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For Whom Does the Bell Toll: The Bell Tolls for *Brown*?

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SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM. By *Derrick Bell.* New York: Oxford University Press. 2004. Pp. x, 201. Cloth, $25; paper, $14.95.

> No man is an *Iland*, intire of it selfe; every man is a peece of himselfe out of the *Continent*, a part of the *maine* . . . .
>
> — John Donne

Fifty years after the landmark decision *Brown v. Board of Education*,[1] black comedian and philanthropist Dr. Bill Cosby astonished guests at a gala in Washington, D.C., when he stated, "'*Brown versus the Board of Education* is no longer the white person's problem. [Black people] have got to take the neighborhood back. . . . [Lower economic Blacks] are standing on the corner and they can't speak English.'"[2] Cosby, one of the wealthiest men in the United States, complained about "lower economic" Blacks[3] "not holding up

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1. 347 U.S. 483 (1954) [hereinafter *Brown I*].

2. Richard Leiby, *Bill Cosby, Back by Popular Demand*, WASH. POST, May 23, 2004, at D3.

3. Throughout this Book Review, I capitalize the word "Black" or "White" when used as a noun to describe a racialized group. Also, I prefer to use the term "Blacks" to the term "African-Americans" because the term "Blacks" is more inclusive. Additionally, "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4 (1992).

their end in this deal."[4] He then asked the question, "'Well, *Brown versus Board of Education*: Where are we today? [Civil rights lawyers and activists] paved the way, but what did we do with it?'"[5] Cosby's comments drew both criticism and praise from the black community,[6] stirring a raging debate about black elitism and the unfulfilled promise of *Brown* and forcing a release of the frustration that many minorities feel about its failed promise.[7]

In his new book *Silent Covenants*, Professor Derrick Bell[8] expounds upon this very disappointment, questioning "whether another approach than the one embraced by the *Brown* decision might have been more effective and less disruptive in the always-contentious racial arena" (p. 6). In so doing, Bell joins black conservatives in critiquing what he describes as civil rights lawyers' misguided focus on achieving racial balance in schools.[9] The focus, Bell contends, should have been on enforcing the "equal" component of the "separate but equal" doctrine of *Plessy v. Ferguson*,[10] in which the Supreme Court held that state-mandated racial segregation in railroad passenger cars did not violate the Equal Protection Clause of the Fourteenth Amendment so long as the separate facilities were equal.[11]

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4. Theodore Shaw, *Even Cosby Knows There Is More to the Story*, TOPEKA CAP.-J., June 3, 2004, at A4.

5. Leiby, *supra* note 2.

6. *Compare* Joseph Perkins, *A Message Black America Needs to Hear*, SAN DIEGO UNION-TRIB., July 9, 2004, at B7 (praising Cosby for giving a speech that was "a loud, clear wake-up call to black America"), *with* James Morton, *Memo to Bill: Our Lost Values*, PHILA. DAILY NEWS, July 13, 2004, at 20 (arguing that Cosby was wrong to blame the victims).

7. *See, e.g.*, Leonard Pitts, *Do White People Matter*, CHI. TRIB., July 13, 2004, § 1, at 19 (describing his frustrations with the status of black people in the United States).

8. Visiting Professor of Law, New York University School of Law. Bell, the founder of Critical Race Theory, is also famous for his protest at Harvard Law School (where he was the first black tenured professor) against the school's failure to recruit and hire a black woman on its faculty and for his resignation from his position as dean of the University of Oregon Law School for its failures to hire an Asian-American woman on its faculty. *See* Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing About Race,"* 82 TEX. L. REV. 717, 727 (2004) (noting that Bell left his tenured faculty position at Harvard Law School and "the deanship at the University of Oregon as part of his continuing efforts to diversify the law faculties at those law schools"); *see also* Adrien Katherine Wing, *Derrick Bell: Tolling in Protest*, 12 HARV. BLACKLETTER L.J. 161, 162 (1995) (book review).

9. Black conservative thought on desegregation and education is partially premised on a denouncement of the integrationist ideal that was advanced by the black community during the late 1950s and 1960s — a position Bell, a black liberal, ironically defends in his book. *See* Angela Onwuachi-Willig, *Just Another Brother on the SCT? What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. (forthcoming 2005) (manuscript at 25-28, on file with author) (discussing black conservative thought on the issue of desegregation and education).

10. 163 U.S. 537 (1896). In *Plessy*, Homer Plessy, who was seven-eighths white and one-eighth black, filed a lawsuit, seeking the rights, privileges, and immunity of Whites, after he was thrown out of a white railroad passenger car because of his race. *See id.* at 538.

11. *See id.* at 544, 550-51.

Had Bell been on the Court in 1954, he would not have voted to overturn the "separate but equal" doctrine established in *Plessy*.[12] According to Bell, had the focus been on ensuring the equality of schools between minorities and Whites instead of maintaining racial balance as a means of obtaining quality education for minority children, the overall quality of public schools, regardless of their racial make-up, would be better. Additionally, Bell maintains that integration eventually would have occurred; only then it would have been the decision of Whites and white policymakers, who after recognizing the enormous expense of maintaining two separate, but truly equal school systems, would have chosen to integrate to protect their own economic interests (p. 106).

The basis of Bell's conclusion is manifold. First, as Bell explains, *Brown* proved to be destructive for minorities because many Whites viewed the decision as dismantling all racially constructed barriers to success, a belief that ultimately created a space in which to blame minorities for any lack of progress instead of linking such failures to institutionalized racism.[13] Additionally, Bell asserts, *Brown* was a failure because it neglected the social realities of race relations in the United States, in particular, the lengths to which many Whites would go to resist enforcement of the decision (pp. 95-101). Primarily, however, Bell's determinations are based on his interest-convergence theory, which can be stated in two rules: (1) policymakers accommodate the rights and interests of Blacks and other minorities only when those interests converge with the interests of Whites in policymaking decisions; and (2) even when policymakers do acknowledge the interests and rights of Blacks and other minorities, they are always willing to sacrifice those rights when they perceive their enforcement as significantly diminishing Whites' sense of

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12. Pp. 20-27; Derrick A. Bell, *Bell, J., Dissenting, in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185 (Jack M. Balkin ed., 2001).

13. P. 7; *see* Derrick Bell, *The Real Lessons of a 'Magnificent Mirage,'* CHRON. HIGHER EDUC., Apr. 2, 2004, at B10 (claiming that *Brown* reinforced "the fiction that . . . the path of progress would be clear"). Professor Siedman has also explained that:

> *Brown* . . . offered the country a kind of deal, and, from the perspective of defenders of the status quo, not a bad one at that. . . . [S]eparate facilities were now simply proclaimed to be inherently unequal. But the flip side of this aphorism was that once white society was willing to make facilities legally nonseparate, the demand for equality had been satisfied and blacks no longer had just cause for complaint. The mere existence of *Brown* thus served to satisfy the demands of liberal individualism and, therefore, to legitimate current arrangements. True, many blacks remained poor and disempowered. But their status was now no longer a result of the denial of equality. Instead, it marked a personal failure to take advantage of one's definitionally equal status.

Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 717 (1992).

entitlement and superior societal status.[14] Furthermore, Bell explains, even though many of the policies that harm racial minorities also hurt poor and working-class Whites, such Whites will often support these racial-sacrifice covenants and subordinate their own economic interests to maintain feelings of racial superiority.[15]

As expected, Bell's book is provocative and intelligent, providing a historical analysis of events that support his interest-convergence theory. It exposes how deeply entrenched racial hierarchy is in our society and how much the perpetuation of racism rests on a continued division between minorities and poor Whites (pp. 77-86). The book is a stimulating and eye-opening critique of a decision that has been championed by people of all races and ethnicities. I highly recommend the book, even if only to serve as a catalyst for engaging in discussions about the plight of minority children in public schools or, more so, the state of race relations in the United States.

At the same time that I strongly agree with Bell's interest-convergence theory, his thorough explanation of historical instances in which policymakers have sacrificed the rights of minorities in the United States, and many of his arguments concerning white resistance to integration, I disagree with Bell's conclusion that court enforcement of the "separate but equal" doctrine would have proved more effective than the strategy that civil rights lawyers employed in arriving at *Brown*. Unlike Bell, I am far more pessimistic about whether it even would have been possible within our society, which is dominated by a belief in white superiority,[16] to have achieved "better" results in public schools.

Indeed, Bell's own interest-convergence theory left me wondering how his proposed alternative decision to *Brown* would have avoided the inevitable sacrifice of minority rights that occurs whenever

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14. Pp. 9, 69; *see* Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980) (describing the principle of interest convergence); *see also* Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1, 20-30 (1989) (explaining how legislation to help the poor must often converge with that of the middle class). As a general matter, Bell lays out his critique within the black-white paradigm of discussing race relations; as a consequence, my own review of his book also largely speaks within the black-white paradigm. *See* john a. powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1413-14 (2002) (noting the weaknesses in the black-white paradigm but acknowledging its importance in highlighting the importance of power). *But see generally* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002) (explaining why black-white conceptualizations of race are incomplete).

15. Pp. 41-44, 80-85; *see* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1741-43 (1993).

16. *See* Regina Austin, *Back to Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-*Brown *Era*, 6 J. APP. PRAC. & PROCESS 79, 81-85, 91-95 (2004) (analyzing how notions of black inferiority and white supremacy continue to be embodied in the structures of public society).

minority interests diverge from those of Whites and white policymakers. Moreover, Bell's interest-convergence theory raised several significant questions that Bell does not address adequately in his book: First, how could segregation, if not truly by choice, ever produce true equality? In other words, even if the *Brown* Court had enforced the "separate but equal" standard in *Plessy* with the requirements and limits proposed in Bell's alternative opinion, how could we have truly expected equality in schools when the very separation of those schools was still premised on white supremacy, or rather, an accommodation of the desire of many Whites to remain segregated from "inferior" minorities? Furthermore, if Bell were to apply his own theory to the enforcement for equality in schools, how would Bell explain white policymakers' interests in even trying to make the schools equal, an act that had been avoided for more than fifty years prior to *Brown*? In other words, why would white and minority interests suddenly converge at this point and for this goal? Or more importantly, why would the Court have been any more capable of enforcing this doctrine than it was at enforcing integration? Furthermore, if white policymakers never reached a point of attempting to make schools equal, how then would they come to realize that integration was really in their best economic interests? And more so, even if Whites and white policymakers eventually chose to integrate to protect their own economic interests, what would have prevented them from developing two "separate but unequal" systems within any particular school, a system that presently exists in many integrated schools — with Blacks and Latinos tracked into lower courses and Whites tracked into advanced placement and honors courses? Finally, what would the course of the Civil Rights Movement have been without *Brown*? Bell argues that other forces, such as the Cold War, would have worked to create an environment in which the anti-discrimination legislation of the 1960s would have been enacted. But would desegregation in other areas such as in busing, beaches, and other public accommodations have truly occurred without *Brown*?

This Book Review probes all of these questions concerning the quest for racial equality in education and, in so doing, argues that Bell's approach to achieving racial equality (as outlined in *Silent Covenants*) would likely have landed minorities in exactly the same position as they are in today. Part I of the Review provides an overview of the current status of integration in public schools. Part II recounts important segments of Bell's book, detailing his analysis of how the failed promise of *Brown* fits within a long history of policymakers either disregarding or sacrificing minority rights (except when those rights coincide with the interests of Whites). Part III demonstrates how Bell's own interest-convergence theory does not support his criticism of *Brown* and his endorsement of the "separate

but equal" strategy that he claims ultimately would have served minorities the best. Finally, this Book Review concludes with a brief analysis of the moral and practical benefits of the victory in *Brown* and a discussion about the potential for coalition building between minorities and poor Whites.

I. AND WE ARE NOT SAVED[17]

The *Brown* decision is one of the most celebrated cases in the history of the United States, having gained widespread acceptance among the general public today and a status of almost mythological proportions in the legal community.[18] At the time *Brown* was handed down in 1954, many Blacks viewed the decision as a magical solution to the problem of racism and race discrimination.[19] As Bell explains in his book, civil rights lawyers and activists held so much faith in the promise of *Brown* that Judge William Hastie, the first black man to be appointed as an Article III judge,[20] advised a young Bell, who in 1957 expressed his desire to become a civil rights lawyer, "Son . . . I am afraid that you were born fifteen years too late to have a career in civil rights."[21]

Unfortunately, Judge Hastie's hopes would prove wrong, and instead the words of Thomas Sowell in 1954, then a student at Howard

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17. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) is Bell's first published book, which created Geneva Crenshaw (after whom Richard Delgado would later model Rodrigo Crenshaw) and addressed numerous issues concerning the status of Blacks in the United States, including crime, affirmative action, and reparations. *See also* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1357-58 (1992) (book review) (introducing Rodrigo as Geneva's brother).

18. P. 2; *see* Edward Lazarus, *Still Striving Toward a More Perfect Union*, L.A. TIMES, May 16, 2004, at R3 ("Public acclaim for and acceptance of *Brown* are at a zenith as the half-century milestone approaches. Today, public officials of every political stripe, and especially nominees to the federal courts, routinely rank the decision as the Supreme Court's finest . . . ."); *see also* Michael J. Klarman, Brown v. Board of Education: *Facts and Political Correctness*, 80 VA. L. REV. 185, 185 (1994) (describing the decision as "so politically sacrosanct that one cannot dispassionately discuss the decision's soundness as a matter of constitutional theory").

19. *See* James Patterson, *Disappointing Impact on Schools* — Brown v. Board *After 50 Years*, PROVIDENCE J., June 8, 2004, at B05 (asserting that Thurgood Marshall "expected school segregation to be wiped out in the South within five years"); Kevin Sack, *Breaking the Barrier*, L.A. TIMES, May 9, 2004, at A1 (discussing the experiences of Josephine Boyd, who, at 17, desegregated Greensboro Senior High School, became its first black graduate, and later noted that her "biggest disappointment [was] that this magical place [she] envisioned never came to be").

20. *See* Derrick Bell, *Law, Litigation, and the Search for the Promised Land*, 76 GEO. L.J. 229 (1987) (book review) (noting that Hastie was the first black to sit on the federal bench).

21. P. 3. *But see* Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS L.J. 991, 998-1002 (2004) (discussing how elite Blacks who had been educated at historically black colleges did not necessarily view school desegregation as beneficial).

University in Washington, D.C.,[22] would prove prophetic. On the day that *Brown* was handed down, a young Sowell proclaimed soon after his professor had proudly announced the decision to the class, "It's been more than fifty years since *Plessy v. Ferguson* — and we don't have 'separate but equal.' What makes you think this is going to go any faster?"[23]

Fifty years later, many minorities wonder what happened to the promise of *Brown* in America's public schools. The educational predicament in which many minorities, especially Blacks and Latinos,[24] find themselves is bleak (pp. 127-29). For instance, statistics reveal that 11 percent of all Blacks between the ages of sixteen and nineteen are high school dropouts[25] and that 27 percent of all Latinos between the ages of sixteen and nineteen are high school dropouts.[26] Furthermore, almost half of the students in schools attended by the average black or Latino student are poor or near poor, meaning that these students are all eligible for the federal government's free or reduced-price lunch program.[27]

Additionally, although the population in the United States is the most racially diverse in its history,[28] the nation's public schools are

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22. Thomas Sowell is a notable black intellectual and a senior fellow at the Hoover Institute in Stanford, California.

23. Thomas Sowell, *Half a Century After* Brown, TOWNHALL.COM, May 12, 2004, *at* http://www.townhall.com/columnists/thomassowell/ts20040512.shtml.

24. My focus on Blacks and Latinos is not intended to ignore the plight of and discrimination against other minorities, nor is it meant to indicate that certain racial groups, such as Asian-Americans, do not suffer from discrimination. This author recognizes the complexity of how racism functions in society and the diversity of groups' political and economic power among Asian-Americans as whole, especially when concerning groups such as the Hmong, Vietnamese, and Cambodians, and within ethnic groups as well. *See generally* Symposium, *Rethinking Racial Divides — Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195 (1998).

25. *See* Perkins, *supra* note 6 (noting that one out of every nine black students is a high school dropout). This dropout rate for Blacks is down from 21 percent in 1972; however, half of the decrease is due to the rise in imprisonment of young black males. *See* Marjorie Coeyman, *The Story Behind Dropout Rates*, CHRISTIAN SCI. MONITOR, July 1, 2003, at 13.

26. *See* Coeyman, *supra* note 25; *see also* Sarita E. Brown et al., *Latinos in Higher Education: Today and Tomorrow*, CHANGE, Mar./Apr. 2003, at 40, 41 (stating that the high school dropout rate for Latinos is more than double the rate for Blacks and more than three times the rate for Whites). It is important to note that the dropout rate of high school age Latinos born in the United States is half that of all high school age Latinos, but still at an alarming 14 percent. *See* Coeyman, *supra* note 25.

27. *See* ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM 35 & n.96 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

28. *See* Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L.J. 861, 862-68 (2002) (describing the growth in the Latino and Asian-American populations during the 1990s).

becoming increasingly more racially segregated.[29] This is especially true in the South, which due to past desegregation orders, once housed the country's most integrated schools, but is now rapidly retreating from such integration.[30]

In fact, public schools today are more segregated than they were in the early 1970s.[31] In many instances, this racial segregation correlates with poverty, resulting in fewer resources and services in minority schools.[32] In fact, nearly 75 percent of all black and Latino students attend schools that are predominantly minority, most of which are poor or near poor.[33] Additionally, nearly 2.4 million students attend what are referred to as "apartheid schools," schools that are 99-100 percent minority schools, and of these students, 2.3 million are black and Latino, and only 72,000 are white.[34]

Specifically, the percentage of black students attending majority white schools has been steadily decreasing over the last twenty years.[35] By 1998, the percentage of black students attending majority white schools in the South had decreased nearly 11 percent from 43.5 percent to 32.7 percent.[36] Likewise, the percentage of Latino students attending schools predominantly or exclusively minority had also increased steadily.[37] In fact, Professor Gary Orfield and his research associates found that Latinos have been more segregated than Blacks for several years, not only by race and ethnicity but also by poverty.[38] Indeed, 76 percent of Latinos, as opposed to 72 percent of Blacks, attend predominantly minority schools.[39]

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29. *See* FRANKENBERG ET AL., *supra* note 27, at 4, 27; *see also* Julianne Malveaux, *How Long? Cosby,* Brown *and Racial Progress*, BLACK ISSUES HIGHER EDUC., June 17, 2004, at 122 (asserting that schools are resegregating and racial economic differences persist).

30. *See* FRANKENBERG ET AL., *supra* note 27, at 4, 27. Public schools in the Northeast are actually the most segregated, with almost 4 out of every 5 Blacks attending predominantly minority schools. *See id.* at 38.

31. *See* Gary Orfield et al., *The Resurgence of School Segregation*, EDUC. LEADERSHIP, Dec. 2002/Jan. 2003, at 17.

32. *See* FRANKENBERG ET AL., *supra* note 27, at 67; Orfield et al., *supra* note 31, at 19 (stating that nine-tenths of intensely segregated schools for Blacks and Latinos have high concentrations of poverty).

33. *See* FRANKENBERG ET AL., *supra* note 27, at 28.

34. *See id.*

35. *See* FRANKENBERG ET AL., *supra* note 27, at 37 & tbl.10. Although the number of black students attending majority white schools in the South increased between 1964 and 1988 from just 2.3 percent to 43.5 percent, since 1988 that number has significantly declined. *See id.*

36. *See id.*

37. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1599 (2003).

38. *See* FRANKENBERG ET AL., *supra* note 27, at 4, 32-33.

39. *See id.* at 33. As of 2000, an unprecedented 37 percent of Latinos attended schools that were 90-100 hundred percent minority. *See id.*

Even more segregated than Latino students, however, are Whites, who, on average, attend schools where 80 percent of the student body is white.[40] Furthermore, whereas Whites once constituted 80 percent of the public school population in 1968, they now constitute only 62 percent today.[41] If nothing else, it is clear that the bell is beginning to toll for *Brown*'s former promise of integration in public schools and possibly, along with it, the hope of equal educational opportunity for children of all races and ethnicities.

II. FACES AT THE BOTTOM OF THE WELL[42]

> Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. . . . Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.
>
> — Derrick Bell[43]

In his book *Silent Covenants*, Derrick Bell uses his interest-convergence theory to demonstrate how this seemingly impending "death" of *Brown* is merely one example of many instances in which the rights of minorities have been either disregarded or sacrificed by policymakers (p. 4). As stated, under Bell's interest-convergence theory, minority rights are acknowledged only when they further the interests of Whites, and an involuntary sacrifice of such rights and interests occurs whenever differences must be settled between two opposing groups of Whites (p. 29). As Bell explains, many other major points of history stand as marks of racial-sacrifice covenants where the interests of minorities were either recognized because of coinciding white interests or had to be forfeited for the interests of Whites and white policymakers (pp. 36-44, 50-68, 71-72).

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40. *See id.* at 4, 27; *see also* Yvonne Abraham & Francie Latour, *School Study Finds Deep Racial Divide; Boston, Other Communities Reflect Impact of White Flight*, BOSTON GLOBE, Sept. 2, 2003, at A1 (reporting that in Boston, the vast majority of white children "attend schools that are typically 90 percent white and remarkably affluent").

41. *See* FRANKENBERG ET AL., *supra* note 27, at 23. Asian students are the most integrated, but even so, they attend schools that are on average 22 percent Asian, even though they constitute only 4 percent of the total student population. *See id.* at 27.

42. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) is Bell's third book, in which he argues that white racism is a permanent, indestructible component of society. The book is famously known for the allegory "Space Traders," in which Whites in the United States vote to surrender Blacks to aliens for unknown purposes and unknown lands in exchange for unlimited wealth. *See id.* at 158-94.

43. *Id.* at v.

For example, in analyzing the issuance of the Emancipation Proclamation in 1863, Bell lays bare the truth of Alexis de Tocqueville's observation that "[i]n the United States people abolish slavery for the sake not of the Negroes but of the white men."[44] In particular, Bell explicates how President Abraham Lincoln, who personally condemned slavery, ended the institution not to protect Blacks but instead to preserve the Union. Noting how Lincoln repeatedly vetoed actions of officers who freed slaves in their areas of command during the Civil War (p. 53), Bell recounts how Lincoln's ultimate motive in freeing slaves was his desire to enlist thousands of Blacks into the Union army and thus win the Civil War and preserve a nation (pp. 54-55, 71). Indeed, Bell's best evidence of Lincoln's primary purpose in recognizing Blacks' rights to freedom comes from Lincoln himself who once asserted, "'If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. *If I could save the Union without freeing any slave, I would do it*'" (p. 53; emphasis added). In sum, as Bell eloquently argued, Blacks were merely the racially fortuitous beneficiaries of a decision intended to further the best interests of the country, and not to recognize Blacks as human beings and citizens.

Throughout *Silent Covenants*, Bell follows up with more contemporary examples of interest-convergence results. For example, Bell illustrates how George Wallace used race-baiting to win his second race for Governor in Alabama as soon as he discovered that the interests of Blacks no longer converged with his own. As Bell explains, after Wallace lost his first race for Governor to a candidate endorsed by the Ku Klux Klan, Wallace vowed never to "'be outniggered again'" and changed his moderate position on integration to become a segregationist (p. 42-43). The end result was that Wallace won, and Blacks lost, with Wallace later assuring Alabamians that he would stand in the schoolhouse door to keep black students from entering the University of Alabama (p. 43).

Similarly, as with the political career of Wallace, Bell shows how the recent debates on affirmative action constitute a contemporary example of the interest-convergence sacrifice of minority interests, especially those of Blacks, Latinos, and Native Americans. In particular, Bell highlights how numerous schools continue to rely on standardized tests, such as the SAT and the LSAT, even though studies show that the tests are poor at predicting performance in or after school for minorities and are more accurate at predicting

44. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 344 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1848).

parental wealth.[45] As Bell makes plain, "standardized tests are retained for the convenience of the schools even though they privilege applicants from well-to-do families," and "Black, other minorities, and . . . all nonwealthy applicants' interest in fair admissions criteria are sacrificed" (p. 46), with the end result being the reinforcement of standards that have historically disadvantaged minorities, endless deliberations about why certain minorities simply cannot cut it, and the maintenance of standards that privilege the white upper-class (pp. 139-42, 155-57). Surprisingly, Bell is, in this sense, agreeing with black conservative Justice Clarence Thomas, who in *Grutter v. Bollinger*[46] proclaimed that the University of Michigan Law School's use of the LSAT, a test that is known to produce racially disparate results, was questionable and called for the law school to re-evaluate its standards.[47] In fact, as Justice Thomas implies in his dissent, Bell contends that *Grutter* itself is an interest-convergence phenomenon, with minorities being the fortuitous beneficiaries of the decision and the real beneficiaries being the already privileged who not only benefit from white upper-class bias but, according to Justice O'Connor, also benefit by being "'better prepare[d] . . . for an increasingly diverse workforce and society.'"[48]

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45. Pp. 46, 140; *see* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 988 (1996) (reporting and analyzing data from the Educational Testing Service regarding the correlation between wealth and high SAT scores); *see also* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1070-79 (1997); Tobias Barrington Wolff & Robert Paul Wolff, *The Pimple on Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. (forthcoming 2005) (highlighting how current admissions plans help those who need the assistance least); Lani Guinier, *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13 ("Admissions decisions reflect a preoccupation with measures of excellence that tell us more about grandparents' wealth than first-year college grades.").

46. 539 U.S. 306 (2003).

47. *Id.* at 349, 369-70 (Thomas, J., concurring in part and dissenting in part) ("Nevertheless, law schools continue to use the test and then attempt to 'correct' for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body."); *see also* Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 46 ARIZ. L. REV. (forthcoming 2005) (manuscript at 56-57, on file with author) (discussing Justice Thomas's critique of the LSAT). *But see* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1629-31 (2003) (criticizing Justice Thomas for his anti-affirmative action stance).

48. Pp. 149-51. *Grutter*, 539 U.S. at 330 (quoting Brief of Amici Curiae American Educational Research Association et al. at 3); *see* Onwuachi-Willig, *supra* note 9 (manuscript at 75-79, on file with author) (analyzing Justice Thomas's dissent in *Grutter* as a critique of how affirmative action fails to deal with the underlying problems of the racial gap in education); *see also* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1452-53 (2004) (declaring that the Court made it clear that affirmative action was not for Blacks, but for Whites, by describing how "[a]ffirmative action yields clear benefits for Whites — the possibility of less racial stereotyping, better-trained and better-informed future national leaders, enhanced

Much like the abolition of slavery and the use of traditional merit standards that have the effect of requiring racial preferences, Bell contends that *Brown I* in 1954 and *Brown II*[49] in 1955 together represent a classic example of the interest-convergence phenomenon or "racial fortuity" (p. 69). In a chapter entitled "*Brown* as an Anticommunist Decision," Bell illustrates how the vote on *Brown I* sustains the first half of his interest-convergence theory — that policymakers accommodate the interests of minorities only when such interests converge with their own. Noting that Blacks had been battling for desegregation for decades before the first *Brown* decision, Bell reveals how the decision in *Brown I* was basically inevitable because it was the only way that the United States could continue to invoke moral authority over the Soviet Union during the Cold War (pp. 63, 67). As Bell establishes, because newspapers across the world published stories about the pervasive discrimination against and murders of minorities in the United States, and because the NAACP also filed a petition with the United Nations seeking to force the United States to be "'just to its own people,'" the United States needed, at least on its face, to eliminate the oppressive racial caste system within its borders (pp. 60-63, 67). Indeed, as Bell points out, the NAACP's briefs and several amicus briefs filed in desegregation cases before the Supreme Court "stressed the international implications of racial discrimination, focusing both on the negative impact on U.S. foreign policy of a decision affirming segregation, and the positive value of a decision striking down segregation policies."[50] While no one knows whether the Court discussed such issues during deliberations, as Bell notes, the impact of repeated statements about

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understanding of non-White races, economic benefits in a global economy, and a more demographically representative military and civilian leadership"). *But see* Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 827 (2004) (arguing that *Grutter* is promising as it affirmed integration "because of its importance in enhancing the lives of Americans more generally . . . [as opposed to] enhancing the lives of minority group members specifically" because it allows Whites not to think of affirmative action as something that solely benefits people of color).

49. Brown v. Bd. of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*].

50. P. 64. See, for example, the amicus brief of the Justice Department in *Brown I*:

> [D]uring the past six years, the damage to our foreign relations attributable to [race discrimination] has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country . . . . [T]he undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare.

MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 100 (2000) (quoting Brief of Amicus Curiae United States at 7, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (alterations in original).

the international effects of the future decision in numerous briefs was likely strong.[51]

After analyzing how *Brown I* was ultimately an anti-Communist decision, Bell explains how the issuance of *Brown II* supports the second half of his interest-convergence theory — that when policymakers fear a remedial racial policy is threatening the superior status of Whites, policymakers will sacrifice those rights of racial minorities. As Bell and many other race scholars have argued, one of the forces behind *Brown II* was the desire to allow integration on terms that the white South could accept,[52] including poor and working-class Whites who depended on a segregative system to validate their superiority to minorities. Thus, when the Court issued its second decision in *Brown II* in 1955, the interests of minorities were once again "sold out" as the Court ignored the pleas of civil rights attorneys to end segregation immediately and instead held that the lower federal courts were to "enter [desegregation] orders and decrees consistent with [its] opinion . . . *with all deliberate speed.*"[53]

What did "all deliberate speed" eventually come to mean? Thurgood Marshall, lead counsel for *Brown*, often explained his understanding of the phrase "all deliberate speed" as "S-L-O-W."[54] As Bell exhibits, Marshall was correct about the phrase's meaning, as the movement to integrate in the South was indeed slow, and the Court's nebulous order opened the doors wide for segregationists to protest integration at all costs (pp. 95, 107).

Indeed, as Bell lays out, white segregationists were even willing to close their schools to avoid racial integration.[55] They warned that

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51. *See* Cass R. Sunstein, *Did* Brown *Matter?*, NEW YORKER, May 3, 2004, at 102, 104-05 (arguing that the Court's cites to briefs from the military and businesses in *Grutter* indicate that the Court in 1954 may have been influenced by statements concerning the international implications of *Brown* for the Cold War).

52. *See* Charles J. Ogletree Jr., *The Flawed Compromise of 'All Deliberate Speed,'* CHRON. HIGHER EDUC., Apr. 2, 2004, at B9 (asserting that this compromise "left the decision flawed from the beginning").

53. *Brown II*, 349 U.S. at 301 (emphasis added); *see* Sunstein, *supra* note 51, at 103 (quoting Thurgood Marshall as saying "'In 1954, I was delirious. What a victory! I thought I was the smartest lawyer in the entire world. In 1955, I was shattered. They gave us *nothing* and then told *us* to work for it. I thought I was the dumbest Negro in the United States.").

54. *See* Charles J. Ogletree, Jr., *Reflections on the First-Half Century of* Brown v. Board of Education, *Part I*, 28 CHAMP. 6, 10 (2004); *see also* John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591, 688 (1995) (noting that "a decade or more of 'all deliberate speed' gave [*Brown*'s due process reasoning] the pale force of a dictum").

55. P. 96; *see also* Griffin v. County Sch. Bd., 377 U.S. 218 (1964). In *Griffin*, the Supreme Court held that action of the Prince Edward County School Board in closing its public schools — while simultaneously contributing to the support of private segregated white schools that took the public schools' place — denied black children equal protection of the laws. *See id.* at 225.

desegregation would lead to miscegenation, and they moved to mainly white suburbs and school districts or enrolled their children in private, all-white schools, which were often funded by state monies.[56] They challenged integration strongly and passionately.[57] One avid segregationist in Delaware even promised in 1954 that "[his] 'daughters [would] never attend school with Negroes so long as there [was] breath in [his] body and gunpowder [would] burn.'"[58]

In fact, as Bell explains, *Brown* did not have any force behind it until 1968[59] when the Supreme Court held in *Green v. County School Board*[60] that the school board's "'freedom-of-choice plan,'" in which black and white students could choose to attend either the white or black school, did not satisfy a school district's duty to eliminate all vestiges of a dual system.[61] Three years later in *Swann v. Charlotte-Mecklenburg Board of Education*[62] in 1971, the Court gave a further hand to desegregation by approving busing as a way to achieve integration (p. 107).

However, as Bell acknowledged in his book, the Court's orders to desegregate through busing only induced white flight from urban areas and into the suburbs.[63] Although civil rights leaders tried to remedy the effects of residential segregation with interdistrict desegregation plans, the Supreme Court struck a heavy blow to these efforts just three years after *Swann* in *Milliken v. Bradley*,[64] which significantly reduced any chances of achieving integration in spite of residential segregation when the Supreme Court rejected a federal district court's multi-district remedy to end de jure segregation that reached into the

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56. P. 7; *see* Sack, *supra* note 19 (asserting that in 1956, residents of North Carolina approved a constitutional amendment that gave local districts the authority to close down public schools and allowed white students to receive state aid to fund private schooling).

57. For example, in Alabama, an unruly white mob chain-whipped a civil rights leader, the Reverend Fred Shuttlesworth, "and stabbed his wife as they tried to enroll their children in school." Sack, *supra* note 19. In Arkansas, Governor Orval Faubus ordered the Arkansas National Guard to prevent nine black students from entering at Little Rock High School. P. 95.

58. Brian Willoughby, *The United States, Circa 1954*, TEACHING TOLERANCE, Spring 2004, at 47, 47.

59. *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 715 (2004) (describing how segregation remained intact in the first ten or more years after *Brown*).

60. 391 U.S. 430 (1968). In *Green*, the Supreme Court noted that "'[t]he time for mere "deliberate speed" has run out.'" *Id.* at 438 (quoting *Griffin*, 377 U.S. at 234).

61. *Id.* at 438; *see also* Adams, *supra* note 48, at 804 (maintaining that the Court became serious about implementing *Brown* in *Green*).

62. 402 U.S. 1 (1971).

63. Pp. 109-12; *see also* Bell, *supra* note 13.

64. 418 U.S. 717 (1974).

suburbs.[65] As Bell notes, the effects of *Milliken* and later Supreme Court decisions concerning desegregation were devastating to all efforts to achieve integration (pp. 126-27).

But as Bell explicates, the problem with achieving educational equality for minority children did not lie solely with the legal barriers to the physical integration of schools. As Bell explains, even when integration was in effect, minorities suffered significant harms as a result. For example, the one-way desegregation of moving minority children into white schools[66] often resulted in the closing of numerous black schools, which required the firing of black teachers and principals.[67] In many instances, black principals and teachers, even those with PhDs, found themselves working as janitors in schools to protect their pensions (pp. 124-25). Once revered in their communities as successes and role models, these persons were now degraded by a battle that was intended to assist all racial minorities. As a former teacher at the now defunct Dunbar High School in Washington, D.C. (which educated black leaders such as Judge William H. Hastie; Dr. Charles Drew, the discoverer of blood plasma; and Benjamin Davis, the first black general),[68] once stated, "[Blacks] got what we fought for, but we lost what we had" (p. 125).

More importantly, as Bell notes, in most majority schools, hostility to minority presence was high, making it difficult for minority children to integrate themselves fully within the schools (pp. 112-13). According to Bell, this hostility essentially doomed minorities for failure in predominantly white schools and left them in a far worse position than they would have encountered in their own schools, had those schools been equal (pp. 104-05, 121-23). White teachers, many of

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65. P. 111. The Court explained that, before the boundaries of separate and autonomous school districts could be set aside, it first had to be shown that there was a constitutional violation within one district that produced a segregative effect in another district. *Milliken*, 418 U.S. at 744-45; *see* Liu, *supra* note 59, at 707, 724-27 (noting that the "racial and socioeconomic isolation of Detroit schoolchildren is due in no small part to the Court's 1974 refusal to find the imperative of racially integrated schooling substantial enough to outweigh claims of suburban local control").

66. *See* Perea, *supra* note 48, at 1451 (maintaining that the language in *Brown* was white supremacist in that it "demanded one-way assimilation of Black and Latino students into formerly all-White educational environments").

67. Sam Tanenhaus, *Black, White, and* Brown, N.Y. TIMES, May 16, 2004, § 7 (book review), at 35 (a moderated discussion between Cornel West and Henry Louis Gates); *see also* Mildred Wigfall Robinson, *Voices of the* Brown *Generation: Description of a Project*, 6 J. APP. PRAC. & PROCESS 39, 40 n.3 (2004) (reporting that after 1954, there was a 90% reduction in the number of black principals in the South (citing JACQUELINE JORDAN IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES AND PRESCRIPTIONS 40-41 (1990)).

68. *See* Thomas Sowell, *Black Excellence: The Case of Dunbar High School*, PUB. INT., Spring 1974, at 3, 4 (detailing the history of Dunbar High School and what such history may suggest for the education of black children).

whom had previously had no contact with minority children, were often ill-equipped to deal with the issues that minority children faced because of harassment at school, culture and language differences, and poverty at home[69] and, in many instances, these same teachers held low expectations for what minority children could achieve in the classroom.[70] In fact, as Bell highlights, due to "tracking" based on intellectual ability, minority children, especially Blacks and Latinos, were "barely tolerated guests in matters of curriculum, teacher selection, and even social activities" (p. 113), as tracking often resulted in minority and white children being segregated within the classroom, with white children generally being admitted to accelerated or advanced programs and Blacks and Latinos being relegated to inferior tracks.[71]

Because of all these factors, Bell maintains, *Brown* achieved much less than it is credited for accomplishing. To Bell, while the struggles of civil rights lawyers (including himself) and activists[72] were admirable, impressive, and hard-fought, *Brown* now holds only limited meaning as a symbol of racial equality. In Bell's eyes, the better road would have been to enforce "separate but equal" as a means of ultimately attaining the goal of good minority schools. This would in turn cause Whites to reach their own decision to integrate based on economic reasons. Indeed, Bell notes that, during the 1960s as he was working to enforce orders to desegregate public schools, school officials would inform him "that they were quietly pleased that [the] NAACP . . . had filed suit because they could not afford to maintain two sets of schools." (p. 106). The question then becomes: Is Bell right?

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69. *See* Perea, *supra* note 48, at 1442-44 (describing how Latino students' language issues were ignored and many Latino students were punished for speaking Spanish); *cf.* Vanessa Siddle Walker & Kim Nesta Archung, *The Segregated Schooling of Blacks in the Southern United States and South Africa*, 47 COMP. EDUC. REV. 21, 26 (2003) (asserting that black "children bring their own unique cultural styles to education and that White teachers often fail to understand and appreciate these traditions").

70. P. 122; *see also* Perea, *supra* note 48, at 1442-43 (describing how teachers assumed that Mexican-American children were less intelligent than their Anglo counterparts, a stereotype referred to as the "pobrecito symdrome").

71. P. 112; *see also* JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT 97 (2003) (noting that leveling or tracking "ensured that the two races [black and white] would be educated separately or would not receive equal education").

72. As some have noted, many of the "foot soldiers," including the plaintiffs in prominent court cases, "go unheralded." Sherman Willis, *Bridging the Gap: A Look at the Public Higher Education Cases Between* Plessy *and* Brown, T. MARSHALL. L. REV. (forthcoming 2005) (manuscript at 2, on file with author); *see also* Sack, *supra* note 19 (stating that "the thousands of young foot soldiers who desegregated their schools have received glancing mention in the history books").

III. CONFRONTING AUTHORITY[73]

> I understand black folks who say "We ought to focus on resources," because some of them are not going to have desegregated schools. And a lot of black folks are tired of chasing white people, and I understand that, too. But nothing in our experience as a nation teaches us that racial segregation is going to be something that's good for our children.
>
> — Ted Shaw, President and Director-Counsel of the NAACP Legal Defense and Educational Fund[74]

I agree with Bell's understanding of racism, his explanation of how race operates in politics, and his analysis of how a pure focus on integration in itself was ultimately damaging. I disagree with Bell's contention in *Silent Covenants* that enforcing "separate but equal" alone would have been the better path. To my mind, regardless of the road taken between the two, minorities, especially Blacks and Latinos, would have found themselves in the same racially precarious position in America's public schools. In fact, Bell's own interest-convergence theory supports my view that minorities would have, even under Bell's alternative plan, remained at the bottom of the well.

This Part of the Review is divided into two subsections. In Part III(A), I apply Bell's interest-convergence theory to show why the alternative "separate but equal" approach proposed by Bell would not have resulted in better circumstances for minorities in America's public schools. First, in Part III(A)(1), I use Bell's theory to show why white and minority interests never would have converged to enable an attempt to equalize all public schools. I then explain why it would have been impossible to achieve equality in a segregated system that was based on white supremacy and was a matter of concession, rather than choice. Then, in Part III(A)(2), I use Bell's theory to show why equality in schools would not have been achieved under Bell's plan even if Whites ultimately chose to integrate schools because of economic reasons (rather than because of a true belief and commitment to eliminating white hegemonic power). Finally, in Part III(B), I address Bell's claim in *Silent Covenants* that the *Brown* decision has only limited meaning as a symbol of equality by

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73. DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER (1994) is Bell's third book, which details his reflections on his protest over Harvard Law School's failure to hire and grant tenure to any woman of color. Ultimately, Bell became tired of the law school's failure to diversify its faculty by hiring a woman of color and left his job at the prestigious institution. *See* Wing, *supra* note 8 (reviewing *Id.*).

74. Ben Feller, Brown v. Board of Education*: Half-Century Later, Are Schools More Separate or More Equal?*, SAN DIEGO UNION-TRIB., May 16, 2004, at www.signonsandiego.com/uniontrib/20040516/news_mzlel16feller.html.

highlighting, on a practical level, *Brown*'s "role in the transformation of American race relations."[75]

A.

1.

Although I readily accept the two prongs of Bell's interest-convergence theory, I believe that Bell fails, in his book, to provide a convincing reason for why white policymakers, especially in light of his theory, would have held an interest in truly attempting to equalize minority schools.[76] The fact remains that, despite stark contrasts in black and white schools for more than fifty years,[77] white policymakers made no real attempts to equalize facilities for minority children. As Bell himself reported in his book, in 1926, thirty years after *Plessy*, the disparities between student spending on Blacks and Whites in Georgia remained shockingly wide, with "an average per-pupil expenditure of $36.29 for whites and $4.59 for blacks" (p. 15), and yet no effort had been made to reduce that gap. The only time any movement was made to equalize schools was when schools feared that integration would be forced upon them. In this sense, given the efforts that school districts made to "equalize" public schools to avoid integration,[78] Bell has some basis for believing that equalization could have occurred despite state-mandated segregation. But even so, that motivation would not have existed without a true fear of forced racial mixing.[79] Even if the Court had written Bell's proposed opinion with its threat of forced integration if no equalization, what would have enabled courts to enforce the equality of facilities and resources in schools any more than they were able to enforce racial desegregation?

Also, Bell does not adequately explain how true equality in public schools could have emerged in a system in which the separation of the

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75. Mark V. Tushnet, *Litigation Campaigns and the Search for Constitutional Rules*, 6 J. APP. PRAC. & PROCESS 101, 101 (2004).

76. *Cf.* Clarence Page, *Rethinking* 'Brown'*?*, BALT. SUN, May 20, 2004, at 21A ("White segregationists defied, circumvented and simply ignored *Brown*'s desegregation orders. There's little reason to believe they would have been any more sanguine toward an invigorated version of *Plessy*.").

77. *See, e.g.*, Walker & Archung, *supra* note 69, at 29 (noting that in the 1920s, the most expensive school built for Blacks in one county in North Carolina cost $4,465 and comparably sized white schools had building budgets that ranged from $9,000 to $15,000).

78. *See Brown I*, 347 U.S. at 491-92 & n.9 (describing how Kansas, South Carolina, Virginia, and Delaware were making substantial efforts to equalize the schools in response to litigation seeking compulsory integration).

79. Moreover, how would one measure this equality to determine if it had been achieved? *See* Sunstein, *supra* note 51, at 105. As Professor Cass Sunstein inquired, "To produce genuine equality, would [courts] have had to ask local school boards to raise taxes, or to take funds from white schools for the benefit of black schools?" *Id.*

races was based on a belief in white superiority. Plain and simple, had the Court, Blacks, and other minorities focused on enforcing "separate but equal" in public schools, such a decision would not really have been their choice, but rather a concession of defeat.[80] In other words, as the proposed opinion details, schools would remain segregated not because Blacks and other minorities wished them to remain so but instead because the Court was giving in to societal prejudices. What meaning then would this choice have had? In fact, studies show that the school-performance gap remains so long as racial stratification, including "forced" segregation, exists.[81]

Moreover, Bell does not account for the failures of civil rights lawyers' pre-integration strategies, which, although primarily focused on equalizing factors that benefited the black middle class, such as teacher salaries,[82] also addressed the need to decrease the gap between the resources spent on the education of black and white children.[83] Indeed, part of the original desegregation strategy was similar to Bell's plan in that it was intended to force white officials, through successful equalization cases, "to pay prohibitively high sums for the luxury of maintaining separate school systems, and thus, indirectly encourage

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80. *Cf.* ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 188 (1993) ("The pain of [black] professionals . . . is more often than not rooted in feelings of exclusion. In attempting to escape that pain, some blacks end up, in effect, inviting increased isolation. When the successful black lawyer declares that he will 'go to my own people for acceptance' because he no longer expects approbation from whites, he is not only expressing solidarity with other members of his race, he is also conceding defeat. He is saying that he is giving up hope of ever being anything but a talented 'nigger' to many of his white colleagues, that he refuses to invest emotionally in those who will never quite see him as one of them, whatever his personal and professional attributes."); Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 748 (2001) (asserting that "the choice to live in a black neighborhood often constitutes acceptance of defeat in trying to fully enter the American mainstream").

81. *See* John U. Ogbu, *Racial Stratification and Education in the United States: Why Inequality Persists*, *in* EDUCATION: CULTURE, ECONOMY, AND SOCIETY 772 (A.H. Halsey et al. eds., 1997). This is not to say that minorities cannot succeed in schools without the presence of Whites. *See* Amy Stuart Wells, *The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771, 779 (2001) (asserting that the educational outcomes of black students do not necessarily hinge on the racial make-up of their schools). Certainly, minorities can. Studies, however, have shown that poor or working-class minorities benefit from integration, not because of the presence of Whites, but because of increased access to powerful networks and to information about colleges, scholarships, jobs, and other opportunities. *See id.* at 780, 785-88.

82. *See* Charles J. Ogletree, Jr., *From* Brown *to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 520 (2004) (stating that the NAACP successfully received state-endorsed settlements in teacher salary equalization cases in Maryland, Virginia, Alabama, Tennessee, Kentucky, Arkansas, South Carolina, Florida, and Louisiana, and that "[a]s a result, Black teachers went from earning 50 percent of what White teachers earned in 1930, to earning 65 percent of White teacher salaries in 1945").

83. *See* Tushnet, *supra* note 75, at 102 (stating that the "litigation campaign began with cases that sought to require school districts to take the equality component of 'separate but equal' seriously").

them to consider integration."[84] What Bell neglects to address, however, is that this strategy proved to be a failure because of costly data collecting and plaintiff buy-offs, leaving minority and white schools still severely unequal and compelling NAACP lawyers to abandon such strategy in part because of costs[85] and in part because they recognized that Whites would only protect the school system if they were in it.[86]

In essence, as Ted Shaw, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, recently declared, "nothing in our experience as a nation [has taught] us that racial segregation is going to be something that's good for [minority] children."[87] In fact, studies have shown that, even in affluent black communities[88] where black professionals have chosen to live in all-black suburbs (not necessarily because they do not want to live in integrated neighborhoods, but because of a desire to be free of racism in their own homes),[89] racial isolation has proven to be harmful for "middle-class black enclaves"[90] and the schools within them. Because of a variety of factors, including discriminatory real estate agents, black middle-class neighborhoods tend to be located closer to poor neighborhoods, which often results in making black middle-class neighborhoods more subject to poverty, higher crime, failing schools, and fewer services than in white middle-class neighborhoods.[91] Additionally, black middle-class neighborhoods are often on the opposite side of areas that attract businesses that will add to their commercial tax base, leaving community schools with less funding than in comparable white middle-class neighborhoods. For example, Prince George's County, an affluent black middle-class area, is located

84. Ogletree, *supra* note 82, at 519; *see also* Tushnet, *supra* note 75, at 102-05.

85. *See* Ogletree, *supra* note 82, at 520; Tushnet, *supra* note 75, at 102-05.

86. *See Symposium Discussion*, 6 J. APP. PRAC. & PROCESS 113, 146 (2004) (involving a discussion in which Professor Tushnet asserted that integration is a means of ensuring adequate financial resources for minority children because "green follows white").

87. Feller, *supra* note 74.

88. I should note that black and white "social classes are not equal in development and . . . are qualitatively different." *See* Ogbu, *supra* note 81, at 769; *see also* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1997) (asserting that when factors other than income are included, black families are significantly worse off than white families with similar incomes).

89. *See* Cashin, *supra* note 80, at 730, 733-34 (detailing how many black professionals' decisions to live in predominantly black middle-class suburbs is not a pure choice, but in a sense, a settlement).

90. *See id.* at 755-70; *see also* Lawrence Hardy, *The New Diversity*, AM. SCH. BOARD. J., Apr. 2004, at 40, 42 (reporting that "[e]ven middle-class African-American families tend to live in very different and much poorer communities than working-class white families").

91. *See* Cashin, *supra* note 80, at 755-70 (citing Myron Orfield, who connects such economic isolation to racism within the real estate industry).

in the opposite direction due west of the "fast growing high-tech corridors of Northern Virginia," and has encountered difficulties in drawing in business that could improve the area's tax base and thus its schools.[92] Ultimately, all of these factors eventually affect the public schools in these black middle-class areas, which become increasingly segregated as the neighborhoods segregate[93] and which have a higher concentration of low-income students than comparable schools in similarly affluent white areas, students who often require a greater need for services that may consume the school's resources more quickly.[94] In the end, black middle-class neighborhood schools do not fare as well as their white counterparts in traditional measurements of academic achievement.[95] In sum, even for the black elite, racial segregation that is not truly voluntary has proven to be damaging.

2.

Most of all, even if one were to accept Bell's claim that Whites and white policymakers would have ultimately decided to integrate public schools because it is much more economically efficient to maintain one good school system as opposed to two separate but equally good systems, there is no reason to believe that the overall quality of education offered to black children would have improved. After all, if the motivation behind integrating the schools was to avoid the economic costs of equalizing black schools, then Whites and white policymakers certainly would have decided to integrate long before the black schools ever became equalized or of sufficient quality. Moreover, there is no reason to think that true integration, both social and academic, would exist within these new physically integrated environments.[96] As Bell himself notes in his brief discussion of

92. *See id.* at 756-58 (noting that the same pattern exists in black middle-class areas in Atlanta and Chicago). Furthermore, as the black middle-class population increases in neighborhoods, Whites leave, causing an influx of lower income individuals to move in and ultimately resulting in higher tax rates, higher public debt, and overextended use of school public services. *See id.* at 756-57.

93. *See id.* at 759 (stating that "Prince George's County schools have gone from being 20 percent black in 1973 to nearly 80 percent black" in 2001).

94. *See id.* at 759-60 (acknowledging that more than half of the school system's students qualify for free or reduced-price lunches).

95. *See id.* at 759. For instance, the public schools in Prince George's County, although the area itself contains some of the most affluent black communities in the country, "have the second lowest test scores in Maryland." *See id.* at 732, 759.

96. Even today, several integrated school districts in the South maintain the outdated practice of hosting racially segregated proms for Blacks and Whites. *See* Charles T. Clotfelter, *An Imperfect Desegregation*, CHRON. HIGHER EDUC., Apr. 2, 2004, at B9 (describing how, from 1971 to 2002, and again in 2004, several school districts in the South "decided to discontinue the tradition of holding a springtime prom, allowing instead separate, privately sponsored proms for white and black students").

tracking, even in schools that are supposedly integrated, two separate academic schools often emerge for Whites and minorities internally.[97]

Indeed, even when integration is voluntary and sought after by well-meaning Whites who want to have claim to living in an "integrated neighborhood," the interests of minorities, as Bell would say, are eventually sacrificed once that claim of physical integration has been achieved. The best example of this phenomenon is the public school system in Shaker Heights, Ohio, which has a significant black middle-class population,[98] one of the best school systems in the nation, and a community that has worked to maintain its racial diversity through special city-sponsored programs.[99] Even in Shaker Heights, where many white residents assert that they value diversity in their neighborhoods (and not just because of economic interests), segregation and inequality persist within the schools.[100] For example, the late Professor John Ogbu of the University of California-Berkeley found that while 93 percent of all students in the lowest track of courses in the Shaker Heights school system were black, more than 94 percent of all those enrolled in the highest track — Honors and Advanced Placement ("AP") courses — were white.[101] Furthermore,

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97. Pp. 112-13; *see also* Jean Kluver & Larry Rosenstock, *Choice and Diversity: Irreconcilable Differences?*, PRINCIPAL LEADERSHIP, Apr. 2003, at 12, 14 ("Many public schools that appear integrated on paper are actually internally segregated because of academic tracking, student and parent choices within schools, and other school policies."); Sack, *supra* note 19 (reporting that at Greensboro High School, which is 62 percent white and 30 percent black, AP and honors courses are, on average, 80 percent white and 11 percent black).

98. This measure of class was based on income alone. According to Ogbu, 58 percent of the white households and 32.6 percent of the black households had an average family income of $50,000 to over $100,000. *See* OGBU, *supra* note 71, at xii. *But cf.* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 428 (2000) ("Most blacks who fall into the middle class by virtue of their income do not possess the other indicators of middle-class stability such as property ownership, manageable debt, and savings. Instead, 'blacks' claim to middle-class status is based on income and not assets.'") (footnote omitted).

99. *See* OGBU, *supra* note 71, at xii, 59-60 (noting that the suburb "became a model of voluntarily self-integrated community, discouraged 'White flight,' and promoted diversity").

100. *See* OGBU, *supra* note 71, at 61 (discussing a comparison of Shaker Heights High School to Little Rock High School). I should note, however, that while black students in Shaker Heights lagged far behind their white peers, black students in the district perform considerably better than other black students in the rest of the country. *See id.*

101. *See* John U. Ogbu, *Black-American Students and the Academic Achievement Gap: What Else You Need to Know*, J. THOUGHT, Winter 2002, at 9, 11; *see also* OGBU, *supra* note 71, at 110-11. One eleventh grade student explained this discrepancy as the result of racial course preferences, stating:

> Um, well in the Shaker school system, uh, the preference [of Black students] seems to be the lower classes, like college prep classes, and not so much the honors and advanced placement classes. Um, obviously the work is easier, and the standards of getting by are much lower. . . . And um, unfortunately a lot of um, uh Black students have that mentality . . . so they tend to take those lower classes.

See OGBU, *supra* note 71, at 16.

Professor Ogbu found that, even though Blacks accounted for less than 50 percent of the students in the district, Blacks received more than 80 percent of the Ds and Fs reported by various departments of Shaker Heights High School.[102] In many instances, the tracks on which the children were placed were determined at an early age in elementary school, with little room for movement at higher levels.[103]

If the problems within the Shaker Heights public school system are indicative, then there is no reason to believe that minorities would be in any better position today had Bell's "separate but equal" strategy been in place. Unless there is a true attack on and reversal of the dominant, societal belief in white superiority and minority inferiority, segregation within schools is certain to follow. As Bell himself indicates, segregation within schools is no more favorable than segregation among schools (pp. 121-25). Indeed, the effects of such racially disproportionate tracking in schools, along with the rampant perception that Blacks are intellectually inferior to Whites, can have — and has had — a significant impact on the performance of minority students, even those who are in advanced classes and otherwise excelling in school.[104] For example, as Professor Ogbu and his researchers learned in Shaker Heights, some black students avoided Honors or AP courses because they were dominated by white students and because many of the black students in Honors or AP courses felt uncomfortable being the only Black or one of a few black students in a course.[105] Furthermore, Professor Ogbu and his associates found that when Blacks were placed in the honors or AP classes in the Shaker Heights district, white students in such classes often did not want to work or study with the black students; additionally, these white peers rarely included their black counterparts in social activities and conversations, making many Blacks feel unwelcome in the courses.[106] Moreover, as Professor Ogbu and his researchers discovered, in many instances, teachers held lower expectations for their black students, deciding not to give homework in predominantly black classes because the students would not do it, or tolerating certain behavior in predominantly black classrooms that would not be acceptable in

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102. *See* OGBU, *supra* note 71, at 36; *see also* Lynette Clemetson, *Trying to Close the Achievement Gap*, NEWSWEEK, June 7, 1999, at 36, 36 (reporting that although Blacks make up less than the half of Shaker High School's population, "they regularly account for less than 10 percent of those at the top of the class and nearly 90 percent of the bottom").

103. *See* OGBU, *supra* note 71, at 111, 262-64.

104. *See id.* at 84-85.

105. *See id.* at 8, 112, 191, 199, 263.

106. *See id.* at 85, 190-91, 199.

predominantly white classrooms.[107] Likewise, many of the black students' peers viewed them as intellectually inferior.[108] In essence, the problem was not with the desire to want physically integrated schools, but the way in which a belief in white supremacy, whether conscious or unconscious, permeated the system.[109] In fact, Professor Ogbu observed that some black students acted, both consciously and unconsciously, as though they were not as intelligent as Whites.[110]

Above all else, the issues in the Shaker Heights school district reveal that, although integration may have ultimately emerged under Bell's proposed "separate but equal" plan due to economic interests, there is nothing to suggest that white policymakers would have maintained any interest in ensuring equality for minorities and Whites within the school system after actual physical integration and expenditure savings had occurred — when the interests of many Whites and the policymakers would have been satisfied. As the Shaker Heights example indicates, even when Blacks and Whites voluntarily integrate, unless racial hegemony is attacked at its core, disparities in education will persist because of racism.[111] Additionally, social mistrust between races will be present at high levels. Indeed, as Professor Ogbu and his research associates noted, many of the Blacks in the Shaker Heights area expressed that there was a "code of silence" about race within the community, with residents of the suburb living in partially integrated neighborhoods but leading segregated lives. In fact, when the racial achievement gap between Blacks and Whites in the Shaker Heights district was first revealed, many Blacks were angered by the disclosure of the statistics because they viewed such action as an attempt by Whites in the community to make Blacks "look bad."[112]

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107. *See id.* at 17, 107, 126-28, 130-33. At the high school level, black students were also disciplined in numbers disproportionate to white students. *See id.* at 136-41.

108. *See* OGBU, *supra* note 71, at 78-81 (also reporting that 82 percent of 1,300 students surveyed stated that people in their families and community believed that white people considered Blacks less intelligent than Whites).

109. *See* Austin, *supra* note 16, at 85 (recognizing how "notions of black inferiority and white supremacy still taint educational policies and practices in this country").

110. *See* OGBU, *supra* note 71, at 260. As many scholars have found, such internal segregation within schools has in part contributed to a cultural attitude among Blacks that certain successes in school constitute "acting White." *See id.* at 24-25, 85-86, 189, 199-205. Indeed, in one article, a young Howard University-bound student from a Virginia suburb reported that he had been called a sellout and proclaimed that "[i]f you try hard in school, you are seen as being white." Patrick Welsh, *When the Street and the Classroom Collide*, WASH. POST, June 20, 2004, at B1.

111. *See* Austin, *supra* note 16, at 93 ("[W]hite intellectual, cultural, and moral superiority is still the dominant ideological underpinning of education in America.... [T]oday, the schools are simply not structured to produce successful, competent, and confident black students....").

112. *See* OGBU, *supra* note 71, at 71.

Finally, even if Bell's "separate but equal" plan had been adopted and Whites and white policymakers had chosen "voluntarily" to integrate for economic reasons, all factors indicate that there would eventually be a breaking point at which many Whites would revert back to segregation, causing a return to previous inequities (that is, unless true equality between the races and sincere appreciation of other races through exposure to diversity had been reached).[113] In fact, as studies have shown, even with voluntary integration in middle-class neighborhoods, there is a breaking point at which many Whites will leave the integrated area, as racial hierarchy in our society has not been successfully challenged. Specifically, studies have demonstrated that a 30-40 percent black presence in a neighborhood usually produces an exodus of Whites from the area.[114] Indeed, despite having one of the best school systems in the nation, more Whites — even well-meaning Whites who claim to value diversity — are fleeing the suburbs of Shaker Heights as its system becomes increasingly black due to the fear that their children will become a powerless minority in the public schools.[115] Indeed, it is ironic that these same Whites, many of whom recognize how damaging it can be to be an "outsider" or a "minority," continue to perpetuate this racist segregated system.

Moreover, such actions raise the question of whether it matters if desegregation is involuntary or, as Bell suggests, voluntary (when that "voluntariness" is not based on a true commitment to defeating racial hierarchy and institutionalized racism). As Bell's own theory suggests, wherever the interest of minorities have been acknowledged solely because of a convergence with white interests, those very same rights and interests will eventually come to be disregarded. In essence, minorities were damned if we did, and damned if we did not. But to my mind, if given the choice, it was better for us to be damned with what the vast majority of society perceives as a moral victory in *Brown* and with at least the widely accepted societal goal of striving for true racial equality that came out of *Brown*.

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113. *See* john a. powell & Marguerite L. Spencer, Brown *is not* Brown *and Educational Reform Is Not Reform If Integration Is Not a Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE 343, 350 (2003) ("True integration in our schools, then, is not assimilative but transformative.").

114. *See* Cashin, *supra* note 80, at 744-45 & n.87 ("Once blacks reach a presence of more than 40% of a neighborhood, within a few years the neighborhood will typically become majority-black if not all-black." (citing Reynolds Farley et al., *Continued Residential Segregation in Detroit: "Chocolate City, Vanilla Suburbs" Revisited*, 4 J. HOUSING RES. 1, 29 (1993)). Cashin further notes that Whites are generally willing to pay a 13 percent premium to live in an all-white neighborhood. *Id.* at 738.

115. *See* OGBU, *supra* note 71, at 65; *see also* Cashin, *supra* note 80, at 768-71 (describing studies that show that both Whites and Blacks prefer integration only when their groups are in the majority).

B.

Equally as important as *Brown*'s moral victory was its impact on the Civil Rights Movement and race relations in the United States. Indeed, two camps of scholars have explored and articulated the importance of the decision on effecting social change. For some, such as Professor Mark Tushnet, *Brown* had a direct and forceful impact on the success of the Civil Rights Movement and landmark civil rights legislation enacted during the 1960s.[116] According to these scholars, *Brown* gave Blacks hope that racial equality would be achieved and that the rights of Blacks would be recognized, thereby shaping and helping to forge a more aggressive Civil Rights Movement, a movement that would result in strong anti-discrimination statutes such as Title VII of the Civil Rights Act and the Voting Rights Act of 1965.[117] For others, such as Professor Michael Klarman, the effects of *Brown* were more indirect.[118] As Professor Klarman explained his theory about how the decision indirectly shaped racial change:

> *Brown* created a political climate conducive to the brutal suppression of civil rights demonstrations. When such violence occurred, and was vividly transmitted through the medium of television to national audiences, previously indifferent northern whites were aroused from their apathy, leading to demands for national civil rights legislation which the Kennedy and Johnson administrations no longer deemed it politically expedient to resist.[119]

Regardless of which camp one falls in, the direct or indirect *Brown* effect camp, the undeniable truth is that *Brown* certainly helped to transform race relations in this country.[120] Whether it ignited racial change because of a stronger belief that Blacks' rights and interests would be acknowledged and protected or whether it effected change in a more perverse manner by creating southern resistance that

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116. *See* Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 179 (1994); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991); *see also* Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1522 (1968).

117. Kenneth B. Clark, *Racial Justice in Education: Continuing Struggle in a New Era*, 23 HOW. L.J. 93, 95; Howard A. Glickenstein, *The Impact of* Brown v. Board of Education *and Its Progeny*, 23 HOW. L.J. 51, 55 (1980); Nathaniel R. Jones, *The Desegregation of Urban Schools Thirty Years After* Brown, 55 U. COLO. L. REV. 515, 553 (1984).

118. *See generally* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85-150 (1994).

119. *See id.* at 11.

120. *See* Angela P. Harris, *Introduction*, 55 FLA. L. REV. 319, 328 ("The revolution marked by *Brown v. Board of Education* and the antidiscrimination statutes passed during the "Second Reconstruction" brought housing, employment, and education into the realm of 'the public' . . . ."). *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 107-56 (1991) (contending that *Brown* carried little legal or social significance).

invoked the sympathies of northern Whites and politicians, *Brown* helped to change a nation. In sum, the *Brown* decision was and is more than a symbol of racial equality. It was the impetus of a movement that worked to change how Americans viewed and thought about race and resulted in important legislation that helped to protect the civil liberties of Blacks and other minorities, even though, as Bell points out, with dwindling force today.

CONCLUSION

In conclusion, Bell asserts in *Silent Covenants* that *Brown* "provided politicians with a racial issue through which to enrage and upset large groups of white people" (p. 7) rather than bringing about a true transformation of racial inequality. For Bell, *Brown* failed because it attempted integration before Whites could discover that integration was in their interests — at least economically — and thus resulted ultimately in white flight to the suburbs[121] and a whole host of other factors that doomed the vast majority of minority children to educational failure. Indeed, Bell's reasoning (p. 20-23) sounds ironically like Justice Brown's pronouncement in *Plessy* that law "is powerless to eradicate racial instincts . . . and the attempt to do so can only result in accentuating the difficulties of the present situation."[122]

Of course, who can blame Bell for voicing the ways in which integration in public schools has proven to be damaging to the psyche of minority students, especially Blacks and Latinos, who are viewed by many as intellectually inferior to Whites? As Dr. Martin Luther King, Jr. once expressed, integration in schools can be a different sort of animal. As Dr. King explained:

> In [the school] setting, you are dealing with one of the most important assets of an individual — the mind. White people view black people as inferior. A large percentage of them have a very low opinion of our race. People with such a low view of the black race cannot be given free rein and put in charge of the intellectual care and development of our boys and girls.[123]

In all, the reality of Dr. King's words leaves many minorities wondering: is integration worth it? Like Professor Sheryll Cashin,

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121. Bell, *supra* note 13 (noting that "the fear of sending their children to desegregated schools led many white parents either to move to mainly white school districts or to enroll their children in private, all-white schools").

122. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

123. Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, § 7 (book review), at 8 (discussing the views of three eminent black law professors who benefited from *Brown* yet express cynicism about integration).

many of us are "'ambivalent integrationist[s]' suffering from 'integration exhaustion.'"[124]

But if, as Bell asserts, history is telling, it seems clear that the enforcement of "separate but equal" alone would not have left minorities in a better position than they are in today. After all, Whites still would have resisted truly equalizing the resources of schools for people they believed to be inferior.[125] The message to Blacks and other minorities of all ages would have continued to be that they were not as "good" as Whites, and the injury to minority children that the Court highlighted in *Brown*, along with the injury to white children that the Court disregarded,[126] would have remained.[127] If so, why not at least have the moral and admittedly limited practical victories of the holding in *Brown*?

As Zelma Henderson, one of the Topeka parents, proclaimed about the moral victory of *Brown*, "When you get right down to it, the message of the *Brown* decision . . . is really that all human beings of all races are created equal. . . . We went to the Supreme Court of the United States to affirm that fact, and we won."[128] Regardless of the status of minorities today, that moral victory was significant. As Professor Dennis Hutchinson recently asserted, "[*Brown*] delegitimized Jim Crow. It said that the social attitude . . . . this insulting,

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124. *See id.*; *see also* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 9-10 (2004). This is not to say that the gains since *Brown* are unrecognized by minorities. Certainly, progress has occurred. For example, since 1957, the number of Blacks with high school degrees is 10 times greater. *See* Sack, *supra* note 19.

125. *See* Patterson, *supra* note 19, at B05 (stating that "[r]ecent state-court decisions mandating equality or adequacy in education have been very difficult to enforce"). Even if minorities could have succeeded in obtaining equal resources in segregated schools, minorities still would have been severely disadvantaged by a lack of access to the power structure, such as powerful alumni and status or prestige among employers in the community. *See* Adams, *supra* note 48, at 800-02; *see also* Wells, *supra* note 81, at 771, 785-88 (arguing that *Brown* also reasoned that segregation was harmful because of intangibles such as the higher status that white public schools held in society "as well as the valuable social networks of the faculty and students within them").

126. *See* Perea, *supra* note 48, at 1458 (identifying these injuries as including "ignorance of other people, ignorance of the fact that Whiteness constitutes a racial identity, isolation from others, and feelings of guilt and shame, rather than a healthy sense of White identity" (footnotes omitted)); John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1794 (2000) ("[Segregation] was a psychologically damaging and educationally destructive experience for my white friends and myself . . . . It has taken literally decades for my generation to begin to shed the unconscious, but pernicious, grip of the segregated environments in which we were brought up, with all of the fears, suspicions, and misunderstandings that they created.").

127. *See* Sunstein, *supra* note 51, at 105 (maintaining that full enforcement of *Plessy* "would have done nothing about the injury produced by segregation").

128. Phillip Boyle, Brown *and the Dream Deferred*, AM. SCH. BOARD. J., Apr. 2004, at 52, 54 (discussing how the plaintiffs in *Brown* understood the moral basis of the case).

demeaning, humiliating attitude that . . . white people have about black people — does not have the official imprimatur of the law."[129]

Furthermore, there was a practical effect to *Brown* that was equally significant. As I suggested earlier, had there not been *Brown*, would segregation have tumbled so easily in other areas, such as with busing and other public accommodations?[130] Moreover, what would have happened if Whites, in their efforts to equalize schools under Bell's "separate but equal" plan, had simply decided that their social interests in preventing race-mixing were much higher than their economic interests in funding only one school?[131] Is this not what Bell astutely points out that many poor and working-class Whites have consistently done throughout history?

The fact is that *Brown* gave society a goal to strive for and set the stage for a movement that created racial change. *Brown* was more than a legal decision; it was "a statement about the fundamental moral basis of democracy."[132] In other words, what is important here is not whether "separate but equal" could have been achieved (which I do not believe was possible), but rather, as Ted Shaw proclaimed, whether we would have been "satisfied with that as a nation."[133] The answer for many of us is a clear, resounding "No." Our ability to interact across racial lines allows us to learn about the differences in each other's culture and history, and more importantly, about what we have in common, what are our shared experiences, and what are our shared interests. It is only through this form of integration that true racial equality can be achieved.[134] Indeed, the most recent debates regarding the Ten Percent Plan in the state of Texas reveal the ways in which integration and the discovery of once concealed, common interests can lead to the unearthing of race and class inequality.

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129. *Symposium Discussion*, *supra* note 86, at 122; *see id.* at 126 (involving a discussion in which Professor Regina Austin proclaimed that the decision's moral significance made for better lives for northern Blacks).

130. *See* Ogletree, *supra* note 82, at 530-31 (describing how *Brown* broadened efforts to end segregation).

131. Harris, *supra* note 15, at 1741-44.

132. Boyle, *supra* note 128, at 53; *see also* Ogletree, *supra* note 82, at 500 ("Much of the significance of Brown flows not from what the opinion says but *from an appreciation of what it hoped to eliminate: an American social, political, economic, and legal system that had once treated African descendants as property and, after the end of slavery, erected an alternative system of subjugation that treated them as second-class citizens*." (emphasis added)).

133. Feller, *supra* note 74; *see also* powell & Spencer, *supra* note 113, at 344 ("To challenge *Plessy*'s 'separate but equal' is to go beyond separate as well as beyond equal in an effort not only to eradicate intentional discrimination, but to achieve true integration." (footnote omitted)).

134. *See* powell & Spencer, *supra* note 113, at 349 (asserting that fixing racism "requires that we embrace true integration as an explicit goal").

After the Fifth Circuit held in *Hopwood v. Texas* that the use of race or ethnicity in admissions by the University of Texas School of Law was unconstitutional,[135] the Texas Ten Percent Plan was adopted.[136] This plan provided that any student in the top 10 percent of his or her high school class would receive automatic admission to the state institution of his or her choice.[137] The Plan, of which similar versions have been adopted in Florida and California,[138] initially came under attack from numerous individuals for reversing the diversity which Texas universities were previously able to achieve;[139] nevertheless, it has allowed Texas state universities to maintain integration, largely because the secondary schools in Texas are segregated by race.[140]

More importantly, the Plan, while certainly imperfect and ineffective at the graduate admissions level, has resulted in an admissions process that also tends to undermine the class privilege inherent in most universities' admission processes. The end result in Texas has been a backlash led by a group consisting primarily of wealthy parents whose children have been unable to gain acceptance to the state's flagship university in Austin.[141] These parents argue that

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135. 78 F.3d 932 (5th Cir. 1996).

136. *See* Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1737 (2001) (stating that in response to *Hopwood* in 1997, then Governor George W. Bush signed House Bill No. 588 into law).

137. *See* Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004, at A1.

138. *See* Adams, *supra* note 136, at 1729-30 (pointing out that the three most populous states have adopted percentage plans).

139. *See, e.g.*, Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A48 (arguing that the plans unfairly reject minority students who previously would have been admitted to state universities in Texas and been successful simply because they are not in the top 10% of their class); *see also* Adrien Katherine Wing, *Race-Based Affirmative Action in American Legal Education*, 51 J. LEGAL EDUC. 443, 446 (2001) (reporting that in 1997, the entering class at the University of Texas School of Law had only four black students and twenty-six Mexican-American students compared with thirty-one Blacks and forty-two Mexican-Americans before).

140. *See* Glater, *supra* note 137, (noting that the new freshman undergraduate class in 2004 will more diverse than in pre-*Hopwood* years); *cf.* Adams, *supra* note 136, at 1730 (highlighting the "astoundingly ironic reality [that] . . . percentage plans can work if and only if secondary education remains firmly segregated").

141. *See* Glater, *supra* note 137; *see also* Jennifer Radcliffe, *College Admissions Rule Generates Debate About Equity; A Law That Guarantees Slots for Top Students at Texas Colleges Is Hailed and also Called Unfair*, FORT WORTH STAR-TELEGRAM, Oct. 22, 2000, at 4B (reporting that some critics of the Plan assert that some high schools have higher academic standards than others and better prepare their students for college"). *But see* Marta Tienda & Sunny Niu, *Texas' 10-Percent Plan: The Truth Behind the Numbers*, CHRON. HIGHER. EDUC., Jan. 23, 2004, at B10 (presenting results of a study that showed "little evidence that masses of students, including those who graduated from feeder schools, are being crowded out of the most selective public institutions in Texas," that 75 percent of students in the second decile have still been able to enroll in the state institution of their choice, and that "black students are [actually] 34 percent more likely than white students to

some high schools (such as their wealthier ones) are better than others, and "that managing to stay in the top 25 percent at a demanding school should mean more than landing in the top 10 percent at a less rigorous one."[142] Additionally, despite the fact that students admitted under the Ten Percent Plan consistently get better grades than white and wealthier students who would have been admitted under the old policy,[143] these parents argue that the Ten Percent graduates from weaker high schools are not prepared to do the work at the elite public universities and that SAT scores, which highly correlate with socioeconomic class and generally predict nothing more than parental wealth,[144] should be used instead.[145] Given the wealth and collective power within the state of these protesting parents, their wishes (as even the President of the University of Texas concedes), are likely to be granted.[146]

Although another plan that helps somewhat to protect minorities' access to higher education (although only on the college level) is at risk once again, some good news flows from this recent attack on the Ten Percent Plan: it has helped to further expose the upper-class bias in admissions and has caused some poor and working class Whites in Texas to connect their own class oppression to that of minorities.[147] The eyes of students and parents from rural white areas, which prior

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prefer non-Texas institutions over four-year Texas institutions, and that they prefer other four-year Texas institutions over the Austin and College Station campuses").

142. *See* Glater, *supra* note 137; Clarence Page, *What Do You Do When a Diversity Plan Works Too Well?*, BALT. SUN, June 17, 2004, at 19A (reporting that "a Texas-size backlash has erupted among parents from better-off high school districts who voice a novel complaint: reverse discrimination against overachievers"); *see also* Ruben Navarrette, *Latest Texas Education Whine: Suburban Victimhood*, DALLAS MORNING NEWS, June 18, 2004, at 31A (joking, "who knew that attending an elite high school could be considered a disadvantage?").

143. *See* Navarrette, *supra* note 142; *see also* Editorial, *College Bound 10 Percent Rule Works Well*, DALLAS MORNING NEWS, June 20, 2004, at 2H (reporting that "the bulk of UT's 10 percenters did just as well or better on their grade point averages as those freshmen who had much higher SAT scores").

144. *See supra* note 45; Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 148-49 (2003) (detailing upper middle-class bias in admissions and asserting that "[q]uantative measures often reflect family resources and influence rather than a student's resourcefulness or intelligence").

145. *See* Glater, *supra* note 137.

146. *See* Glater, *supra* note 137 (noting that the president of the University of Texas at Austin claims the Plan may need adjustment and that, post *Grutter*, the university plans to resume use of race as a factor in admissions).

147. Clay Robison, *Minority Leaders Urge State to Keep College 10% Rule*, HOUSTON CHRON., June 24, 2004, at A17 (quoting the interim executive director of the Texas League of United Latin American Citizens, who responded to criticisms that the plan was unfair by saying "Join the club. (The admissions system) has never been fair for minorities. It's never been fair for poor, rural whites." (alteration in original)).

to the Ten Percent Plan had never sent a student to the University of Texas at Austin,[148] have been further opened to see the ways in which they were disadvantaged by the elite school's previous admissions process, a view long held and understood by parents of students from impoverished minority schools.[149] In the end, this revelation has created and maintained a stronger potential for long-term coalition-building between poor Whites and minorities. As Bell argued in his book while discussing *Hopwood*, instead of a challenge by Whites on race-based affirmative action, a challenge by Whites that focused on the exclusionary tools of admissions in general would have assisted everyone, including poor and working-class Whites such as Cheryl Hopwood.[150] Indeed, the current debates about the merits of the Texas Ten Percent Plan, even with its imperfections, certainly lend powerful support to Bell's comments concerning the upper-class bias in admissions across the nation[151] and even suggest that the tides may be beginning to change. For example, as the Texas state legislature considers whether it can resolve the "problems" generated by the Plan with the implementation of course requirements for the Top Ten Percent students in the state, a discussion of funding and requiring all districts to provide a more advanced minimum curriculum has also occurred, a factor that many impoverished minority schools have desired for years and that could greatly improve the quality of education for the students in these schools.[152]

Who knows? Perhaps, the long route from segregation to integration and back to segregation again was meant to lead us to this small coalition that attacks inequality at its core. Maybe one day, if asked, "For whom does the bell toll?," no student will have to answer, "It tolls for thee." The school bell, I mean.

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148. *See* Glater, *supra* note 137 (highlighting that the "number of schools that send their graduates to the University of Texas has risen by a third, from just over 600 to more than 800"); Robison, *supra* note 147 (reporting that "the 10 percent law has created a more geographically diverse student body at UT, because many white students from property-poor, rural districts — as well as minorities — have been admitted under it").

149. *See* Glater, *supra* note 137 (asserting that some of those requesting a change in the Plan are concerned about students at the state's elite schools in wealthy districts while some defenders of the Plan are concerned about students from poorer rural and urban areas).

150. P. 141. In fact, Bell notes that such a challenge would have been more meaningful to an individual like Cheryl Hopwood, the lead plaintiff in *Hopwood*, as her denial of admission was more socioeconomic than racial. Pp. 144-45.

151. *See* Don Erler, *Don't Mess with Texas Plan*, STAR-TELEGRAM.COM, June 29, 2004, *at* http://www.dfw.com/mld/startelegram/9037663.htm?lc (describing how the backlash about the plan is based on class bias, leading some to want "to turn back the clock to good old days of racial preferences").

152. *See* Michael May, *The Cream of Every Crop: What Other States Can Learn from the Ten Percent Plan*, TEXAS OBSERVER, July 7, 2001, at 5.