitting black students. The term seemed to diffuse the urgency of the desired social justice outcome. It was a euphemism, I thought, designed to duck the real issue. But it worked as a tactic, and as black, Hispanic, and then Asian and Asian-American enrollment grew, and opposition to it fell mute, I resigned myself to ‘diversity’ as an artful term of necessity.”).

²⁷ The phrase was made famous by W.E.B. Du Bois who wrote in 1903: “the problem of the Twentieth Century is the problem of the color-line.” W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 3 (Library of America ed., First Vintage Books 1990) (1903). On its continuing relevance, see HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 23 (HarperCollins 1999) (1980); Evan Thomas, *The Color Line*, NEWSWEEK, Jan. 22, 2008, <http://www.newsweek.com/id/98028>.

suspicion in commercial establishments,²⁸ and the disproportionate presence of African-Americans and Hispanics in the criminal justice system and impoverished neighborhoods compounds that stigma. Bringing together all kinds of whites with all kinds of nonwhites must remain an indispensable element of integration if racial hierarchy is ever to be undone. Yet this understanding of integration now is endorsed in media marketing more than in American public policy. And white Americans have little knowledge of the continuing patterns of racialized degradation, and of the high percentages of poverty among nonwhites.²⁹

Remembering the work and inspiration of Dr. King and the modern civil rights movement he helped to lead, we can try to imagine what this moment would look like to him. What would a consummate visionary and strategist understand and do next? I will focus on schools, kindergarten through 12th grade. Targeted by the NAACP since the 1930s and by President Bush since 2000, schools capture hopes for each next generation and duties of each current generation. Let's consider first, what ever linked racial integration with equality historically; what now are the prospects for equal opportunity in schooling without integration; what arguments, related to the key purposes of education, remain for integration; and what prospects for change in our multiracial, multicultural time we should now pursue.

II. WHAT HISTORICALLY LINKED RACIAL INTEGRATION WITH EQUALITY?

The resegregation of American public schools makes it tempting to argue that integration was never the goal, but merely a means toward the still viable end of equal opportunity.³⁰ The pattern of school resegregation is striking. In 2000, 72% of African-American students

²⁸ MONICA McDERMOTT, *WORKING-CLASS WHITE: THE MAKING AND UNMAKING OF RACE RELATIONS* 6, 63 (2006); Lawrence Blum, *Race, National Ideals, and Civic Virtue*, 33 *SOCIAL THEORY & PRACTICE* 533, 545–48 (2007). For earlier accounts, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

²⁹ See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 748–78 (1975); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 *MINN. L. REV.* 265 (1999); Philip J. Mazzoco et al., *The Cost of Being Black: White Americans' Perceptions and the Question of Reparations*, 3 *DU BOIS REV.* 261 (2006); Patricia J. Williams, *Class Warfare*, *NATION*, Feb. 17, 2003, at 10, 10 (commenting on the insult Secretary of State Condoleezza Rice experienced when she was shown only costume jewelry rather than real jewelry at a store).

³⁰ "Resegregation" here means a return to the racial identifiability of schools, not a return to explicitly state-enforced racial segregation. A combination of government policies (dealing with housing, districting, and school funding), private preferences, and economic factors produce the increasing separation of whites and non-whites in school settings.

nationwide attended predominantly minority schools, compared with 63% in 1980; 37% of African-American and 38% of Hispanic students in 2000 attended schools with 90% or more minority enrollment.³¹ With racial integration remote, it is convenient to conclude that it was never the point.

There is some historical support for this view. Recent scholarship makes clear that the civil rights movement identified economic equality through jobs and equal treatment before commercial and criminal law.³² The extreme exclusion of African-Americans from economic, social, and political opportunities in the United States—and the daily risk of terrorizing violence sanctioned by the states in the Deep South—fueled the NAACP's campaigns under the Equal Protection Clause from the 1930s on. Given the Supreme Court's approval of "separate but equal" in *Plessy v. Ferguson*,³³ the early NAACP initial strategy was to press for equal expenditures for racially separate schools.³⁴ In the case of graduate and professional schools, that meant exposing the states' failures to provide *any* program for black students—and integration seemed far more feasible and cost-effective than building entirely separate campuses.

The pursuit of equal resources continued as the NAACP lawyers turned to public elementary and high schools; the strategy for equal opportunity pursued integration at least in part on the theory that "green follows white." The dollars spent on white students would have to benefit black students if the students sat side by side in the same school. Looking back on the strategy, lawyer and later Judge Robert Carter recalled:

[W]e believed the surest way for minority children to obtain their constitutional right to equal educational opportunity was to require the removal of all racial barriers in the public school system, with black and white children attending the same schools Integration was viewed as the means to our ultimate objective, not as the objective itself.³⁵

³¹ Linda Darling-Hammond, *Educational Quality and Equality: What It Will Take To Leave No Child Behind*, in *ALL THINGS BEING EQUAL: INSTIGATING OPPORTUNITY IN AN INEQUITABLE TIME* 39, 43 (Brian D. Smedley & Alan Jenkins eds., 2007) (using U.S. Department of Education statistics). Students of color are typically taught by teachers with lower qualifications than those teaching white students, and also have unequal access to advanced placement courses, science labs, and other components of quality educational programs. *Id.* at 54–59.

³² RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

³³ 163 U.S. 537 (1896).

³⁴ MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, 105–06 (1987).

³⁵ Robert L. Carter, *The Unending Struggle for Equal Educational Opportunity*, 96 TCHRS. C. REC. 619, 621 (1995) (quoted in Lawrence Blum, *The Promise of Racial Integration in a Multicultural Age*, in *MORAL AND POLITICAL EDUCATION* 383, 393 (Stephen Macedo & Yael Tamir eds., 2002)).

This was a retrospective statement, made long after the deep troubles with integration emerged, and it no doubt reflected something real. From the vantage point of more than 50 years after *Brown*, the elusiveness of full integration accompanies many reassessments. Commentators emphasize that integration was a means, not the goal. My colleague Charles Ogletree stresses how many African-Americans would have rather kept their jobs and positions of influence as teachers, school principals, and janitors “than see their charges bused to white schools run by white principals where white educators often made the children all too grimly aware of their distaste for the new state of affairs.”³⁶ Professor Roy Brooks argues that integration has failed as a school reform program, and urges a focus on achievement of black students in their essentially separate schools.³⁷ Professor Derrick A. Bell Jr. and Mary Dudziak emphasize that the victory in *Brown* had more to do with the efforts by the United States to improve its international image during the Cold War than with any real commitment to improve educational lives for disadvantaged and minority students.³⁸ Leading expert Professor Linda Darling-Hammond reviews the resegregation patterns in a recent essay, and ends with a crisp and cogent summary of school reforms to achieve equality.³⁹ Most striking is the omission of integration as a strategy for future school reform.

Many people on the front lines of scholarship of, and advocacy for, equal educational opportunities do not see racial integration as necessary or feasible. Sheryll Cashin puts it succinctly in observing that black people “have become integration weary.”⁴⁰ So have education officials. The superintendent of the Boston public schools said a few years ago: “My issue is focusing on how to improve education for all children in this city . . . and not be distracted or have a lot of energy and resources going into debates around student assignment.”⁴¹

Yet it would be wrong to deny the long-standing importance of integration as a goal in the civil rights struggles for advocates of racial

³⁶ CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 296–97 (2004).

³⁷ ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* (1996). *See also* DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 161 (2004); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

³⁸ BELL, *SILENT COVENANTS*, *supra* note 37, at 49–68; MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

³⁹ Darling-Hammond, *supra* note 31, at 77–78.

⁴⁰ SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* xii (2004).

⁴¹ JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 30 (2003) (quoting Thomas Payzant).

equality. Before the Civil War and the end of slavery, abolitionist publisher Benjamin Roberts tried to enroll his daughter in a white school in Boston in the 1840s; he pursued integration in order to obtain the best educational opportunity for his daughter and to make schools the place of preparation for a society of equals.⁴² His lawyers, including a leading white anti-slavery advocate, framed a challenge to the legislated segregation and made the radical argument for full equality to the Massachusetts Supreme Court: "The school is the little world where the child is trained for the larger world of life . . . and therefore it must cherish and develop the virtues and the sympathies needed in the larger world."⁴³ They argued further that the inculcation of caste distinction among citizens precluded "those relations of Equality which the constitution and Laws promise to all."⁴⁴ This court challenge to officially mandated segregation failed in 1849, but helped to trigger the Massachusetts legislature's abolition of segregated schools in 1855.⁴⁵ Other states did not follow this lead.

After the Civil War and the Reconstruction Amendments, political backlash formalized segregation-by-law while vigilante violence arrived as a tool of white supremacy.⁴⁶ Neither racial mixing nor the fuller ideal of integration could be separated from the search for economic

⁴² After the war and enactment of the Civil Rights amendments, Roberts recalled the legislative solution for his desegregation suit: "The man of yesterday, borne down by servile oppression, a stranger in the land of his nativity, his limbs galled by chains and fetters and naught but black despair settled upon his troubled mind . . . now wrested by the powerful arm of justice from his tormentors and placed on the moral platform untrammelled, free and supplied with all that is necessary to a fully developed member of the brotherhood of man. . . . Who among us can refrain from giving vent to highest exultation over these remarkable events?" BENJAMIN F. ROBERTS, OUR PROGRESS IN THE OLD BAY STATE, THE NEW ERA (1870), quoted in George R. Price & James Brewer Stewart, *The Roberts Case, the Easton Family, and the Dynamics of the Abolitionist Movement in Massachusetts, 1776-1870*, 4 MASS. HIST. REV. ¶ 7 (2002), available at <http://www.historycooperative.org/journals/mhr/4/price.html>. Roberts had first publicly resisted segregation by refusing in 1800 to sit in the section set aside for blacks in his church; he and his family were ejected from the church. *Id.* at ¶ 18.

⁴³ James Oliver Horton & Michele Gates Moresi, Roberts, Plessy, and Brown: *The Long Hard Struggle Against Segregation*, OAH MAG. OF HIST., WINTER 2001, at 14, 15, available at <http://www.oah.org/pubs/magazine/deseg/horton.html>.

⁴⁴ *Id.* In David Herbert Donald's biography of Sumner, Robert's lawyer and a leading anti-slavery leader, Donald emphasizes how unusual Sumner's commitment to equality between black and white Americans in education, social relations, and politics was for a white leader during that time. See DAVID HERBERT DONALD, CHARLES SUMNER (Da Capo Press 1996). On the response of the Massachusetts court, see also LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

⁴⁵ *Roberts v. Boston*, 59 Mass. (5 Cush.) 198 (Mass. 1849); Leonard W. Levy & Harlan B. Phillips, *The Roberts Case: Source of the "Separate but Equal" Doctrine*, 56 AM. HIST. REV. 510, 517 (1951); Donald M. Jacobs, *The Nineteenth Century Struggle Over Segregated Education in the Boston Schools*, 39 J. NEGRO EDUC. 76, 80-85 (1970).

⁴⁶ RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 66-67 (2003).

opportunity, political participation, physical safety, and social respect, given the starting points of slavery, lynching, Jim Crow laws excluding blacks from commercial and public spaces, and white control of economic and political resources. Official segregation arose in the South alongside strategies to prevent blacks from voting, and the separate facilities—from train cars to schools—never approximated the white facilities in quality.⁴⁷ Undoing racial oppression, exclusion, and violence would entail the creation of a shared community of equals—and would advance society toward the ideals of democracy and freedom not yet fully realized for anyone.⁴⁸ Ending lawlessness and seeking opportunities for education and work stood at the top of the agenda in the years following the Civil War, with some African-American leaders seeking conciliation and accommodation, and others more militantly pressing for an end to racialized treatment, including an end to segregation.⁴⁹

The NAACP owes its roots to the more militant group, led by W.E.B. Du Bois and William Monroe Trotter who launched the Niagara Movement in 1905 to pursue equal education, complete enfranchisement, enforcement of the 14th and 15th Amendments, and the end of forced segregation.⁵⁰ The Declaration of the Niagara Movement

⁴⁷ KLARMAN, *supra* note 14.

⁴⁸ An important feature of King's vision pointed to the ways that the civil rights movement would benefit whites and everyone in the society: "American politics needs nothing so much as an injection of the idealism, self-sacrifice and sense of public service which is the hallmark of our movement." MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 151 (1964). See also Martin Luther King, Jr., Address at the Youth March for Integrated Schools at the Washington Monument (Apr. 18, 1959), in 5 THE PAPERS OF MARTIN LUTHER KING, JR., at 186, 188 (Clayborne Carson et al. eds., 2005): "Thus, the Negro, in his struggle to secure his own rights is destined to enlarge democracy for all the people, in both a political and a social sense." Even more pointed are the reflections of James Baldwin, who emphasized the distorting effects of racial oppression on whites, and that whites can only liberate themselves when blacks are liberated. JAMES BALDWIN, THE FIRE NEXT TIME (1963).

⁴⁹ John Hope Franklin's magisterial book, *From Slavery to Freedom: A History of American Negroes*, first published in 1947 and revised in 1956, devotes little attention to integration in recounting the struggles to overturn slavery, pursue self-help, and survive lynching and race riots. JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES (Alfred A. Knopf 2d ed. 1956) (1947).

⁵⁰ *Id.* at 437. The declaration of the Niagara Movement had this to say about schooling: "Education: Common school education should be free to all American children and compulsory. High school training should be adequately provided for all, and college training should be the monopoly of no class or race in any section of our common country. We believe that, in defense of our own institutions, the United States should aid common school education, particularly in the South, and we especially recommend concerted agitation to this end. We urge an increase in public high school facilities in the South, where the Negro-Americans are almost wholly without such provisions. We favor well-equipped trade and technical schools for the training of artisans, and the need of adequate and liberal endowment for a few institutions of higher education must be patent to sincere well-wishers of the race."

spoke more of oppression, violence, condescension, and abuse than integration as it demanded equal treatment.⁵¹ Yet the Niagara group also opposed distinctions drawn solely on race or color, and expressly targeted instances of legally mandated segregation for change; they protested the Jim Crow car on the train for making blacks “pay first-class fare for third-class accommodations,” where they faced “insults and discomfort” and sought “equal treatment in places of public entertainment.”⁵² Attacking the degradation and dishonor of segregation, the activists also emphasized instances when the refusal of integration spelled complete denial of opportunity. The most explicit call for integration in the Niagara Movement’s statement in 1905 blasted military and naval training schools which excluded blacks, despite the service of African-Americans in five wars.⁵³

The Niagara Declaration did not insist on integration in public schools. Instead, it demanded access to schooling, with high aspirations—a familiar plea in African-American struggles for freedom.⁵⁴ Demanding rights, the document also embraced correlative duties, including the duty “to send our children to school,” and the document advanced a very clear and comprehensive conception of education, crucial to self-respect and self-development—yet, again, without reference to integration.⁵⁵

We want our children educated. The school system in the country districts of the South is a disgrace and in few towns and cities are the Negro schools what they ought to be. We want the national government to step in and wipe out illiteracy in the South. Either the United States will destroy ignorance or ignorance will destroy the United States.

And when we call for education we mean real education. We believe in work. We ourselves are workers, but work is not necessarily

The Niagara Movement’s Declaration of Principles (July 11, 1905), *available at* <http://www.math.buffalo.edu/~sww/0history/hwny-niagara-movement.html>.

⁵¹ Niagara Movement’s Declaration of Principles, *supra* note 50 (“The Negro race in America stolen, ravished and degraded, struggling up through difficulties and oppression, needs sympathy and receives criticism: needs help and is given hindrance, needs protection and is given mob-violence, needs justice and is given charity, needs leadership and is given cowardice and apology, needs bread and is given a stone.”).

⁵² *Id.*

⁵³ *See id.* (“We regret that his [sic] nation has never seen fit adequately to reward the black soldiers who, in its five wars, have defended their county [sic] with their blood, and yet have been systematically denied the promotions which their abilities deserve. And we regard as unjust, the exclusion of black boys from the military and naval training schools.”).

⁵⁴ *See* IRONS, *supra* note 8, at 6–10; WORMSER, *supra* note 46, at 27; Theresa Perry, *Up from the Parched Earth: Toward a Theory of African-American Achievement*, in YOUNG, GIFTED, AND BLACK 1 (Theresa Perry, Claude Steele & Asa G. Hillard III. eds., 2003).

⁵⁵ Niagara Movement’s Declaration of Principles, *supra* note 50.

education. Education is the development of power and ideal. We want our children trained as intelligent human beings should be, and we will fight for all time against any proposal to educate black boys and girls simply as servants and underlings, or simply for the use of other people. They have a right to know, to think, to aspire.⁵⁶

Over time, W.E.B. Du Bois himself grew skeptical about the possibility of integration as a goal and stressed that “theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education;”⁵⁷ segregated schools would be better than mixed schools where Negroes were harassed or degraded.⁵⁸ Yet, in language that could not be more relevant today, Du Bois wrote in 1934:

I know that this article will forthwith be interpreted by certain illiterate nitwits as a plea for segregated Negro schools. It is not. It is saying in plain English that a separate Negro school where children are treated like human beings, trained by teachers of their own race, who know what it means to be black, is infinitely better than making our boys and girls doormats to be spit and trampled upon and lied to by ignorant social climbers whose sole claim to superiority is the ability to kick niggers when they are down.⁵⁹

⁵⁶ W.E.B. Du Bois, Address at the Second Annual Meeting of the Niagara Movement ¶ 11 (Aug. 16, 1900), *available at* <http://www.wfu.edu/~zulick/341/niagara.html>.

⁵⁷ W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, in DU BOIS ON EDUCATION 134, 143 (Eugene F. Provenzo Jr. ed., 2002).

⁵⁸ John W. Davis cited W.E.B. Du Bois in his defense before the Supreme Court of the “separate but equal” doctrine, but in so doing, misunderstood Du Bois’s long-term hope for desegregation. Yale Kamisar, *Foreword* to ARGUMENT: THE COMPLETE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, xxvi–xxvii (Leon Friedman ed. 1969). Du Bois made clear in his autobiography in the context of medical education that integration remained his long-term goal, but because it would take so long, creating and supporting all-black institutions should be a priority. See DAVID LEVERING LEWIS, *W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963*, 292 (2000) (quoting from *Dusk of Dawn*). The NAACP board debated and rejected Du Bois’s argument for opposing enforced segregation while supporting “divergent development” through black institutions, and in 1934, Du Bois resigned his post as editor of *The Crisis*, the NAACP’s “organ.” *Id.* at 341–44. Demonstrating that the argument pertained to tactics rather than to ends, Du Bois wrote: “Use segregation. . . . Use every bit that comes your way and transmute it into power . . . [and that power] someday will smash all race separation.” *Id.* at 345 (quoting Du Bois).

⁵⁹ WORMSER, *supra* note 46, at 149 (quoting Du Bois).

Martin Luther King, Jr. had a similar view;⁶⁰ if the choice is solely between racial mixing in a school where teachers and fellow students disparage students of color, separate instruction with qualified teachers who believe in the students of color would be a better option. Yet truly integrated education, with access to students from different backgrounds and walks of life, and an atmosphere of mutual respect and commitment to advancing the dignity and rights of each, would be better still.

Even if this full achievement of integration seemed remote, the choice between separate instruction and racial mixing did not work for graduate and professional training, which grew much in demand among blacks after World War I. Only racial mixing would open access to the education, credentials, and job opportunities represented by these programs. Acknowledging that separate institutions would be both exorbitant and ineffective, several states appropriated money for out-of-state graduate training for Negroes in order to preserve the in-state white-only public institutions. The Supreme Court rejected this strategy in 1938, ruling in *Missouri ex rel. Gaines v. Canada* that each state must provide education within the state in order to satisfy its duty to all of its citizens.⁶¹ The goal of integration became bound up with the recognition that separate institutions would not only be too expensive but also would never offer access to the same social networks and resources as would a shared and integrated institution.⁶² Here, integration emerged as a goal precisely because diverse people do and should become resources for each other. This vision of integration may have seemed remote given the presumption, even by liberal white political leaders, that blacks and whites would continue to live and work in separate worlds. Franklin Delano Roosevelt's New Deal recruited African-American leaders to roles as political advisors but confined them to problems affecting the black community.⁶³

Integration—the creation of a diverse community marked by equality, respect, appreciation of differences, and creative exchanges—would be preferable to the policy of mixing, if mixing only replicates

⁶⁰ Martin Luther King Jr. once said: "I favor integration on buses and in all areas of public accommodation and travel . . . I am for equality. However, I think integration in our public schools is different. In that setting, you are dealing with one of the most important assets of an individual—the mind. White people view black people as inferior. A large percentage of them have a very low opinion of our race. People with such a low view of the black race cannot be given free rein and put in charge of the intellectual care and development of our boys and girls." Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, at 8.

⁶¹ 305 U.S. 337, 352 (1938). States resisted complying with this ruling, however; institutions like the University of Texas School of Law enacted out-of-state graduate scholarship programs after the Supreme Court rejected this scheme in *Missouri ex rel. Gaines v. Canada*. See KLARMAN, *supra* note 14, at 136–37.

⁶² See e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

⁶³ FRANKLIN, *supra* note 49, at 519–28.

racial hierarchies. By 1948, the NAACP targeted not only unequal resources, but also segregation, in its legal challenges to segregated public schooling. Five separate suits proceeded, initially exposing the inadequacy of the materials allotted to black schools, such as transportation, books, and teachers. Some of the schools had no desks. Parents named in the suits lost their jobs and faced harassment.⁶⁴ One suit pressed the South Carolina governor to institute a sales tax to raise funds for black schools. The plaintiffs' lawyers included the claim that separate schools could never be fully equal, but ultimately conceded that the separate schools had sufficient equality in material resources so that the challenge to segregation alone remained.⁶⁵ The Supreme Court combined the suit into what we now call *Brown v. Board of Education*. Before the Court, lawyer Thurgood Marshall argued that regardless of increasing expenditures to improve black schools, the significant point was that segregation took African-Americans "out of the mainstream of American life."⁶⁶ The Supreme Court accepted the claim that official segregation communicated an unacceptable message of inferiority, and announced, "[s]eparate educational facilities are inherently unequal" in the context of public schooling.⁶⁷

The Court put off its announcement of the remedy for the constitutional violation posed by segregated schools for another year, amid debates over whether gradual or swift desegregation would give rise to more social resistance.⁶⁸ President Dwight D. Eisenhower failed to signal support for aggressive enforcement and instead urged moderation and local decision making, and the Court turned in 1955 to the remedy for the constitutional violations found a year earlier.⁶⁹ The Court directed that the defendant school districts make a "prompt and reasonable start" toward compliance, advised the district courts to retain jurisdiction to consider problems arising with desegregation efforts, directed the district courts to require the school board defendants in the five cases to submit a desegregation plan within 90 days, and established the incongruous notion of "all deliberate speed" as the guide for the timing of desegregation plans.⁷⁰ Only 15 months after *Brown*, a group of white men brutally lynched fourteen-year-old Emmett Till in Mississippi. An all-white

⁶⁴ KLUGER, *supra* note 29, at 302, 349–52, 447–48, 542.

⁶⁵ *Id.* at 334–35, 450–51.

⁶⁶ BENJAMIN F. HORNSBY, JR., S.C. DEPT. OF ARCHIVES & HIST., STEPPING STONE TO THE SUPREME COURT: CLARENDON COUNTY 17 (1992).

⁶⁷ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954). By 1946, a federal judge had already rejected educational segregation of Mexican Americans; the California legislature revoked statutory school segregation for Asian Americans that same year. *See also*, KLARMAN, *supra* note 14, at 145.

⁶⁸ *See* KLUGER, *supra* note 29, at 745.

⁶⁹ KLARMAN, *supra* note 14, at 154.

⁷⁰ *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 300–01 (1955); KLUGER, *supra* note 29, at 745–48.

jury acquitted the men prosecuted for the murder and Emmett Till's mother insisted on an open casket, attracting international media exposure of his mutilated body. The incident exposed the strict code of racial subordination enforced by vigilante violence and a corrupted legal system, and it is widely credited for sparking the grassroots movements for the still-unrealized civil rights for all.⁷¹

Against the backdrop of this and other violent incidents, school desegregation stalled in the South. White resistance took the forms of delay, subterfuge through segregative school assignment plans using proxies for race and overt refusals to comply.⁷² After the Supreme Court remanded the five cases consolidated in *Brown*, the district court in South Carolina forbade the school authorities from requiring segregation, but explicitly distinguished abolishing segregation from requiring integration.⁷³ In Virginia, the legislature cut off public funds for any racially integrated school and the governor decided to close schools rather than integrate them.⁷⁴ The NAACP filed successful challenges to these laws until both the Virginia Supreme Court of Appeals and the Federal Court of Appeals rejected the school closing statute.⁷⁵ The state legislature responded by repealing the compulsory school law,⁷⁶ and local authorities closed the public schools in Prince Edward County in 1959. Private schools, supported by state tuition grants and county tax credits,

⁷¹ See THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE (Christopher Metress ed., 2002). See also Press Release, U.S. Department of Justice, Justice Department to Investigate 1955 Emmett Till Murder (May 10, 2004) (available at http://www.usdoj.gov/opa/pr/2004/May/04_crt_311.htm). The investigation did not produce any new charges or sanctions. When the federal Department of Justice reopened an investigation into the murder, it was a Bush appointee, Assistant Attorney General for Civil Rights R. Alexander Acosta, who stated, "This brutal murder and grotesque miscarriage of justice outraged a nation and helped galvanize support for the modern American civil rights movement." *Id.*; Jerry Mitchell, *Grand Jury Issues No Indictments in Till Killing*, CLARION LEDGER, Feb. 27, 2007, <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20070227/NEWS/702270388/0/NEWS>.

⁷² See Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 202 (1964).

⁷³ *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

⁷⁴ See *James v. Almond*, 170 F. Supp. 331, 334–35 (E.D. Va. 1959). See also Matthew D. Lassiter & Andrew B. Lewis, *Massive Resistance Revisited: Virginia's White Moderates and the Byrd Organization*, in THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA 1, 7 (Matthew D. Lassiter & Andrew B. Lewis eds., 1998); BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE, 1–5, 119–21 (1961).

⁷⁵ *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959); *Allen v. County Sch. Bd. of Prince Edward County*, 198 F. Supp. 497 (E.D. Va. 1961).

⁷⁶ J. KENNETH MORELAND, THE TRAGEDY OF CLOSED PUBLIC SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA: A REPORT FOR THE VIRGINIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1964), available at <http://www.library.vcu.edu/jbc/speccoll/report1964.pdf>.

emerged to educate the county's white children.⁷⁷ Most of the county's 1,700 black children had no educational opportunities for five years. A full ten years after *Brown v. Board of Education*, the Supreme Court rejected these evasions of the desegregation mandate and declared, "[t]he time for mere 'deliberate speed' has run out."⁷⁸

Although this was the most extreme instance of resistance to desegregation, other federal courts delayed serious enforcement in the face of similar resistance.⁷⁹ The Supreme Court left enforcement to the federal district courts, which had discretion to slow desegregation to a standstill.⁸⁰ Some counties voluntarily desegregated, but segregation persisted in most Southern districts⁸¹ with the vocal defense of ninety-six United States senators, representatives, governors, and mayors.⁸² The Court turned a corner in 1958 when it unanimously rejected state resistance to a school board plan to desegregate the high school in Little Rock, Arkansas.⁸³ This time, President Eisenhower backed the Court fully.⁸⁴ Yet, until 1960, 1.4 million black schoolchildren in the Deep South still remained in fully segregated schools,⁸⁵ and by 1964, integrated schooling reached only one in eighty-five black students in the eleven Southern states that had joined the Confederacy during the Civil War.⁸⁶

Sympathy for slain President John F. Kennedy, and the political skills of new President Lyndon Johnson, propelled grassroots politics, boycotts, national attention and political action surrounding state-level crises, and,

⁷⁷ The lawfulness of racial exclusion in private settings itself reflects a series of public policy choices. See Imani Perry, *Dismantling the House of Plessy: A Private Law Study of Race in Cultural and Legal History With Contemporary Resonances*, 33 *STUD. IN L., POL., & SOC.* 91, 93–94 (2004).

⁷⁸ See *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 232 (1964) ("[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws."). For details on the Prince Edward County story, see OLIVER W. HILL SR., *THE BIG BANG: BROWN V. BOARD OF EDUCATION AND BEYOND* 148–75 (2000). Lassiter & Lewis, *supra* note 74, at 19. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 752–59 (2006).

⁷⁹ JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 86–117 (2001).

⁸⁰ See J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, 80–82 (1979).

⁸¹ *Id.* at 101–117.

⁸² See *The Southern Manifesto*, 84 *CONG. REC.* 4459 (March 12, 1956).

⁸³ *Cooper v. Aaron*, 358 U.S. 1 (1958). See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 *GEO. L.J.* 1, 3 (1979).

⁸⁴ See KLARMAN, *supra* note 14, at 155 (Eisenhower authorized the Army to enforce desegregation in Little Rock).

⁸⁵ *Id.* at 157.

⁸⁶ *THE CIVIL RIGHTS RECORD* 378 (Richard Bardolph ed., 1970).

ultimately, the adoption of the 1964 Civil Rights Act.⁸⁷ Then, aided with the tools given to the federal government by the 1964 Civil Rights Act and energized by the Civil Rights movement that pushed for it, the United States Department of Justice, federal judges, and public officials began to dismantle officially dual school districts and desegregate parks, buses, courthouse, and hotels. Reinforced with justices appointed by Democratic presidents, the Supreme Court itself joined in enforcing school desegregation and rejecting the delaying tactics of resisting school districts.⁸⁸ In 1968, the Court rejected a “freedom of choice” plan under which no white students elected to join the 85% of black students who remained in the historically black school.⁸⁹ In 1970, President Richard Nixon expressed his commitment to enforce the law, and his staff organized biracial leaders in the seven key Southern states to plan for peaceful and orderly implementation of desegregation.⁹⁰ In 1971, the Supreme Court, with the participation of Justices appointed by President Nixon, authorized district courts to order comprehensive desegregation plans; including shifting grades between schools to combine different school populations, altering attendance zones, and requiring busing in a school system where over half of the African-American students still attended all-black schools.⁹¹ By 1972, the previously segregated Southern schools became the least segregated in the country.⁹² School desegregation moved North with the affirmation of the Court.⁹³ Between 1964 and the early 1980s, black student high school graduation rates escalated, and their performance on standardized tests approached the

⁸⁷ See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 33–39 (1969). President Johnson urged Congress to enact the civil rights bill as the best memorial for the slain President Kennedy. KLARMAN, *supra* note 14, at 176. See also WALTER F. MURPHY & JOSEPH TANENHAUS, *THE STUDY OF PUBLIC LAW* 52 (1972).

⁸⁸ From 1962 to 1967, Democratic presidents appointed Byron White, Arthur Goldberg, Abe Fortas, and Thurgood Marshall. In addition, although appointed by a Republican president in 1956, William J. Brennan, proved a forceful leader for racial desegregation. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* lxxxix–xc (5th ed. 2005); Peter M. Shane, *The Limits of Legal Realism as Biography*, 21 *LAW & SOC. INQUIRY* 205 (1996) (reviewing KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* (1993)).

⁸⁹ *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 441 (1968).

⁹⁰ George P. Shultz, *How a Republican Desegregated the South's Schools*, *N.Y. TIMES*, Jan. 8, 2003, at A23; TOM WICKER, *ONE OF US: RICHARD NIXON AND THE AMERICAN DREAM* 486–87 (1991) (“[T]he Nixon administration accomplished more in 1970 to desegregate Southern school systems than had been done in the sixteen previous years.”).

⁹¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 8–10 (1971).

⁹² CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 26, 179 (2004).

⁹³ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 191 (1973).

performance of white students.⁹⁴ Notably, and inadequately publicized, whites' high school graduation rates and test performance also increased during the same period.⁹⁵

This high-water mark was short-lived. Opponents renamed desegregation as "forced busing" and protested it in many regions. White families with sufficient resources fled to the suburbs or private schools.⁹⁶ A majority of whites told opinion pollsters that the Johnson administration was pursuing civil rights too aggressively.⁹⁷ The conservative appointees to the Supreme Court rejected a challenge to interdistrict disparities in school expenditures in Texas,⁹⁸ and then enabled white flight and set back the cause of integration. In *Milliken v. Bradley* in 1974, the Court confined desegregation orders to district lines and forbade the inclusion of suburbs to rectify urban segregation, despite evidence of involvement by the state in policies that produced racial segregation.⁹⁹ The Court treated differences in the racial composition between districts as beyond its remedial power, giving no recognition of the longstanding roles to local, state, and federal government in promoting and enforcing racial segregation in housing and real estate.¹⁰⁰ City borders would henceforth confine both desegregation plans and the enclaves of impoverished neighborhoods themselves victimized by violence and drugs. In 1979, dissenting from the Court's approval of a desegregation plan, Justice Louis Powell treated residential segregation as a product of economic and social forces beyond both school board action and legitimate judicial remedy.¹⁰¹

Recasting *Brown* as a rejection of official segregation, the Supreme Court began to draw sharp lines between official and intentional governmental segregation, warranting a desegregation remedy, and "de facto" segregation resulting from individual choices or social practices, exempted from judicial remedy.¹⁰² As most white parents repeatedly

⁹⁴ HOCHSCHILD & SCOVRONICK, *supra* note 41, at 38–40 (reviewing studies); Gary Orfield, *Introduction* to SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 1, 7–8 (John Charles Boger & Gary Orfield eds., 2005).

⁹⁵ HOCHSCHILD & SCOVRONICK, *supra* note 41, at 38.

⁹⁶ CLOTFELTER, *supra* note 92, at 75–96.

⁹⁷ KLARMAN, *supra* note 14, at 190.

⁹⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court also allowed private discrimination to proceed outside equal protection guarantees even when the private group received public support through a state liquor license. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

⁹⁹ 418 U.S. 717 (1974).

¹⁰⁰ See, e.g., CASHIN, *supra* note 40, at 8, 32–38; KLARMAN, *supra* note 14, at 140–41.

¹⁰¹ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 488 (1979) (Powell, J., dissenting).

¹⁰² *Milliken*, 418 U.S. at 717; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 139–141 (1997).

demonstrated a preference for mainly white schools,¹⁰³ whites then and now could choose largely white schools by moving to the suburbs, selecting private schools, or arranging placement of their children in high academic tracks.¹⁰⁴ Desegregation plans to redistribute declining numbers of whites in inner-city public schools started to present questions and courts began to consider whether further desegregation would simply spur more “white flight.”¹⁰⁵ The Court abandoned its 1968 call to remove segregation “root and branch,” and by 1991, the Court declared that discrimination need only be “eliminated to the extent practicable.”¹⁰⁶ Since then, school districts under desegregation orders have successfully petitioned to end judicial supervision.¹⁰⁷ Racial segregation increased as districts returned to assigning students to neighborhood schools.¹⁰⁸ After Thurgood Marshall’s appointment, a Democratic president would not nominate a Supreme Court Justice for 26 years.¹⁰⁹ In the meantime, the Court has not only turned course on desegregation, racial mixing, and integration, it has also curbed the ability of others to pursue them.¹¹⁰ It has allowed local districts to use new student assignments, rezoning and redistricting to undo racial mixing and increase segregation.¹¹¹

¹⁰³ CLOTFELTER, *supra* note 92, at 90–95, 181–85.

¹⁰⁴ *Id.* at 81–138, 181–85. From *Brown* on, the Court rejected official segregation. What about unofficial segregation? What does it communicate when whites resist education with nonwhites? These questions, raised then, are still relevant today.

¹⁰⁵ See Calhoun v. Cook, 332 F. Supp. 804, 806 (N.D. Ga. 1971); Mapp v. Bd. of Educ., 525 F.2d 169 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). On debate over causes of white flight, see KEVIN M. KRUSE, WHITE FLIGHT, ATLANTA, AND THE MAKING OF MODERN CONSERVATISM (2005); David Armor, *White flight and the Future of School Desegregation*, in SCHOOL DESEGREGATION 187 (Walter G. Stephan & Joe R. Feagin eds., 1980).

¹⁰⁶ Compare Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) (“root and branch”) with Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991) (“to the extent practicable”); H.L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION: CIVIL RIGHTS AND LIBERTIES 32 (2nd ed. 2005).

¹⁰⁷ See, e.g., Dowell, 498 U.S. at 237; Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000); Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325 (11th Cir. 2005).

¹⁰⁸ HOCHSCHILD & SCOVRONICK, *supra* note 41, at 35. See Freeman v. Pitts, 503 U.S. 467 (1992) (permitting withdrawal of desegregation remedy in portions that achieved compliance). See also Missouri v. Jenkins, 515 U.S. 70 (1995) (rejecting remedy intended to improve Kansas City schools and attract white students).

¹⁰⁹ President Bill Clinton successfully nominated Ruth Bader Ginsburg in 1993 after 10 justices were named by Republican presidents. Members of the Supreme Court, Infoplease.com, <http://www.infoplease.com/ipa/A0101281.html>.

¹¹⁰ See Alexander v. Sandoval, 532 U.S. 275 (2001) (rejecting private right of action under civil rights statute and halting efforts to pursue educational equality without proof of intentional racial discrimination).

¹¹¹ David L. Kirp, *Interring a Dream: The Quiet Death of School Integration*, AM. PROSPECT, Aug. 12, 2002, at 17. The Supreme Court denied the request by black parents to review resegregation in Charlotte-Mecklenburg, which was the scene of the

This is the context for the return of racially separate schools; this is the context for the decline of the integrationist ideal. Scholars agree that desegregation did not fail, as long as it was tried. During the time that courts and the Department of Justice actually enforced it, desegregation worked both to produce interracial contact and raise the educational opportunities for both blacks and whites until courts and school districts allowed it to end.¹¹² The courts lost their nerve; many whites took advantage of reduced judicial enforcement to opt for mainly white schools; and many African-Americans started to give up on the hard work integration has involved for them.¹¹³

Weirdly, at the same time, rejection of segregation, approval of racial mixing, and at least sometimes, the ideal of integration succeeded as a cultural and political ideal on the public stage. Rejection of segregation is the most clearly established public value. As one recent example, Senator Trent Lott was forced to resign as majority leader of the Senate in December 2002 due to the public outcry after he expressed nostalgia for Strom Thurmond's segregationist platform during his 1948 presidential campaign.¹¹⁴ Approval of racial mixing was itself endorsed when the democratically-elected school boards in Louisville, Kentucky, in Seattle, Washington, and in many other parts of the country embraced voluntary integration plans for their schools right up until the Supreme Court's consideration of such plans in 2007.¹¹⁵ Integration requires work to create diverse communities truly marked by mutual appreciation and respect. This concept increasingly appears in the pop culture spheres of

landmark 1971 *Swann* case. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 535 U.S. 986 (2002), *cert denied*; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1.

¹¹² CLOTFELTER, *supra* note 92, at 179–81; HOCHSCHILD & SCOVRONICK, *supra* note 41, at 31, 36–42; IRONS, *supra* note 8, at 289–337; GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996); PATTERSON, *supra* note 79, at 158, 164, 191–205. *See also* Walter Stephan, *School Desegregation: An Evaluation of the Predictions Made in Brown v. Board of Education*, 85 PSYCH. BULL. 217 (1978); WALTER STEPHAN, REDUCING PREJUDICE AND STEREOTYPING IN SCHOOLS (1999).

¹¹³ *See* James Bock, *Resegregated Schools Not All Bad, Some Say*, BALTIMORE SUN, May 20, 1996, at 1A (64% of surveyed African-Americans would prefer local schools to integrated schools outside their own communities), *cited in* James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL. REV. 463, 480 (2004).

¹¹⁴ Peter Applebome, *Divisive Words: The Record; Lott's Walk Near the Incendiary Edge of Southern History*, N.Y. TIMES, Dec. 13, 2002, at A36; *Majority Leader Trent Lott Steps Down*, ONLINE NEWSHOUR UPDATE, Dec. 20, 2002, http://www.pbs.org/newshour/updates/lott_12-20-02.html.

¹¹⁵ The Kentucky school board embraced the plan after the withdrawal of court-ordered desegregation in 2000; the Seattle plan was launched in 1998. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

successful films, TV shows, music, and advertisements.¹¹⁶ The appearance of integration—the images of communities with multiracial groups, caring about one another and welcoming their mutual dependence for respect and equality—sells even as its reality as a practice and a lived ideal recedes. Whites can therefore assume there is no need for continued efforts to desegregate or to integrate because integration exists in the images of popular cultures and high profile entertainers and business people.

The focus on simple appearances does not advance realization of this bold vision. The first President Bush appointed Clarence Thomas to the seat held by *Brown*'s hero, Thurgood Marshall, in the apparently obligatory homage to the appearance of integration—but not to advance the dream of a common community. And Thomas joined the two newest justices and two others to compose the majority rejecting the voluntary integration plans in the summer of 2007.¹¹⁷ Some opinion polls suggest that the ideal of color-blindness may have proved more successful than the goal of integration, but other polls show continued support for at least some notion of integration.¹¹⁸ With court-enforced desegregation nearly over, and voluntary racial mixing nearly impossible, no wonder there is little effort to work for full integration of blacks, whites, Hispanics, and Asians in communities of mutual respect. Despite racial mixing in professions, colleges and universities, and media images, Richard Kluger, a long time observer of racial justice struggles, recounts that “in their private lives and social contacts, white and black Americans still lived mostly apart, and many blacks felt that whites, in their hearts and minds, still viewed them by and large as their moral and intellectual inferiors”¹¹⁹ In this light, it is understandable that many people say, “forget integration, let's just make schools equal,” although it may be the derailed effort to produce racially mixed schools that has turned so many educators and families to pursue equal schooling without the dream of integration.

¹¹⁶ *HAIRSPRAY* (New Line Cinema 2007).

¹¹⁷ *Parents Involved*, 127 S. Ct. at 2738.

¹¹⁸ *Compare* Polling Report.Com, Quinnipiac University Poll, Aug. 7–13, 2007, <http://www.pollingreport.com/race> (71% of 1,545 individuals surveyed nationwide agree with the Supreme Court's decision that public schools may not consider an individual's race when deciding which students are assigned to specific schools; 24% disagree) with Pollingreport.com, ABC News/Washington Post Poll, July 18–21, 2007, <http://www.pollingreport.com/race> (when 1,125 adults surveyed nationwide were given a prompt regarding the Supreme Court decision that “restricted how local school boards can use race to assign children to schools” and were ultimately asked “[s]ome argue this is a significant setback for efforts to diversify public schools, others say race should not be used in school assignments. On balance, do you approve or disapprove of this decision?” 40% of those surveyed agreed with the Supreme Court's decision and 56% disagreed with the decision.).

¹¹⁹ KLUGER, *supra* note 29, at 753.

III. HOW TO PURSUE EQUALITY WITHOUT INTEGRATION

Equal schooling, in the sense of quality instruction and excellent student performance, can exist even without integration; suggestions to the contrary are demeaning to the capacities of students of color. In his concurring opinion, rejecting a court's effort to attract whites back to the urban schools in Kansas City, Missouri, Justice Clarence Thomas wrote, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."¹²⁰ Justice Thomas argued that by assuming that de facto segregation harmed blacks, the district court in that case implied that "segregation injures blacks because blacks, when left on their own, cannot achieve."¹²¹ Justice Thomas at times seems to go further and argue that calls for integration are themselves derogatory to African-Americans—which makes sense only if integration is reduced to the sheer fact of racial mixing. Under this view, equality is not only possible without racial mixing, but also any contrary suggestion would itself be racist.

Yet Justice Thomas himself easily concluded that many predominantly black inner-city schools were inadequate when the issue before the Court was the constitutionality of a voucher program, opening the option of integrated private religious schools.¹²² It is not coincidental that majority-minority schools coincide with highly impoverished communities and with the related problems of violence, crime, unstable families, high drop-out rates, and teen pregnancy. Justice Thomas is surely right to emphasize the historic and potential strength of majority-minority institutions. During the Jim Crow era, segregated schools for "colored" children often resulted in students from a range of economic and social backgrounds, and with teachers who believed in the students, knew their parents, and identified as part of the same community.¹²³ Many of these elements can contribute to a sense of purpose and high standards. Nonetheless, it remains wrong to gloss over the difference between freely chosen and forced reasons for their composition.

Identifying strengths within majority-minority institutions is one potential component in pushing for equality without reopening the struggle for integration. Instead of racial integration, many educational and civil rights leaders have made admirable efforts that focus on: 1) designing curricular and academic support programs explicitly to counter cultural stereotypes and attitudes associated with low

¹²⁰ *Missouri v. Jenkins*, 515 U.S. 70, 114 (1996) (Thomas, J., concurring).

¹²¹ *Id.* at 122.

¹²² *Zelman v. Simmons-Harris*, 536 U.S. 639, 677 (2002) (Thomas, J., concurring). See Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 *How. L.J.* 323–29 (2004) (comparing Justice Thomas's opinions in the two cases).

¹²³ Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 *J. AM. HIST.* 43 (2004).

achievement by blacks and Latinos; 2) equalizing resources, in terms of sheer dollars and also access to excellent teachers; 3) specifying school management and desegregation reforms, and 4) integrating along socio-economic lines.

A. *Counterprogramming: Rejecting Social Stereotypes in Majority-Minority Schools*

Pursuing not just equality but excellence in schooling involves setting demanding academic standards and building a school-wide capacity to prepare students to achieve in a sometimes hostile world. Here is a back-to-the-future moment: The traditions of majority-minority institutions from an age that forbade integration could provide guidance for majority-minority institutions in an age of de facto segregation. Education Professor Theresa Perry points to historic black schools as “intentionally organized in opposition to the ideology of black intellectual inferiority.”¹²⁴ Besides teaching content, such schools affirmed the humanity of the minority student, passed on dispositions such as persistence and thoroughness essential to success, and “mobilized all available resources so that the idea of African-Americans as an achieving and a literate people could be realized.”¹²⁵ Lacking racial mixing, these schools could nonetheless convey the kind of mutual respect and commitment in one another’s success that would be a crucial feature of the integration ideal.

Perry argues that the task for schools in the post-Civil Rights era is more complicated because an illusion of opportunity co-exists with the continuing assumption of African-American intellectual inferiority.¹²⁶ Perhaps ironically, majority-minority schools today may have an easier chance than integrated schools which would not ordinarily develop an ideology to counter implicit racist assumptions.¹²⁷ One implication could be that majority-minority schools should consciously embrace an identity associated with racial and ethnic pride; for some educators, though not Perry, this would be an argument for Afro-centric schools.¹²⁸ Even Justice Thomas suggests that majority-minority institutions should be celebrated

¹²⁴ Perry, *supra* note 54, at 88.

¹²⁵ *Id.* at 94.

¹²⁶ *Id.* at 98.

¹²⁷ *Id.* at 99–101.

¹²⁸ See INFUSION OF AFRICAN & AFRICAN AMERICAN CONTENT IN THE SCHOOL CURRICULUM (Larry O. Williams, Asa G. Hilliard III & Lucretia Payton-Stewart eds., 1996); Molefi Kete Asante, *Afrocentric Curriculum*, EDUC. LEADERSHIP, Dec. 1991–Jan. 1992, at 28–31; Gloria Ladson-Billings, *Multicultural Teacher Education: Research, Practice, and Policy*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 747 (James A. Banks & Cherry A. McGee Banks eds., 1995); GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE (2000); Mary Stone Hanley, *A Culturally Relevant Lesson for African American Students*, New Horizons for Learning, <http://www.newhorizons.org/strategies/multicultural/hanley2.htm>.

even when not chosen, despite the obvious tension this creates with his usual distaste for treating any individual as a member of a racial group.¹²⁹

With or without this cultural focus, all schools should construct a culture of achievement where membership, for everyone, means being an achiever. Theresa Perry points to Catholic schools, historically black colleges, and Department of Defense schools each as examples of schools where African-American youth succeed—and as schools that intentionally craft for each student the social identity of an achiever as a member of a community of learners.¹³⁰ Research shows that features of the educational situation, not merely internal self-doubt, can depress student performance; when the situation signals that the student may be viewed through the lens of a negative stereotype, he or she can experience “stereotype threat” with measurable costs to test performance.¹³¹ Conscious articulations of high expectations, coupled with direct, critical feedback and explicit expectations of success, boosts achievement of minority students, as demonstrated by the research of psychologist Claude Steele.¹³² An inclusive culture of achievement does not need racial mixing or integration to succeed. Racial mixing itself may not provide equal educational experiences if schools fail to counter the remnants of racism through an inclusive culture of achievement. Indeed, Justice Thomas’ sensitivity may reflect his own experiences with white institutions that failed to do so.¹³³

B. *Focused School Reform*

Other strategies for creating excellent schools take center stage as racial integration recedes from the public agenda. Despite widespread and repeated criticisms, especially of urban public schools in high-poverty areas, examples of excellence in individual schools inspire reforms; many cities and states have pursued broad initiatives to improve reading instruction and raise student performance on standardized tests,

¹²⁹ See Tushnet, *supra* note 122, at 324. That Justice Thomas would press in this direction seems in tension with his own dislike of group-based thinking and his preference of treating each person as a distinct individual.

¹³⁰ Perry, *supra* note 54, at 100.

¹³¹ Claude Steele, *Stereotype Threat and African-American Achievement*, in YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS 109–130 (Theresa Perry, Claude Steele & Asa Hilliard III eds., 2003). To prevent this problem, teachers should tell students that they are judged by high standards while also communicating belief that the students can meet those standards; then, the teachers should give honest criticism and the students will be motivated and trusting enough to respond. *Id.* at 126–27.

¹³² *Id.* at 126–27.

¹³³ See Jeffrey Toobin, *Unforgiven: Why is Clarence Thomas so Angry?*, THE NEW YORKER, Nov. 12, 2007, at 86, available at http://www.newyorker.com/arts/critics/books/2007/11/12/071112crbo_books_toobin.

thus elevating graduation and college admission rates.¹³⁴ Initiatives include governance reforms, such as shifting managerial authority to the school principal (otherwise known as “site-based management”), and reallocating policy-making from multi-member school boards to individual mayors who can then be held more accountable.¹³⁵ Standards-based reforms align curricular changes, testing, and teacher practices.¹³⁶ Integration of health, social services, and education meet children’s entire needs in order to enhance learning.¹³⁷ Engagement with parents and communities,¹³⁸ and the revamping of the school day to include more “time-on-task,” involves longer school days and allows for supervised homework.¹³⁹ There are many examples of inspiring and effective teachers¹⁴⁰ and individual high-performing schools;¹⁴¹ the

¹³⁴ See Olatokunbo S. Fashola & Robert E. Slavin, *Schoolwide Reform Models: What Works?*, 79 PHI DELTA KAPPAN 370 (1998).

¹³⁵ See LINDA DARLING-HAMMOND & CAROL ASCHER, *CREATING ACCOUNTABILITY IN BIG CITY SYSTEMS* (1991); Paul T. Hill, Josephine J. Bonan & Kelly Warner, *Uplifting Education: Set Schools Soaring With Site-Based Management*, AM. SCH. BOARD J., March 1992, at 21–25; Jane L. David, *The Who, What, and Why of Site-Based Management*, EDUC. LEADERSHIP, Dec. 1995–Jan. 1996, at 4–9; Joyce C. Levey & Michele Acker-Hocevar, *Site-Based Management: Retrospective Understandings and Future Directions* (Annual Meeting of the Mid-South Educational Research Association) (1998); WENDY MCCLOSKEY, VICKY MIKOW-PORTO & STEVE BINGHAM, *REFLECTING ON PROGRESS: SITE-BASED MANAGEMENT AND SCHOOL IMPROVEMENT IN NORTH CAROLINA SOUTHEASTERN REGIONAL VISION FOR EDUC.* (1998); Eleanor R. Odden & Priscilla Wohlstetter, *Making School-Based Management Work*, EDUC. LEADERSHIP, Feb. 1995, at 32–36; Michael W. Kirst, *Mayoral Influence, New Regimes, and Public School Governance* (Consortium for Policy Research in Educ. Research Report Series RR049, 2002); Kenneth K. Wong & Francis X. Shen, *Do School District Takeovers Work? Assessing the Effectiveness of City and State Takeovers as a School Reform Strategy*, STATE EDUC. STANDARD, Spring 2002, at 19–23; Debra Viadero, *Big-City Mayors’ Control of Schools Yields Mixed Results*, EDUC. WEEK, Sept. 2002, at 8; Kenneth K. Wong & Francis X. Shen, *When Mayors Lead Urban Schools: Assessing the Effects of Mayoral Takeover*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* (William G. Howell ed., 2005); *MAYORS IN THE MIDDLE: POLITICS, RACE, AND MAYORAL CONTROL OF URBAN SCHOOLS* (Jeffrey R. Henig & Wilbur C. Rich eds., 2004).

¹³⁶ See Success for All, <http://successforall.com/faqs/index.htm>; Annenberg Institute for School Reform, <http://www.annenberginstitute.org/WeDo/index.php>.

¹³⁷ See Comer School Development Program, <http://www.med.yale.edu/comer/>; Margot Hornblower, *It Takes a School*, TIME, June 3, 1996, at 36, 37–38 (describing Comer school commitments to creating a caring community and involving parents); LISBETH B. SCHORR, *WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE* (1988); RICHARD WEISSBOURD, *THE VULNERABLE CHILD* (1996).

¹³⁸ Richard Weissbourd, *Lee Academy: A School Focused on Closing the Achievement Gap*, <http://www.uknow.gse.harvard.edu/teaching/TC105-407.html>.

¹³⁹ See Karen Irmsher, *Block Scheduling*, ERIC DIGEST, March 1996, <http://eric.uoregon.edu/publications/digests/digest104.html>.

¹⁴⁰ See JAY MATHEWS, *ESCALANTE: THE BEST TEACHER IN AMERICA* (1988); LOUANNE JOHNSON, *MY POSSE DON’T DO HOMEWORK* (1992); Kevin Fedarko, *Starting From Scratch: A Noble Scheme Takes Root In a Humble Part of Town*, TIME, Oct. 27, 1997, at 82 (praising a school developed by the for-profit Edison Project).

challenge has been to scale those successes up to hundreds of schools and entire school systems.¹⁴² The federal No Child Left Behind Act has many problems,¹⁴³ but its strength is the commitment to establishing and following through on high academic expectations for every child, including those from impoverished families living in depressed communities, and members of historically disadvantaged racial and ethnic minorities.¹⁴⁴ For many students, high school is too late for teachers to express high expectations because patterns of studying and deficits in learning in place by then are too difficult to alter.

Private philanthropists are major participants in funding low-income inner-city schools. The Bill and Melinda Gates Foundation finances model urban schools;¹⁴⁵ Walter Annenberg's Institute for School Reform

¹⁴¹ See SAMUEL CASEY CARTER, NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS (2001).

¹⁴² Difficulties of system-wide change in education are well-documented. DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM (1995); AN ASSESSMENT BY THE KORET TASK FORCE ON K-12 EDUCATION: OUR SCHOOLS & OUR FUTURE . . . ARE WE STILL AT RISK? 8-15 (Paul E. Peterson ed., 2003); RICHARD F. ELMORE, ALBERT SHANKER INSTITUTE, BUILDING A NEW STRUCTURE FOR SCHOOL LEADERSHIP (2000), available at <http://www.ashankerinst.org/Downloads/building.pdf>. The recipe of testing and accountability employed by state-level high-stakes testing and by federal law under No Child Left Behind has mixed results. See MARK BERENDS ET AL., CHALLENGES OF CONFLICTING SCHOOL REFORMS: EFFECTS OF NEW AMERICAN SCHOOLS IN A HIGH-POVERTY DISTRICT 55 (2002) (sacrifice of rich curriculum produced by focus on high-stakes tests); Amanda Paulson, *Chicago's Mixed Record on School Reform*, CHRISTIAN SCIENCE MONITOR, Jan. 9, 2008, at 3, available at <http://www.csmonitor.com/2008/0109/p03s03-usgn.html?page=1>. Actually, Chicago has been subject to a series of reform initiatives, with mixed results. See Thomas A. Downes & Jacquelyn L. Horowitz, *An Analysis of the Effect of Chicago School Reform on Student Performance*, ECON. PERSPECTIVES, May/June 1995, at 13; CIVIC COMM. OF THE COM. CLUB OF CHICAGO, ILL., LEFT BEHIND: STUDENT ACHIEVEMENT IN CHICAGO'S PUBLIC SCHOOLS (2003), available at http://www.commercialclubchicago.org/civiccommittee/initiatives/education/LEFT_BEHIND.pdf (concluding that the city school system is "radically dysfunctional," lacking sufficient information about student and teacher performance and sufficient funds, competition, and mechanisms for keeping effective teachers). And what works for an individual school does not easily translate on the large scale. Compare Fedarko, *supra* note 140, at 82-84, with Lisa Snell, *Whittled Away: Don't Blame Edison's Failure on the Market*, REASON MAGAZINE, Sept. 16, 2002, <http://www.reason.com/news/show/32631.html>; DAVID K. COHEN & HEATHER C. HILL, LEARNING POLICY: WHEN STATE EDUCATION REFORM WORKS (2001).

¹⁴³ Dana Goldstein, *Segregated Schools Leave Children Behind*, AM. PROSPECT, Sept. 19, 2007, http://www.prospect.org/cs/articles?article=segregated_schools_leave_children_behind.

¹⁴⁴ U.S. Dept. of Education, Learning from Nine High Poverty, High Achieving Blue Ribbon Schools—2006, <http://www.ed.gov/programs/nclbbrs/2006/profiles/index.html> (discussing focused school reform).

¹⁴⁵ See Bill & Melinda Gates Foundation: Model High Schools, <http://www.gatesfoundation.org/UnitedStates/Education/TransformingHighSchools/Schools/ModelSchools/default.htm>; *Gates Donates \$30 Million to Education Reform Group*, N. Y. SUN, Jan. 4, 2008, available at

pays to increase the capacity of school professionals and systems, especially in urban areas;¹⁴⁶ and Eli Broad funds scholarships.¹⁴⁷ The "I Have a Dream Foundation" provides mentoring, tutoring, and additional resources to support low-income students.¹⁴⁸ Doris and Donald Fisher, co-founders of Gap, Inc., formed a partnership with founders Mike Feinberg and David Levin to replicate across the country the success of two initial academies in Texas and New York through the non-profit KIPP Foundation and currently operate 57 schools while training new school leaders.¹⁴⁹ KIPP South Fulton Academy's (Atlanta, GA) seventh graders outperformed the seventh grades at every other public middle school in South Fulton County on the state Criterion-Referenced Competency Test for all five core subject areas in 2006.¹⁵⁰ I take particular note of this school as the headmaster is one of my former law students,¹⁵¹ but other KIPP schools post similar results.¹⁵² Fifty-five of these schools operate as charter schools; over 80% of our students are eligible for the federal free and reduced-price meals program, and more than 90% are African-American or Hispanic.¹⁵³ KIPP teachers typically receive 15 to 20% more in salary than the average teacher in neighboring public schools for this extra time, and other additional expenses pay for extended day, week, and year schedules.¹⁵⁴

Private philanthropy cannot elevate the quality of all the schools in need, but these initiatives indicate avenues that all struggling schools could use. Although it may seem frustrating that there is no single recipe for building success in majority-minority and high poverty schools, it could also be a source of encouragement that many strategies work. Studies show high success rates in majority-minority institutions when high poverty schools are associated with several different initiatives and infusions of effort, such as: schools with teachers who hold and

<http://www2.nysun.com/business/gates-donates-30-million-to-education-reform-group/68921/> (donation to Strong American Schools).

¹⁴⁶ Annenberg Institute for School Reform, <http://www.annenberginstitute.org/WeDo/index.php>.

¹⁴⁷ The Broad Foundation, Eli Broad, <http://www.broadfoundation.org/eli/index.shtml>.

¹⁴⁸ I Have a Dream Foundation, http://www.ihaveadreamfoundation.org/html/about_us.htm.

¹⁴⁹ About KIPP, <http://www.kipp.org/01>.

¹⁵⁰ Fulton County Schools, Spring 2006—Criterion Referenced Competency Tests Preliminary System Results, http://www.fultonschools.org/story_detail.asp?id=214.

¹⁵¹ See Life Lesson, Marina Volankis '99 Delivers on the Promise of Public Education, http://www.law.harvard.edu/news/bulletin/2004/summer/classnotes_04.php.

¹⁵² About KIPP, Results of KIPP, <http://www.kipp.org/01/resultsofkippsch.cfm>.

¹⁵³ About KIPP, Frequently Asked Questions, question 1, <http://www.kipp.org/01/kippfaq.cfm>.

¹⁵⁴ *Id.* at question 6.

communicate high expectations for all students, schools offering extra hours for instruction and homework, single-sex mission-driven instruction, and a middle-school focus on algebra in preparation for college-level math.¹⁵⁵ One common denominator is instituting a clear educational focus and getting all teachers on board, even though different schools have different articulations of their focus or mission. Lacking a single shared focus can make district-wide and system-wide reform challenging, unless what is shared is a commitment to choice among individual schools with their own special focus.¹⁵⁶

Meanwhile, because any school is limited in its ability to remedy the gap in student achievement that is attributable to differences in the backgrounds and resources of families, ambitious reforms turn to housing as well as school improvement. A court order addressing housing segregation led to relocation of many poor families of color from the inner city of Chicago to its suburbs—and the students' academic achievement improved in the suburban schools.¹⁵⁷ School reform that reaches broader social and economic reform could produce more access to quality instruction and more mixing of students across racial and class lines—but the very scale of the ambition raises more obstacles.

C. *Equalizing Resources*

In a poignant respect, equalizing resources as a strategy takes us back to the legal strategy before *Brown v. Board of Education*. Given the Supreme Court's approval of "separate but equal" in *Plessy v. Ferguson*,¹⁵⁸ the early NAACP strategy was to press for equal expenditures for the separate schools for black children. Even after *Brown*, attention to school expenditures and resources remained a crucial feature, both in desegregation suits and in separate challenges to disparate resources in different schools.¹⁵⁹ In 1973, the Supreme Court rejected the federal constitutional challenge to a property tax funding public schools in

¹⁵⁵ Robert P. Moses & Charles E. Cobb, Jr., *RADICAL EQUATIONS: CIVIL RIGHTS FROM MISSISSIPPI TO THE ALGEBRA PROJECT* (2001); The Algebra Project, <http://www.algebra.org/>.

¹⁵⁶ See CLARENCE N. STONE ET AL., *BUILDING CIVIC CAPACITY: THE POLITICS OF REFORMING URBAN SCHOOLS* 47 (2001) (arguing that absence of shared focus makes system-wide school improvement difficult).

¹⁵⁷ Diana Jean Schemo, *It Takes More than Schools to Close Achievement Gap*, N.Y. TIMES, Aug. 9, 2006, at B7. See also BENJAMIN I. PAGE & JAMES R. SIMMONS, *WHAT GOVERNMENT CAN DO: DEALING WITH POVERTY AND INEQUALITY* 183 (2000); RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 135–36 (2004).

¹⁵⁸ 163 U.S. 537 (1896).

¹⁵⁹ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

Texas.¹⁶⁰ The plaintiffs claimed that children located in districts with less valuable property suffered compared with children located in districts with more valuable property. The Court noted that poor districts did not necessarily have concentrations of poor individuals, and in any case, because the funding system did not absolutely deprive any students of education, no heightened judicial scrutiny was necessary.¹⁶¹ Thereafter, advocates turned to challenge school finance schemes through state court litigation under state constitutions, with much more success—but with the effect of ruling out of bounds any challenge to inequities between the states.¹⁶²

By now, all but six states have seen challenges to their education finance schemes, and lawsuits in 29 states have succeeded in requiring changes in school finance toward equal access.¹⁶³ Still, almost all states rely on a mix of state and local tax revenues to fund public schools.¹⁶⁴ As a result, most states have disparities that reflect wealth differences in different localities and also fail to relate school funding to the cost of

¹⁶⁰ San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

¹⁶¹ *Id.* at 56–59. The Court also rejected the claim that education is a fundamental interest and therefore should trigger heightened judicial scrutiny. *Id.* at 19.

¹⁶² See Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2061–88 (2006) (showing interstate disparities fall disproportionately on children who are poor, minority, or limited in English proficiency, and reflecting disparities in states' resources).

¹⁶³ See National Access Network, State by State, http://www.schoolfunding.info/states/state_by_state.php3. A somewhat different summary puts the results this way: "Forty-four out of 50 states have experienced some form of school finance litigation. Of the other six states, Delaware, Hawaii, Mississippi, Nevada and Utah have had no school funding litigation; in Indiana a suit was filed but withdrawn prior to any court decision. Adequacy lawsuits have been filed in 32 states. The results of these cases are as follows: In 14 cases the courts found that the school funding system, in part or in whole, violated the state's constitution. Seven cases resulted in court rulings in favor of the state. Four cases were settled out of court. Six cases are still pending. One case was withdrawn prior to being heard." Educational Commission of the States, <http://www.ecs.org/clearinghouse/59/07/5907.htm>. Even when state courts rejected adequacy challenges in Oregon, the voters passed an initiative shifting much of school funding from local property taxes to state revenues. PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS 236 (2003). Failed adequacy suits elsewhere have also mobilized voters to push for changing school funding. *Id.* at 246 (discussing Wisconsin and Pennsylvania).

¹⁶⁴ MICHAEL J. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE 9 (2005); MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 269–72 (2d. ed. 2000). Michigan and Hawaii are outliers, relying substantially or completely on state funding. See Lynn R. Harvey, 1994 *Michigan School Finance And Property Tax Reform*, in INCREASING UNDERSTANDING OF PUBLIC PROBLEMS AND POLICIES 171 (1994); Pauline Vu, Hawaii adopts new school funding, July 26, 2006, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=129623>. See also DAPHNE A. KENYON, THE PROPERTY TAX-SCHOOL FUNDING DILEMMA (2007).

providing an adequate education for each child.¹⁶⁵ Reports show widespread patterns of states spending less per child in highest-poverty districts as well as other disparities in per-pupil expenditures across each state,¹⁶⁶ although both may spend more than the average district in the same state.¹⁶⁷ Despite a debate among academics about whether expenditures matter to educational opportunity, the disparities in funding track disparities in students' socio-economic status and, in general, student achievement.¹⁶⁸ Wealthy communities clearly think money matters in some way; many have created foundations or obtained tax credits to supplement the budget for a particular school even while the communities limit overall education spending.¹⁶⁹

Nearly 70 years before *Brown v. Board of Education*, the North Carolina Supreme court had no trouble rejecting a law that earmarked taxes paid by Negroes to be used only for Negro schools, and taxes paid by whites for white schools, in light of the state constitutional ban on

¹⁶⁵ See National Access Network, Costing Out, <http://www.schoolfunding.info/policy/CostingOut/overview.php3>; Education Trust, The Funding Gap 2005: Low-Income and Minority Students Shortchanged by Most States, <http://www2.edtrust.org/NR/rdonlyres/31D276EF-72E1-458A-8C71-E3D262A4C91E/0/FundingGap2005.pdf>.

¹⁶⁶ See, e.g., Education Trust, *supra* note 165, at 2. ("In 27 of the 49 states studied, the highest-poverty school districts received fewer resources than the lowest-poverty districts."). See also Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, in BROOKINGS PAPERS ON EDUCATION POLICY 201, 202 (2004).

¹⁶⁷ See, e.g., High Degree of Equity in NJ Schools, Spending Data Show—Will a New Funding Formula Sustain or Reverse Progress? (March 26, 2007) (New Jersey), http://www.edlawcenter.org/ELCPublic/elcnews_070326_SpendingDataShowsEquity.htm.

¹⁶⁸ See Quentin Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 10–11 (2002). See also Andrew E. Goldsmith, *The Bill for Rights: State and Local Financing of Public Education and Indigent Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 89, 90–91 (2005) ("Consider a school finance system like that challenged in Michigan in the early 1970s, in which one school district could raise \$10,125 per student per year while another could levy the same tax rate and raise just \$54.13. Even if, as some studies suggest, district expenditures are not directly related to such 'result' measures as test scores, it strains credulity to claim that disparities like these do not affect the quality of the education children receive." (citations omitted)). Michigan's per-pupil expenditure disparities returned despite law reform efforts during the 1980s, and the legislature in 1993 made Michigan the first state to eliminate the local property tax as the basis for school revenues. *Id.* at 106–07 (citing 1993 Mich. Pub. Acts 145).

¹⁶⁹ Brigid McMenamin, *Robin Hood Doesn't Approve*, FORBES, Dec. 13, 1999, at 102 (foundation funded privately supplements resources for some public schools and not others); Rachana Kamtekar, *School Tax Credits Let State Leaders Off Hook on Education Funding*, ARIZONA DAILY STAR, Dec. 15, 2007, p. A15, available at <http://www.azstarnet.com/sn/printDS/217729> (tax credits allow parents to donate for fine arts and after-school activities for chosen public schools).

discriminating for or against either race.¹⁷⁰ The Court's opinion stated that the justices could not

shut our eyes to the fact, that the vast bulk of property, yielding the fruits of taxation, belongs to the white people of the State, and very little is held by the emancipated race; and yet the needs of the latter for free tuition, in proportion to its numbers, are as great or greater than the needs of the former.¹⁷¹

Given the patterns of residential segregation currently in force in much of the country, reliance on local property taxes to support schools has a similar racial effect, though without the explicit use of race in the law.

Initial law reform efforts focused either on equalizing per-pupil expenditures or on pegging district spending to the district's tax rate rather than its tax base, to reward effort rather than wealth. Early suits emphasized equalization of expenditures across the state; some raised the politically disastrous requirement of capping what wealthy districts could spend, and even those that succeeded to some degree had difficulty securing meaningful remedies.¹⁷² Courts felt limited in telling legislatures how to raise funds, and the substantive measures of equal finance raised complex moral and political problems.¹⁷³

More recent and more successful suits instead plumb state constitutional education guarantees to discern enforceable elements of

¹⁷⁰ *Puitt v. Gaston County*, 94 N.C. 709, 1886 WL 974 (N.C. 1886).

¹⁷¹ *Id.* at *5.

¹⁷² *Serrano v. Priest*, 557 P.2d 929, 958 (Cal. 1976) (finding a fundamental right to education under the state constitution); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 95 (Ark. 1983) (rejecting reliance on local property taxes in financing education). On the remedial difficulties, see Molly McUsic, *The Law's Role in the Distribution of Education*, in *LAW AND SOCIAL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 88, 105–106 (Jay P. Heubert ed., 2000); Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *Achieving HIGH EDUCATIONAL STANDARDS FOR ALL* 218, 218–26 (Timothy Ready, Christopher Edley, Jr., and Catherine E. Snow eds. 2000).

¹⁷³ Should the poverty of a district be measured by the wealth of the property taxed or the incomes of the children's families? Should districts willing to tax themselves at the same level receive the same dollars despite wide variations in the value of the properties subject to taxation? What could and should a court do when the legislature refuses to acknowledge a judicial decision requiring increased school expenditures? Perhaps the best solutions have been political settlements. In the neighboring context of expenditures for school construction, Colorado's Governor and Attorney General negotiated the settlement of a lawsuit challenging Colorado's school finance laws concerning capital construction for dismissal of the complaint if the legislature provided specified capital construction. See Press Release, State of Colorado Announces Settlement in School Finance Lawsuit (Apr. 26, 2000), available at http://www.ago.state.co.us/press_detail.cfm?pressID=597.html (discussing *Giardino v. Colorado State Bd. of Educ.*, 98CV0246, Denver District Court).

an adequate education for each child.¹⁷⁴ These suits are bolstered by the movement for educational standards launched at both the state and federal levels. Standards defining what students should learn, and measured by student assessments, support a shift of remedial focus outcomes as the basis for estimating required inputs of resources.¹⁷⁵ For example, in 1983, Maryland's Supreme Court rejected a lawsuit challenging its school financing method as inequitable.¹⁷⁶ But 13 years later, a Maryland trial court concluded that students in the city of Baltimore were not receiving an adequate education.¹⁷⁷ This led officials to create a commission to study the cost of adequate education, and ultimately the state legislature enacted changes based on the commission's study.¹⁷⁸ An adequacy-based legal challenge succeeded in New Jersey,¹⁷⁹ and in 2007, the governor announced a new school

¹⁷⁴ See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); see *McUsic*, *supra* note 172, at 103; *Rebell*, *supra* note 172, at 228.

¹⁷⁵ See, e.g., Molly A. Hunter, National Access Network, *Maryland Enacts Modern, Standards-Based Education Finance System*, May 2002, http://www.schoolfunding.info/resource_center/research/MDbrief.pdf; David T. Conley & Lawrence O. Picus, *Oregon's Quality Education Model: Linking Adequacy and Outcomes*, 17 EDUC. POL'Y 586, 587 (2003) (examining how Oregon links state assessments, school finance, and school accountability); Palfrey, *supra* note 168, at 10–11.

¹⁷⁶ *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

¹⁷⁷ *Md. State Bd. of Educ. v. Bradford*, 875 A.2d 703 (Md. 2005).

¹⁷⁸ Hunter, *supra* note 175, at 3; National Access Network, *Litigation: Maryland*, http://www.schoolfunding.info/states/md/lit_md.php3.

¹⁷⁹ *State of New Jersey*, Introduction to “Abbott” in New Jersey, <http://www.nj.gov/education/abbotts/about/> (describing series of suits on behalf of economically disadvantaged students establishing and enforcing state constitutional guarantees of an adequate education for all students); National Access Network, *New Jersey*, http://www.schoolfunding.info/states/nj/lit_nj.php3. The litigation addressed both financial resources and school priorities: “*Resources*. Under the Abbott decisions, Abbott districts receive state aid that is calculated to provide them with the same per-pupil operating budget as would be found in New Jersey's wealthiest school districts. Called “Abbott parity aid,” this funding is adjusted annually to reflect spending and enrollment in wealthy districts. In FY2006, it equals about \$1 billion. Districts that demonstrate educational needs for its students that cannot be financed with state formula aid and parity may apply to the Commissioner of Education for “supplemental aid” (also called Discretionary Education Opportunity Aid). In FY2006, this aid equals about \$500 million. The state is financially responsible for the creation of high-quality preschool programs for all three and four year-old children residing in Abbott districts. Currently, 70 percent of approximately 55,000 eligible children are enrolled in Abbott preschools, supported by \$500 million in state funds. Finally, the state is financially responsible for providing adequate facilities with priority given to health and safety projects, creation of preschool facilities, and reduction in overcrowding. As of 2005, the state has committed \$6 billion for school construction. *Priorities*. The Abbott division has given relentless and consistent focus to increasing early literacy for the obvious reason that a fourth grader who cannot read and write the English language will have great difficulty learning science, history,

financing arrangement allocating the same funding to similarly situated students regardless of where they reside.¹⁸⁰ A similar process of political branches responding to litigation is underway with mixed results in Connecticut, Massachusetts, and New York.¹⁸¹

The focus on “adequacy” may sound minimal, but the adequacy suits seek to raise standards, resources, and aspirations for all students¹⁸² and to do so in ways that reflect evolving demands of the economy and

and mathematics required to graduate from high school. To this has been added an equally strong push on early mathematics mastery. Each Abbott district is expected support schools and teachers with a district curriculum that is fully aligned to the NJ Core Curriculum Content Standards, with instructional materials and software that are consistent with the district curriculum, and with professional development that is tailored to the content and pedagogical needs of its teachers and administrators.” Introduction to “Abbott” in New Jersey, *supra*.

¹⁸⁰ *New Jersey Governor Announces New School Funding Formula*, ALL AMERICAN PATRIOTS, Dec. 13, 2007, http://www.allamericanpatriots.com/48738911_new-jersey-governor-announces-new-school-funding-formula.

¹⁸¹ On Connecticut, see *Sheff v. O'Neill*, 678 A.2d 1267 (1996); SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (2007). On Massachusetts, see Rachel Wainer Apter, *Institutional Constraints, Politics, and Good Faith: A Case Study of School Finance Reform in Massachusetts*, 17 CORNELL J.L. & PUB. POL'Y (forthcoming 2008) (discussing *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005); and legislative actions). On New York, see Campaign for Fiscal Equity, <http://www.cfequity.org/>. Although the state appellate court most recently simply directed the state to consider increasing New York City's school expenditure by \$2 billion, Governor Eliot Spitzer agreed to a state-wide increase of \$7 billion in annual state education aid, including \$5.4 billion for New York City, phased in over four years. *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 52 (N.Y. 2006); *Spitzer's Pledge*, N.Y. SUN, Jan. 3, 2008, <http://www2.nysun.com/editorials/spitzers-pledge/68875/>. National Access Network, New York, http://www.schoolfunding.info/states/ny/lit_ny.php3; Jay Chambers, et al., *A Proposal for Determining Adequate Resources for New York Public Schools*, Nov. 27, 2002, <http://www.cfequity.org/costingoutsummary.pdf> (determined that statewide, an additional \$6.7 to \$9 billion, phased in over four years, would be needed to provide all students a true opportunity to meet the Regents Learning Standards, based on student needs). See generally Michael Heise, *Educational Adequacy as Legal Theory: Implications from Equal Educational Opportunity Doctrine* (Cornell Legal Studies Research Paper 06-005, 2006), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1036&context=cornell/lsrcp>; Denise Morgan, *The New School Finance Litigation or Why Race Discrimination in Public Education is More than Just a Tort*, 96 NW. U. L. REV. 99 (2001); Brian J. Nickerson & Gerard M. Deenihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 FORDHAM URB. L.J. 1341 (2003).

¹⁸² See DEBORAH MEIER, *THE POWER OF THEIR IDEAS: LESSONS FOR AMERICA FROM A SMALL SCHOOL IN HARLEM* (1995); BRUCE L. WILSON & H. DICKSON CORBETT, *LISTENING TO URBAN KIDS: SCHOOL REFORM AND THE TEACHERS THEY WANT* (2001); see resources at High Achieving Schools Initiative, <http://www.unm.edu/~jbrink/HASchools/index.html>; *Critical Issue: Creating High-Achieving Learning Environments*, North Central Regional Education Laboratory, available at <http://www.ncrel.org/sdrs/areas/issues/educatrs/leadrsrp/le400.htm>.

society.¹⁸³ Kentucky's landmark suit in 1989 specified capabilities that all students must develop; other states have instead looked to the accomplishments of students in the wealthier districts to set the benchmark for the poorer districts.¹⁸⁴ Despite academic debate over whether money matters to educational quality, researchers, administrators, and parents all recognize that good teachers are crucial and schools that pay higher salaries get and retain better teachers.¹⁸⁵

Access to quality instruction is no doubt central to adequate education, and expanding the numbers of teachers with fine instruction abilities remains the unanswered challenge. Those abilities include responsiveness to students with different needs and abilities,¹⁸⁶ which may be strained in heterogeneous classrooms even though tracking students by ability raises further problems.¹⁸⁷

The "adequacy" lawsuits are the rightful heirs of *Brown* in terms of pursuing educational equality through litigation, though this strategy does not pursue racial integration.¹⁸⁸ The results to date in actual educational opportunities and achievement, however, are unclear.¹⁸⁹ Even the basic assumptions relevant to estimating the amount of resources necessary to achieve specified educational goals remain in contention.¹⁹⁰

D. Socioeconomic Integration

Sometimes there are silver linings in defeats. Because the Supreme Court rejected heightened judicial scrutiny of the wealth-based distinctions,¹⁹¹ public school districts may use students' socioeconomic status in making school assignments—and may seek to integrate students from low-income households with students from high-income households. Public universities have turned to socioeconomic status as an

¹⁸³ See Liu, *supra* note 162, at 2049–51, 2105–12.

¹⁸⁴ Ryan & Saunders, *supra* note 113, at 473–74.

¹⁸⁵ SCHRAG, *supra* note 163, at 219–22 (summarizing studies by Ronald Ferguson, Dan Goldhaber, Dominic Brewer, Steven Rivkin, John Kain, and Eric Hanushek).

¹⁸⁶ Stephanie Bravmann, New Horizons for Learning, *Two, Four, Six, Eight, Let's All Differentiate: Differential Education: Yesterday, Today, and Tomorrow*, Dec. 2004, <http://www.newhorizons.org/strategies/differentiated/bravmann.htm>.

¹⁸⁷ Sally M. Reis et al., *Equal Does Not Mean Identical*, EDUC. LEADERSHIP, Nov. 1998, at 74. On problems with tracking, see ANNE WHELOCK, *CROSSING THE TRACKS: HOW "UNTRACKING" CAN SAVE AMERICA'S SCHOOLS* (1993).

¹⁸⁸ See James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 547–49, 557–60 (1999).

¹⁸⁹ William J. Glen, *Separate but Not Yet Equal: The Relation Between School Finance Adequacy Litigation and African American Student Achievement*, 81 PEABODY J. OF EDUC. 63 (2006); Molly Townes O'Brien, Book Review, 40 EDUC. STUDIES 87, 88 (2006).

¹⁹⁰ James W. Guthrie & Matthew G. Springer, *Courtroom Alchemy: Adequacy Advocates Turn Guesstimates into Gold*, EDUC. NEXT, Winter 2007, at 21, available at <http://www.hoover.org/publications/ednext/4611792.html>.

¹⁹¹ See *supra* note 160 and accompanying text.

admissions factor in the face of legal and political opposition to race-based affirmative action—and many argue that socioeconomic class is a more justifiable trait to use in that context. Although it does not by itself produce racial diversity,¹⁹² a focus on socioeconomic integration in kindergarten through high school could guarantee every student access to a predominantly middle-class school as a route to school equality.¹⁹³ This is another back-to-the-future moment, reviving the ambition of school desegregation suits but with the focus on class-based, rather than race-based, mixing.

Richard Kahlenberg has provided the most thorough argument for the use of socioeconomic status in public school assignment for public schools.¹⁹⁴ He argues that economic integration of poor and middle-class students produces better achievement results for the poor students without reducing the success of the middle-class children.¹⁹⁵ Identifying predominantly middle-class schools as the ones where most students succeed, Kahlenberg traces the influences of expectations from peers, parents, and teachers as strengths of these middle-class schools that could be extended to economically disadvantaged students.¹⁹⁶ Class-conscious politics could be less divisive and more effective than racial politics in building winning coalitions.¹⁹⁷ Still, opposition is likely, and flight of the middle-class would be a serious risk. Kahlenberg predicts a tipping point of 50% low-income students would prompt middle-class parents to remove their children, and therefore he recommends that no more than 50% of students in any given school be eligible for reduced-price lunch.¹⁹⁸ He also proposes a choice-based school assignment scheme, allowing parents to list first, second, and third choices from among district schools and producing an appropriate socioeconomic balance for

¹⁹² Amanda Lepof, *Empirical Study Finds Socio-economic Status Not a Likely Substitute for Race in CA College Admissions*, DIVERSITY DIGEST, Fall/Winter 2002, <http://www.diversityweb.org/Digest/fw02/studyrace.html>; Robert Bruce Slater, *Why Socioeconomic Affirmative Action in College Admissions Works Against African Americans*, J. BLACKS HIGHER EDUC., Summer 1995, at 57. See also ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS (2003).

¹⁹³ See RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE (2001).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 23–46.

¹⁹⁶ *Id.* at 47–66, 72–76.

¹⁹⁷ See TOM WICKER, TRAGIC FAILURE: RACIAL INTEGRATION IN AMERICA (1996); see also TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995). Racial divisions affect political decisions about school finance—but it is not clear that class differences would be less divisive politically. See JEFFREY R. HENIG ET AL., THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION (1999); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 480 (1999).

¹⁹⁸ KAHLENBERG, *supra* note 193, at 110–14.

each school based on these choices.¹⁹⁹ He describes three school districts that already pursue this kind of policy with educational and political success.²⁰⁰

There is much to admire in this alternative, and it is one very much worth pursuing, especially since Kahlenberg correctly anticipated that the Supreme Court would object to voluntary plans to produce racially mixed schools.²⁰¹ The overrepresentation of blacks and Hispanics in the most impoverished settings makes targeting socioeconomic disadvantage a strategy of racial as well as redistributive justice.²⁰² Yet on the special issues posed by race, problems remain. Socioeconomic mixing would not necessarily increase the degree of racial mixing; most analysts reach this conclusion because the lion's share of impoverished people are white. Hence, Kahlenberg himself advocated racial mixing as long as it was lawful—although his justification was to combat prejudice rather than to boost student achievement.²⁰³

But the deeper problem pertains to the step from race-mixing to integration: from sharing the same space to sharing the same communal dreams, respect, and sense of membership. Kahlenberg assumes that simply being in the same school with middle-class students will produce that sense of membership for poor kids. A strong enough school culture may do so—if there are not other barriers. Racial differences remain such a barrier in too many settings. Sadly, the racial achievement gap persists, even in integrated middle-class schools.²⁰⁴ Minimally, the solution of socioeconomic mixing must be combined with the counterprogramming and creation of truly inclusive cultures of achievement and respect.²⁰⁵ Indeed, absent careful attention, socioeconomically-mixed schools too often are already settings for renewed racial segregation through academic tracking, special education assignments, and students' own divisions in lunch tables and cliques.²⁰⁶ In

¹⁹⁹ *Id.* at 116–17.

²⁰⁰ *Id.* at 228–57.

²⁰¹ *Id.* at 43–45.

²⁰² See KLARMAN, *supra* note 14, at 202 (blacks living below the poverty level were three times the percentage of whites in 2004).

²⁰³ Richard Kahlenberg, *Socioeconomic School Integration: A Reply to the Responses, Is Class or Race the Central Inequality in Education?*, EQUALITY & EDUCATION, Dec. 1, 2001, <http://www.equaleducation.org/commentary.asp?opedid=901>.

²⁰⁴ See Harold Berlak, *Race and the Achievement Gap*, RETHINKING SCHOOLS ONLINE, Summer 2001, http://www.rethinkingschools.org/archive/15_04/Race154.shtml; Pedro Noguera & Antwi Akom, *The Significance of Race in the Racial Gap in Academic Achievement*, IN MOTION MAGAZINE, June 19, 2000, available at <http://www.inmotionmagazine.com/pnaa.html>; Christopher Jencks & Meredith Phillips, *America's Next Achievement Test: Closing the Black-White Test Score Gap*, AM. PROSPECT, Sept.–Oct. 1998, at 44, 47.

²⁰⁵ See *supra* Part III.A. (discussing counterprogramming).

²⁰⁶ BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE (1997).

a racially-mixed school with racial tension, nonwhite peers can harass studious minority students for “acting white,” and white peers can exacerbate perceptions of “stereotype threat.”²⁰⁷ The simple focus on socioeconomic integration, without thoughtful attention to race, is unlikely to halt racial segregation in a world where white parents, given the choice, select schools without many nonwhites.²⁰⁸ These parents may not be aware they are doing this, they may simply want their children to be with children who perform well on tests. However, given the racial gap in school testing, those children are disproportionately white.²⁰⁹ Socioeconomic mixing could make a difference to the educational opportunities of many students, and could produce some racial mixing, but on its own, it will neither produce racial mixing in every district nor overcome the patterns of racial disparity in educational aspiration and achievement.

Communities and this nation as a whole must pursue equal educational opportunities regardless of the prospects for racial integration—but putting race aside leaves the risk of perpetuating the stereotypes and disadvantages that hamper too many African-American and Hispanic students. Reforms outside of racial mixing do not clearly eliminate or reduce for a sustained time the racial gap in achievement, and they do not open access for students from different backgrounds to the resources of one another. Segregation during childhood predicts segregation during adulthood not only as a sheer fact, but also as an indication of discomfort with integrated settings.²¹⁰ Societies that organize schooling to reproduce lines of social division run risks of exacerbating social division and risks that students in substantially

²⁰⁷ See JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* 85 (2003) (describing the initial controversial claim of peer pressure to avoid academic achievement in order to avoid “acting white”). No cost to social popularity has been recently found among students with average performance but it did appear among high performing students. See David Austen-Smith & Roland G. Fryer, Jr., *An Economic Analysis of “Acting White,”* 120 Q. J. OF ECON. 551, 551–52 (2005); Roland G. Fryer, *Acting White: The Social Price Paid by the Best and Best and Brightest Minority Students*, EDUC. NEXT, Winter 2006, at 53; Ronald F. Ferguson, *New Evidence on Why Black High Schoolers Get Accused of “Acting White”* (Achievement Gap Initiative at Harvard University, Research Brief, 2006), available at <http://agi.harvard.edu/events/Papers.php>.

²⁰⁸ See CASHIN, *supra*, note 40, at 176–77.

²⁰⁹ The effect of peers on student achievement is well-documented; see, e.g., Weili Ding & Steven F. Lehrer, *Do Peers Affect Student Achievement in China’s Secondary Schools*, (Nat’l Bureau of Econ. Research, Working Paper No. 12305, 2006); Caroline Hoxby, *Peer Effects in the Classroom: Learning From Gender and Race Variation*, (Nat’l Bureau of Econ. Research, Working Paper No. 7867, 2000). Such studies have not disentangled the benefit of being with higher-performing peers from potential harm to students’ performance due to teachers’ low expectations or other environmental factors.

²¹⁰ See EATON, *supra* note 181.

separated schools come to hold very different views of their society and polity.²¹¹ The integration ideal deserves to be revisited and defended.

IV. DEFENDING THE INTEGRATION IDEAL

The purposes of education should be the starting point. I know two scholars who fought the whole time they wrote a recent book on schools. Despite their many disagreements, Jennifer Hochschild and Nathan Scovronick found that they agreed about educational purposes; their statement is a very good place for all of us to start:

We agreed that the great flaw in the American public school system is its systematic and pervasive denial to poor (and disproportionately nonwhite) children of the chance to get a good education. We agreed that much can be done within the contours of public schooling to overturn this egregious inequity and that such a change can also foster other goals of public education—eliminating racial discrimination, training children to be democratic citizens, promoting respect for difference along with appreciation of commonality, opening up an array of new dreams for children to consider, seeking to ensure that all children are taught as much as they can learn.²¹²

This statement should remind us of the civic and social goals of schools that are so crucial to this democracy—and why racial integration, with all the complexities of a multicultural and politicized society, still matters. Schools offer not simply a vehicle for individual success but also the lived experiences of community that forge the basis for democratic self-governance. Schools provide the intellectual and social preparation for realizing the potential of democratic self governance through “communities of relationships” whose members specify rules about themselves and about how they relate to one another, ensure the rights of each person, and advance the capacity of individuals and the collectivity for social provision and advancement.²¹³

School integration—mixing students across the color line *and* producing a community of shared respect and inclusive membership—is

²¹¹ Nathan Glazer, *Some Problems in Acknowledging Diversity*, in *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* 168, 177–78 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

²¹² HOCHSCHILD & SCOVRONICK, *supra* note 41, at ix–x.

²¹³ See VINCENT OSTROM, *THE MEANING OF DEMOCRACY AND THE VULNERABILITIES OF DEMOCRACIES: A RESPONSE TO TOCQUEVILLE’S CHALLENGE* (1997); Richard E. Wagner, *Self-governance, Polycentrism, and Federalism: Recurring Themes in Vincent Ostrom’s Scholarly Oeuvre*, 57 J. OF ECON. BEHAV. & ORG. 173 (2004); Ann Marie Thomson, *Preliminary Musings on the Relationship Between Spiritual Capital and Civic Engagement for Democratic Self-Governance* 5–6, 20–21, 23 fig.1 (Mar. 29, 2006) (Indiana University School of Public and Environmental Affairs, Working Paper), *available at* http://www.indiana.edu/~workshop/papers/thomson_wrkconf.pdf.

crucial if students are to have the chance to learn and experience social cooperation, to build friendships with people different from themselves and their families, and to imagine an inclusive “we” that mirrors the polity. A 2006 review of 500 prior studies, involving more than 250,000 participants, found that greater levels of intergroup contact among children, adolescents, and adults are associated with lower levels of intergroup prejudice.²¹⁴ The importance of ethnic and racial diversity to workplace and commercial success motivated many large businesses to weigh in when the Supreme Court considered challenges to the University of Michigan Law School’s affirmative action plan²¹⁵—and their arguments helped to influence the Court’s decision to uphold the plan.²¹⁶ Schools should give children enough shared experiences to raise a reservoir of commonality crucial for the civic activities of self-governance in a diverse society.²¹⁷

Especially now, when more immigrants are arriving each year than ever before in our nation’s history, public schools need to build bridges for students and for their parents and resist the re-creation of racial apartheid or other lines of division and hostility. Recent immigrants to the United States quickly learn about the color line, and try hard not to be racialized, to distinguish themselves from America’s long-time minorities.²¹⁸ These immigrants accurately detect the stigma still

²¹⁴ Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. OF PERSONALITY AND SOC. PSYCH. 751 (2006).

²¹⁵ Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516), available at http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um/Fortune500-both.pdf; Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 23, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-215), available at http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um/GMboth.pdf (“There can be little doubt that racial and ethnic diversity in the senior leadership of the corporate world is crucial to our Nation’s economic prospects. In a country in which minorities will soon dominate the labor force, commensurate diversity in the upper ranks of management is increasingly important.”).

²¹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

²¹⁷ Cf. DANIELLE S. ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION* 45 (2004) (“[C]itizens of different classes, backgrounds, and experiences are inevitably related to each other in networks of mutual benefaction, despite customary barriers between them, and despite our nearly complete lack of awareness, or even disavowal, of those networks”); see *id.* at 47 (“Democracy depends on the ability of citizens to submit their fates willingly to the hands of others”); *id.* at 48 (trust in other citizens grows from participation and contact).

²¹⁸ See Heather Lindqvist, *The Reach and Limits of Cultural Accommodation: Public Schools and Islamic Immigrants in Maine*, in JUST SCHOOLS (Martha Minow, Richard Shweder & Hazel Markus eds., 2008 forthcoming); and Marcelo M. Suárez-Orozco, Carola Suárez-Orozco & Desirée Baolian Qin, *Introduction to THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER* (Marcelo M. Suárez-Orozco, Carola Suárez-Orozco & Desirée Baolian Qin eds., 2004). See also ALEJANDRO PORTES & RUBEN RUMBAUT, *Chapter*

associated with being African-American and Hispanic in this country. They discern how structures of social hierarchy, organized around race, establish and maintain a power structure of exclusion and subordination affecting access to jobs, politics, and social interaction. Racialization, affecting society's opportunity structures, is a crucial factor in explaining the disturbing fact, confirmed by many scholars, that over the past several decades, recent immigrants show better indicators of health, employment, and encounters with the law than do their children or grandchildren.²¹⁹ Even when not overt, hostilities and fears about "the other" lie latent in a society, ready to be mobilized by unscrupulous leaders interested in their own power.²²⁰

Martin Luther King, Jr. and others have held out a different vision for America, one that values shared humanity, one that unleashes the vibrancy and creativity of a welcoming nation and one that both builds and reflects a community of interdependency and respect. Fundamentally, the equality that schools should serve would be demonstrated not only by test performances, and not even simply by good jobs and economic success. At stake is also civic equality, which means having and being able to give to others the regard accorded to

3: *Not Everyone is Chosen: Segmented Assimilation and its Determinants*, in LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION 44–47 (2001); Paul A. Silverstein, *Immigrant Racialization and the New Savage Slot: Race, Migration, and Immigration in the New Europe*, 34 ANN. REV. ANTHROPOLOGY 363 (2005).

²¹⁹ See, e.g., CAROLA SUÁREZ-OROZCO & MARCELO M. SUÁREZ-OROZCO, CHILDREN OF IMMIGRATION (2001); THE NEW SECOND GENERATION (Alejandro Portes ed., 1996); FROM GENERATION TO GENERATION: THE HEALTH AND WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES (Donald J. Hernandez & Evan Charney eds., 1998); Min Zhou, *Growing Up American: The Challenge Confronting Immigrant Children and Children of Immigrants*, 23 ANN. REV. OF SOC. 63 (1997); JANE REARDON-ANDERSON, RANDY CAPPS & MICHAEL FIX, THE URBAN INSTITUTE, THE HEALTH AND WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES (2002), available at <http://www.urban.org/url.cfm?ID=310584>. On gang and criminal activities, see Cliff Akiyama & Ron Kawasaki, *Southeast Asian Youth Gangs: A Rising Epidemic*, 10 MIND & HUMAN INTERACTION 247 (1999); Jo Anne Grunbaum et al., *Prevalence of Health Risk Behaviors Among Asian American/Pacific Islander High School Students*, J. OF ADOLESCENT HEALTH, Nov. 2000, at 322–30. See also Min Zhou & Carl L. Bankston III, *Social Capital and the Adaptation of the Second Generation: The Case of Vietnamese Youth in New Orleans*, in THE NEW SECOND GENERATION (Alejandro Portes ed., 1996). Researchers have not fully explained the "hispanic health paradox," in which Hispanic immigrants show better health indicators than do their native-born American peers, regardless of race, ethnicity, and income. See Deborah E. Bender & Dina Castro, *Explaining the Birthweight Paradox: Latina Immigrants' Perceptions of Resilience and Risk*, 2 J. IMMIGRANT HEALTH 155 (2000).

²²⁰ See MICHELLE BRATTAIN, THE POLITICS OF WHITENESS: RACE, WORKERS, AND CULTURE IN THE MODERN SOUTH (2001). See also BRIAN KELLY, RACE, CLASS, AND POWER IN THE ALABAMA COALFIELDS, 1908–21(2001); Omar McDoom, *Framing Threats to Mobilize Ethnic Violence: Insights from Rwanda*, Int'l Studies Assoc. 48th Annual Convention, Feb. 28, 2007, available at http://www.allacademic.com/meta/p180764_index.html; J. Andrew Slack & Roy R. Doyan, *Population Dynamics and Susceptibility for Ethnic Conflict: The Case of Bosnia and Herzegovina*, 38 J. PEACE RESEARCH 139 (2001).

peers in the process of governing oneself and one's community. Civic equality includes a sense of nondiscrimination, and commitment to the social ideals of justice, liberty, and equality; it means commitment and capacity to engage in the public deliberations essential to a democracy.²²¹ If schools no longer are expected to pursue racial integration, other institutions will need to carry the task of achieving civic equality. But it is hard to imagine any other institutions as well situated for this task.

There can be further, surprising benefits from racial and ethnic integration. Studies of adolescents in Los Angeles show students enrolled in schools with high ethnic diversity are more likely to feel safe and experience less harassment in school than students who attend schools predominantly of one race.²²² There is some evidence that students in diverse classrooms effectively learn critical thinking through exposure to novel ideas and situations.²²³ Racially and culturally integrated schools are more likely to allow each individual to challenge stereotypes about himself and others—and to gain the latitude to be self-defining.²²⁴ Both blacks and whites who attended desegregated schools before high school graduation are more likely to have friends of other races, to attend integrated colleges, and to work and live in integrated settings.²²⁵

Simply put by Christopher Jencks, long-time scholar of equality: “If we want a segregated society, we should have segregated schools. If we want a desegregated society, we should have desegregated schools.”²²⁶

V. WHAT'S AVAILABLE NOW: BACK TO THE FUTURE

So, back to the future: what does the Supreme Court direct now if you, and I, and our neighbors and colleagues want to make schools racially integrated, diverse, and places of and for equality? In 2003, the

²²¹ Lawrence Blum, *The Promise of Integration in a Multicultural Act*, in MORAL AND POLITICAL EDUCATION 383 (Stephen Macedo & Yael Tamir eds., 2002). See also James Banks, *Diversity Within Unity: Essential Principles for Teaching and Learning in a Multicultural Society*, New Horizons for Learning, <http://www.newhorizons.org/strategies/multicultural/banks.htm>; James A. Banks, *Teaching for Social Justice, Diversity and Citizenship in a Global World*, 68 EDUC. FORUM 296 (2004).

²²² See Rutland, A. et al., *Interracial Contact and Racial Constancy: A Multi-site Study of Racial Intergroup Bias in 3–5 Year Old Anglo-British Children*, 26 APPLIED DEVELOPMENTAL PSYCHOL. 699 (2005).

²²³ Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002).

²²⁴ For discussions of self-definition regarding identity, see KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005); MARTHA MINOW, *NOT ONLY FOR MYSELF* 152 (1997); AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (2006).

²²⁵ Jomills Henry Braddock II, Robert L. Crain & James M. McPartland, *A Long-Term View of School Desegregation*, 66 PHI DELTA KAPPAN 259, 261 (1984).

²²⁶ CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 106 (1972).

Court accepted diversity as a compelling reason that could justify the use of race-conscious factors by public universities selecting students for higher education.²²⁷ Dissenting Justice Antonin Scalia disputed whether “cross-racial understanding” and “better prepar[ation of] students for an increasingly diverse workforce and society” could be viewed as an “educational benefit,” but conceded “it is a lesson of life” taught to young people, including in public-school kindergartens.²²⁸

When he was presented last year with the plans of two elected school boards to pursue the “life lessons” from voluntary racial integration, Justice Scalia joined the majority of Supreme Court Justices who found the voluntary assignment plans were unconstitutional.²²⁹ The result and the plurality opinion’s reasoning represent a set-back, a shocking rebuke to the integration ideal. But, to be accurate, the issue split the Court. Four members of the Court questioned whether promoting diverse schools can ever be a sufficiently compelling interest to justify the use of racial categories in school assignments; four dissenters indicated that they would preserve constitutional permission for local school boards “to use race-conscious criteria to achieve positive race-related goals.”²³⁰ Justice Anthony Kennedy, the swing vote, asserted a middle position. Diversity can be a compelling interest, schools can use race-conscious measures—on these fronts he joined the dissenters—but the plans at issue, he concluded, were not narrowly tailored, and thus he supplied the crucial fifth vote, striking down the plans.²³¹

Plainly and directly, Justice Kennedy wrote, “The enduring hope is that race should not matter; the reality is that too often it does.”²³² He rejected the plurality’s implication that school authorities must simply accept racially isolated schools.²³³ Justice Kennedy’s opinion—now pored over like an arcane treasure map—approved the use of race-conscious measures to bring together students of different races and backgrounds—but only if under very limited circumstances. First, the school system must show that its plan is “narrowly tailored,” unlike the Seattle and Louisville plans, which 1) divided students into only two categories—white/nonwhite, or black/nonblack, rather than the more varied racial and ethnic divisions of the actual student populations; 2) neglected to present sufficient evidence of serious consideration given to race-neutral alternatives; and 3) failed to show that the race-conscious

²²⁷ Grutter v. Bollinger, 539 U.S. 306 (2003).

²²⁸ *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

²²⁹ Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

²³⁰ *Id.* at 2811 (Breyer, J., dissenting).

²³¹ *Id.* at 2788–2800 (Kennedy, J., concurring in part and concurring in the judgment).

²³² *Id.* at 2791.

²³³ *Id.*

provisions would effect enough students to be considered “necessary” to produce racial integration.²³⁴ Justice Kennedy then indicated a set of race-conscious strategies that would be constitutionally sufficient if used generally—and not by categorizing individual students by race.²³⁵ Such use of racial categories to assign individuals to school could only be justified, in Justice Kennedy’s view, when a court has found an instance of *de jure*, governmental racial discrimination.²³⁶ His opinion nonetheless directs that local governments can be “race-conscious” in five ways: through “[1] strategic site selection of new schools; [2] drawing attendance zones with general recognition of demographics of neighborhoods; [3] allocating resources for special programs; [4] recruiting students and faculty in a targeted fashion; and [5] tracking enrollments, performance, and other statistics by race.”²³⁷ Here, Justice Kennedy supplies a fifth vote and a majority-making vote by joining the dissenters, who also approve of the use of race-conscious means to remedy racial isolation in public schools. The closely divided Court—and Justice Kennedy’s own compromise position—capture national ambivalence over the treatment of race.

Justice Kennedy, along with the four dissenters, create a fragile majority that would permit school systems and housing developers to locate schools based on demographic studies with the aim of encouraging racial integration, to develop special programs and locate them in order to attract a racially diverse group of students, and to hold targeted information and outreach meetings to attract groups of diverse students and teachers. Chief Justice John Roberts’s opinion for four justices announced that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²³⁸

Yes, freeing us all from color-consciousness is one of the crucial aspirations of Martin Luther King, Jr. and the civil rights movement. But at least three profound mistakes saturate Chief Justice Roberts’s insistence that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” however nifty it may sound.²³⁹ Mistake number one: he is mistaken about what the problem is. The central problem to be remedied is not simply race-consciousness, not simply freedom from specific acts of racial distinction-drawing; it is the

²³⁴ *Id.* at 2789–97.

²³⁵ *Id.* at 2796–98.

²³⁶ *Id.* at 2794–96. Further, Justice Kennedy indicated that the race of individual students might be permissible in school assignment if it reflects a “more nuanced, individual evaluation of school needs and student characteristics,” but beyond rejecting the plans from Seattle and Louisville, his opinion does not indicate how the race of an individual student could ever be lawfully made part of a student assignment plan. *Id.* at 2793.

²³⁷ *Id.* at 2792.

²³⁸ *Id.* at 2768 (plurality opinion).

²³⁹ *Id.*

realization of equality for all people in this democratic society—including not only equal access to educational resources, but also presumptive equality of regard and appreciation, regardless of skin-color, income level, or language spoken at home.

Second, entirely missing from Chief Justice Roberts's opinion is recognition that the equality in question includes civic equality as well as educational opportunity; it is integration as well as desegregation; it is, to paraphrase Dr. King, where hearts come together, where friendships, and debates, and childhoods criss-cross the racial, ethnic, religious and socio-economic variety of this country. It is where you see the possibilities in me and I in you; it is when we strive to create schools that unlock the curiosity, creativity, and talents of each child.²⁴⁰

And third, ignored by the Chief Justice is the simple difference between the use of race by Seattle and Louisville and the use of race rejected by the Court in *Brown*. To stop current discrimination in schools, communities may need schools to take race into account—but in a very different way than the exclusions of the Jim Crow days. Using race and ethnicity to redress effects of past discrimination, to overcome poor educational outcomes associated with schools with majority non-white enrollments, and to promote work, play, and democratic cooperation across racial lines simply are not the same kind of invidious discrimination that *Brown* struck down. Somehow, color-blindness replaced equality as the measure of the law.²⁴¹ Chief Justice Roberts appropriated objections to affirmative action used to increase diversity in competitive admissions in colleges, universities, and highly selective public exam-schools.²⁴² Distributing the scarce placement in a prestigious educational institution raises a different issue of fairness than does

²⁴⁰ Martin Luther King, Jr., Speech before Church Conference in Nashville, Tenn. (Dec. 27, 1962), in MARCUS D. POHLMANN, *AFRICAN AMERICAN POLITICAL THOUGHT* 39 (Taylor & Francis 2003). Desegregation even at its best would only eliminate invidious treatment against blacks in education, public accommodations, and employment, but would not achieve integration, which requires welcoming the participation of blacks in “the total range of human activities.” *Id.* at 40. See Kenneth L. Smith & Ira G. Zepp, Jr., *Martin Luther King's Vision of the Beloved Community*, *CHRISTIAN CENTURY*, April 3, 1974, at 361, available at <http://www.religion-online.org/showarticle.asp?title=1603>.

²⁴¹ See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 *CARDOZO L. REV.* 1689, 1701 (2005); Frank I. Michelman, *Foreword: “Racialism” and Reason*, 95 *MICH. L. REV.* 723, 737 (1997); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 *STAN. L. REV.* 1, 2–3 (1991); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 *CAL. L. REV.* 77 (2000); Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 *HARV. L. REV.* 1470 (2004); Laurence Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?*, 20 *J. MARSHALL L. REV.* 201 (1986).

²⁴² See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

assigning students who are each assured a place in the public schools, all designed to provide equal educational opportunities. Even in the higher education context, the Supreme Court decided before Chief Justice Roberts's arrival that producing diversity in the classroom could be a compelling reason for the state's use of race in admissions in higher education, because access to students from different backgrounds is crucial to the educational mission and development of leaders.²⁴³

Wrong about the differences between higher education and elementary and secondary schools, and wrong even about the role of race consciousness in selective admissions, Chief Justice Roberts's opinion actually makes it harder to achieve both racial integration and equal opportunity in schools. By forbidding elected school boards from pursuing voluntary integration through the combination of school choice and racial balance guidelines, the Court leaves school systems to the patterns of residential segregation that are themselves encouraged by this kind of decision.²⁴⁴ Pretending to have achieved color-blind as well as open opportunity—when we have not—disables individuals and communities from understanding what is going on and from becoming equipped to deal with it. This is what produces schools—both integrated and racially isolated—where children of color get little or no programming to counter ongoing racial stereotyping and low expectations. Mica Pollack calls the result “color muteness”—the conspiracy of silence about race and discrimination that helps no one and hurts those most vulnerable to racism's reach.²⁴⁵

When Louisville and Seattle embraced integration, it should have been a time for national celebration; what could be a better rebuttal to segregation's past than democratically chosen integration?²⁴⁶ The

²⁴³ Grutter v. Bollinger, 539 U.S. 306 (2003).

²⁴⁴ The Seattle and Louisville school systems whose programs were rejected each struggled to combat the effects of residential racial segregation in their communities. The Louisville school system had in 1956 replaced race-based assignments, existing before *Brown v. Board of Education* with geographically-based school assignments, producing such a high-level of racial segregation that a federal court found it unconstitutional, and issued a school desegregation plan that lasted between 1975 and 2000. *Parents Involved*, 127 S. Ct. at 2806–09 (Breyer, J., dissenting). In 2000, the federal court dissolved the plan. It rejected the use of racial targets in magnet schools that had programs unavailable at other schools, but otherwise found “overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes.” *Id.* at 2809 (quoting *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 370 (W.D. Ky. 2000)). The court concluded, approvingly, that the Louisville School Board had “treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy and an essential element of any well-rounded public school education.” *Id.*

²⁴⁵ See MICA POLLACK, *COLORMUTE: RACE TALK DILEMMAS IN AN AMERICAN SCHOOL* (2004).

²⁴⁶ The successful adoption of voluntary desegregation in Seattle is noteworthy given the previous battle that produced a state-wide initiative removing power from the city to make such a plan—and the Supreme Court's rejection of that initiative as a

avenues spelled out by Justice Kennedy remain, as well as the steps of counterprogramming, targeted school reform, adequacy initiatives, and socio-economic integration. And there is one more: families and students can choose integrated schools—by their residential choices, by voting with their feet, by making their own lives look like the high-concept ads celebrating integration.²⁴⁷

In the 1985 movie, “Back to the Future,” the main character carries a family photo from his own era but watches his own image nearly disappear as his own blunders in the past alter the future. When he turns things around, and his own image reappears, his future is assured.²⁴⁸ At this moment, the future of equality hangs in the balance, the balance of a 4-1-4 court, the balance of an ambivalent nation. Whose image will appear, in our photo of the future, will it include our entire national family, or will it be a segregated photo? Like Marty McFly in “Back to the Future,” more of our future is in our own hands than we know.

burden on “all future attempts to integrate Washington schools in districts throughout the State.” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982).

²⁴⁷ See CASHIN, *supra* note 40, at 39. Senator Barack Obama, Speech, South Carolina, (Jan. 26, 2008) (transcript available at http://www.barackobama.com/2008/01/26/remarks_of_senator_barack_obam_42.php).

²⁴⁸ BACK TO THE FUTURE, *supra* note 1.