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Ivan E. Bodensteiner

ARTICLES

THE SUPREME COURT AS THE MAJOR BARRIER TO RACIAL EQUALITY

*Ivan E. Bodensteiner**

This Article suggests that the U.S. Supreme Court, through its decisions in cases alleging race discrimination, stands as a major barrier to racial equality in the United States. There are several aspects of its decisions that lead to this result. Between 1868 and 1954, the Equal Protection Clause of the Fourteenth Amendment, while it had been interpreted to strike down a few blatant forms of de jure discrimination, allowed government to separate the races based on the "separate but equal" fiction. Beginning in 1954, Brown *and a series of subsequent decisions attacked this fiction, and for a period of nearly twenty years, the Court was intent on eliminating the vestiges of segregation in the schools, approving broad remedial orders. This changed drastically beginning in 1974 when the Court began limiting the available remedies and relieving school systems of the burdens imposed by court orders. Around the same time, the Court decided that equal protection plaintiffs needed to show a discriminatory governmental purpose in order to trigger meaningful constitutional protection. This meant that facially neutral laws and practices with discriminatory effects were largely constitutional.*

Beginning with Bakke *in 1978, the Court made it difficult, and eventually nearly impossible, for government to take affirmative steps designed to promote equality. A majority of the Court determined that invidious and benign racial classifications should be treated the same under the Equal Protection Clause, with both subjected to strict scrutiny. This completed the Court's interpretation of the Fourteenth Amendment in a manner that makes it a real barrier to racial equality: government is free to engage in invidious discrimination as long as it masks the real purpose, and affirmative steps designed by government to promote equality will be struck down as a violation of equal protection. Ironically, the constitutional amendment designed to promote freedom and equality for the newly-freed slaves now stands in the way of true freedom and equality.*

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* Professor of Law, Valparaiso University School of Law.

I. INTRODUCTION

After the Thirteenth Amendment abolished slavery in 1865, it became apparent that the abolition of slavery as an institution would not assure freedom and equality. This recognition led to the adoption of the Equal Protection Clause of the Fourteenth Amendment in 1868, prohibiting states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws."[1] At a minimum, this clause was designed to address the inequality encountered by the newly-freed slaves. It was an early acknowledgement that merely eliminating legal approval and recognition of discrimination, in the form of slavery, would not lead to equality. Today, 140 years after adoption of the Equal Protection Clause and the passage of several federal antidiscrimination statutes, we remain in essentially the same position—racial minorities do not enjoy equality in the United States.

My goal is not to demonstrate the absence of racial equality in some of the most important aspects of our lives, such as health care, education, housing, employment, political influence, and access to resources. Rather, I assume inequality exists and attempt to identify the single most responsible branch of government. Much to my dismay, I conclude the U.S. Supreme Court, sitting at the top of our system of justice, is most culpable. In this period of 140 years, there is a very short period of time, roughly between 1954 and 1973,[2] during which the Court demonstrated a willingness to use the Fifth[3] and Fourteenth Amendments to promote racial equality. This is not to suggest that the executive and legislative branches have promoted racial equality consistently since 1868. While the record of these branches is not stellar, I believe it is better than that of the Court, even though the efforts of these two branches have been stymied frequently by the Court.

Part II of this Article briefly explores the context and purpose of the Fourteenth Amendment. In Part III, I examine (a) some of the key Supreme Court decisions interpreting the Equal Protection Clause before *Brown;* (b) the promise of *Brown;* (c) the Court's rejection of *Brown* beginning in 1974; and (d) the Court's decisions limiting the ability of the other branches to promote racial equality through legislation, by interpreting Section 5 of the Fourteenth

1. U.S. CONST. amend. XIV, § 1.

2. This coincides, roughly, with the period of the Warren Court. Of course, there are a few exceptions, such as *Palmore v. Sidoti*, 466 U.S. 429 (1984), in which the Court held an invidious racial classification unconstitutional.

3. Although the Fifth Amendment does not contain an equal protection clause, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that the right to equal protection of the laws can be enforced against the federal government through the due process provision in the Fifth Amendment.

Amendment narrowly and by applying the most rigid standard of review to affirmative steps taken by the other branches to promote equality. Part IV notes the irony of the Court's use of the Equal Protection Clause to promote, or at least tolerate, race discrimination.

II. PURPOSE OF EQUAL PROTECTION CLAUSE

The Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[4] Five years after the Fourteenth Amendment was adopted, the Court, in the *Slaughterhouse Cases*,[5] stated: "notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before."[6] In short, abolishment of slavery in 1865, by passage of the Thirteenth Amendment, made the former slaves legally free, but did nothing to assure equality. More specifically, in addressing the Equal Protection Clause, the Court said

> [i]n light of the history of these amendments, and the pervading purpose of them . . . it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."[7]

Because of this narrow focus on racial inequality, the Court predicted that the Equal Protection Clause would address only race discrimination.[8] This prediction, of course, was not accurate as the Court has, for example, held that the Equal Protection Clause prohibits sex discrimination unless the classification satisfies intermediate scrutiny.[9]

A few years after its decision in the *Slaughterhouse Cases*, in *Strauder v. West Virginia*,[10] the Court struck down a state statute excluding blacks from jury service and said the Fourteenth Amendment was "one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a

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4. U.S. CONST. amend. XIV, § 1.

5. 83 U.S. 36 (1872).

6. *Id*. at 70.

7. *Id*. at 81.

8. *Id*. ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.").

9. *See* United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976).

10. 100 U.S. 303 (1879).

race that through many generations had been held in slavery, all the civil rights that the superior race enjoy."[11] Further, it said the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."[12] Four years later, in *Pace v. State*,[13] the Court said the purpose of the Equal Protection Clause "was to prevent hostile and discriminating state legislation against any person or class of persons,"[14] but upheld an Alabama law that provided a harsher punishment for adultery between a Negro and a white person than adultery between persons of the same race.[15] The same year, in *The Civil Rights Cases*,[16] the Court struck down the Civil Rights Act of 1875, on the grounds that it exceeded the power of Congress under Section 5 of the Fourteenth Amendment because it regulated private conduct, but described the Fourteenth Amendment as extending "its protection to races and classes, and prohibit[ing] any state legislation which has the *effect* of denying to any race or class, or to any individual, the equal protection of the laws."[17] In *Plessy v. Ferguson*,[18] the Court upheld public transportation facilities separated by race, saying that while the

> object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, . . . in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[19]

In *Brown v. Board of Education*,[20] before the Court rejected *Plessy* and held that "[s]eparate educational facilities are inherently unequal,"[21] it scheduled reargument that was:

> largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively

11. *Id.* at 306. In this context, the Court stated that the "recently emancipated" race "especially needed protection against *unfriendly* action in the States where they were resident," *id.* (emphasis added), suggesting the Equal Protection Clause was not aimed at friendly action, such as affirmative steps to assure equality. *See id.*

12. *Id.*

13. 106 U.S. 583 (1883).

14. *Id.* at 584.

15. *Id.* at 585.

16. 109 U.S. 3 (1883).

17. *Id.* at 24 (emphasis added).

18. 163 U.S. 537 (1896).

19. *Id.* at 544.

20. 347 U.S. 483 (1954).

21. *Id.* at 495.

> consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.[22]

Because of the status of public education in 1868, the Court noted it was not surprising that the history of the Fourteenth Amendment provided little guidance "relating to its intended effect on public education."[23]

The first clause of Section 1 of the Fourteenth Amendment was designed to overrule the *Dred Scott v. Sandford*[24] decision. Beyond that, the Fourteenth Amendment was intended to supplement the Thirteenth Amendment, at least with respect to the former slaves, because the framers recognized that legal status alone does not lead to equality. Similarly, the current status of racial minorities in the United States makes it apparent that neither a constitutional provision nor statutes prohibiting intentional race discrimination lead to equality. As with most provisions of the Constitution, reasonable people can disagree about the appropriate interpretation of the Equal Protection Clause. But the early decisions of the Court referred to above, while generally not favorable to the parties alleging race discrimination, suggest that they were (a) designed to supplement the Thirteenth Amendment in that the abolition of slavery did not assure freedom and equality;[25] (b) aimed at the facially discriminatory laws that existed in many states and stood in the way of "absolute equality;"[26] and (c) aimed at prohibiting state laws that have the effect of denying equal protection of the laws.[27] Most importantly, there is nothing in either the history of the Equal Protection Clause or the generally unfavorable pre-*Brown* decisions that precludes an interpretation of the Fourteenth Amendment that would promote actual equality, instead of only formal equality.

22. *Id*. at 489.
23. *Id*. at 490.
24. 60 U.S. 393 (1857).
25. Slaughterhouse Cases, 83 U.S. 36, 81 (1873).
26. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
27. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

III. SUPREME COURT DECISIONS INTERPRETING THE EQUAL PROTECTION CLAUSE

*A. Pre-*Brown *Decisions*

Shortly after adoption of the Fourteenth Amendment, in *Strauder v. West Virginia*,[28] the Court held that a West Virginia law limiting jury service to "white male persons who are twenty-one years of age and who are citizens of this State," violated the Equal Protection Clause and was, therefore, unconstitutional.[29] Despite the decision in *Strauder*, the Equal Protection Clause did not get off to a good start in the Supreme Court. A few years after *Strauder*, in *Pace v. Alabama*,[30] the Court interpreted the Equal Protection Clause narrowly, holding that an Alabama criminal statute, which provided a greater punishment for adultery between a Negro and a white person than adultery between persons of the same race, did not violate equal protection because there was no discrimination against either race.[31] The same year, in *The Civil Rights Cases,* the Court limited the power of Congress, under Section 5 of the Fourteenth Amendment, holding Congress could not pass a law prohibiting race discrimination in the operation of privately-owned public accommodations because the Equal Protection Clause limits only state laws and acts committed under state authority.[32] Justice Harlan wrote a lengthy dissent, arguing that those who operate public accommodations are "agents of the state," and thus subject to regulation by Congress when they engage in race discrimination.[33]

In 1896, the Court determined, in *Plessy v. Ferguson*, that "equal but separate" transportation accommodations for the white and "colored" races did not violate equal protection.[34] Such laws, according to the Court, "do not necessarily imply the inferiority of either race to the other," and the Court referred to the plaintiff's assumption that the "enforced separation of the two races stamps the colored race with a badge of inferiority" as the "underlying fallacy" of his argument.[35] Justice Harlan, in dissent, indicated everyone knows that the Louisiana statute "had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white

28. 100 U.S. 303 (1879).
29. *Id.* at 305.
30. 106 U.S. 583 (1883).
31. *Id.* at 585.
32. 109 U.S. at 23.
33. *Id.* at 58 (Harlan, J., dissenting).
34. 163 U.S. 537, 550-51 (1896).
35. *Id.* at 544, 551.

persons."[36] He accurately predicted that the judgment in *Plessy* "will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[37] "Separate but equal" remained the law until *Brown* was decided in 1954, although in between *Plessy* and *Brown*, the Court found a violation of the Equal Protection Clause in a few cases where the educational opportunity was clearly not equal.[38]

Ten years before *Brown*, there was yet another low point in the history of the United States Supreme Court when it concluded, in *Korematsu v. United States*,[39] that the federal government's placement of Japanese-Americans in concentration camps did not violate equal protection because it was justified by national security concerns.[40] The Court reached this result even though it stated "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are therefore subjected to "the most rigid scrutiny."[41] While he said the Court was utilizing "the most rigid scrutiny," it is quite apparent that Justice Black, who delivered the opinion of the Court, was deferring to the judgment of the United States military.[42] Justice Murphy wrote that he dissents "from this legalization of racism" and indicated that racial discrimination "is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."[43]

Even though a few challenges to racial classifications, based on the Equal Protection Clause, were successful before *Brown*, the Court had rendered the clause quite ineffective in addressing race discrimination. Race discrimination flourished under the "separate but equal" regime because the equal portion of the equation generally was not enforced by courts. There was no way to fit *Korematsu* into

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36. *Id*. at 557 (Harlan, J., dissenting).

37. *Id*. at 559.

38. *See* McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637, 643 (1950) (ruling that after blacks were admitted to what had been an all-white school, the university could not segregate them in areas of the classrooms, libraries, and cafeterias). In *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950), the University of Texas Law School denied admission to a black applicant because he could attend Prairie View Law School, a recently-created school for black students, but the Court held there was not substantial equality in the educational opportunities at the two schools. *See also* Gaines v. Canada, 305 U.S. 337 (1938) (holding that Missouri violated equal protection in denying admission to black students at its law school, but offering to pay for them to attend law school in other states).

39. 323 U.S. 214 (1944).

40. *Id.* at 218-19.

41. *Id*. at 216.

42. *See id.* at 223-24.

43. *Id*. at 242 (Murphy, J., dissenting).

the "separate but equal" doctrine because, as in *Strauder*, there was no pretense of equality. *Korematsu* was like *Strauder* in that a particular race was singled out and disadvantaged, but the Court was unwilling to reach the same result it reached in *Strauder*. Instead, the Court pretended that "Korematsu was not excluded from the Military Area because of hostility to him or his race," but rather "[he] was excluded because we are at war with the Japanese Empire."[44] Even when *Brown* arrived at the Supreme Court during its 1952-53 term, according to Justice Douglas, a majority of the Justices were ready to rule "that separate but equal schools were constitutional, that separate but unequal schools were not constitutional, and that the remedy was to give the states time to make the two systems of schools equal."[45]

B. Brown *and Its Short-Lived Promise*

If we accept Justice Douglas's bleak assessment of the situation, only the death of Chief Justice Vinson during the summer of 1953, and the appointment of Earl Warren as his replacement, led to the unanimous decision in *Brown*, holding that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[46] Therefore, the segregation in the five school districts before the Court violated equal protection; and, after further argument, in 1955, the Court determined the appropriate remedy, which essentially deferred to the trial courts for the application of equitable principles and created the famous "all deliberate speed" standard of the Court.[47]

Not surprisingly, the mere elimination of Jim Crow laws, such as laws providing for segregated schools, did not lead to equality. For a period of approximately fifteen years, it appeared the Court was serious about ending segregation in public education. In the early years after its decision in *Brown*, the Court was adamant about not only eliminating the laws providing for segregation in education but also eliminating the effects of that government-approved discrimination. In *Cooper v. Aaron*,[48] the Court relied on *Marbury* in determining that its interpretation of the Fourteenth Amendment in *Brown* is the supreme law of the land and binding upon the states.[49] Ten years after *Brown*, in *Griffin v. County School Board*,[50] the Court found that it was unconstitutional for school systems to close rather

44. *Korematsu*, 323 U.S. at 223.
45. WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975, at 113 (1980).
46. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
47. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).
48. 358 U.S. 1 (1958).
49. *Id.* at 18-19.
50. 377 U.S. 218 (1964).

than desegregate, and assessed the resistance to *Brown* by stating "[t]here has been entirely too much deliberation and not enough speed in enforcing [*Brown*]."[51] A few years later, in *Green v. County School Board*,[52] the Court declared that school boards have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," and held that a "'freedom-of-choice' plan" violated equal protection.[53] Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*,[54] the Court reiterated the goal of "eliminat[ing] from the public schools all vestiges of state-imposed segregation,"[55] in upholding a lower court order requiring racial balance, prohibiting one-race schools absent a strong showing by the school district that such schools were not the result of present or past discrimination, approving affirmative action in the form of altered attendance zones, and permitting busing as a means of desegregating.[56] It was necessary for the Court to "defin[e] in more precise terms [than it had done before] the scope of the duty of school authorities and district courts in implementing" the decision in *Brown*.[57] *Swann* clarified that broad remedial powers are available to the district courts, including busing and other affirmative steps designed to achieve racial balance in formerly segregated school systems.[58] Finally, in *Norwood v. Harrison*,[59] the Court held the Equal Protection Clause prohibited a state from subsidizing private schools that engaged in race discrimination in order to circumvent *Brown*.[60] The Court stated, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible *effect*."[61]

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51. *Id*. at 229.

52. 391 U.S. 430 (1968).

53. *Id*. at 437-38.

54. 402 U.S. 1 (1971).

55. *Id*. at 15.

56. *Id*. at 22-31.

57. *Id*. at 6.

58. *Id* at 22-31.

59. 413 U.S 455 (1973). Shortly before *Norwood*, the Court addressed segregation in the North in *Keyes v. School District No. 1*, 413 U.S. 189 (1973). Although the Denver school system was never segregated by mandate of state or local law, the Court held that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious" and creates "a prima facie case of unlawful segregative design," shifting the burden to the school system to prove "that other segregated schools within the system are not also the result of intentionally segregative actions." *Keyes*, 413 U.S. at 208. Not surprisingly, Justice Rehnquist dissented. *Id.* at 254-55 (Rehnquist, J., dissenting).

60. *See Norwood,* 413 U.S. at 463-65.

61. *Id.* at 466 (quoting Wright v. Council of Emporia, 407 U.S. 451, 462 (1972)) (emphasis added). While this decision was not explicitly overruled by *Washington v.*

Around this time the makeup of the Court was changing.[62] These changes may help to explain a critical five-four decision in 1974, demonstrating that the Court quickly lost its interest in promoting equality.[63]

C. The Rejection of Brown*'s Promise during the Years Justice Rehnquist Served on the Court*

Although Justice Rehnquist did not replace Chief Justice Burger until 1986, the rejection of *Brown* seems to coincide with Justice Rehnquist's time on the Court, beginning in 1972.[64] Starting with *Milliken v. Bradley*,[65] the Court significantly limited the district courts' power to use an interdistrict remedy in attempting to address a single-district segregation problem.[66] The Court stated:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts or of a single school district have been a substantial cause of interdistrict segregation.[67]

Justice White wrote a dissenting opinion, joined by three other Justices, in which he noted that the decision in *Milliken* "cripples the ability of the judiciary to perform [its remedial] task," and, as a result, "deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State."[68] As a result, Justice White observed, the "State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide

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Davis, finding the "effect" impermissible is inconsistent with *Davis*. *See infra* notes 74-76 and accompanying text.

62. In 1969, Chief Justice Burger replaced Chief Justice Warren; in 1970, Justice Blackmun replaced Justice Fortas; in 1972, Justice Powell replaced Justice Black and Justice Rehnquist replaced Justice Harlan; in 1975, Justice Stevens replaced Justice Douglas; and in 1981, Justice O'Connor replaced Justice Stewart. PETER CHARLES HOFFER, ET AL., THE SUPREME COURT: AN ESSENTIAL HISTORY 369, 372-76 (Michael Briggs, ed., Univ. Press of Kansas 2007).

63. *See infra* note 65.

64. *Id.* at 408.

65. 418 U.S. 717 (1974).

66. *See id.* at 744-45.

67. *Id.*

68. *Id.* at 762-63 (White, J., dissenting).

effective desegregation remedies by vesting sufficient power over its public schools in its local school districts."[69]

Thus, within a year after its decision in *Norwood,* the Court signaled it was not willing to use the Equal Protection Clause to abolish segregation when it placed substantial limits on the power of the courts to "impose a multidistrict, area wide remedy to a single-district *de jure* segregation problem."[70] It did this even though it said, in *Brown,* that "the doctrine of 'separate but equal' has no place" in the "field of public education" and "[s]eparate educational facilities are inherently unequal."[71] When combined with its decision a year earlier, in *San Antonio Independent School District v. Rodriguez*,[72] the effect of *Milliken* was disastrous. Those who favor segregated schools had won the battle; *Brown*, while not overruled, had become fairly irrelevant. By the 1972-73 school year, over ninety-one percent of southern schools were desegregated; however, between 1988 and 1998, most of the progress was lost.[73]

Milliken was followed by a series of Supreme Court decisions that fatally wounded the Equal Protection Clause as an agent of racial equality. Shortly after *Milliken*, the Court delivered an important blow to the Equal Protection Clause in *Davis*,[74] holding that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race" and that "disproportionate impact . . . alone . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[75] In short, *Washington v. Davis* requires that plaintiffs alleging racial discrimination in violation of the Equal Protection Clause prove intentional discrimination, that is, that the challenged action was taken "'because of,' not merely 'in spite of,' its adverse effects."[76] As

69. *Id*. at 763.

70. *Id.* at 721 (majority opinion).

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

72. 411 U.S. 1 (1973) (holding that significant disparities in school funding resulting from a wide difference in the tax base of school districts does not violate equal protection).

73. *See* GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2001), http://www.civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf.

74. 426 U.S. 229 (1976).

75. *Id*. at 239, 242 (citations omitted). Standing in contrast to the *Davis* holding, see *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), where the Court held that a law "fair on its face, and impartial in appearance" nevertheless violates equal protection "if it is applied and administered by public authority with an evil eye and an unequal hand."

76. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

stated in *Feeney*, "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences."[77]

In the same year it decided *Washington v. Davis*, the Court decided *Pasadena City Board of Education v. Spangler*,[78] in which Justice Rehnquist, writing for the Court, said "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."[79] In other words, the federal courts were not to police the school districts to guard against resegregation. The Court made it clear that the Equal Protection Clause does not ban segregation nor assure actual equality in public education; rather, it bans only intentional discrimination, that is, segregation that is the result of intentional government action.[80]

Thus, by 1976, only twenty-two years after *Brown,* it was apparent that the Fourteenth Amendment would tolerate a public education system that is "inherently unequal" by virtue of its segregated schools, so long as a challenger could not prove the segregation resulted from government action intended to achieve a segregated school system.[81] When this is combined with the decision in *Rodriguez*,[82] holding that a large disparity in per-pupil expenditures in different school districts within a state that opts for local control and funding does not violate the Equal Protection

77. *Id*. (citation omitted). Justice Stevens concurred in both *Davis* and *Feeney*. In *Davis*, he observed "that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." 426 U.S. at 254 (Stevens, J., concurring). He states that not every disproportionate impact gives rise to a constitutional claim, but where "the disproportion is dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect." *Id*. The challenge to the test at issue was insufficient, according to Stevens, because the test served "a neutral and legitimate purpose of requiring all applicants to meet a minimum standard of literacy" and was "used throughout the federal service." *Id*. at 254-55. Justice Stevens agreed with the outcome in *Feeney* because "the number of males disadvantaged by [the Massachusetts law] (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—to refute the claim that the rule was intended to benefit males as a class over females as a class." 442 U.S. at 281 (Stevens, J., concurring).

78. 427 U.S. 424 (1976).

79. *Id*. at 436-37.

80. *See supra* notes 74-77 and accompanying text.

81. Four Justices in *Parents Involved in Community School v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), repeated the distinction between de jure and de facto segregation, with the latter not having constitutional implications. *Id*. at 2761 (plurality opinion).

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

Clause,[83] the Court's license to the states to operate a public school system providing children with an education that is "inherently unequal" was granted in full.[84] As a result, today we have states operating school systems in which the per-pupil expenditure varies widely, depending on the district's property tax base, and in which many children attend schools that are predominantly one race.[85] Frequently, the school districts with the lowest per-pupil expenditure are those with the largest racial minority population.[86]

Any doubt about the Court's willingness to tolerate segregated schools was eliminated in *Board of Education of Oklahoma City Public Schools v. Dowell*,[87] in which Justice Rehnquist, again writing for the Court, held that school districts were entitled to be relieved of burdensome court orders that displaced local authority at the point the school district can demonstrate that the "vestiges of past discrimination had been eliminated to the extent practicable."[88] In dissent, Justice Marshall, joined by Justices Blackmun and Stevens, expressed his belief that "a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions."[89]

The dismantling of *Brown* continued the following year when the Court decided, in *Freeman v. Pitts*,[90] that a school district could be

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83. *See supra* note 72.

84. *See, e.g., Parents Involved*, 127 S. Ct. at 1234-37 (Breyer, J., dissenting).

85. *See, e.g.*, Diane Rado, *Rich School, Poor School; Suburbs Facing a Great Divide Over Spending for Students*, CHI. TRIB., Feb. 4, 2007, at C1 (showing that the wealthiest elementary district (10% low income students) in Lake County, near Chicago, spends $22,508 per student, while another school district (73% low-income students) in the same county spends $8,675 per student). In the Chicago public schools, where there were 336,793 African Americans under age eighteen, 265,857 Hispanics under age eighteen, and 228,041 Caucasians under age eighteen, according to the 2000 Census. CHILDREN AND FAMILY RESEARCH CTR., CENSUS DATA: CHICAGO COMMUNITY (2000), http://xinia.social.uiuc.edu/outcomes/chidata.htm. In 2006, 264 schools had 90% or more African-American students, 46 schools had 90% or more Hispanic students, and no schools had 90% or more Caucasian students. DEP'T OF APPLIED RES., CHI. PUB. SCH., RACIAL/ETHNIC SURVEY OF STUDENTS AS OF SEPT. 29, 2006, at 1-43 (2006); *see also Parents Involved,* 127 S. Ct. at 2801-02 (Breyer, J., dissenting) ("Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation . . . but then reversed direction by the year 2000, rising from 63% to 72% in the Nation . . . . Today, more than one in six black children attend a school that is 99-100% minority.").

86. *See, e.g.*, *San Antonio Indep. Sch. Dist.*, 411 U.S. at 11-13.

87. 498 U.S. 237 (1991).

88. *Id.* at 250. For a recent application of *Dowell*, see *Anderson v. School Board of Madison County*, 517 F.3d 292 (5th Cir. 2008).

89. *Id.* at 252 (Marshall, J., dissenting).

90. 503 U.S. 467 (1992).

relieved of the provisions of a court order part-by-part.[91] In this case, the school district was entitled to be relieved of the portion of the order requiring desegregation in pupil assignment and in facilities, because those terms had been met, even though the school district had not complied with a provision relating to the assignment of teachers.[92] Further, since the facilities portion of the order had been met, the district court could not review the discriminatory effects of the district's plan to build a facility that would likely be of greater benefit to white students than black students.[93] Finally, in *Missouri v. Jenkins*,[94] the Court terminated a school desegregation order governing the Kansas City Schools, holding (i) that the district court's attempt to attract nonminority students from outside the district was impermissible because there had been no showing of an interdistrict violation, (ii) the district court lacked authority to order an increase in teachers' salaries, based on its belief that such an increase designed to attract teachers was essential for desegregation, and (iii) the continuing disparity in student test scores did not justify retaining the desegregation order because the Constitution requires only equal opportunity, not any particular result.[95] Even though the 1977 district court order was making a difference by reducing the number of black children enrolled in schools with a ninety percent or more black enrollment, the Court was willing to abandon the "project."[96] Eighteen years, 1977-1995, is a relatively short period in which to fix a school system that had been segregated by state statute, but the Court appeared unconcerned about the continuing disparity in student performance. Interestingly, in the five cases, *Milliken* through *Jenkins*, Justice Rehnquist authored three of the opinions for the Court and joined the opinion of the Court in the other two cases.

The significance of the decision in *Davis*, requiring that those alleging a violation of the Equal Protection Clause show a discriminatory purpose, cannot be overstated.[97] While a discriminatory purpose may often be inferred from the surrounding

91. *See id.* at 471.

92. *See id.* at 492.

93. *See id*. at 492-99.

94. 515 U.S. 70 (1995).

95. *Id.* at 89-102.

96. *Id.* at 154 (Souter, J., dissenting).

97. While the Court is willing to require challengers in equal protection cases to show a discriminatory purpose, in other areas it has expressed a reluctance to inquire into the purpose of legislation. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."); *see also* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469-70 (1981) (plurality opinion) (explaining that the search for the actual or primary purpose of a statute "is likely to be elusive").

circumstances, it is nevertheless difficult to prove when the racial classification does not appear on the face of the law, ordinance, or policy at issue. The effect of the decision in *Washington v. Davis* is clearly demonstrated in a sex discrimination case, *Personnel Administrator of Massachusetts v. Feeney*,[98] where a Massachusetts statute provided a veterans' preference for veterans who applied for state civil service positions.[99] When the case was filed, over ninety-eight percent of the veterans in Massachusetts were male and the district court referred to the absolute preference provided by the statute as having "a devastating impact upon the employment opportunities of women."[100] So, the discriminatory effect of the statute was obvious. However, the Court said the dispositive question "is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."[101] Ms. Feeney's "ultimate argument rest[ed] upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions."[102] After conceding that it would be "disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable,"[103] the Court went on to explain that "discriminatory purpose," for purposes of equal protection litigation, "implies more than intent as volition or intent as awareness of consequences."[104] Rather, the challenger must show that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[105]

The "discriminatory purpose" approach to race discrimination is somewhat at odds with current cognitive psychology, suggesting that race discrimination is often unconscious and that "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy."[106] A social cognition approach to discrimination is based on three premises: first, stereotyping or categorization is a common cognitive mechanism used by most people "to simplify the task of perceiving, processing, and retaining information about

98. 442 U.S. 256 (1979).
99. *Id.* at 259.
100. *Id.* at 260.
101. *Id.* at 276.
102. *Id.* at 278.
103. *Id.*
104. *Id.* at 279.
105. *Id.*
106. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987).

people in memory;" second, stereotypes operate as "person prototypes" or "social schemas" that function as "implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people," and these cognitive biases "operate absent intent to favor or disfavor members of a particular social group," and "bias a decisionmaker's judgment long before the 'moment of decision;'" and third, these stereotypes, "when they function as implicit prototypes or schemas, operate beyond the reach of decisionmaker self-awareness," making cognitive bias "both unintentional and unconscious."[107] These cognitive biases, because they operate automatically, "must be controlled, if at all, through subsequent 'mental correction.'"[108] As a result, "[t]o establish liability for . . . discrimination, a . . . plaintiff [should] simply be required to prove that his group status *played a role* in causing the employer's action or decision. Causation would no longer be equated with intentionality."[109]

Even if the Court is correct in requiring the challenger who asserts a claim based on the Equal Protection Clause to show intent, why does it define intent differently than it is defined in a well-established body of, for example, tort law? A more appropriate way to determine the constitutionality of the Massachusetts statute would have been to find an intentional classification that disadvantaged female applicants, and then address whether the justification for the statute, that is, "to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations,"[110] met the intermediate standard of review for sex discrimination.

As described by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[111] *Washington v. Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact," which, although not irrelevant, alone will not establish racially discriminatory intent or purpose.[112] The Court in *Arlington Heights* recognized that the challenger does not have "to prove that the challenged action rested solely on racially discriminatory purposes," but rather, that "a discriminatory purpose has been a motivating

107. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88 (1995).

108. *Id*. at 1216 (citation omitted).

109. *Id*. at 1242 (emphasis added).

110. *Feeney*, 442 U.S. at 265.

111. 429 U.S. 252 (1977).

112. *Id*. at 264-65.

factor in the decision."[113] It went on to describe how the challenger can attempt to prove this, through a showing of (a) a disproportionate impact, which in some cases may establish such a clear pattern that is "unexplainable on grounds other than race," (b) the historical background of the challenged decision, including the sequence of events leading to the decision, departures from the normal procedural sequence and substantive departures, and (c) the legislative or administrative history, particularly where there are contemporary statements are made by members of the body in the course of rendering the challenged decision.[114]

Later, in *Hunter v. Underwood*,[115] the Court indicated that if the race discrimination plaintiff shows race was a substantial or motivating factor behind the law or decision that is challenged, the burden shifts to the government to demonstrate that the law would have been enacted without considering this factor.[116] In *Hunter*, a law that denied the right to vote to anyone who had been convicted of a crime involving "moral turpitude" had a substantial discriminatory impact against black residents of Alabama.[117] The Court agreed that race discrimination was a key purpose behind the legislation when it was adopted in 1901 and the government failed in its burden of demonstrating that the law would have been enacted without this consideration.[118]

So, three key decisions of the Supreme Court—*Rodriguez* (1973), *Milliken* (1974), and *Davis* (1976)[119]—established the legal framework that allows today's situation in public education. *Rodriguez* allows states to avoid responsibility for inequality in resources by establishing independent local school districts, with

113. *Id*. at 265-66.

114. *Id*. at 266-68. *Compare* City of Mobile v. Bolden, 446 U.S. 55, 66-68 (1980) (no showing of a discriminatory purpose in establishing or maintaining an at-large system of electing the three members of a City Commission), *with* Rogers v. Lodge, 458 U.S. 613, 622 (1982) (holding that an at-large system of electing members of a County Commission was unconstitutional, based on the District Court's finding that the system was "*maintained* for [the] invidious purpose" of diluting the voting strength of the black population).

115. 471 U.S. 222 (1985).

116. *Id.* at 228.

117. *Id.* at 227.

118. *Id*. at 231-33.

119. The Court deciding *Rodriguez* and *Milliken* consisted of Justices Burger, Stewart, Powell, Blackmun, Rehnquist, Douglas, Brennan, White, and Marshall; the latter four Justices dissented in each of the two cases. *See* Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The *Davis* Court was the same, except Justice Stevens had replaced Justice Douglas, and only two Justices, Brennan and Marshall, dissented. *See* Washington v. Davis, 426 U.S. 229 (1976).

property taxes as the primary source of funds.[120] Similarly, *Milliken* excuses states from responsibility to avoid segregation by establishing independent local school districts and allowing parental choice of residence to preclude court-ordered integration.[121] *Davis* provides the excuse to ignore the discriminatory effects of facially neutral government actions and insulates such effects from challenges based on the Equal Protection Clause,[122] unless the challenger can prove a discriminatory purpose, that is, the government "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[123] This means there is no equal protection problem where a state tolerates a predominantly white suburban school district, spending nearly $600 per pupil, while an adjoining predominantly minority urban school district spends around $350 per pupil.[124] Further, the fact that the education provided in these two districts is "inherently unequal" does not offend the Constitution.

Of course, the Court is not the sole cause of this tragic situation. There is plenty of blame to go around—the executive and legislative branches of government are partly responsible, and parents who select housing based, at least in part, on the type of education available play a role. But, the fact remains that the Court, through its interpretation of the Equal Protection Clause, has paved the way for the segregated educational systems operating in many states. Not only has the Court interpreted the clause narrowly when those seeking equality rely on it, it has interpreted the clause broadly to prohibit benign race-conscious decisions when those opposed to government making race-conscious decisions to achieve equality challenge such decisions. As stated by Justice Marshall in *Bakke*,

> [I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy

120. 411 U.S. at 23-26.

121. *See* 418 U.S. at 741-49.

122. *See* 426 U.S. at 242-46.

123. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

124. In *Rodriguez,* a school district in the core-city of San Antonio, where approximately 90% of the students were Mexican-American and over 6% of the students were African-American, spent $356 per pupil, while another school district in San Antonio, where the student population was 18% Mexican-American and less than 1% African-American, spent $594 per student. 411 U.S. at 11-13. The Court decided there was no violation of equal protection. *Id.* at 28-29.

> of discrimination, I cannot believe that this same Constitution stands as a barrier.[125]

The point is that many low-income children are not receiving an adequate education in our public school system, and without such an education at the elementary and secondary level, it is difficult to level the playing field in the future. When low-income children receive an inferior education, this means a disproportionate number of minority children are receiving an inferior education. Unfortunately, being left behind in elementary and secondary education often results in being left behind in higher education and in employment. Recognizing the adverse effects of an inadequate education leads some higher educational institutions to take affirmative steps designed to compensate for the failures of public education. When these affirmative steps are challenged, the Supreme Court is very willing to use the Equal Protection Clause to strike them down.[126] The Court's decisions are, therefore, not only responsible for the need for affirmative, remedial steps, but also responsible for making it very difficult for the executive and legislative branches to take remedial action.

The Court has stood in the path of legislation aimed at promoting equality in three major ways. First, the Court has narrowed the scope of Section 5 of the Fourteenth Amendment, thereby limiting the power of Congress to pass legislation. This started with the 1997 decision in *City of Boerne v. Flores*,[127] holding that the Religious Freedom Restoration Act exceeded the Section 5 power of Congress because the "congruence and proportionality" between the injury to be addressed and the means utilized was lacking.[128] Second, the Court has insisted on applying strict scrutiny when facing a challenge to affirmative steps taken by government in an effort to promote racial equality and, as a result, it has found most such efforts to violate the Equal Protection Clause.[129] Third, the Rehnquist Court has narrowly interpreted civil rights statutes, including Title VII of the Civil Rights Act of 1964, to the point that Congress has responded with several "restoration" acts.[130] Of course

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125. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

126. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003).

127. 521 U.S. 507 (1997).

128. *Id.* at 520.

129. *See* discussion *infra* Part III.D.

130. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 § 181, 123 Stat. 5 (rejecting the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and clarifying that a discriminatory compensation decision or other practice that is unlawful under statutes prohibiting employment discrimination occurs each time compensation is paid pursuant to the discriminatory decision or practice);

the impact of the Court's legal framework extends far beyond public education, promoting inequality in employment, contracting, housing, health care, and other aspects of society.

All of this leads me to conclude that the U.S. Supreme Court, since the mid-1970s and continuing to the present, is the institution most responsible for racial inequality in this country. It is indeed a sad state of affairs when the nation's "justice" system is the greatest cause of injustice. Even the Court recognizes that "compliance with the Fourteenth Amendment's ban on racial discrimination . . . bolsters the legitimacy of the entire criminal justice system"[131] and that "[r]ace discrimination is 'especially pernicious in the administration of justice.'"[132] There is, indeed, reason to question the legitimacy of our justice system.

D. Blocking Political Branches' Attempts to Promote Equality

In a series of cases, beginning with *Regents of the University of California v. Bakke*[133] and culminating with *Parents Involved in Community Schools v. Seattle School District No. 1*,[134] the Court has made it very difficult for federal, state, and local government to take benign race-conscious steps designed to promote racial equality.[135] Just as those who promoted the Fourteenth Amendment realized that making slavery illegal would not ensure freedom and equality, government officials across the country, as well as leaders of private institutions, understand that prohibiting race discrimination does not assure equality.[136] The Court has continually blocked their efforts.

When the so-called "affirmative action"[137] cases came before the Court, starting with *Bakke*, a key issue concerned the appropriate standard of review. Recall that in the context of invidious race

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ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553 (rejecting several Supreme Court decisions interpreting the Americans with Disability Act in a manner that narrowed the intended broad scope of the Act).

131. Johnson v. California, 543 U.S. 499, 510-11 (2005).

132. *Id.* at 511 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

133. 438 U.S. 265 (1978).

134. 127 S. Ct. 2738 (2007).

135. I do not include the Court's decisions in voting cases addressing race-conscious districting. Generally, if race is used in drawing election districts, strict scrutiny applies even though no one is excluded from voting and every vote is counted equally. *See* Bush v. Vera, 517 U.S. 952, 958-59 (1996); Shaw v. Hunt, 517 U.S. 899, 906-07 (1996); Miller v. Johnson, 515 U.S. 900, 920-21 (1995); Shaw v. Reno, 509 U.S. 630, 643-45 (1993).

136. *See generally Bakke*, 438 U.S. at 364-73 (Brennan, J., concurring in part and dissenting in part).

137. I try to avoid using this term because it has a pejorative connotation, suggesting quotas and other sorts of horrible actions designed to disfavor white persons.

discrimination, the Court, as early as *Korematsu*, indicated that legal restrictions on the rights of a single racial group were "immediately suspect" and subject to the "most rigid scrutiny."[138] Strict scrutiny requires the government to show that it has a compelling justification for the racial classification and that the means selected to accomplish its goal are the least restrictive or narrowly tailored.[139] When addressing invidious race discrimination, *Korematsu* remains the only case in which the Court found that government had met its burden.[140]

In *Bakke*, four Justices argued that intermediate scrutiny should govern benign racial classifications, that is, those intended to benefit minorities.[141] This position never gained the support of five Justices and, after skirting the issue in several cases, in *Richmond v. J.A. Croson Co.*,[142] the Court held that strict scrutiny governs all racial classifications, both invidious and benign, when the classification was made by state or local government.[143] A year later, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[144] the Court held that race-conscious programs adopted by Congress would be subjected to intermediate scrutiny because Congress, as the "National Legislature," was entitled to deference.[145] However, five years later, that decision was overruled when the Court, in *Adarand Constructors, Inc. v. Pena*,[146] held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[147] This means that all benign race-conscious actions, designed to promote racial equality, will be subjected to strict scrutiny, a standard that is nearly always fatal. In his dissenting opinion, Justice Stevens refers to the Court's "disconcerting lecture about the evils of governmental racial classifications" and its assumption "that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the

138. Korematsu v. United States, 323 U.S. 214, 216 (1944).

139. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

140. *See Korematsu*, 323 U.S. at 217-18.

141. *Bakke*, 438 U.S. at 358-62 (Brennan, J., concurring in part and dissenting in part).

142. 488 U.S. 469 (1989).

143. *Id.* at 493-94.

144. 497 U.S. 547 (1990).

145. *Id.* at 563-66.

146. 515 U.S. 200 (1995).

147. *Id.* at 227.

majority."[148] Justice Stevens states that the assumption of the majority is untenable because "[i]nvidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."[149]

When applying strict scrutiny, a racial classification can fail either because the government has not established a compelling justification or because the government fails to show that the means selected is narrowly tailored. The first prong of this standard can be satisfied when government is attempting to remedy past discrimination by the entity that is taking the affirmative steps. So, for example, if a minority proves invidious race discrimination by a municipality in hiring, as part of the remedy, the court may order the municipality to take affirmative steps to remedy that past wrong. If a municipality wants to take affirmative steps voluntarily to address past discrimination, it must establish a prima facie case that it has discriminated in the past in the particular activity at issue, such as employment or contracting.[150] Of course, most municipalities are reluctant to make a determination that they have engaged in invidious discrimination in the past.

The theory of unconscious discrimination, or implicit bias,[151] informs the need for and utility of affirmative steps designed to promote equality. Such affirmative steps can be seen "as attempts by the state to correct for implicit bias, and thus, to break the connection between such bias and outcomes" and a "preference for

148. *Id*. at 242-43 (Stevens, J., dissenting).

149. *Id*. at 243.

150. City of Richmond v. J.A. Croson Co., 488 U.S. at 498-506. Compare *Croson*, *id*., with *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), where the Court said:

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

In *Parents Involved in Community School v. Seattle School District No. 1*, 127 S. Ct. 2738, 2752 n.10 (2007), the Court, as well as the plurality, *id.* at 2762, dismissed this portion of *Swann* as dicta.

151. *See supra* notes 106-09 and accompanying text.

those harmed by the biased assessments can help prevent the implicit bias from being translated into final outcomes."[152] Efforts to "debias" decisionmaking, both direct and indirect, can be enhanced by affirmative steps because "the presence of population diversity in an environment tends to reduce the level of implicit bias,"[153] and affirmative steps can lead to increased diversity.[154] Further, by tolerating plans or programs calling for affirmative steps designed to promote equality, "the law is engaging in a form of indirect debiasing; that is, regulated actors are permitted to take steps that, in turn, tend to reduce implicit bias."[155] Two other authors argue that a proper interpretation of the Equal Protection Clause and Title VII would allow employers to engage in affirmative action in order to produce a diverse workforce and thereby reduce implicit bias.[156] This empirical data supports a common sense notion that the most effective way to address the effects of discrimination in employment, for example, is to design a program that addresses the causes of unequal opportunity and, in fact, leads to more jobs for racial minorities. It is difficult to pretend we have eliminated race discrimination by simply passing laws making it illegal, but ignoring the fact that the results show little or no improvement in employment opportunities for racial minorities.

In the context of education, a majority of the Court, in *Grutter v. Bollinger*,[157] accepted diversity in an educational institution (a law school) as a compelling government interest.[158] However, the decision is narrow and such programs must meet the narrowly tailored requirement.[159] They cannot use a quota system, applicants must be evaluated individually, all factors that may contribute to student body diversity must be meaningfully considered along with race, the school must consider workable race-neutral alternatives, the race-conscious admissions program must not unduly harm members of any racial group, and the program should be limited in time.[160]

The continuing vitality of *Grutter* was placed in issue when the Court, in *Parents Involved in Community Schools v. Seattle School*

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152. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 979-80 (2006) (footnotes omitted).

153. *Id*. at 981 (footnote omitted).

154. *Id*. at 980.

155. *Id*. at 987.

156. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1111-15 (2006).

157. 539 U.S. 306 (2003).

158. *Id.* at 328.

159. *Id*. at 333-34.

160. *See id*. at 336-42.

District No. 1,[161] struck down the school districts' use of race in assigning students to a particular school in order to assure "that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole."[162] The Seattle School District, the Court noted, had "never operated segregated schools, nor . . . ha[d] it been subjected to court-ordered desegregation," but used "the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments."[163] In contrast, the Jefferson County Public Schools, which operates the public school system in Louisville, Kentucky, had maintained a segregated school system until 1975 when the federal court entered a desegregation decree; however, this decree was dissolved in 2000 after a finding that it had achieved unitary status.[164] A student assignment plan adopted in 2001 required that "all non magnet schools maintain a minimum black enrollment of 15 percent and a maximum black enrollment of 50 percent," in a system in which approximately 34 percent of the students are black.[165]

Five Justices voted to strike down both the Seattle plan and the Louisville plan; however, to understand the meaning of the case, it is necessary to analyze carefully the plurality opinion of Justice Roberts[166] and the concurring opinion of Justice Kennedy, who supplied the critical fifth vote. Justice Roberts, in a portion of his opinion joined by Justice Kennedy, suggests that diversity may be a compelling government interest only in higher education, because *Grutter* "relied upon considerations unique to institutions of higher education."[167] In a portion of his opinion not joined by Kennedy, Roberts referred to the design and operation of the challenged plans as "directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."[168] Later, he said "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[169] Justice Kennedy joined the plurality in concluding that the school districts failed to show that their plans were narrowly tailored, particularly because they did not establish necessity and they did not show they considered methods other than explicit racial

161. 127 S. Ct. 2738 (2007).
162. *Id.* at 2746.
163. *Id.* at 2747.
164. *Id.* at 2749-50.
165. *Id.* at 2749.
166. Justice Roberts was joined by Justices Scalia, Thomas, and Alito.
167. *Parents Involved*, 127 S. Ct. at 2754.
168. *Id.* at 2755.
169. *Id.* at 2758.

classifications to achieve their stated goals.[170] Finally, in a portion of his opinion not joined by Kennedy, Justice Roberts gave a narrow version of what *Brown* stands for, stating:

> Before *Brown*, schoolchildren were told where they could go and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop discriminating on the basis of race is to stop discrimination on the basis of race.[171]

Responding to this language, Justice Stevens, in his dissent, states:

> There is a cruel irony in the Chief Justice's reliance on our decision in [*Brown*]. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.[172]

Justice Stevens goes on to attack what he calls the Court's "rigid adherence to tiers of scrutiny" because it "obscures *Brown*'s clear message."[173]

When it comes to affirmative steps voluntarily taken by school districts to avoid resegregation, it appears apparent that the plurality wants strict scrutiny to be fatal in practice. Justice Thomas, in his concurring opinion, refuses to recognize even the starkest racial imbalance as resegregation because the term segregation is reserved for de jure segregation.[174] Justice Kennedy, while agreeing

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170. *Id.* at 2759-60.

171. *Id.* at 2768 (second, third, and fourth alteration in original) (citation omitted). The simplistic final sentence sounds good in the abstract, but it ignores the reality of our real world, in which much discrimination is unconscious, in the sense that it is based on stereotypes. *See supra* notes 106-09 and accompanying text.

172. *Parents Involved*, 127 S. Ct. at 2797-98 (Stevens, J., dissenting) (footnotes omitted).

173. *Id.* at 2799.

174. *Id.* at 2768-70 (Thomas, J., concurring).

that the plans were not narrowly tailored, sees it differently.[175] He states that parts of the plurality opinion "imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account," and that "[t]he plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling."[176] Further, "[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[177] He goes on to say school districts may "seek to reach *Brown's* objective of equal educational opportunity," and that "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[178] Most importantly, Justice Kennedy said "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population."[179] He concludes by encouraging school districts to continue "the important work of bringing together students of different racial, ethnic, and economic backgrounds."[180]

So, what does the decision in *Parents Involved* mean for the future? If the plurality view prevails, strict scrutiny will, in fact, be fatal, and states and school districts will simply have to accept resegregation that is not the direct result of government action. In contrast, if the four dissenting Justices prevail, affirmative steps to address the inequality inherent in segregation will be allowed. The key, of course, is Justice Kennedy and whether a school district can convince him that its plan is narrowly tailored.[181]

The irony of the Court's rigid adherence to strict scrutiny in all cases alleging race discrimination, both invidious and benign, is that such scrutiny is not necessary to strike down invidious

175. *See id.* at 2788-97 (Kennedy, J., concurring).

176. *Id.* at 2791.

177. *Id.*

178. *Id.* at 2791-92.

179. *Id.* at 2797.

180. *Id.*

181. While Justice Kennedy's opinion in *Parents Involved* is encouraging to school districts interested in taking benign race-conscious actions, Justice Kennedy has consistently voted in favor of striking down such actions. *See* Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995); Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 631 (1990) (Kennedy, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring).

discrimination.[182] As a result heightened scrutiny serves no purpose other than to strike down benign race-conscious actions designed to achieve racial equality. A racial classification, the purpose of which is to disadvantage a racial minority, violates equal protection even if a court applies a heightened version of rational basis. For example, in *Romer v. Evans*,[183] the Court recognized "that if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end,"[184] but went on to strike down a Colorado constitutional amendment that prohibited the passage of any law banning discrimination based on sexual orientation because there was no legitimate governmental purpose, that is "the disadvantage imposed is born of animosity toward the class of persons affected."[185] The Court relied, in part, on its earlier decision in *U.S. Department of Agriculture v. Moreno*,[186] where it stated that if "'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[187] Based on the rationale of *Romer* and *Moreno*, invidious race discrimination would be struck down utilizing rational basis because such action is "born of animosity."[188]

In contrast, affirmative government actions designed to promote racial equality have a legitimate governmental purpose—racial equality and equal opportunity—and the means utilized are rationally related to that purpose. In short, strict scrutiny is not needed to strike down invidious discrimination based on the Equal Protection Clause, but strict scrutiny serves to prohibit nearly all voluntary race-conscious steps taken by government in an effort to achieve racial equality. It is difficult to believe that this was the intent or goal of those who fought for the passage of the Fourteenth Amendment.

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182. In *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), the Court said racial classifications, in most circumstances, are "irrelevant to any constitutionally acceptable legislative purpose."

183. 517 U.S. 620 (1996).

184. *Id*. at 631.

185. *Id*. at 634.

186. 413 U.S. 528 (1973).

187. *Id*. at 534 (emphasis omitted).

188. *Romer*, 517 U.S. at 634. Justice Ginsburg, in her concurring opinion in *Stenberg v. Carhart*, 530 U.S. 914, 951-52 (2000) (Ginsburg, J., concurring), and her dissenting opinion in *Gonzales v. Carhart*, 550 U.S. 124, 169-91 (2007) (Ginsburg, J., dissenting), the so-called "partial birth abortion" cases, states that a statutorily imposed burden on the constitutional right to choose to have an abortion constitutes an "undue burden" if its only justification is that the legislature chose it as a means of expressing its hostility to the constitutional right.

IV. THE SUPREME COURT AS THE PROBLEM

The net effect of the Court's equal protection jurisprudence is that the Equal Protection Clause has become a huge barrier to achieving racial equality. It appears that the Court's message to government is that it is free to engage in invidious race discrimination so long as it is able to mask the discrimination. In other words, do not make the racial classification explicit and find proxies for your discriminatory purposes. Racial discrimination may flourish so long as it is disguised in a manner that makes it difficult for any challenger to establish the real purpose of facially neutral policies and practices. Similarly, benign efforts to promote equality that take race into account are more likely to survive if government is not transparent, that is, government attempts to mask its race-conscious decisions. Can this result possibly be consistent with the Equal Protection Clause? Is it possible that the clause has nothing to do with actual equality? Why did the Court choose this path?

To address the last question posed above, it is necessary to examine the "top three" decisions that have led to the current status of the law.[189] Starting with *Milliken*, the decision that severely limited the power of the courts to address segregation in elementary and secondary education by restricting the use of an interdistrict remedy,[190] we should examine what was at stake in the case, that is, the ability of whites to flee from integrated schools. It was easy for parents to flee from Detroit and move a few miles to a nearby, mostly-white, school district.[191] This was a less costly alternative to sending their children to a private, mostly-white, school.[192] The Court was unwilling to take this "right to flee" from parents, so it ignored the fact that Michigan, like most states, had made a conscious decision to vest control over its public schools in local school districts.[193] Even if fleeing is private action, not subject to the restrictions of the Fourteenth Amendment, certainly the organization and governance of the public schools is state action. In *Norwood*, the Court recognized what Mississippi was doing—assisting white parents who wanted to flee from public schools that were ordered to desegregate by subsidizing the mostly-white private schools—and

189. I am referring to *Milliken v. Bradley*, 418 U.S. 717 (1974), *Washington v. Davis*, 426 U.S. 229 (1976), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). A fourth decision, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), made the evil of *Croson*, the use of strict scrutiny when a benign racial classification is challenged, more comprehensive in that it applied strict scrutiny to benign classifications made by Congress.

190. *See Milliken,* 418 U.S. at 745.

191. *See id.* at 804-05 (Marshall, J., dissenting).

192. *See id.* at 801-02.

193. *See id.* at 763 (White, J., dissenting).

found a violation of the Equal Protection Clause because of the impermissible effect of the state's action.[194]

Why was Mississippi's action struck down while Michigan's was upheld? Of course there are factual differences, for example, Mississippi's goal was more obvious and Michigan's explanation (local control of public schools) was more legitimate, but are there real differences? In both states, the effect was impermissible in that it facilitated the private action of white parents who wanted to interfere with *Brown*'s mandate to desegregate public schools. In short, *Milliken* allowed states to facilitate the efforts of white parents who were intent upon avoiding the Court's mandate to integrate public schools. This looks a bit like what the Court would not allow in *Shelley v. Kramer*,[195] when the Court reversed the decision of a state court in Missouri that was very willing to assist white parents who sought the assistance of government in carrying out a racially restrictive covenant.[196] While Michigan could not have prevented its residents from leaving the state to avoid integration, it certainly did not have to facilitate their efforts by ceding control of its schools to local districts and boards.[197]

Following closely on the heels of *Milliken*, the Court in *Davis* made explicit what was implicit in *Milliken*, that is, discriminatory effects alone, without a discriminatory purpose, do not violate the Equal Protection Clause.[198] This decision was instrumental in gutting the Equal Protection Clause because the Court made it clear that the clause did not assure actual equality.[199] *Davis* paved the way for the Court's retreat from *Brown* in public education by making it clear that neither segregation nor resegregation violates the Equal Protection Clause so long as the challengers cannot prove it is the result of government action.[200] As made clear in a subsequent decision, government is now free to ignore the obvious discriminatory effects of its action so long as it masks any discriminatory purpose.[201] What was really at stake in *Davis*, beyond the employment test utilized by the District of Columbia? This decision goes to the guts of the Equal Protection Clause in that it relieved government of any constitutional obligation to promote equality by monitoring the effects of its actions. As stated earlier, in a more sinister way, *Davis*

194. Norwood v. Harrison, 413 U.S. 455, 466-67 (1973).

195. 334 U.S. 1 (1948).

196. *See id.* at 20-21.

197. *See Milliken*, 418 U.S. at 741-43.

198. Washington v. Davis, 426 U.S. 229, 240 (1976).

199. *See id.* at 240-41 (noting the existence of predominantly black or white schools is not alone violative of equal protection).

200. *See id.*

201. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278-79 (1979).

legalized government activity designed to maintain inequality so long as its purpose could not be unmasked. In other words, the Equal Protection Clause does not guarantee actual equality, only formal (de jure) equality. There is nothing in the language of the Equal Protection Clause that mandates the result in *Davis*, nor is Justice White's opinion for the Court compelling. Justice White refers to a number of prior decisions to support his conclusion that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[202] He concedes "[t]here are some indications to the contrary in our cases."[203] My point is simply that there is nothing in either the language of the Equal Protection Clause or the Court's prior decisions that dictated the result in *Davis*.

Even if one is convinced that the purpose of the clause was to reach only intentional discrimination, the Court could have reached a different result by simply applying the well-established understanding of intent in tort law—"intent as volition or intent as awareness of consequences."[204] Alternatively, the Court could have utilized the approach developed in *Griggs v. Duke Power Co.*,[205] for cases alleging employment discrimination in violation of Title VII.[206] Very briefly, under *Griggs*, the plaintiff can establish a prima facie case by showing that a facially neutral practice has a significant disproportionate impact, thus shifting the burden of persuasion to the employer to show that the practice has a manifest relationship to the job at issue.[207] This is similar to the scheme employed in an equal protection case, *Castaneda v. Partida*,[208] where the Court held that a stark statistical disparity showing a substantial underrepresentation of Mexican-Americans selected for grand jury duty establishes a prima facie case[209] and shifts "the burden of proof to the State to dispel the inference of intentional discrimination."[210] So, in light of the credible alternatives to its holding in *Davis,* how can we explain the decision in *Davis*? Maybe the Court was simply unwilling to

202. *Davis*, 426 U.S. at 239 (emphasis omitted).

203. *Id*. at 242.

204. *Feeney*, 442 U.S. at 279.

205. 401 U.S. 424 (1971).

206. 42 U.S.C. § 2000e-(2)(a) (2000).

207. *Griggs*, 401 U.S. at 431-32. Subsequently, the Court modified *Griggs* in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-58 (1989), making the proof scheme less plaintiff friendly, and a few years later, in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-(2)(m), (k) (2000), Congress restored most of the *Griggs* holding.

208. 430 U.S. 482 (1977).

209. *Id.* at 495.

210. *Id*. at 497-98.

promote true equality by forcing government to prepare a "discriminatory effects impact statement" before it takes action. As suggested by Justice Stevens in his concurring opinions in *Davis* and *Feeney,*[211] the Court could have ruled in favor of the government in these two cases without gutting the Equal Protection Clause.

One more step and the Court's mission was complete—to avoid racial equality, it needed to subject affirmative government steps designed to promote equality to strict scrutiny. After several years of litigation, the Court accomplished this in *Croson* and *Adarand*. In an effort to disguise what it is really doing in these cases, several Justices insist that race-conscious actions will only perpetuate race discrimination. For example, in his plurality opinion in *Parents Involved*, Chief Justice Roberts states, without any supporting empirical data, that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[212] In the same case, Justice Thomas refuses to view racial imbalance as segregation[213] and argues that there is really no difference between invidious and benign discrimination.[214] Is there really no difference between an action taken for the purpose of promoting equality and an action taken for the purpose of hurting a particular race? Isn't the latter action "born of animosity," while the former action is well-intentioned? Even if it is sometimes difficult to distinguish between the two,[215] in most circumstances, it will not be difficult and the trier of fact should be up to the task.[216]

Assuming that all three of these "top three" decisions raise difficult issues, that reasonable people could differ, and that there is some support for the Court's decisions, these assumptions do not provide an explanation for why the Court selected the path it did rather than the path that would have promoted racial equality. Given the nature of constitutional interpretation, which leaves some slack in joints of the various provisions, it is quite apparent that the

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211. *See supra* note 77.

212. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007). In fact, the empirical data may suggest that benign race-conscious decisionmaking may promote equality by reducing unconscious or implicit bias. *See supra* notes 106-09 and accompanying text.

213. *Parents Involved*, 127 S. Ct. at 2769 (Thomas, J., concurring).

214. *Id*. at 2782 (criticizing the dissent's "rejection of the colorblind Constitution").

215. *Id*. at 2786 n.27 ("How does one tell when a racial classification is invidious?").

216. In considering a facial challenge to the Partial-Birth Abortion Ban Act, the Court, including Justice Thomas, indicated it "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." Gonzales v. Carhart, 550 U.S. 124, 163 (2007). Should the same deference be given to legislatures when making judgments about the need for affirmative steps to achieve racial equality when there is uncertainty about whether specific steps will actually promote equality?

Court, beginning in the mid-1970s, deliberately selected the path that perpetuates and even promotes racial inequality. When a perfectly legitimate, reasonable, and justifiable alternative existed, the Court's choice is unjustified.

V. CONCLUSION

Contrary to Alexander Bickel's description of the Court,[217] in the area of racial equality, it is indeed the "most dangerous branch" because, with the exception of a short period between 1954 and 1973, it has consistently interpreted the Fourteenth Amendment in a manner that prevents it, and the other branches of the federal government as well as state and local government, from promoting racial equality. While the Thirteenth Amendment, which abolished slavery as a matter of law, the Equal Protection Clause of the Fourteenth Amendment, which serves to strike down most de jure discrimination, and several federal statutes that address discrimination by both government and private parties in certain activities have resulted in substantial progress in our society, they have not resulted in any semblance of racial equality. A major promoter of this sad state of affairs, I believe, has been the U.S. Supreme Court.

217. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1976).