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DESEGREGATION LAW AND JURISPRUDENCE

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ESSAY

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In the inaugural issue of the *Duke Forum for Law & Social Change* (the "*Forum*"), the founders chose to pursue the question: "How Do We Move Education Forward?" The panel presentations at the Spring Conference and the articles in the inaugural publication address the question from two distinct vantage points. First, the *Forum* asked panelists to tackle the question, "Does Integration Still Matter?" At a time when some would contend that we are living in a post-racial America—following the election of Barack Obama, the first black President of the United States—the *Forum* members demonstrated their understanding that a proactive challenge to the entrenched structural inequality in our public education system remains vitally important to the future of public education.[1] The *Forum's* Spring Conference stimulated probing discussion about

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1. Scholars periodically query the relevance of desegregation remedies as we move further forward from the days of de jure segregation and society becomes more diverse and integrated. *See, e.g.*, Wendy Parker, *The Future of School Desegregation,* 94 NW. U. L. REV. 1157 (2000) (proposing ways

creative ways to address the continuing educational crisis. In the keynote address, Rufus Williams, President of Chicago Public Schools, challenged the audience to become involved in local school governance and contribute to the public policy debate. New perspectives on integration are discussed in depth in the articles by Professor Kristi Bowman and Professor Olati Johnson.

The second issue, "Innovations in Legal Education," called for reconsideration of teaching and testing methods in law school. The articles by Professor Irene Ayers and Professor John Garvey propose several alternative pedagogical and testing methods. The articles also discuss how innovative pedagogy and assessment help reveal the benefits of diversity in the profession. The founding editors of the *Forum* deserve thanks for advancing discussion on the value of diversity in legal education and on the need to continue moving towards actual equality in public education.

My Essay provides context for the articles that query the contemporary relevance of integration. Part I addresses the challenge of understanding desegregation and its relationship to integration. Part II explores the equality rationales offered by courts and scholars to support or reject integration as the most viable method for achieving desegregation. The Essay concludes that we should move beyond substantive equality to anti-subordination strategies targeted at the deeply entrenched structural inequalities that marginalize children in poor or racially-isolated schools.

I. THE ORIGINAL DEBATE: DOES DESEGREGATION REQUIRE INTEGRATION?

Beyond the removal of statutory barriers, we generally understand desegregation to mean "the actual attendance together in public schools of significant proportions of black and white children as the result of judicial or administrative orders issued by authorities outside the school district or by the school authorities themselves as a result of litigation or the threat of litigation."[2] However, the political and legal debates over whether desegregation required actual integration complicated the Court's gradual arrival at an authoritative meaning of desegregation. It appears, then, that what James Liebman observed almost twenty years ago rings true today as evidenced by the split decision *Parents Involved in Community Schools v. Seattle School District No. 1*:[3] "[T]he legal, intellectual, and moral bases for desegregation remain unstable even now."[4]

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to combat the dormancy of school desegregation litigation); john a. powell & Margaret L. Spencer, Brown *Is Not* Brown *And Educational Reform Is Not Reform If Integration Is Not The Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE 343, 346-51 (2003) (distinguishing reforms in delivery of education from achieving racial integration); Danielle R. Holley, *Is Brown Dying? Exploring The Resegregation Trend In Our Public Schools*, 49 N.Y.U. L. REV. 1085, 1086 (2004) (questioning whether the resegregation trend is evidence that integration has failed).

2. James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465 n.3 (1990) (undertaking an exhaustive discussion of five theories of desegregation).

3. 127 S. Ct. 2738 (2007) (deciding by plurality that plans to create more racially diverse schools violated equal protection; with four dissents).

4. Liebman, *supra* note 2, at 1472.

After *Brown v. Board of Education*,[5] courts and scholars claimed that simply ending de jure segregation by judicial and legislative edict satisfied it's mandate to provide equal educational opportunity. Others contended that desegregation described the ideal of facilitating racial integration—through some voluntary process or one required by law—in order to obtain a critical mass of minority students in majority schools.[6] Eventually, the latter viewpoint prevailed. Desegregation developed into a judicially managed remedy to de-constitutionalize the social, economic, and political inequality reinforced by *Plessy v. Ferguson*.[7] Yet there is still no consensus by the Supreme Court over whether actual system-wide integration, or good faith attempts that result in some racially diverse schools alone satisfy the equality mandate of *Brown I.*

Desegregation law consists of federal and state court decisions as well as federal, state, and local statutes and regulations intended to create and protect the process of desegregation in a political system devoted to local control over education. Desegregation jurisprudence accounts in large measure for the expanded remedial power enjoyed by federal courts.[8] Unfortunately, the court-supervised implementation of these judicially mandated integration plans conjures images of social unrest and racial conflict in communities across the nation as they went through what both progressive[9] and conservative[10] thinkers considered a failed social experiment. On the other hand, desegregation fundamentally changed public education at all levels in America. The process produced compulsory and voluntary racial integration at a level commonplace today, but unheard of only two generations ago in America's history.[11]

Moreover, the study of desegregation jurisprudence is interdisciplinary. Thurgood Marshall and his legal team introduced social science evidence in *Brown I* to prove the theory that segregation caused stigmatic injury to children of color.[12] History and politics also inform our understanding of the converging

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5. 347 U.S. 483 (1954) (holding that education systems separated based on race violated the equal protection clause right to equal educational opportunity).

6. Liebman, *supra* note 2, at 1465 n.3.

7. 163 U.S. 537 (1896).

8. Although the initial remedial order in *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955), only required state and local governments to act with "all deliberate speed" to end segregation, eventually the Supreme Court recognized the expansive power of the federal judiciary to mandate racial integration plans to satisfy the *Brown* mandate to end segregation.

9. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 123 (2004) (observing that "the pattern of black and Hispanic children's educational experience being undermined by uncaring teachers whose approach is geared to racial stereotypes is far more widespread than any of us want to contemplate).

10. Members of the U.S. Civil Rights Commission on Civil Rights, chaired by Gerald Reynolds and Abigail Thernstrom, concluded, "There is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvements in academic performance." *The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education*, U.S. COMMISSION ON CIVIL RIGHTS, July 28, 2006, at 3, *available at* www.usccr.gov/pubs/112806diversity.pdf.

11. SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 1 (John Boger & Gary Orfield, eds., 2005) (describing the collection of essays as telling the story "of a South where schools have been transformed beyond recognition. . . ").

12. *See* Brief for Appellants, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), 1952 WL 47265.

interest that forged this area of law.[13] Desegregation policies have also spurred the growth of innovative education methods such as magnet schools,[14] assessment tools to measure student development in racially integrated settings,[15] and single-sex education.[16]

Finally, desegregation law has expanded our understanding of equality and due process.[17] Over time, the Court reshaped the principle of equality largely in the context of remedying the deprivation of rights to black Americans relegated to second-class citizenship status. The Court moved from relying on the deferential equality rationale that upheld segregation to formal declarations of the equality of black and white Americans in *Brown I*. The Court's initial prohibition of segregation, however, eventually warranted an assertion of judicial authority to impose an affirmative obligation on local governing bodies to integrate schools. The next section explores the evolution from deferential equality to the current debate over whether the formal or substantive equality rationale (that supports affirmative plans to integrate) should guide the Court.

II. EQUALITY RATIONALES FOR DESEGREGATION

From *Roberts v. City of Boston*[18] to *Parents Involved*,[19] the goal of desegregation has been to place children of color and white children on equal footing in public education. During the one hundred and fifty plus years between these two decisions, desegregation jurisprudence developed in response to the entrenched system of racial hierarchy that prevented integrated education. The equality rationales relied on by courts to accept or reject integration include deferential equality, formal equality, substantive equality, and the non-subordination theory of equality.

A. Deferential Equality

A desegregation case brought prior to the ratification of the Reconstruction Amendments failed because the court deferred to local authorities to decide whether race-based school assignments contradicted the guarantee of equality. In *Roberts v. City of Boston* the father of Sarah Roberts brought the first reported

13. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. & expanded ed. 2004).

14. KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 282 (2005) (discussing the creation of choice as a means of promoting integration with magnet and charter schools).

15. Missouri v. Jenkins, 515 U.S. 70 (1995).

16. *See generally* Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455 (2005).

17. *Bolling v. Sharpe*, 347 U.S. 497 (1954), decided the same day as *Brown I*, held that education systems operated under federal control in Washington, D.C. violated the due process clause of the Fifth Amendment, which incorporates the same principles of fairness as equal protection.

18. 59 Mass. (5 Cush.) 198 (1849).

19. 127 S. Ct. 2738 (2007).

legal challenge to segregated schools in 1850.[20] Roberts argued that separate schools created a racial caste system in violation of the Massachusetts Constitution.[21] The plaintiff also argued that educational institutions built on a caste system reinforced the social attitude that the entire black race "possess[es] certain moral or intellectual qualities, which render it proper to place them all in a class by themselves."[22] Finally, Roberts contended that even if facilities and curricula at the white and black schools were identical, "a school exclusively devoted to one class must differ . . . in its spirit and character."[23]

In *Roberts,* the court deferred to the local school board despite the glaring inequalities presented to the court. Chief Judge Shaw, foreshadowing arguments made in *Plessy*, reasoned that social sentiment militated against recognizing the same legal rights for white and black children.[24] The court declared that the exercise of state power to create separate schools was reasonable despite the unequal instruction and conditions in the all-black schools.[25] The *Roberts* decision had far-reaching effects. Less than fifty years later in *Plessy*, the Supreme Court relied on *Roberts*, and later state court opinions upholding separate schools for white and black children, to justify segregation in public transportation.[26]

Deferential equality gave way to the purportedly neutral formal equality rationale that individuals or groups that are alike, or similarly situated, should be treated similarly based on their actual characteristics. For over sixty years, from *Plessy* to *Brown,* the Supreme Court grappled with how to employ the formal equality rationale.

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20. *Roberts*, 59 Mass. (5 Cush.) 198. Boston established separate schools for Black children in 1820, at the behest of Black parents whose children could not attend the public schools "on account of the prejudice then existing against them." *Id.* at 200. Eventually the Massachusetts legislature outlawed segregated schooling, but closed black schools and dismissed black teachers. Within ten years, the schools were re-segregated. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 82–83 (2008).

21. *Roberts*, 59 Mass. (5 Cush.) at 201 (citing MASS. CONST. art. I, VI).

22. *Id.* at 203.

23. *Id.* The United States Supreme Court later adopted this "spirit and character" argument in *Sweatt v. Painter*, 339 U.S. 629 (1950), stating that long-established majority institutions possessed intangible qualities "which are incapable of objective measurement but which make for greatness." *Id.* at 634.

24. *Compare Roberts*, 59 Mass. (5 Cush.) at 209–10 ("It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.") *with* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

25. *Roberts*, 59 Mass. (5 Cush.) at 209–10.

26. "Similar laws have been enacted by congress under its general power of legislation over the District of Columbia (sections 281–283, 310, 319, Rev. St. D. C.), as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts." *Plessy,* 163 U.S. at 545.

B. Formal Equality

The fledgling ideal of formal equality emerged when the Court reasoned that segregation laws did not violate the Fourteenth Amendment as long as the same treatment applied to both black and white citizens.[27] The *Plessy* decision solidified constitutional protection for segregation under this original formal equality rationale. Justice Harlan's dissent in *Plessy*, also based on the formal equality rationale, reached the opposite conclusion.[28] Justice Harlan shared the clearly expressed racial prejudice of the Court.[29] He was, however, able to separate his personal and legal views.[30]

The NAACP Legal Defense Fund developed a strategy to reverse *Plessy* and its effects. The goal was to obtain a declaration from the Court endorsing racially integrated schools because segregation in public education offended equality.[31] Starting in 1938, the Supreme Court prohibited segregation in several public universities.[32] The Court reasoned that since the states could not provide "the same" education to black students as provided for white students, their only alternative was to admit black students. The campaign to overrule the separate–but-equal doctrine culminated in *Brown v. Board of Education*.[33]

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27. *Plessy*, 163 U.S. at 544 ("The object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but 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."); *see also* Pace v. Alabama, 106 U.S. 583 (1883) (upholding Alabama law punishing fornication and adultery between a white person and black person more severely than between persons of the same color); *but see* Loving v. Virginia, 388 U.S. 1, 8 (1967) (rejecting the state's "equal application" argument that anti-miscegnation laws equally prohibited interracial marriage by blacks and whites).

28. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

29. *See, e.g.*, *id.* at 552 (majority opinion) ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."); *id.* at 559 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."). For a critique of Harlan's use of the formal equality rationale, see Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1 (1991).

30. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.").

31. Brief for Appellants at 15–17, *Plessy*, 163 U.S. 537, 1952 WL 47265 (arguing for system wide integration that social science evidence suggests leads to positive race relations).

32. *See* McLaurin v. Okla. State Regents, 339 U.S. 637 (1950) (striking down practices in the University of Oklahoma Graduate School that admitted a black student but separated him from his classmates in the library, cafeteria and classrooms); Sweatt v. Painter, 339 U.S. 629 (1950) (requiring the State of Texas to admit African Americans to the law school); Sipuel v. Oklahoma, 332 U.S. 631 (1948) (ordering the admission of a black applicant into the Oklahoma state law school); Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337 (1938) (ordering the admission of a black applicant into the Missouri state law school).

33. 347 U.S. 483 (1954) (declaring separate education systems inherently unequal). For a comprehensive history of the campaign launched by the NAACP and other organizations to overrule *Plessy*, see RICHARD KLUGER, SIMPLE JUSTICE (rev. & expanded ed. 2004)(1975) .

In *Brown* the Court finally directly confronted the issue of whether the use of state police power to require separate schools violated the Fourteenth Amendment. *Brown* rested on the assumption that the long denial of equal protection stigmatized black students at all levels of education.[34] Even if the states could in fact provide virtually identical schools for black and white students, segregation itself, especially when practiced by the state, was repugnant to the Constitution. In sum, the Court found that segregation produced inherent inequality. Moreover, Leibman explains that desegregation broke up the "ingrained willingness of our political system to count 'the racist opinion'—that citizens of one race are less deserving of political respect"—as a valid basis for deciding how to allocate scarce resources.[35]

A unanimous Court overruled the formal equality analysis of *Plessy*. But overruling *Plessy* did not resolve the contradiction inherent in the formal equality rationale. As Reva Siegel rightly observed, "When *Brown v. Board of Education* prohibited racial segregation in public education, it inaugurated a great debate about equal citizenship and federalism that spanned the second half of the twentieth century."[36]

Shortly after *Brown*, scholars recognized that the Court had not yet completed its task. Because the Court-constructed desegregation law was built on the idea of formal equality, the debate over what equality required centered largely on whether *Brown* stood for the proposition that racial classification is per se unconstitutional, or that racial classification is permissible when used to disrupt rather than further the racial subordination of a racial minority group.[37]

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34. The brief for the *Brown* plaintiffs used rudimentary social science to argue that racial segregation itself had a detrimental effect on children of color. Brief for Appellants, *supra* note 12, at 8–9. The detrimental effects included denial of "the opportunity available to all other racial groups to learn to live, work, and cooperate with the [majority white] population; to develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population." *Id.* at 9.

35. Liebman, *supra* note 2, at 1474. Similarly, Reva Siegel observes:

> At the core of arguments about classification and group harm that stretch across the decades are questions of legitimacy: in what ways and to what extent can the Constitution be construed to mandate intervention in the affairs of a relatively powerful group, on behalf of a less powerful group? Conflicts over this question do much to shape the relation of claims about racial classification and racial subordination in the modern equal protection tradition.

Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1474 (2004). *Cf.* Wendy Brown Scott, *The Sin of Racism: Comments on the Remarks of Chancellor Julius Chambers*, 27 CAP. L. REV. 35 (1998) (characterizing the treatment of black Americans and the denial of racial equality as mean-spirited).

36. Siegel, *supra* note 35, at 1470.

37. "The problem which the courts face in giving meaning to 'equal protection' is to determine which particular types of classifications are so unequal and discriminatory as to be within the constitutional purview of this clause. . . [On the other hand s]ome unequal and discriminatory laws will be held valid under the equal protection clause." ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 114–15 (1957). For alternative viewpoints on the contradictions produced by formal equality premised on First Amendment principles, see Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (critiquing segregation for violating the freedom of association rights of black citizens and integration for violating the same rights of white citizens). For a critique of the freedom of choice rationale, see Wendy R. Brown, *The Convergence of Neutrality and*

After the Court's remedial command in *Brown v. Board of Education II* to desegregate "with all deliberate speed,"[38] state officials and local school boards used formal equality like a two-edged sword to resist the idea that equal protection required compulsory integration.[39] On the one hand, the concept of formal equality could support the premise that only race-neutral or color-blind policies satisfy the mandates of equal protection, despite the failure of those policies to produce integrated schools.[40] Thus, the demise of the doctrine of separate-but-equal, school boards resistant to integration argued, ended the government's authority to make race-based distinctions under any circumstances. On the other hand, the intentional failure of post-*Brown* race-neutral "choice" plans to integrate schools[41] led the Court to revisit the question of what equality required. School boards throughout the South, under political pressure and threat of violence from white citizens, devised race-neutral desegregation policies intended to delay integration. Lower courts charged with enforcing *Brown I* condoned the use of race-neutral plans to protect the status quo for white students, despite their obvious and intentional failure to achieve meaningful equality.[42] Such widespread resistance signaled the need for the Court to go beyond formal equality.

Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity, 60 TENN. L. REV. 63 (1992) (discussing why it is inappropriate to justify the continuation of racially segregated and unequal colleges and universities on the basis of the right of free association).

38. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

39. For an example of one of the original cases consolidated with *Brown*, see *Briggs v. Elliott*, 132 F.Supp. 776, 777 (E.D.S.C. 1955) (finding that *Brown* did not require integration and did not "forbid such segregation that occurs as a result of voluntary action"*). See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 199–202 (1994) (discussing how white school boards crafted complex unworkable plans and state constitutional amendments to enshrine segregation, while black parents remained reluctant to send their children to predominantly white schools).

40. For a perspective that suggests a substantial dichotomy between colorblindness and racial neutrality, see Eboni S. Nelson, *What Price* Grutter? *We May Have Won the Battle, But Are We Losing the War?*, 32 J.C. & U.L. 1 (2005). Nelson embraced the anticlassification norm, but distinguished colorblindness and racial neutrality, writing, "Contrary to some theories, race-neutral measures do not necessitate a color-blind approach to achieving the goal of providing meaningful educational opportunities to minority students." *Id.* at 6. She claims, "It is not necessary . . . for [race-neutral] programs to neglect or ignore race and the influence of race on certain students in order to be considered race-neutral. It is only necessary that they do not allow applicants to be classified and/or selected based on their race or ethnicity." *Id.* at 8.

41. For a discussion of the origins of "freedom of choice" plans and their effect on desegregation, see Brown, *supra* note 37, at 97–100.

42. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430 (1968) *rev'g* Green v. County Sch. Bd., 382 F.2d 338 (4th Cir. 1967) (striking down a typical race-neutral desegregation plan, that had been upheld by the district court and court of appeals). In the Kent County, Virginia, school system, children were given the option of choosing between the county's two elementary schools, one all white the other all African-American. *Id.* at 431–32. The Court noted that in three years of operation under the plan, "not a single white child has chosen to attend [the black school] and . . . 85% of the Negro children still attend the all-Negro . . . school." *Id.* at 441. *See also* Bowman v. County Sch. Bd., 382 F.2d 326, 328 (4th Cir. 1967) (holding that a racial integration plan was not required and that freedom of choice plan that gave black children an unrestricted right to attend any school in the system did not violate their constitutional rights); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on reh'g en banc*, 380 F.2d 385, 391 (5th Cir. 1967) (expressly abolishing certain types of freedom of choice plans).

B. Substantive Equality

The substantive equality rationale rejects the anti-classification norm in favor of an understanding of equality that goes beyond requiring the repeal of segregation laws. In *Parents Involved*, Justice Breyer wrote that the Equal Protection Clause "outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria."[43] Therefore, substantive equality supported race-conscious affirmative action, aggressive remedial intervention by the court, and improvements in student achievement. The Court, however, did not arrive at a substantive understanding of equality with haste.

Owen Fiss referred to crafting remedies to desegregate schools as the "central riddle" of school desegregation law.[44] Therefore, the failure of the Court in *Brown II* to mandate swift and effective integration plans delayed the realization of desegregated, and presumably equal schools. Fourteen years after *Brown I*, the Supreme Court finally demanded affirmative and race-conscious enforcement. *Green v. County School Board*[45] signaled a move by the court away from color-blind formal equality to a more substantive meaning of what *Brown I* required to satisfy the equality mandate. While so-called "choice" plans were not per se constitutional,[46] the Court promised to strike down any plan that perpetuated segregation and to uphold plans intended to convert segregated school systems into unitary school systems.[47] After accusing the school board of the "deliberate perpetuation" of racially segregated schools,[48] the Justices called eleven years of delay "intolerable" and ordered "meaningful and immediate progress."[49] The Court mandated that recalcitrant school boards "fashion steps which promise realistically to convert promptly to system[s] without a 'white' school and a 'Negro' school, but just schools."[50]

In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court affirmed its role in advancing remedies to achieve substantive equality.[51] Justice Burger amplified the guidelines for schools to meet their constitutional obligations.

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43. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1., 127 S. Ct. 2738, 2834 (Breyer, J., dissenting).

44. Owen M. Fiss, *The Charlotte-Mecklenburg Case – Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697, 697 (1971).

45. 391 U.S. 430 (1968).

46. In fact, Justice Breyer characterized the Seattle and Louisville school assignment plans as the kinds of choice plans permitted under *Green*. *Parents Involved,* 127 S. Ct. at 2825 (Breyer, J., dissenting) (concluding that "choice and not race was the "predominant factor in the plans).

47. *Id.* at 441–42. School systems are considered "unitary" when a court finds that the boards have acted in "good faith" to eliminate "the vestiges of past discrimination . . . to the extent practicable." Therefore, lower courts dismissed desegregation decrees even when racial imbalance or single-race schools persisted in a school district. Bd. of Educ. v. Dowell, 498 U.S. 237, 246 (1991) (holding that lower courts should apply a good faith test in determining whether a school board has achieved unitary status); Freeman v. Pitts, 503 U.S. 467, 489 (1992) (permitting incremental or partial withdrawal of court supervision and control); Milliken v. Bradley, 418 U.S. 717, 740–41, 746 (defining the constitutional right of black children as the right to attend school in a unitary district without regard to any particular racial balance in each school, grade, or classroom).

48. *Id.* at 438.

49. *Id.* at 439.

50. *Id.* at 442.

51. 402 U.S. 1 (1971).

Specifically, the Court called for school boards to "eliminate invidious racial distinctions" that existed in "transportation, supporting personnel, and extracurricular activities . . . [as well as] the maintenance of buildings and the distribution of equipment."[52]

C. Retreat from Substantive Equality

Between 1971 and 1995, in a series of contentious decisions, the unanimity of the Court in favor of substantive equality waned. Judicial assault on and sociopolitical backlash against desegregation efforts came from several directions. The post-*Brown* debate spiraled into conflict over affirmative action and whether courts should continue supervising desegregation efforts in the face of demographic changes that made achieving racial integration impossible in majority minority urban school districts like Detroit. In *Milliken v. Bradley,* the lower court had approved an inter-district remedy that included suburban school systems surrounding Detroit that had not been found to have practiced de jure segregation. The Supreme Court rejected the desegregation plan on the ground that the lower courts had exceeded their equitable powers.[53] The Court also held, in opposition to its position in *Swann*, that the constitutional mandates of *Brown I* and *II* did not call for achieving racially balanced schools.[54] According to *Milliken*, black children were constitutionally entitled to attend school in a unitary school system, not a racially balanced school within the system.[55] *Milliken* also rejected evidence that racial segregation in housing contributed to racial segregation in schools,[56] preventing school officials from accounting for changing residential demographics in crafting desegregation plans.

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52. *Id.* at 18.

53. Milliken v. Bradley, 418 U.S. 717, 756 (1974) ("The formulation of an interdistrict remedy was . . . simply not responsive to the factual record before the District Court and was an abuse of that court's equitable powers.").

54. *Id.* at 745–46.

55. *Id.* at 740–41 ("[D]esegregation does not require any particular racial balance in each school, grade, or classroom").

56. *Id.* at 721, 751 (rejecting district court finding that state action, combined with private action, established and maintained the pattern of residential segregation in Detroit and surrounding suburbs that made intra-district desegregation impossible); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1., 127 S. Ct. 2738, 2758 (2007) (characterizing the effect of racially identifiable housing patterns on perpetuating racially isolated schools as societal discrimination that is beyond the scope of the school board's authority to address); Missouri v. Jenkins, 515 U.S. 70, 94–96 (1995) (rejecting reliance on "white flight" as a justification for expansion of a remedial plan to attract suburban students to urban schools); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435–36 (1976) (reasoning that school districts are not required to address the "normal pattern of human migration" that accepts the racial mix of housing and therefore schools); Gary Orfield, *Segregated Housing and School Resegregation* [hereinafter Orfield, *Segregated Housing*], *in* GARY ORFIELD & SUSAN E. ORTON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 291 (1996) (chronicling the inconsistent position of the Supreme Court on the role of state action in housing patterns that perpetuate school segregation); *see generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (documenting the devastating impact of residential segregation on black socioeconomic advancement); Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996) (attributing entrenched housing patterns to widespread government housing discrimination). For the most recent comprehensive study of the impact of

Milliken also signaled a retreat from advancing substantive equality by severely limiting for the first time the scope of district courts' equitable power to remedy inequality.[57] Eventually, school boards across the country began to argue that their court-ordered integration plans had succeeded in creating unitary school systems.[58] Ironically, many schools within those systems remained racially identifiable. Nonetheless, lower courts released hundreds of school systems from court supervision.[59] By releasing school boards from judicial supervision, the Court set in motion a retreat to the race-neutral anti-classification approach under the formal equality rationale. As predicted by Justice Thurgood Marshall in his last school desegregation opinion, the Court's retreat to formal equality would help accelerate the re-segregation of schools.[60]

The Court continued its retreat from substantive equality in *Missouri v. Jenkins*.[61] *Jenkins* involved the Kansas City, Missouri school district, which operated segregated schools before *Brown*. In 1984, a federal district court found that the city and state continued to maintain segregated schools. The judge ordered the city and state to create a number of well-funded magnet schools to attract white children to the city's schools.[62]

The presentation of the facts in *Jenkins* exemplifies the tension on the Court between proponents of formal equality and proponents of substantive equality. In summarizing the facts, Chief Justice Rehnquist, author of the 5-4 majority opinion, presented the case in race-neutral, colorblind terms typical in a formal equality analysis. For example, Chief Justice Rehnquist provided no facts regarding the constitutional violation. Instead, he employed an a-historical cost-benefit analysis that balanced the intangible cost of the loss of equal protection by millions of children over the years against monetary expenditures by the school board between 1985 and 1994.[63] He characterized the cost of the remedial

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demographic shifts and changes on school desegregation, see *Becoming Less Separate? School Desegregation, Justice Department Enforcement And The Pursuit Of Unitary Status*, UNITED STATES CIVIL RIGHTS COMMISSION, Sept. 27, 2007, *available at* http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf [hereinafter *Becoming Less Separate*].

57. *Milliken*, 418 U.S. at 777 (White, J., dissenting) (accusing the majority of "incapacitating the remedial authority of the federal judiciary").

58. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Anderson v. Sch. Bd., 517 F.3d 292 (5th Cir. 2008); Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001); Jenkins v. Missouri, 11 F.3d 755 (8th Cir. 1993).

59. The Civil Rights Commission study reported that from 2000 to 2007, the Department of Justice's docket of elementary and secondary school desegregation cases dropped from approximately 450 cases to 266. *Becoming Less Separate*, *supra* note 56, at 28. This does not include the school boards that remain under Department of Education supervision, or litigation initiated by private plaintiffs.

60. Justice Thurgood Marshall issued early warnings of the potential re-segregation that would occur if school boards were no longer under legal compulsion to maintain desegregated school systems. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 259–60 (1991) (Marshall, J., dissenting) (claiming that the re-emergence of racially separated schools would cause harm to black children).

61. 515 U.S. 70 (1995). Plaintiffs filed suit against the school board and school officials in 1977. In 1984, after a lengthy trial, the District Court determined that the State and Kansas City School District were liable for operating a segregated school system.

62. *Id.* at 76–77.

63. *Id.* at 175 (Ginsburg, J., dissenting) (dating laws of racial subordination through slavery in Missouri back to 1724).

plan as excessive[64] without regard to the immeasurable lack of resources made available for the education of African American and other minority children as far back as *Roberts* in the nineteenth century. In her dissent, Justice Ginsburg criticized the majority's myopic view, writing: "The Court stresses that the present remedial programs have been in place for seven years. But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent."[65]

The *Jenkins* majority's enough-is-enough presentation of the facts rest on a perspective reminiscent of the Court's attitude towards post-slavery remediation in the *Civil Rights Cases*:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be a special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[66]

But in her dissent, Justice Ginsburg reminded the majority that, "[g]iven the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon."[67] Overall, the presentation of facts by Justice Ginsburg and Justice Souter provided a more realistic context by opening with a discussion of the early twentieth-century state laws against educating children of color and describing the recalcitrant attitude of the states towards the enforcement of *Brown*.[68]

Desegregation premised on formal equality had come to rely heavily on evidence of a causal connection between continued practices, or vestiges, of discrimination and unconstitutional pre-*Brown* segregation laws. In the face of the history presented by the dissent, the *Jenkins* majority questioned the causal connection between intentional state discrimination and the persistence of

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64. The district court's desegregation plan has been described as the most ambitious and expensive remedial program in the history of school desegregation. *Id.* at 78-79 (citing Jenkins v. Missouri, 19 F.3d 393, 397 (1994) (Beam, J., dissenting from denial of rehearing en banc)).

65. *Id.* at 175 (Ginsburg, J., dissenting).

66. The Civil Rights Cases, 103 U.S. 3, 25 (1883). *See also* Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767 (1996) (comparing the retreat by white citizens from support for African American interests during the Civil Rights Cases era and *Jenkins*).

67. *Jenkins*, 515 U.S. at 175 (Ginsburg, J., dissenting).

68. Justice Souter wrote:

> After *Brown*, neither the state nor the [Kansas City, Missouri School District] moved to dismantle this system of separate education "root and branch" despite their affirmative obligation to do that under the Constitution. "Instead, the [City] chose to operate some completely segregated schools and some integrated ones" . . . . Consequently, on the [twentieth] anniversary of *Brown* in 1974, 39 of the 77 schools . . . had student bodies that were more than 90 percent black . . . . Ten years later . . . 24 schools remained racially isolated with more than 90 percent black enrollment. Because the State and [City] intentionally created this segregated system of education, and subsequently failed to correct it, the District Court concluded that the State and the district had "defaulted in their obligation to uphold the Constitution."

Jenkins, 515 U.S. at 140 (Souter, J., dissenting) (citations omitted).

racially isolated schools.[69] In his concurring opinion, Justice Thomas wrote at length to challenge the dissenting justices' claim that there remained a causal connection between past segregation and current conditions.[70] Justice Thomas insisted that "[w]hen a district court holds the State liable for discrimination almost 30 years after the last official state action, it must do more than show that there are schools with high black population or low test scores."[71] He contended:

> District courts must not confuse the consequences of *de jure* segregation with the results of larger social forces of private decisions. . . . As state-enforced segregation recedes further into the past, it is more likely that "these kinds of continuous and massive demographic shifts," will be the real source of racial imbalance or of poor educational performance in a school district.[72]

He concluded: "Federal courts should not lightly assume that States have caused 'racial isolation' in 1984 by maintaining a segregated school system in 1954."[73] Justice Souter countered with a broader interpretation of the causation requirement, arguing: "There is in fact *no break in the chain of causation* linking the effects of desegregation with those of segregation."[74]

Proponents of substantive equality, like Justice Breyer, Souter, and Ginsburg, also claimed that one measure of whether equality had been realized was student achievement.[75] Chief Justice Rehnquist disagreed in *Jenkins*, quoting extensively from a dissenting judge on the Court of Appeals who claimed that the district court had wrongly embedded a "student achievement goal" as a measure of whether Kansas City had sufficiently remedied past discrimination.[76] The majority, therefore, found that *Dowell* and *Freeman* did not impose this

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69. *Id.* at 96 (majority opinion).

70. *Id.* at 114 (Thomas, J., concurring).

71. *Id.* at 117–18.

72. *Id.* at 117–18 (citation omitted).

73. *Id.* at 138.

74. *Id.* at 164 (Souter, J., dissenting) (emphasis added).

75. In earlier cases, courts included educational achievement components recognizing that part of being separate was being denied access to educational resources. *See, e.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 21 (1969) (per curiam) (affirming discretion of court of appeals to require implementation of federal educational requirements); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 394 (5th Cir. 1967) (incorporating remedial programs in the court order); Morgan v. Kerrigan, 401 F. Supp. 216, 246, 264 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976) (ordering more state financial assistance for improving educational performance); United States v. Texas, 342 F. Supp. 24, 28 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) (requiring staff training, counseling and special education); United States v. Hinds County Sch. Bd., 423 F.2d 1264, 1268 (5th Cir. 1969) (ordering the transfer of equipment, supplies, and libraries). The most insightful challenges to desegregation as a panacea for ensuring quality education for children of color have come from Derrick Bell. Bell relies on research and his personal experience in litigating school desegregation cases to question the utility of desegregation in improving the educational experience of black children. He claims that desegregation "leaves dominant group values intact, does no damage to the notion of white superiority and helps to gain the support of those whites who view it as a means of helping nonwhite people to become fully human." BELL, *supra* note 9, at 122. *See also* Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 619 (1992) (referring to *Brown* as bringing about transformation without change).

76. Missouri v. Jenkins, 515 U.S. 70, 83 (1995) (majority opinion).

measure as a condition for release from court supervision.[77] The majority ordered the district court, on remand, to "sharply limit, if not dispose with" reliance on achieving desegregation through quality education programs.[78] He concluded with an endorsement of local control, claiming that "[i]nsistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own."[79]

D. Substantive Equality and Diversity

After *Jenkins*, the discourse surrounding race in early and secondary education shifted from achieving formal equality through desegregation to the substantive equality concept of diversity. School boards believed that doing so would allow for more focus on the actual educational benefits of integration and less on the showing of a causal connection between past segregation and present effects such as racially isolated schools. In *Comfort v. Lynn School Committee*,[80] parents who opposed the school committee's race-conscious transfer restrictions brought suit. They relied on the formal equality anti-classification rationale, arguing that "mechanically taking race into account" violated the Equal Protection Clause.[81] The First Circuit rejected the argument. Instead, the majority relied on *Grutter v. Bollinger*[82] to base the finding that elementary and secondary schools reaped the benefits that flow from having a racially diverse student body and avoiding the negative consequences that accompany racial isolation.[83] Of significance, the Court found that the evidence presented on the impact of diverse classrooms suggested that "the benefits of a racially diverse school are more compelling at younger ages."[84]

Like the plans in *Lynn,* the diversity plans scrutinized by the Court in *Parents Involved* represented efforts by Seattle and Louisville school boards to operate creatively by also relying on the *Grutter* diversity rationale. Justice Breyer's dissenting opinion provides a detailed historical context for both plans.[85] The boards drafted school assignment plans that used race consistent

77. *Id.* at 88–89 (citing Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991)).

78. *Id.* at 101.

79. *Id.* at 102.

80. 418 F.3d 1 (1st Cir.), *cert. denied*, 546 U.S. 1061 (2005).

81. *Id.* at 12.

82. 539 U.S. 306 (2003) (concluding that the state law school had a compelling state interest in securing the educational benefits of diversity).

83. 418 F.3d at 14.

84. *Id.* at 15–16.

85. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1., 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting). Seattle had never operated under a court order to desegregate, but did settle a lawsuit that required mandatory busing as a term of the agreement. Later, segregated housing patterns made it necessary for the school board to use race as a factor in school assignments to achieve diversity and avoid racial isolation within the school system. *Id.* at 2747. In a continuing effort to desegregate schools, Seattle implemented a student assignment plan that used race as a "tie-breaker" between 1998 and 2002 in the school assignment lottery. *Id.* at 2805–07. (Breyer, J, dissenting). After *Brown*, the Jefferson County public schools in Louisville, Kentucky continued to operate segregated schools until placed under a court-ordered desegregation plan from 1975–2000. *Id.* at 2806–07. In 2000, the district court declared that the school board had, "to the extent practicable," achieved unitary status. *Id.* at

with their understanding of what *Grutter* allowed.[86] *Parents Involved* addressed whether public school systems that had not operated legally segregated schools, like Seattle, or had been found to be unitary, like Louisville, may use race as a factor in making school assignments.[87] Respondents argued that both promoting diversity to maintain integration and avoiding the perpetuation of racially isolated schools constituted compelling state interests.[88]

The Court splintered on both questions. Justice Roberts employed the formal equality rationale and called for an end to race-conscious remedies in school assignment, stating: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[89] Justice Breyer and his fellow dissenters, however, coupled with Justice Kennedy's concurring opinion,[90] formed a majority view that increasing diversity in K-12 education and avoiding racially isolated schools are compelling state interests that advance substantive equality.[91]

Justice Breyer emphasized the historical and remedial elements of diversity, explaining that the diversity interest has three essential elements:

> an interest in setting right the consequences of prior conditions of segregation . . . an interest in continuing to combat remnants of segregation caused in whole or in part by these school-related policies [and] an interest in maintaining hard-won gains . . . and preventing what gradually may become the *de facto* re-segregation of America's schools.[92]

Justice Breyer contended that these were exactly the kind of "choice" plans that could withstand scrutiny under *Green*.[93] A majority of the Court, therefore, secured the groundwork for the continued reliance on the substantive equality rationale.

III. ANTI-SUBORDINATION

We started our exploration of equality rationales underlying desegregation with the idea that desegregation law developed in response to entrenched systems of racial hierarchy that subordinated children of color in school. Yet, the

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2809. A year after being released from the decree, however, the school board chose to create a "managed choice plan" with magnet schools to maintain integrated schools. *Id*.

86. *Id.* at 2753–54 (2007).

87. *Id.* at 2746.

88. *Id.* at 2755–57.

89. *Id.* at 2768.

90. *Id.* . at 2788–97 (Thomas, J., concurring).

91. *Id.* at 2800–37(Breyer, J., dissenting). "[T]he evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one. *Id.* at 2821. *See also* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (endorsing the law school's admissions plan as advancing the compelling state interest in obtaining the educational benefits that flow from a diverse student body). *But see Parents Involved*, 127 S. Ct. at 2776–79 (Thomas, J., concurring) (stating that the educational benefit from "coerced racial mixing" is "far from apparent").

92. *Id.* at 2820 (Breyer, J., dissenting).

93. *Id.* at 2825 (Breyer, J., concurring); *see also* Book Note, *The Desegregation Dilemma,* 109 HARV. L. REV. 1144, 1146 (1996) (reviewing literature that endorses "equity choice" plans that combine elements of school choice policy with voluntary desegregation measures).

Court has never fully embraced the idea that equality requires structural changes in public education to end the adverse effects of racial subordination on people of color.[94] Critical race theorists have argued that race itself has been socially constructed to justify racial discrimination.[95] Therefore, Richard Delgado, for instance, has urged scholars to give serious attention to the impact of socially constructed white privilege left in place even after the demise of state-sponsored racism. He describes the privilege as "a system of informal favors, exchanges, informal networks, old-boy references, and college entrance criteria by which whites see to their own."[96] Without confronting the reality of white privilege, Delgado contends, "the system of white-over-black power relations will hardly budge."[97]

Moreover, in less than fifty years, it is likely that the majority of Americans will be people of color.[98] Again, Delgado advocates moving beyond the two-group, black/white model to also counter the types of discrimination experienced by Latinos, Asians and Native Americans.[99] For instance, these changing demographics will create the urgent need to reshape our educational system to accomplish what I call "transformative desegregation." Transformative desegregation is "intellectual desegregation,"[100] intended to go beyond the models of desegregation that emphasize simply putting children of different

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94. Reva Siegel makes a similar point: "The modern equal protection tradition is commonly understood to be founded on an embrace of individualism associated with an anticlassification principle and a repudiation of concerns about group inequality associated with an antisubordination principle." Siegel, *supra* note 35, at 1547. She suggests that "understanding that anticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision or of the earliest debates it prompted." *Id.* at 1474–75.

95. Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door"*, 49 UCLA L. REV. 1343 (2002).

96. Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1271 (2006) [hereinafter *Current Landscape*].

97. *Id. See also* powell & Spencer, *supra* note 1 at 345 (contending that colorblind mentality and constitutional proceduralism support and normalize white privilege). For discussions of white privilege in the context of the 2008 presidential campaign, see Sherrilyn A. Ifill, Editorial, *No Loss for Feminism*, BALT. SUN, June 8, 2008, at 13A (describing the face-off between Hillary Clinton and Barack Obama as "the continuing power of sexism over racism as a barrier to equality").

98. In fact, according to some experts, two significant causes of the declining percentage of white students in the South are the influx of blacks and international migration. Gary Orfield, *Southern Dilemma: Losing* Brown*, Fearing* Plessy*, in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 1 (John Charles Boger & Gary Orfield eds., 2005).

99. *Current Landscape*, *supra* note 96, at 1272. The potential for tensions among people of color has been brought out in recent studies of the relative success of immigrant black Americans compared to black people who have been in the United States for generations. Scott Jaschik, *Black (Immigrant) Admissions Edge*, INSIDE HIGHER EDUC., Mar. 17, 2009, http://www.insidehighered.com/news/2009/03/17/immigrant.

100. Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 IOWA J. GENDER, RACE & JUST. 315 (1999) [hereinafter *Transformative Desegregation*]; Wendy Brown Scott, *The Miseducation of White America,* 9 WIDENER L. SYMP. J. 73 (2002) (characterizing public school curricula as a vestige of past discrimination subject to remedial attention in desegregation and diversity planning).

races in close physical proximity, or avoiding harm to whites.[101] Transformative desegregation first requires that students unlearn the racial superiority/inferiority model, a process described by author and activist bell hooks as "decolonization."[102] Second, transformative desegregation requires curricula changes in public education to undo the harm caused by the distorted images of people of color shaped in the crucible of oppression.[103] Finally, both substantive and anti-subordination models for diversity support transformative desegregation.

CONCLUSION

In the articles that follow, Professors Bowman and Johnson answer the question, "Does integration still matter?" with a qualified "yes." Both authors embrace the substantive and anti-subordination equality rationales. In her article *Integration, Reconstructed*, Johnson contends that while discussing racial integration in schools seems outmoded, given current demographics and greater interest in educational equity, the success of the Louisville plan[104] challenges the notion that integration is futile. She examines the mechanisms that made the plan largely a success. She concludes with an anti-subordination equality claim that since the Court left some constitutional breathing room for policies that promote integration, integration's contemporary salience depends on tying it to the larger project to create structural racial equality. In *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools,* Professor Bowman contends that school desegregation is rarely an effective vehicle in the pursuit of substantive equality. Instead, she focuses on race-conscious remedies in school-finance litigation in order to combat the compounding, subordinating effects of race and poverty as a route to equal education.

But while the articles that follow reach varying answers to the question posed, we all agree that equality will always matter in a democratic society committed to providing a meaningful education to our children. How and when we achieve an equitable system of education remains a challenge in the twenty-first century.[105] Justice O'Connor and Justice Ginsburg both comment on the importance of reaching the goals articulated by Justice Breyer. Writing for the majority in *Grutter,* O'Connor concluded the opinion stating: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today."[106] While Justice Ginsburg concurred with the aspiration for diversity, she hesitated to suggest a timeframe, writing:

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101. *Transformative Desegregation, supra* note 100, at 370–73 (discussing the evolution of various judicial concepts of desegregation).

102. *Id.* at 321.

103. *Id.*

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

105. Justice Breyer counters the plurality's certainty that color-blind school assignment plans are justified under the formal equality rationale, stating: "By way of contrast, I do not claim to know how best to stop harmful discrimination. . . how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner city schooling and poverty co-related with race." *Id.* at 2833 (Breyer, J. dissenting).

106. Grutter v. Bollinger, 529 U.S. 306, 345 (2003) .

> However strong the public's desire for improved education systems may be . . . it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. . . . From today's vantage point, one may hope, *but not firmly forecast,* that over the next generation's span, progress towards non-discrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[107]

As if heeding the warning issued by Justice Marshall in *Dowell,* five justices in *Parents Involved* agreed that avoiding re-segregation or racial isolation is a compelling state interest, which permits school systems to continue crafting narrowly tailored plan to promote diversity. By doing so, the Court has left room to continue the very discussion chronicled in this historic inaugural issue.

107. *Id.* at 246 (Ginsberg, J., concurring) (emphasis added).