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Equality does not mean Conformity: Reevaluating the use of Segregated Schools to Create a Culturally Appropriate Education for African American Children

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Envision the education of an African American child. From a very early age, she learns that her ancestors were stolen from their homes and brought to America in chains. She is told that their clothes, their names, and their faiths were taken from them because they were barbarians, and that the white people wished to rid them of their primitive ways. They were separated from their families and given masters, threatened with death if they chose to leave their servitude.

She is told of the great 'victory' over slavery, when her forefathers were released from their bondage with no wealth, no land, and no jobs. Their names were not returned to them, and their families were lost without a trace. Their culture had long since been beaten out of them; they knew no more of their ancient ways and no longer spoke their ancient tongues.

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Though declared free and equal, this child is told that, for nearly a century, white people refused to live with her people, eat with her people, or be educated with her people. She learns that when her parents were younger, it was illegal for white people and black people to marry. Yet, she is told that these times of disgrace are over, that her people are free, and that these two races now live in harmony. She is taught this in a classroom where the white children number only three of forty-two students.

What is there in this education to make this child think that there is something positive in being black, when all this negativity is surrounding her and no encouraging aspects of her race are introduced? All she learns about her ancestors is a history of victims. Their only successes that are reported to her are freedoms from chains they never should have worn and discrimination they never should have endured.

Is it enough to tell her that racism is over now? Can she even believe it, when the lack of diversity around her suggests the persistence of some kind of stigma? Will confidence come from seeing more white faces in her classroom? Will diversity make her feel powerful and proud? What will it take to reverse the damage done to the minds of black children and provide them with the equal and appropriate education that they have sought for so many years? What roles do integration and segregation play in achieving a quality education for African American children?

I. INTRODUCTION

In 1954, the Supreme Court stated that de jure segregation was detrimental to the minds and the development of minority children.[1] However, the Supreme Court has never held that children have a right to diversity in their educational environment.[2] Further, though integration was ordered by the Supreme Court, as applied by the enforcement mechanisms of the United States government, desegregation measures have been unsuccessful in creating diversity in educational institutions.[3] More than fifty years after *Brown v. Board of Education*[4], minority children are consistently placed in schools that are segregated by race and poverty.

Integration has also been unsuccessful in eliminating the disparities

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[1] Brown.v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[2] Consider the distinction between a right and an interest. As will be discussed later, the Supreme Court has held that there is an interest in diversity in law school classrooms; however, there is no right to that diversity. While schools can offer it to their attendants, students cannot file suit alleging an obligation of schools to provide that diversity. However, they can file suits alleging that diversity is attained through inappropriate, unconstitutional measures.

[3] *See* discussion *infra* Part III.C.

[4] *Brown*, 347 U.S. 483.

between the educational institutions of primarily white students and those of primarily black students.[5] African American children experience a largely inadequate education that places them at a disadvantage in terms of job competition and admission into higher education.[6] Meanwhile, integration has caused African American children to be subjected to an education that focuses on Euro-Centric history and culture.[7] American education also disregards the contributions of Africans to the development of the U.S. and the world.[8]

Over the past few years, the Supreme Court has had the opportunity to consider the role of diversity in primary and secondary schools, as well as institutions of higher education.[9] However, one question has been neglected. Given the past failures surrounding integration measures, in particular, and minority education, in general, is a ruling in favor of racial diversity the appropriate step to improving education for African American children?

The purpose of this paper is to reevaluate the perceptions of what constitutes an equal education regarding the roles that segregation and integration play in educational quality. Part one will introduce the problems with integrated education. Part two will identify the conflicting claims regarding the construction of educational facilities. Part three will review the past trends in decision of the courts of the U.S. regarding racial segregation and the conditioning factors that resulted in these decisions. Part four will predict the future trends of U.S. courts based on the current political climate and recent court decisions. Part five will suggest alternatives and make recommendations about how minorities can best achieve a quality education. Since the determination of what constitutes a quality education is relative, this article will examine the interpretations of international bodies about what appropriate education should include.

II. DELIMITATION OF THE PROBLEM

Conversations about education of African Americans often center on spending disparities, placement of black children in remedial classes, and access to similar college preparation programs.[10] While these are

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[5] *See generally* GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (2001).

[6] *Id*.

[7] *See* discussion *infra* Part II.D.

[8] *See* discussion *infra* Part II.D.

[9] S*ee*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003). *See also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

[10] *See generally* PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION (2002); JONATHAN KOZOL, THE SHAME OF A NATION: THE RESURRECTION OF APARTHEID

legitimate concerns about the quality of education for black children, for the purposes of this paper, the concern is only with the impact of diversity and with mental and emotional discrimination, including forced assimilation and other barriers to enjoyment of the right to culture.

The United States has transitioned from a "salad bowl" of individuals with different ideas and different values to a "melting pot" of individuals pressured to become one "American" collective mass. This transition is problematic in three ways. First, culture, tradition, and preservation of language are things that are valuable, in and of themselves, as they are part of the unique characteristics of every individual and every ethnic group.[11] Second, there are numerous relationships between culture and the development of self that require one's culture to be preserved.[12] Third, current educational systems in Western schools with Eurocentric ideologies are often demeaning at best, teaching minorities that their existence is inconsequential and their traditions are barbaric, and revering slaveholders and other great oppressors of minority rights.[13]

A. Defining Black Culture

Before determining what type of educational structure best promotes black culture, exactly what is meant by "black culture" must be clear. The American Heritage Dictionary defines culture as "[t]he predominating attitudes and behaviors that characterize the functioning of a group or organization."[14] This definition should begin with the acknowledgement that before the 16th century black people had their own distinct culture that was completely independent from white culture.[15] At this time, most African people had never encountered a white person in their lives.[16]

Those "behaviors" or "attitudes" that characterize culture include such items as religion, language, dance, and dress, which were stripped from

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SCHOOLING IN AMERICA (2006); JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991); ORFIELD, *supra* note 5.

[11] *See* discussion *infra* Part II.C.

[12] *See infra* note 15.

[13] *Id*.

[14] The American Heritage Dictionary 442 (4th Ed. 2000).

[15] CHANCELLOR WILLIAMS, THE DECONSTRUCTION OF BLACK CIVILIZATION: GREAT ISSUES OF A RACE FROM 4500 B.C. TO 2000 A.D. 243 (1987). When the Portuguese encountered the Kongo Kingdom of West Africa in the late 15th century, they claimed that their king and their culture were better than any other in the world and stated that they wished to unite the world under one religion because this religion was the source of the power of their great king. *Id.* at 245–46. Portugal sent Christian missionaries to convert the people of the Kongo Kingdom and create the standard of white culture as the epitome of civilization and development. *Id.* at 246–47.

[16] *Id.* at 243.

blacks very early in American history.[17] Due to the colossal success of forced assimilation throughout the history of the United States,[18] it may be difficult to identify one location in Africa or one pre-colonial culture that an African American originates from. Thus, culture also means the right to study the history of Africa, the languages of Africa, and the cultural traditions generally common throughout the continent.

B. The Removal of Black Culture

After twenty-five years of teaching in public schools in the United States, Yaa Asantewa Nzingha concluded that culturally sensitive education is necessary for African American children.[19] She states that most black children are ignorant about their heritage and that "[u]ntil African people become clear that they are Africans with African connections they will not be able to move forward in a healthy way."[20]

In order to examine the argument presented by Nzingha, it is important to begin with the acknowledgment that the removal of culture from Africans was intentional during slavery and thereafter. The practice of African religions was prohibited, and Africans were forcibly converted to Christianity because this conversion was provided as a justification for the slave trade itself.[21] Europeans portrayed themselves as the caretakers of African spirituality, declaring that they must enslave them to save them from damnation; yet six American states passed laws to ensure that the

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[17] Generally, before 1760, most slaves in North America had already been completely separated from the religious traditions of their ancestors. Verna C. Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 51–52 (1997).

[18] *See* discussion *infra* Part II.B.

[19] Yaa Ansantewa Nzingha, *Reparations + Education = The Pass to Freedom*, *in* SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 299, 312 (Raymond A. Winbush ed., 2003). Michele Moses underscores the significance of multicultural curriculums, stating that they "emphasize the importance of a nonoppressive education and thus aim to enrich the quality of students' educational experiences and their sense of authentic cultural identity." MICHELE MOSES, EMBRACING RACE: WHY WE NEED RACE-CONSCIOUS EDUCATION POLICY 81 (2002).

[20] Nzingha, *supra* note 19, at 312. Nzingha is not the only African scholar to present this argument. Amos Wilson stated assimilated African Americans suffer from 'social amnesia' claiming to be American but not black or African. AMOS N. WILSON, THE FALSIFICATION OF AFRIKAN CONSCIOUSNESS 40 (1993). Chancellor Williams expresses the same concern about the "Caucasian acculturation" of black Americans and he notices that other ethnic identities within the United States do not suffer the same affliction, as Indians, Chinese and Japanese "were able to hold on doggedly to their own racial pride and cultural heritage as the last resource for survival as a people." WILLIAMS, *supra* note 15, at 331.

[21] ROGER PINCKNEY, BLUE ROOTS: AFRICAN-AMERICAN FOLK MAGIC OF THE GULLAH PEOPLE 22 (2003). Additionally slaves were prohibited from assembling under penalty of death. JOSEPH CEPHAS CARROLL, SLAVE INSURRECTIONS IN THE UNITED STATES 1800-1865 25 (2004). This prohibition prevented African religious practices because most traditions rely on drums and group singing to bring about spirit possession. Nzingha also notes that not only were slaves forced to convert, but the gods that they were told to pray to bared no resemblance to them, and she provides the example of the depictions of Jesus with a white face, blue eyes and blond hair. Nzingha, *supra* note 19, at 305.

conversion of a slave did not confer on him his freedom.[22]

Language was also purposely removed from slaves. For example, Willie Lynch, in his pamphlet entitled *Let's Make a Slave,* states

> . . . for further severance from their original beginning, we must completely annihilate the mother tongue of both the nigger and the new mule and institute a new language that involves the new life's work of both. You know, language is a peculiar institution. It leads to the heart of a people.[23]

Lynch further states that interbreeding white people and black people would result in making African Americans forget where they come from.

> Cross-breeding a horse means taking a horse and breeding it with an ass and you get a dumb backward ass, longheaded mule that is not reproductive nor productive by itself.
>
> Cross-breeding niggers means taking so many drops of good white blood and putting them into as many nigger women as possible, varying the drops by the various tones that you want, and then letting them breed with each other until the circle of colors appear as you desire.
>
> What this means is this: Put the niggers and the horse in the breeding pot, mix some asses and some good white blood and what do you get? You got a multiplicity of colors of ass backwards, unusual niggers, running, tied to backwards ass longheaded mules, the one productive of itself, the other sterile.
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> (The one constant, the other dying. We keep the nigger constant for we may replace the mule for another tool) both mule and nigger tied to each other, neither knowing

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[22] Sanchez, *supra* note 17, at 51. The colonies that passed these laws were Maryland, Virginia, New York, New Jersey, North Carolina, and South Carolina. *Id.* at 51 n.123.

[23] Willie Lynch: Let's Make a Slave, http://www.ybmb.com/make_a_slave_1712.html (last visited April 22, 2007). The reference to a mule within this quote is made because the pamphlet written by Lynch is, according to Lynch, designed to illustrate how to break both a horse and a "negro." *Id.*

> where the other came from and neither productive for itself, nor without each other.[24]

However, Nzingha notes that opposition to connecting African Americans to their African heritage is not a thing of the past.[25] She recounts the experiences of several African educators who have been threatened and ridiculed for presenting an Afro-centric curriculum.[26] Nzingha also shares her personal experience of opposition, claiming to have been fired from a New York public school for teaching African American children to refer to themselves as African instead of American.[27]

Additionally, not only have teachers been prevented from teaching Afro-Centric curriculums, some schools and universities have required education in Eurocentric thought.[28] For example, until 1988, Stanford University required all first-year students to take one year of courses that concentrated on Western Civilization.[29]

C. The Connection between Culture and Development

Linguists estimate that nearly half of the world's 6000 languages will be gone in the next century.[30] Many argue that with the loss of language comes the loss of culture.[31] Some scholars, including Molefi Asante, have stated that one of the main problems with African Americans today is that during the times of slavery, they were forced to speak a foreign tongue and subscribe to foreign cultural practices.[32] Slave owners believed that it was

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[24] *Id.*

[25] Nzingha, *supra* note 19, at 300–01. In San Francisco high schools before 1998, the only required English classroom texts were "Romeo and Juliet, the Adventures of Huckleberry Finn, and The Canterbury Tales." MOSES, *supra* note 19, at 99. In 1998, a proposal was set forward that 70% of the literature presented should be written by authors of color. *Id.* There was such an outcry against the proposal that it was passed with only a requirement that one work by an "ethnic" author be used per year. *Id*.

[26] Nzingha, *supra* note 19, at 301. In particular, Nzingha mentions Laurence C. Jones of Mississippi who was threatened by white supremacists in the early 1900s because he taught black children. She also mentions an incident as recent as the 1990s, when Dr. Leonard Jeffries was ridiculed for underscoring the importance of contributions of Africans to topics such as science and religion. *Id.*

[27] *Id.* Nzingha claims that after her termination, other teachers at the same institution experienced similar persecution for presenting an Afro-centric perspective and that numerous other teachers across the country contacted her to share their sympathy and related experiences. *Id.* at 301–02.

[28] MOSES, *supra* note 19, at 101.

[29] *Id.*

[30] JOEL SPRING, THE UNIVERSAL RIGHT TO EDUCATION: JUSTIFICATION, DEFINITION, AND GUIDELINES 132 (2000).

[31] *Id.*

[32] *Id.* at 133. Some slave owners argued that the only way to subjugate African slaves was to remove their language and culture. This is evidenced in the pamphlet of Willie Lynch entitled *Let's Make a Slave.* Lynch states that negros "must be taught to respond to a particular new language" and

necessary to rid Africans of their heritage to make them dependent on their owners.[33] Further, the mixing of tribes on plantations and the forced practice of European culture caused African Americans to adopt Western traditions.[34] Therefore, according to some scholars, the adjustment problems that African Americans have can be attributed to the cultural dysfunction that resulted from forced migration and the loss of their own heritage during slavery.[35] In particular, drug use and unstable familial structures have been linked to African assimilation.[36]

Throughout years of oppression, and education that tells African Americans that they are worthless, minorities internalize this feeling and believe that they deserve to be ruled.[37] Some connect this internalized self-loathing to blacks committing violence and crimes against each other, and generally distrusting members of their own race. Cornel West argues that the answer to these problems is "self-love" through "cultural centeredness."[38] Self-hatred is a product of anger towards whites for their discrimination against African Americans and this anger prevents economic and social development.[39] Joel Spring defines "cultural centeredness" by providing an example of what is means to be culturally "uncentered."[40] He states that being culturally uncentered "refers to the psychological confusion resulting from acting according to cultural values that find no representation in the schools, media, government, economic system, or surrounding society."[41] Examples of this "uncentered" approach in education include learning history from the perspective of the victors, glossing over slavery, and tracing the history of minorities back only so far as the interaction of their people with Europeans.[42] African Americans are only taught to identify their ancestors as slaves, and they learn nothing of the cultures of the tribes from which these slaves descended.[43] However,

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that "physical and psychological instruction for containment must be created . . . ." Lynch, *supra* note 23. Nzingha argues that Lynch's pamphlet should be presented in schools to show "the psychology used during slavery to take the minds of African people" and to show how "his method has been indoctrinated into today's society, just as Lynch predicted." Nzingha, *supra* note 19, at 310–11.

[33] JOEL SPRING, DECULTURALIZATION AND THE STRUGGLE FOR EQUALITY: A BRIEF HISTORY OF THE EDUCATION OF DOMINATED CULTURES IN THE UNITED STATES 42 (McGraw-Hill Companies, Inc. 2004) (1994). Spring provides the example of Africans being given new names by Europeans to take away their African identity.

[34] SPRING, *supra* note 30, at 133. Spring states that since Africans on a plantation spoke different languages, they were forced to converse in English as a common language.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 135.

[38] *Id.* at 134.

[39] *Id.*

[40] *Id.* at 136.

[41] *Id.*

[42] *See* discussion *infra* Part II.D.

[43] *See id*.

many classes and chapters are devoted to the progress of Europeans throughout the centuries.[44] Nzingha adds to this problem her view that it is useless to try to teach African American children such fundamental topics as math and science if their minds are clouded by inferiority based on stereotypes from the media and textbook propaganda.[45]

D. Portrayal of Minorities in American Education

In the 1990s, James Loewen did an extensive study of the inaccuracies of American history classes and published his findings in the book "Lies My Teacher Told Me: Everything Your American History Textbook Got Wrong."[46] A recount of just a few of these things will assist in illustrating how textbooks' accounts of history warp the view of America's children as it pertains to minorities.

First, Columbus Day is a national holiday and American schools are closed on this date, out of respect for this explorer. American history books portray Christopher Columbus as a hero and a leader.[47] Columbus referred to indigenous peoples in the Americas as "primitives," kidnapped them and took them to Spain, disfigured them for minor offenses, and raped some of their women.[48] Columbus also forced some tribes into labor so difficult that indigenous peoples committed suicide by the hundreds.[49] Then, Columbus began the slave trade in the Americas and shipped more slaves than any other individual across the Atlantic.[50] Half of the history books examined by Loewen did not mention the murder of indigenous peoples by the Spanish.[51] The history books that did mention these atrocities failed to connect murder and enslavement to Columbus or referred to them as allegations that are not supported by evidence.[52] However, these facts have been proven by the content of Christopher Columbus's own diary and letters he sent to Spain.[53]

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[44] *Id.*

[45] Nzingha, *supra* note 19, at 303.

[46] *See generally* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG (1995). Loewen was not the first author to examine this issue, although his is one of the most recent and comprehensive studies. For another book that illustrates the inadequacy of American education, particularly on the subject of portrayals of African Americans, see INDUS KHAMIT-KUSH, WHAT THEY NEVER TOLD YOU IN HISTORY CLASS (A & B Publishers Group 1999) (1983).

[47] LOEWEN, *supra* note 46, at 50.

[48] *Id.* at 51.

[49] *Id.* at 53.

[50] *Id.* at 55. Columbus shipped about 5000 slaves across the Atlantic.

[51] *Id.* at 56.

[52] *Id.*

[53] *Id.* at 53. Christopher Columbus was not the only historical figure revered in American education that was involved in the slave trade. Both George Washington and Thomas Jefferson were slave owners, yet children are taught to regard them as heroes. Nzingha, *supra* note 19, at 305. Further, students are frequently not instructed in the conflicting versions of the reasons that Abraham Lincoln

Loewen also noted that major accomplishments throughout history are presented with a Eurocentric bend.[54] In particular, the discovery of the Americas is attributed to the Portuguese explorer Vasco de Gama.[55] However, a conflicting view of some historians suggests that Afro-Phoenicians discovered the Americas many years before that.[56] Loewen proposes that this omission of prior discovery of the Americas by Africans is purposeful because white historians do not want to improve the self-image of African children.[57]

Loewen also found that, historically, American textbooks failed to adequately address the topic of slavery.[58] Today, many books devote more space and depth to the topic, but slavery continues to be glossed over in the northern regions of the nation.[59] Additionally, while some textbooks talk about the conditions of servitude and the treatment of slaves, they do not address the causes of racism.[60] Textbooks do not discuss the perception of Europeans that they were superior to Africans because Africans were barbaric or uncivilized.[61] They try to neutralize the influence of racism on slavery to provide the perception that there is no one to blame for this unfortunate accident.[62]

Further, the history of the slave trade is told with a focus on issues that create a basis for equal culpability of Africans in the Transatlantic Slave Trade. Historians focus on African rulers that sold their own people into slavery.[63] These historical accounts rarely highlight the role of African leaders in the fight for abolition and freeing slaves.[64] It is important for teachers to adequately address slavery and to inform black students of the contributions of African Americans to prevent them from being uncomfortable when the topic of slavery is brought up and to keep black children from feeling victimized throughout their lives.[65]

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freed the slaves. They are only presented with the moral basis for freeing them, not the political reasons. *Id.*

[54] LOEWEN, *supra* note 46, at 42.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 134.

[59] LOEWEN, *supra* note 46, at 134–35.

[60] *Id.* at 136.

[61] *Id.* at 137.

[62] *Id.* at 137–38. There has been a recent trend to present slavery in a romanticized fashion, referring to certain slave owners, like George Washington, as gentile masters so that their reputation would not be tarnished by their ownership of slaves. Nzingha, *supra* note 19, at 307.

[63] WILLIAMS, *supra* note 15, at 257.

[64] *Id.*

[65] ANNIE S. BARNES, EVERYDAY RACISM 59–60 (2000).

III. IDENTIFICATION OF CONFLICTING CLAIMS

Any scholarly examination of the concept of segregation, integration or the role of diversity in the classroom should acknowledge the conflicting claims surrounding educational construction. These claims can be divided into five main categories: forced segregation, voluntary segregation, integration with mainstream education, integration with culturally inclusive education, and status quo with educational improvement.

A. Forced Segregation

The people that support the idea of forced segregated could be divided into two groups. The first group is the white population that still subscribes to belief in a superior Aryan race. For example, the Aryan Nation's website advertises that their cause is "not a matter of White Supremacy, it's about Racial Purity!"[66] Segregation would prevent the intermingling and intermarriage of minorities and whites, thereby preserving the purity of the white race. Similarly, the Ku Klux Klan advertises that they believe that people must accept that the U.S. was built for white people and they support the idea of voluntary repatriation of individuals who are not willing to tolerate white Christian rules of conduct.[67]

The second sect of the population seeking forced segregation is composed of minorities. A driving force behind this movement is the idea of cultural relativism. Cultural relativists believe that there are no concepts that can be universally adopted, thus it logically follows that the push for universality results in oppression of one group's beliefs by another.[68] Since there will always be certain beliefs that cannot be reconciled, the imposition of any uniformity results in cultural imperialism.[69] Schools, in particular, can become dangerous facilities if they are used to indoctrinate minority children in the ways of the majority.[70] Therefore, cultural relativists would support the idea of forced segregation to protect the integrity of cultures that cannot live together without conformity.

Malcolm X was opposed to integration, stating "I too believe the best solution is complete separation, with our people going back home, to our own African homeland."[71] Other civil rights leaders, such as W.E.B. Dubois, shared Malcolm X's view that there would be no progress of black

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[66] Welcome to Aryan Nations Official Website, http://www.aryan-nations.org (last visited Oct. 29, 2007).

[67] The Knights Party Platform, http://www.kkk.bz/program.htm (last visited Oct. 29, 2007).

[68] SPRING, *supra* note 30, at 32.

[69] *Id.* at 33.

[70] *Id.* at 35.

[71] MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 20 (George Breitman, ed.) (1989).

people through integration. In fact, prior to renouncing his American citizenship and moving to Ghana, Dubois announced that he realized "I was not an American . . . but a colored man in a white world."[72]

Opposition to the argument of forced segregation appears in the interracial, intercultural relationships that exist in the United States today. It would be difficult to separate entire populations because few people can claim heritage of only one pure race. However, it should be noted that during slavery and the years thereafter, white Americans had no difficulty in distinguishing where the lines of segregation should be drawn in the case of biracial children. U.S. history is littered with "one drop rules" to determine who can enter segregated facilities.[73] While few would argue that this is a proud place in American history that the U.S. should seek to return to, it clearly illustrates that it is not impossible to distinguish individuals of mixed heritage by race. Therefore, it would be conceivable to do the same today and force all persons of mixed race to also live apart with the rest of the minority cultures. Thus, this argument cannot be discounted due to impossibility.

B. Self-Segregation

Many people argue that segregation cannot work because it has been tried and failed.[74] However, a widespread policy promoting voluntary segregation has never been seriously considered. Several groups of African Americans have created entire communities focused on African traditions, culture, and dress. These communities provide some insight about the possibility of voluntary segregation.

1. Oyotunji Village

Oyotunji Village in South Carolina was created after Oseijeman Adefunmi traveled to Nigeria in 1959 to become the first African American initiated in the Orisha African priesthood.[75] Oyotunji Village was established for the purpose of bringing Africa to the United States.[76] The activities of the village consist of "communal living, farming of traditional crops by traditional means, shrines and temples, a school were children would learn Yoruba language and custom and Ifa religious practice- including ritual animal sacrifice, divination and polygamy."[77] For

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[72] ARTHUR MANN, THE ONE AND THE MANY: REFLECTIONS ON THE AMERICAN IDENTITY 174 (1979).

[73] SPRING, *supra* note 33, at 4. This history is evidenced in *Plessy v. Ferguson*. In this case, the Supreme Court treated a Creole man that passed for white as a black person because, being 1/8 black, he had a drop of African heritage. Plessy v. Ferguson, 163 U.S. 537, 538 (1896).

[74] ORFIELD, *supra* note 5, at 12.

[75] Oyotunji Village, http://www.oyotunjiafricanvillage.org/about.htm (last visited Oct. 29, 2007).

[76] PINCKNEY, *supra* note 21, at 124–25.

[77] *Id.* at 124.

example, the men of Oyotunji, as a rite of passage, have to be able to identify certain herbs and know the drum beats that call the men to work or

to emergencies.[78] Further, the village holds annual festivals on the spring equinox to honor the African spirits.[79]

2. Gullah People of South Carolina

The Gullah people have several communities in South Carolina that are almost entirely composed of African Americans.[80] They were not intentionally formed for the purpose of preserving African culture.[81] Rather, the Gullah communities developed after slave owners fled during the Civil War when the Navy seized these areas.[82] In a land redistribution scheme unprecedented in American history, African Americans were given the deeds to the lands of their former owners.[83] These communities have been able to preserve their traditional African languages and spiritual beliefs because of a lack of interference from outside influences.[84] In the South Carolina Gullah communities, residents still retain "African naming practices, net making, fishing practices, the ring shout, basketry, and burial ceremonies."[85]

C. Integration with Cultural Education

Though there will be differences between minority and majority cultures that present themselves as a difficulty when these individuals interact together, some argue that schools provide an important occasion for the problems that develop from these differences to be solved.[86] Schools present a prime opportunity for dialogue that could eliminate the problems that arise from misunderstanding.[87] Segregated schools do not permit this same opportunity for intercultural education.[88]

A 1998 survey found that most blacks and about 34% of whites

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[78] *See* Inside Oyotunji Ogun fest'07 pt.1, http://www.youtube.com/watch?v=1vs4RbNZD2w (last visited Oct. 30, 2007).

[79] *Id.*

[80] PINCKNEY, *supra* note 21, at 6–7.

[81] *Id.* at 4–5

[82] *Id.* at 5

[83] *Id.* at 4–5.

[84] *Id.* at 5. In particular, the Gullahs retain their ancestors' beliefs that life does not end at death but rather death is a new beginning in the unbroken circle of life. JOSEPH E. HOLLOWAY, AFRICANISMS IN AMERICAN CULTURE 215 (Indiana University Press, 2005) (1990). Further, Gullah communities, like many African American religious traditions today, include the African concept of spirit possession in their religious ceremonies. *Id.* at 207.

[85] HOLLOWAY, *supra* note 84, at 187. Holloway gives the example that the above ground grave decorations in South Carolina are very similar to those found in Central African communities. *Id.* at 201. These communities also retained African patterns of cooperative labor. *Id.* at 203. Further, the Gullahs place a bowl of water to keep the spirits out of the house, a practice reminiscent of the African tradition of sprinkling water around the house in the morning for the same purpose. *Id.* at 207.

[86] SPRING, *supra* note 30, at 34–35.

[87] *Id*. at 34.

[88] ORFIELD, *supra* note 5, at 11.

believed that diversity in education is essential.[89] In fact, another study found that most minorities attending the nation's elite law schools came from integrated schools.[90] Based on these statistics, some people argue that diversity is fundamental to a child's education.

The New Black Panther Party argues for a new, more culturally sensitive education to protect the progress of African American children in their ten point platform. They state:

> We want decent education for our people that exposes the true nature of this decadent American society. We want education that teaches us our true history and our role in the present-day society. We believe in an educational system that will give to our people a knowledge of the self. If you do not have knowledge of yourself and your position in the society and in the world, then you will have little chance to know anything else.[91]

This argument is not a new one. Carter Woodson presented the same problem in 1933 in his book "The Mis-Education of the Negro."[92] Woodson states that black children were taught that Africans are inferior and unrefined.[93] Africans were not included in the literature that children studied and the Negro dialect was scoffed at and disregarded for pursuit of mastery of French and Spanish languages.[94] Woodson argues that this mis-education is intentional and refers to the constructors of the educational system as 'the oppressor,' indicating that it is the objective of this oppressor to make black people hate themselves so that they will open the doors for white subjugation and annihilation without question.[95]

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[89] *Id.* at 6.

[90] Though the author argues this is evidence of the importance of diversity in education, it could be interpreted as representing the fact that schools that contain more white children are likely to be of a higher educational quality and produce more prepared students. *Id.* at 9.

[91] The Black Panther Party: The Ten Point Plan, http://www.blackpanther.org/TenPoint.htm (last visited Oct. 29, 2007).

[92] *See generally* CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO (2005).

[93] *Id.* at 12.

[94] *Id.*

[95] *Id.* at 123. Woodson states,

> [t]he education of the Negro then must be carefully directed lest the race may waste his time trying to do the impossible. Lead the Negro to believe this and thus control his thinking. If you can thereby determine what he will think, you will not need worry about what he will do. You will not have to tell him to go to the back door. He will go without being told; and if there is no back door he will have one cut for his special benefit.

Id.

D. Integration with Mainstream Education

One of the most prominent civil rights leaders in the United States, Dr. Martin Luther King Jr., labored tirelessly against segregated institutions. Though it is impossible to predict what Dr. King would propose to improve the quality of integrated American institutions, it is clear that he felt that the objective at hand was integration, rather than the segregation and cultural preservation that other activists of his time like Dubois and Malcolm X focused on. In his timeless speech in 1963 in Washington D.C., King stated, "We can never be satisfied as long as our children are "stripped of their selfhood and robbed of their dignity by signs saying 'for whites only.'"[96]

The difficulty with focusing on integration alone is that there is only a certain amount of information that can be introduced into a child's classroom or textbooks. Therefore, it could be argued that education must be made mainstream because of the limitations of time and space. Cultural education is further limited by the fact that public schools do not have unlimited funds to create culturally sensitive programs. The default form to create unified educational materials is in the version of the majority culture. In fact, some people argue that this approach is preferable because indigenous and minority cultures are inevitably affected by majority culture.[97] Therefore, it is only natural that minority and indigenous cultures accept and embrace the changing nature of their culture as it interacts with majority culture.[98] Thus, a child's education should be established in a spectrum of cultural Darwinism. Since there is only room for one perspective, education cannot accommodate minority cultures.

Additionally, teaching history from a minority perspective has been called a divisive form of instruction. Warren Nord[99] argues that one of the dangers of multicultural education is that it leads to reverse discrimination by distorting the retelling of past injustices in a manner that creates an over-exaggerated picture of the oppression of minorities.[100] If educational facilities discuss controversial issues like slavery, racism, or colonization, then students will develop a hatred of one another based on these past events.[101] Therefore, integration should reflect a mainstream education that glosses over the ugly parts of history to avoid future conflict.

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[96] LESLIE H. FISHEL, JR. & BENJAMIN QUARLES, THE NEGRO AMERICAN: A DOCUMENTARY HISTORY 534 (1967).

[97] SPRING, *supra* note 30, at 25.

[98] *Id.*

[99] Warren Nord is a lecturer at the University of North Carolina. Nord states that he is not an expert in the area of religion or education. He writes from the perspective of a philosopher and he seeks to underscore the things that shape the way people think. WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA XV (1995).

[100] *Id.* at 226.

[101] *Id.*

Support for integrated education is also found in test scores, which have shown that blacks perform better when they are in integrated schools.[102] Some people suggest that better performance is attributable to the sense of competition that blacks feel in classes with white students.[103] They feel that they are receiving equal opportunities and this motivates them to compete.[104] This argument is tied to the reality that white schools have better materials, teachers, and programs.[105] Blacks are motivated by access to these facilities.[106]

E. Status Quo with Educational Improvement

It is a common belief that it is not possible to rectify the situation that renders schools segregated due to white flight to suburbs and private schools.[107] Further, for many years, the answer has been to provide financial support to public schools since desegregation hasn't worked to create more equal educational institutions.[108]

Today, many African Americans are tired of seeking the seemingly unattainable integrated institution.[109] Therefore, there is a segment of the population that seeks to disregard this conversation about segregation and integration from consideration of what constitutes a quality education. Instead, the focus should be on improving the quality of education provided through financial incentives to poor schools.[110]

Annie Barnes argues that the solution to racism in American education is to ensure that students are treated fairly and disciplined equally, and that minority students must not be ignored and made to feel bad about themselves.[111] School coaches should encourage black children to focus on academics, as well as or instead of, sports.[112] School counselors should encourage black children to follow their dreams.[113]

While Barnes certainly doesn't discount the importance of a multicultural education, she argues that 'good' history lessons are most effectively provided by white teachers to minority students due to the history of racism in this country.[114] She bases this premise on the powerful

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[102] BARNES, *supra* note 65, at 32.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 32–33.
[106] *Id*.
[107] ORFIELD, *supra* note 5, at 2.
[108] *Id* at 11.
[109] *Id.* at 2.
[110] *Id.*
[111] BARNES, *supra* note 65, at 58–59.
[112] *Id.* at 61.
[113] *Id.*
[114] *Id.* at 60.

ability that a white teacher has to make a lasting impression on a minority child with comments of stereotype and prejudice.[115] Barnes states that it is equally powerful to have a white teacher encourage a black student and teach them pride in their identity.[116]

IV. PAST TRENDS IN DECISION

A. The Purpose of Segregation

In order to examine the role of segregation in American education today, the purpose of segregation in U.S. history must be examined. The story begins with the restrictions on African American education during slavery and culminates with the declaration of the Supreme Court that separate but equal institutions are constitutional.

1. Slavery

Blacks were prohibited from reading and writing during slavery because it was dangerous to teach them to read.[117] They might develop the idea or realization that they deserved more than slavery.[118] In 1680, Virginia had a law prohibiting the gathering of slaves.[119] This law was intended to prevent black schools and black rebellion.[120] Maryland created a law in 1695 that fined an individual 1000 pounds of tobacco if they were caught teaching blacks.[121] In 1740, South Carolina criminalized teaching slaves to write or employing slaves in a job that required slaves to write.[122] As growing fear of abolition mounted from 1800 to 1835, the number of southern states with prohibitions against black education increased.[123] In spite of the many states possessing these legal prohibitions, Christian missionaries were often sent to teach blacks to read because they believed it would ease conversion if blacks could read the bible.[124]

Slave owners were correct in their fear that educating blacks would endanger slavery. Famous leaders of slave rebellions like Nat Turner and Denmark Vessey proved to whites the correlation between literacy and revolt.[125] After Turner's rebellion, black children were barred from white

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[115] *Id.*
[116] *Id.*
[117] IRONS, *supra* note 10, at 1–3.
[118] *Id.*
[119] *Id.* at 3.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] SPRING, *supra* note 33, at 35.
[124] IRONS, *supra* note 10, at 4.
[125] *Id.* at 5.

churches that taught them to read the bible.[126] Due to fear of rebellion, by the time of the civil war only about 5% of slaves knew how to read.[127]

Fear wasn't the only motivation behind the prevention of black education. A justification of early segregation was that black boys were thought to be a "sexual threat" to white girls.[128] These concerns about black education also were not limited to the South. Connecticut passed a law in the early 1830s that prevented black and white children from being educated in the same institutions because blacks were not equal to whites.[129]

Conversely, at this time, segregated societies were also promoted by abolitionists. Some believed that separate colonies outside the United States should be established for African Africans.[130] They thought that slave owners would be more likely to free their slaves if they had somewhere else to send them.[131]

2. Post-Emancipation, Pre-Plessy

After the abolition of slavery, black children tried to take advantage of public education. In Mississippi, African Americans were nearly 40% of the school age population in 1871.[132] However, white teachers were threatened and attacked for teaching black children. [133] Black schools were frequently burned and bombed in the South.[134] Some states, like South Carolina, required racial integration in their schools.[135] Numerous white people refused to pay their taxes because they did not want their money funding the education of black children.[136] In other areas, white people voted to fund black education solely in areas that whites thought blacks needed to be educated, such as any education necessary to house and field work.[137] Black people were prohibited from voting due to violence at the polls and other harassment, so they could not rectify the trend of whites to alter the content of black education.[138] Therefore, segregated schools provided the purpose of tailoring a simpler education to black needs and a

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[126] *Id.*
[127] SPRING, *supra* note 33, at 45.
[128] IRONS, *supra* note 10, at 54–55.
[129] *Id.* at 6. Florida and North Carolina went so far as to create separate facilities to house the textbooks for African American and white children. JOHN DAVID SMITH, WHEN DID SOUTHERN SEGREGATION BEGIN? 9 (2002).
[130] PAULA A. FRANKLIN, MELTING POT OR NOT? DEBATING CULTURAL IDENTITY 48 (1995).
[131] *Id.*
[132] IRONS, *supra* note 10, at 7.
[133] *Id.* at 8.
[134] *Id.*
[135] *Id.* at 7.
[136] *Id.*
[137] *Id.*
[138] *Id.*

more advanced education to white needs.[139]

Despite efforts of some states to train black teachers and build black schools, 80% of black children in the Southern states did not go to school during the Reconstruction Period (1865-1877).[140] Three million freed slaves suddenly found themselves without land, with little skills to secure an income, and with limited economic assistance from the government. [141] Therefore, they often worked as sharecroppers for their former owners.[142] Black children couldn't go to school because school conflicted with the time that they needed to do farm work with their families, particularly during harvesting in summer and fall.[143] Sharecropping remained an obstacle to black education into the 1950s.[144]

Other obstacles faced African American children trying to attend school. At times, they were physically incapable of getting to school because the dirt roads were impassible by foot.[145] The children that did not attend school remained illiterate because most of their parents were prohibited from reading and writing during slavery. [146] In 1890, only 40% of African American adults were literate.[147] Therefore, parents taught their children through oral traditions from Africa.[148]

In 1849, Benjamin Roberts brought a case in Massachusetts alleging that black children should have the right to attend the same public schools as whites.[149] The Civil War had not been fought and the 14th amendment had not yet been ratified, but the Massachusetts Court in *Roberts v. City of Boston* found that blacks were entitled to equal treatment.[150] However, the Court determined that the way to ensure equal treatment was in the hands of the lawmakers and the Court should not interfere in their decisions unless they are unreasonable.[151] Even after the 14th amendment was passed, the Ohio Supreme court in *State v. McCann*[152] still relied upon

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[139] *Id.* at 13.

[140] *Id.* at 6–9. It is important to note that the First Reconstruction Act, passed in 1866, disbanded the legislatures of ten Southern states that refused to ratify the 14th Amendment. JAMES TACKACH, BROWN V. BOARD OF EDUCATION 15 (1998).

[141] FRANKLIN, *supra* note 130, at 51.

[142] *Id.*

[143] BARNES, *supra* note 65, at 32.

[144] *Id.* at 31.

[145] IRONS, *supra* note 10, at 10.

[146] *Id.* at 9.

[147] *Id.* at 32.

[148] *Id.* at 9.

[149] Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849). Though this early challenge to segregation occurred in 1849, not many objections occurred between this case and the 1870s cases because even segregated institutions were better than what blacks experienced prior to the Civil War, during slavery, which was complete exclusion from public facilities like hospitals and theaters. SMITH, *supra* note 129, at 10.

[150] *Roberts*, 59 Mass. at 206.

[151] *Id.* at 206–07.

[152] State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871).

similar arguments to those presented in the decision in *Roberts* to determine that equal protection does not mean that whites and blacks must be in the same school.[153]

In 1870 in California, segregated schools were provided for by law.[154] Whites attended one set of facilities, while blacks and Native Americans were to attend a separate school.[155] A case was brought before the California Supreme Court, alleging this law violated the 14th amendment.[156] The California Supreme Court relied on the *Roberts* opinion and determined that segregation was best for both black and white children.[157] The Court stated that equality requirements were not violated because, though blacks were prohibited from attending white schools, whites were also prohibited from attending black schools.[158]

3. Plessy v. Ferguson

One of the landmark cases in determining the constitutionality of segregation was *Plessy v. Ferguson*.[159] *Plessy* upheld the ejection of a black man from a train because he refused to leave the section of the train reserved for white passengers.[160] The Supreme Court stated that segregation could be forced because the 14th amendment was not intended to eliminate distinctions based on race, and segregation does not imply that one race is inferior to the other.[161] As long as the law equally permitted the

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[153] *McCann*, 21 Ohio St. at 203. The plaintiff had three school age children in Franklin County, Ohio where less than 20 black children resided at the time. *Id.* The adjoining county had the same number of children thus they created a joint school for black children in between the two counties. *Id.* The court held that it is within the discretion of the local governments to create educational institutions for its children. Since the government was authorized to determine the manner in which this education would be constructed and black children received equal education in their schools, there was no question that the schools were permitted to segregate the children. *Id*. at 207. The court made a distinction between the "classification" of black children and the "exclusion" of them. As long as black children were not being prohibited from attending common schools without an alternative black school to attend, there was no violation of the law. *Id.* at 208.

[154] Ward v. Flood, 48 Cal. 36, 37 (1874).

[155] *Id.* 37–38.

[156] *Id.* at 36. This case held that the 14th Amendment did not address the right to education, as it only prohibited states from interfering with rights guaranteed by the federal constitution. Since the construct of education was not addressed in the Federal Constitution, the right of admission to public schools was a matter reserved to the States. *Id*. at 49–51.

[157] The court quotes Justice Shaw as stating that if separate schools created an atmosphere of discrimination it was not an atmosphere created by the law, thus it did not need to be rectified by the law. *Id.* at 54–56.

[158] *Id.* at 41.

[159] Plessy v. Ferguson, 163 U.S. 537 (1896).

[160] Interestingly, the law at issue in *Plessy* not only permitted the ejection of a black individual from the train for occupying a whites only area, it also made such occupation a criminal offense, punishable by up to 20 days imprisonment. *Id.* at 540–41. *Plessy* was in fact taken to jail subsequent to his ejection. At his trial, he was sentenced to a fine and a period of imprisonment. *Id.* at 538–39.

[161] *Id.* at 544.

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from

operators of the train to determine who was black and who was white and place them each in their respective cars, the Court held that there was no greater onus placed on blacks than whites.[162] The Court stated that while it is the obligation of the government to ensure that the civil and political rights of one race are equal to another, if one race is perceived to be socially unequal, then the U.S. constitution cannot render them equal.[163] The Court's argument assumed that, should black people come into power and enforce segregation, white people would not view themselves as placed in an inferior position to blacks.[164]

While the rulings of state courts regarding segregation in schools would later rely on *Plessy* for their decisions, interestingly the Supreme Court first relied on the practice of segregation in schools to justify its decision in *Plessy*.[165] The Court stated the establishment of separate schools has been "held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."[166]

Justice Harlan wrote a dissenting opinion in *Plessy* in which he acknowledged in his dissent that the white race was the dominant race in the United States "in education, in wealth and in power" and that it would "continue to be for all time" if white people were true to their "great heritage" and embraced their "principles of constitutional liberty."[167] Yet, Harlan stated that the separation of the two races prevented racial harmony from ever being achieved, and harmed both races in rendering reconciliation impossible.[168] He asserted that the "common government" of white and black men should not "permit the seeds of race hate to be

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> political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id.

[162] *Id.* at 549.

[163] *Id.* at 552. "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." *Id.* at 551.

[164] *Id.* at 551.

[165] Id. at 544. This case cited these state court cases, including *McCann, Roberts*, and *Ward*. *Plessy*, 163 U.S. at 544–45. *Plessy* also cited the restrictions placed on interracial marriage as evidence that separation of the races did not constitute a violation of equal protection of the 14th amendment. *Id.* at 545.

[166] *Id.* at 544.

[167] *Id.* at 559. (Harlan, J., dissenting).

[168] *Id.* at 561. (Harlan, J., dissenting).

planted under the sanction of law." [169] In Harlan's opinion, hate and distrust were the result of requiring segregation of black and white citizens because that separation was based on the idea of the inferiority of blacks.[170]

4. Summarizing the Purpose of Segregation

The purpose of the restriction on African American education in the beginning of this nation until the beginning of the 20th century is composed of three eras. First, slave owners sought to restrict black education to prevent slave revolts. Then, after emancipation, separate black educational institutions were created to give African American children what white America thought was an appropriate education, geared toward the labor intensive lives that they were expected to lead and neglecting academic purpose. Separate black schools were also maintained because black male children were perceived as a threat to white girls. Finally, as these separate institutions became more common, courts began to uphold them, stating that separate facilities were not discriminatory and did not violate equal protection.[171] The courts ignored the true purpose of segregation, and the fact that institutions were always created because white people refused to commingle with blacks.[172] There were no black neighborhoods, schools, stores, or sections of the train the white people *wanted* to enter and could not.[173] Numerous signs for segregated facilities read "Negroes and Dogs Not Allowed," placing blacks in the same category as animals.[174] Ignoring the discriminatory intent of segregation itself, the majority of the Supreme Court claimed that if racism existed in American culture and society, it cannot be addressed by the court or the law.[175] Only the dissenting opinion of the Supreme Court in *Plessy* challenged the fact that segregation was based on racism and forecast the animosity it would heap onto race relations in U.S. society.[176]

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[169] *Id.* at 560. (Harlan, J., dissenting).

[170] *Plessy*, 163 U.S. at 560.

[171] *See* discussion *supra* Part IV.A.3–4.

[172] *Id.*

[173] Despite the allegations of the *Plessy* court that there was no unequal burden and blacks and whites together were equally prohibited from mingling with one another, there were exceptions to segregated facilities, for example, allowing black servants to accompany a white child in a "whites only" park or section of the train. This exception clearly illustrates that it was the purpose of segregation to keep blacks in a subservient position. SMITH, *supra* note 129, at 161.

[174] *Id.* at 158.

[175] Plessy v. Ferguson, 163 U.S. at 551–52.

[176] The 'one-sided' nature of segregation is evidenced by the fact that at the same time that segregated facilities were in place across the United States, there were certain social standards that clearly illustrated that separate-but-equal was not the reality. For example, social customs dictated that African Americans were to refer to all whites as "Mr." or "Mrs.," while all whites were to refer to black people by their first names. SMITH, *supra* note 129, at 22. Additionally, blacks were expected to look at the ground when addressing white people, particularly white women. *Id.* Further, blacks were to permit

B. The Purpose of Integration

The analysis of the role of segregation does not conclude with an overview of the history of segregation and the environment of racism and intolerance that bred it. It is also essential to assess the factors that preceded the *Brown* decision and the motivations of the court that led to the declaration that segregation is unconstitutional.

1. Pre-Brown, Post-Plessy

During the period of segregation, African American educational facilities were much worse than those white children attended.[177] Schools spent between three and ten times as much on white children as on black children.[178] Black schools lacked good textbooks, spent an average of two months less in school in session each year, and were taught by teachers that had an average of ten years of education themselves.[179]

The first Supreme Court case to address separate educational institutions was *Gong Lum v. Rice*.[180] *Gong Lum* concerned an Asian girl prohibited from attending a whites only school in Mississippi.[181] The court stated that this was not a new question and thus did not even warrant full discussion.[182] The only burden placed on the state was to provide equal educational facilities for whites and "coloreds," and it was within the discretion of each state to determine if all non-whites could be classified in the same category as blacks.[183] The Court declared that each state possessed the discretion to determine how it will structure education that is provided with public funds.[184]

Once it became clear that segregation applied to schools, opponents of this policy considered both the option of appealing to the Court to force separate institutions to be equal and attacking *Plessy* on the basis that "segregation imposed a 'badge of servitude' on black children."[185] While some of the early cases reflect the tendency to rely on the inequality of institutions to destroy segregation, these cases were a colossal failure at

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all whites to be served before them and were expected to move aside for whites to pass when walking or driving. *Id.* at 22–23.

[177] IRONS, *supra* note 10, at 32.

[178] *Id.* at 33. A study was done in 1910, where an average was taken of the spending amounts on each white child. It concluded that $9.45 was spent per year on each white child, while $2.90 was spent on each black child per year. TACKACH, *supra* note 140, at 27. Expenditure on white children increased from $9.45 to $10.32 between 1910 and 1916, while it decreased from $2.90 to $2.89 on black children in the same period. *Id.* at 27–28.

[179] IRONS, *supra* note 10, at 40. Further, in 1945, states spent $42 million on busing white children to segregated schools and $1 million on busing black children. TACKACH, *supra* note 140, at 29.

[180] Gong Lum v. Rice, 275 U.S. 78 (1927).

[181] *Id.* at 82.

[182] *Id.* at 85–86.

[183] *Id.*

[184] *Id.* at 85.

[185] IRONS, *supra* note 10, at 53.

achieving that end.

Missouri ex rel. Gaines v. Canada[186] provided that legal education could not be denied to blacks and offered to whites in the same state.[187] If a state did not supply a legal education to black students, then it had to admit blacks to the State University.[188] However, after *Gaines*, the University of Oklahoma denied admission to the law school to Ada Sipuel, promising that it would create an equal educational system for blacks.[189] The Supreme Court found that this denial was also unconstitutional and required the state to admit Sipuel to the University of Oklahoma since it did not have a law school for blacks.[190] Overnight, the state created a school with no teachers and no library.[191] Thurgood Marshall brought a case in 1948 to force the state to create a facility that was equal.[192] The Supreme Court denied Marshall's petition for a writ of mandamus, claiming that the issue of creating equal institutions had not been before the Court; the question had only been whether, without a separate institution for blacks, Sipuel had to be admitted to the University of Oklahoma.[193] Oklahoma's construction of this teacherless school remained unchallenged by the Supreme Court.

In 1946, University of Texas Law School denied admission to Herman Sweatt, a black man, solely on the basis of race.[194] The Texas court, in *Sweatt v. Painter*, held that this denial was unconstitutional unless the school supplied substantially equal facilities.[195] School officials created a plan for an all-black law school that had no library and no full time instructors.[196] Part time professors would teach in the two first-floor rooms of an office building.[197] Texas judges held this school to be equal with the

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[186] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[187] *Id.* at 345.

[188] *Id.* The petitioner was an applicant to the University of Missouri School of Law. Upon application, the school registrar informed him that there was a law permitting the law school to refuse him admission and refer him to the adjacent states of Kansas, Nebraska, Iowa and Illinois, where there were law schools that permitted black students, until the school within Missouri that provided higher education for blacks developed a law school. *Id.* at 342–343. The court concluded that the State of Missouri had not fulfilled its obligation to provide equal facilities for blacks because it did not provide them with the privilege of a legal education, a privilege that it afforded to white students.

[189] Sipuel v. Bd. of Regents, 332 U.S. 631 (1948).

[190] *Id.* at 632–33.

[191] Fisher v. Hurst, 333 U.S. 147, 151 (1948) (Rutledge, J., dissenting) (mentioning the overnight construction of the black law school and the inadequacy of the facility).

[192] *See generally* Fisher v. Hurst, 333 U.S. 147 (1948).

[193] *Id.* at 150.

[194] Sweatt v. Painter, 210 S.W.2d 442, 443 (Tex. Civ. App. 1948), *rev'd*, 339 U.S. 629 (1950).

[195] *Id.* at 446.

[196] *Id.* at 448–49. The school officials claimed that they planned to hire 4 full time teachers, but until they were able to, the black school would share four professors with the University of Texas Law School. *Id.* at 448. Further, the school provided 200 books to the Negro Law School and additional books were available for transfer. *Id.* at 449. Additionally, the Negro Law School could use the Supreme Court library for their research. *Id.*

[197] *Id.* at 448, 450.

white law school which housed 850 students, had full time professors, and possessed its own library.[198] *Sweatt v. Painter* was one of two cases that Marshall brought before the Supreme Court to argue that the Court needed to force the construction of equal facilities or declare segregation unconstitutional.[199] The Supreme Court ordered Sweatt to be admitted to the University of Texas, School of Law.[200]

In the case of *Briggs v. Elliot*[201] in South Carolina, Thurgood Marshall used Kenneth Clark, author of the "colored doll," "white doll" test to prove that segregation caused black children to feel inferior.[202] The black schools contested in the *Briggs* case had outdoor bathroom facilities.[203] The school superintendent argued that because black students did not have working toilets at home, they should not need them in school.[204] Clark contended that black children were "subjected to an obviously inferior status in the society in which they live," and they are therefore harmed in their development.[205]

The court held that equal facilities were necessary and upheld an injunction for their creation but refused to abolish segregation because segregation had a strong history that the Court felt it could not ignore.[206] Marshall attempted to appeal to the Supreme Court but the school presented the Supreme Court with a report detailing the construction of a new black high school and other measures to equalize these institutions.[207] Though the court acknowledged that the changes the school system made had no bearing on the constitutional question raised by Marshall, they remanded the case because they could not obtain enough justices to agree to hear it.[208]

2. Brown

Brown v. Board of Education brought the final challenge to de jure

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[198] *Id.*

[199] IRONS, supra note 10, at 57.

[200] Sweatt v. Painter, 339 U.S. 629, 636 (1950).

[201] Briggs v. Elliot, 98 F. Supp. 529 (E.D.S.C. 1951).

[202] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 317–18 (Alfred A. Knopf 1976) (1975). Kenneth Clark and his wife Mamie Clark did a series of studies about the psychological damage of racism, asking children to show them which doll they liked better, or preferred to play with. The result was that black children showed a strong preference for the white dolls, even at the young age of three. *Id.* Though it was deemed impossible to show that Clark's findings were a result of segregated schools, Clark argued that schools were so fundamental to a child's learning that they had to have an influence. *Id.* at 319. Clark's doll test was also a part of the presentation before the Supreme Court in *Brown* of evidence that segregation was humiliating and created a sense of inferiority. *Id.* at 557.

[203] IRONS, *supra* note 10, at 67.

[204] *Id.* at 68.

[205] *Id.* at 69.

[206] *Briggs*, 98 F. Supp. at 535–38.

[207] *See* Briggs v. Elliott, 103 F.Supp. 920, 921–22 (E.D.S.C. 1952).

[208] IRONS, *supra* note 10, at 78.

segregated institutions before the Supreme Court. At the time of *Brown*, segregation was required by law in seventeen states.[209] Contrary to common belief, segregation was not reserved for only black children. Mexican and Native American children were often included in segregation statutes.[210]

In *Brown*, the plaintiffs argued that segregated schools "are not 'equal' and cannot be made 'equal' and that hence they are deprived of the equal protection of the laws."[211] The Court deliberated for six months. Then, on June 8, 1953, the Court presented the issue of whether the 14th amendment was intended to abolish segregation to both sides for further research.[212] The case was then set for re-argument, which occurred on December 7, 1953.[213]

The decision in Brown ultimately disregarded the argument of the physical inequality of segregated schools and hinged on the argument that separate institutions were inherently unequal because of the essential nature of education and the badge of inferiority that segregation created.[214] In fact, the Court noted that the schools involved in the Brown case had been found by the lower courts to be equalized.[215]

The Supreme Court relied upon the arguments made before the Delaware and Kansas courts that segregation has an injurious effect on black children because it is based on the idea of the inferiority of blacks.[216] The Kansas court stated, as recited by the Supreme Court:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted

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[209] ORFIELD, *supra* note 5, at 3–4.

[210] In fact, the Supreme Court Justices asked Atty. Carter in the course of his presentation in *Brown* about the *Gong Lum v. Rice* case, noting that a Chinese girl was considered colored, not just black children, implying that this consideration of all non-white children as colored did not therefore discriminate against black children. TACKACH, *supra* note 140, at 60.

[211] Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

[212] TACKACH, *supra* note 140, at 73.

[213] *Id.* at 66, 70.

[214] *Brown*, 347 U.S. at 492. Justice Warren underscored the importance of education, stating

> [i]t is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

[215] *Id.*

[216] *Id.* at 494.

> as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[217]

However, the plaintiffs in *Brown* did not seek integration for the purpose of allowing blacks to "simply sit next to white students."[218] The movement that led to *Brown* was seeking economic and social equality.[219] At this time, equality could not be achieved without integration because of the perception of the purpose of segregation. However, later interpretations clarify that despite the enforcement mechanisms put in place to implement the Supreme Court's decision,[220] *Brown* only outlawed de jure segregation,[221] not segregation by choice. Though immediately after *Brown* schools were prevented from implementing policies that could end in segregation, there is no such restriction today.[222]

3. Summarizing the Purpose of Integration

Litigation challenging segregated institutions initially centered around the physical and economic disparities between the institutions. The unavailability of higher education institutions, particularly law schools, for black students caused the movement toward integration. Initially, states attempted to create alternative institutions overnight, but they were vastly unequal, understaffed, and inadequate. The court acknowledged this inadequacy before that of primary and secondary institutions, and ordered states to admit black students into their higher education institutions.

Finally, *Brown* challenged the very thing that *Plessy* said that the government could not address, the social inequality that segregation was based on and the "badge of inferiority" that it placed on African Americans. *Brown* did not focus on physical disparities, rather it attacked the very foundation, slavery and the mindset that followed, that led to the

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[217] *Id*.

[218] ORFIELD, *supra* note 5, at 3.

[219] *Id.* The Supreme Court in *Brown* held that to segregate black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494. This illustrates that part of the Court's reasoning in *Brown* was that segregation was linked to social factors, linked to a feeling of inferiority, and not merely that segregated facilities were physically unequal.

[220] As a part of the *Brown* decision, Justice Warren requested legal briefs from both sides in six months on the implementation of the Court's decision. TACKACH, *supra* note 140, at 74.

[221] ORFIELD, *supra* note 5, at 2.

[222] *Id.* at 5.

creation of separate facilities.

C. The Waning Enforcement of Integration

The true meaning of integration cannot be determined if the examination concludes with the interpretation of the basis for the necessity for segregation as applied in *Brown.* It must also address the changing interpretation of how far and how fast integration must occur from the time of *Brown* until the present.

1. Post-Brown

After the *Brown* decision was delivered, the parties returned before the Court in 1955 to seek enforcement of the *Brown* mandate.[223] In this decision, commonly known as *Brown II*, the Court ordered that schools comply with its desegregation order "with all deliberate speed."[224] However, despite the order of *Brown II*, many schools remained defiant. The most notorious example of opposition to the *Brown* decision occurred in Little Rock, Arkansas in 1957. Governor Faubus ordered the Arkansas National Guard to prevent nine black students from attending Central High School, a historically "whites only" institution.[225] The National Guard was removed by President Eisenhower, but in retaliation, Faubus shut down Central High School for one academic year.

Dr. Martin Luther King Jr. argued that segregation must end to have America "live up to its democratic ideals."[226] King led protests against segregated facilities. This movement resulted in a law against segregated public accommodations in the Civil Rights Act of 1964.[227]

Despite the Civil Rights Movement and the Brown decision, 98% of Southern schools remained segregated in 1964.[228] Federal aid was provided to the desegregation process over the course of thirty-five years; however, this aid went more toward improving the quality of education than toward integration.[229] Any aid the federal government provided to facilitate desegregation in schools post-*Brown* ended in 1981.[230] It is unclear that desegregation was ever truly intended as a consequence of federal funding. Further, federal funding has been largely unsuccessful in

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[223] Brown v. Bd. of Educ., 349 U.S. 294, 294, 298 (1955).

[224] *Id.* at 301.

[225] TACKACH, *supra* note 140, at 82.

[226] FRANKLIN, *supra* note 130, at 55.

[227] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2003). *See also* FRANKLIN, *supra* note 130, at 55.

[228] ORFIELD, *supra* note 5, at 3.

[229] *Id.* at 13–14. For example, Title I is the largest federal program toward equalizing education. Its focus is on improving education in high poverty schools. *Id.*

[230] *Id.* at 12.

equalizing education.[231]

In 1973, in *San Antonio Independent School District v. Rodriguez*,[232] the Supreme Court examined whether the Equal Protection Clause of the 14th Amendment was violated when school districts with a high concentration of minority students[233] received drastically lower expenditures.[234] In examining this question, the Court noted that the petitioners did not assert that the children in the San Antonio school district were receiving no education; they asserted that they were receiving a poorer education.[235] The Court did not find disparity in education problematic because they stated that it is impossible to create equal educational institutions.[236] Since the State is not endowed with infinite financial resources, the Supreme Court declared that the question at hand was whether each child was receiving an adequate education.[237] In response to this question, the petitioner had provided no information asserting that they were not.[238]

The Court in *San Antonio* rejected the application of strict scrutiny to the petitioners' claims on two bases.[239] First, the Court stated that strict scrutiny can be applied on the basis of dealing with a suspect class; however it was not clear that there was a suspect class at issue in *San Antonio*.[240] The Court stated that it cannot be assumed that the poor reside in poor districts and the petitioners had not provided evidence to support this assumption.[241] Thus, the Court held that "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."[242]

Second, the Court determined that education is not a fundamental right because it is not explicitly or implicitly guaranteed by the Constitution.[243]

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[231] *Id.* at 14.

[232] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). San Antonio was a class action suit brought on behalf of Mexican American children living in a Texas school district that possessed a low base for property taxes. *Id.* at 4–5.

[233] The school district at issue in San Antonio was composed of 22,000 students, with 90% of those students being Mexican American and over 6% African American. *Id.* at 11–12. Alternatively, the most affluent school district in Texas contained only 18% Mexican American children and less than 1% African American children. *Id.* at 12–13.

[234] *Id.* at 12–14.

[235] *Id.* at 23–24.

[236] *Id.*

[237] *Id.* at 24.

[238] *Id*.

[239] *Id.* at 40.

[240] *Id.* at 28.

[241] *Id.* at 23.

[242] *Id.* at 54–55.

[243] *Id.* at 35. Interestingly, the Court acknowledges in *San Antonio* that education is fundamental to the development of cultural values for a child. *Id.* at 30.

After determining that strict scrutiny does not apply, the Court stated that it is appropriate to defer to the state, which traditionally holds the power to determine the structure of education.[244]

In *Milliken v. Bradley* in 1974,[245] the Supreme Court held that "[t]he target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils."[246] The Court stated that prior case trends clearly illustrated that racial balance in U.S. schools was not required as a component of the mandate of desegregation.[247] Here again, the Court returned to its conclusion that education is an issue best left to the discretion of the state, and that local control of education permits citizens to take an active role in determining the structure of education.[248] Though it acknowledged that the powers reserved to the state, such as education, are not above the Constitution, the Court refused to find that the inter-district transportation of students was necessary to remedy the effects of de jure segregation that occurred only in Detroit public schools.[249] Thus, this decision upheld the constitutional validity of de facto segregation that was created by white flight to the suburbs and created no obligation of states to implement any measures to create a more racially balanced community.[250]

Left with limited obligations for seeking integrated education, some school districts tried to maintain segregation by creating school districts that hinged on racial lines.[251] In 1986, "[m]ore than half of the black students attended schools that were more than 90% black, while the vast majority of white children were in schools with few black students."[252] Some schools attempted to rectify this situation by requiring the racial composition of schools to be reflective of the school district population.[253] However, these requirements resulted in further white flight to the suburbs.[254]

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[244] *Id*. at 58–59.

[245] Milliken v. Bradley, 418 U.S. 717 (1974). In *Milliken*, the petitioners brought a class action suit alleging that the Detroit public schools were racially segregated, seeking a comprehensive desegregation plan. *Id.*

[246] *Id.* at 737.

[247] *Id.* at 740–41. However, in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978), the Supreme Court stated that racial balancing is unconstitutional in institutions of higher education.

[248] *Milliken*, 418 U.S. at 741–42.

[249] *Id.* at 744, 746–47.

[250] This decision seems reminiscent of the statement in *Plessy* that if the law created equal status for black and white people, and social perceptions still rendered them unequal, the law was powerless to rectify that inequality. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

[251] IRONS, *supra* note 10, at 238–39.

[252] *Id.* at 272.

[253] ORFIELD, *supra* note 5, at 3.

[254] *Id.*

Then, during the 1990s, the Supreme Court delivered several decisions stating that desegregation measures were meant to be temporary and schools could return to segregation because desegregation was not intended to actually achieve integration and measures were eventually suppose to return to local control.[255]

In 1991, the Supreme Court determined that there was no further obligation to develop programs to eliminate segregation in schools.[256] Schools are not permitted to implement policies that seek segregation, but the occurrence of segregation as a result of a policy does not make that policy impermissible, so long as de jure segregation has been eliminated "as far as practicable."[257] Then, in 1992,[258] the Supreme Court stated that a school district that once possessed de jure segregation has the obligation to take all necessary steps to eradicate segregation that was remnant of the de jure segregation in order to release the stigma placed on minorities by that segregation."[259] However, when segregation occurs as a result of private action, not as a result of the actions of the state, it is not regulated by the Constitution.[260]

While leaving the primary and secondary schools to determine their own racial composition based on residential patterns, in 2003, the Supreme Court upheld affirmative action programs to ensure admission to higher education institutions, namely law school.[261] However, before mistaking

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[255] *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991). *See also* ORFIELD, *supra* note 5, at 16 n.57 (Justice Rehnquist was one of the major forces behind limiting the programs to eliminate segregation during his tenure on the Court. Orfield notes that Rehnquist was a Supreme Court clerk when *Brown* was decided and he pressed for upholding the separate but equal doctrine.).

[256] *Dowell*, 498 U.S. 237 (1991). This case dealt with a school district that had been ordered post-Brown to develop a desegregation plan. *Id.* at 240. Oklahoma City was unable to rectify the problem by redistricting the region, so they developed a plan to bus black children to other schools. *Id*. at 241. Then in 1985, the School Board developed the School Reassignment Plan to begin ceasing to bus black children to other schools to try to achieve desegregation. *Id.* at 242–43. Petitioners protested on the grounds that this Plan would result in a return to the segregated state of schools. *Id.* The Court held that on remand, only if the District Court found lingering evidence of the system of de jure segregation. *Id*. at 249–50.

[257] *Id.*

[258] Freeman v. Pitts, 503 U.S. 467 (1992). The school system in question was mandated to desegregate but did nothing until 1966–1967, when it offered a freedom of choice plan, permitting blacks to choose to attend white schools. *Id.* at 472. The Court found it important to note that the racial composition of the school district had changed from 5.6% black at the time of the desegregation mandate, to 47% in 1986. *Id* at 475. In this area, the Court noted that "of the twenty-two DCSS high schools, five had student populations that were more than 90% black, while five other schools had student populations that were more than 80% white; and . . . of the seventy-four elementary schools in DCSS, eighteen are over 90% black, while ten are over 90% white." *Id*. at 476–77.

[259] *Id.* at 485.

[260] *Id.* at 495. The Court expressed its concern that if the Court attempted to regulate the choices of private individuals which create what the Court viewed as natural residential patterns, then there would be a constant stream of desegregation litigation and the supervision of the Court would never end. *Id.*

[261] Grutter v. Bollinger, 539 U.S. 306, 343 (2003). An expert of the University of Michigan Law School reported that he predicted a large negative effect on minority admissions if the University were

the Court's decision as pro-diversity, several items discussed by the Court must be acknowledged. First, immediately after stating that a diverse student body is a compelling interest and thus survives strict scrutiny, the Court expresses its deference to the University when it comes to "academic decisions."[262] Second, the Court made the "affirmative action" measures of the university permissible, not required.[263] It allowed the University of Michigan to consider race, but did not require racially homogenous universities to consider race and did not address the historical tendency to reject black applicants to white universities.[264] Third, the Court stressed that law schools are the gateway to many important careers within the United States, noting the number of political positions that are filled by individual with law degrees.[265] In creating this distinction, the Court laid the groundwork for later decisions to conclude that other educational institutions (e.g., primary, secondary, and other higher education institutions) are not so highly selective or prone to producing the Nation's leaders, and thus do not warrant affirmative action measures. Fourth, the Court affirmed its prior holding that said that race must be one factor among many and it must not unduly harm members of the majority race.[266] Finally, the Court held that "race-conscious admissions policies must be limited in time."[267] Specifically, the Court stated that that "twenty-five years from now, the use of racial preferences will no longer be necessary to

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to adopt a racially blind admissions process, reducing the percentage of minority students of the entering 2000 class from 14.5% to 4%. *Id.* at 320–21.

[262] *Id.* at 328. This deference seems reminiscent of the attitude that the Supreme Court has maintained toward primary and secondary schools, refusing to interfere in race relations unless there are blatant violations of the Constitution. The Court seems reluctant to interfere in measures that result in de facto segregation or greater student diversity. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("[n]o single tradition in public education is more deeply rooted than local control over the operation of schools").

[263] *Grutter*, 539 U.S. at 343. A certain language is used throughout this case to illustrate that affirmative action is permissible but not required. In particular, the Court states "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions . . . ." Notice that the Court states it "does not prohibit" rather than "it requires." *Id.*

[264] *Id.*

[265] *Grutter*, 539 U.S. at 332.

[266] *Id.* at 341. For instance, the Court declared that the University of Michigan's consideration of race in its undergraduate admissions was unconstitutional because the majority of the admissions were based on a point system that gave minority applicants a large advantage without evaluating them individually. Gratz v. Bollinger, 539 U.S. 244, 273–76 (2003). Upon comparing this assessment with the decision in *Grutter*, it becomes clear that affirmative action measures shaped to increase diversity will be upheld in situations where there are fewer applicants or more individuals responsible for applicant review because the assessment must go deeper than the point system contested in *Gratz*. This presents a challenge to increasing diversity in primary and secondary schools because the sheer volume of students would present an obstacle to individual review for admission to primarily white schools, unless a distinction is made between primary or secondary schools and higher education permitting race as the only factor in admission to the former.

[267] *Grutter*, 539 U.S. at 342.

further the interest approved today."[268] Though the Court states that diversity is a compelling interest, the time limitation links these measures to a history of discrimination that led to lower minority enrollment, thereby making affirmative action a type of remedial scheme rather than merely an interest for its own sake.

2. Other Governmental Means for Dealing with Discrimination in Education

The Office for Civil Rights (OCR) within the Department of Education "gives particular attention to discrimination against minorities in special education and remedial courses, in math and science and advanced placement courses, in the use of tests and assessments, and in higher education admissions . . . ."[269]

The OCR derives is mandate from Title VI of the Civil Rights Act of 1964, and its implementing legislation at 34 C.F.R. Part 100 and 101. [270] These provisions prohibit discrimination based on race in all educational institutions that receive federal financial assistance. [271] Thus, the OCR monitors almost 15,000 public school districts and over 3,600 colleges and universities, as well as thousands of public libraries and museums.[272]

The OCR devotes most of its time to investigating civil rights complaints.[273] These complaints can be filed by students, parents and other individuals. [274] The OCR acts as a mediator or negotiator, providing a non-adversarial dispute mechanism for the resolution of these complaints. [275] The OCR is also responsible for conducting its own reviews into school district compliance with U.S. civil rights laws[276] and conducting "a pre-grant review of magnet school applications to determine whether the school district has an eligible desegregation plan or voluntary plan to eliminate, prevent, or reduce minority group isolation. OCR provides civil rights technical assistance to these school districts."[277]

The Department of Education also develops a report called "Condition of Education and the National Assessment of Educational Progress"

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[268] *Id.* at 343. The Court's rationale in this limitation is that the number of minority applicants with high grades and high test scores increased during the period between its holding in *Bakke* and the holding in *Grutter*, thus it expected that in twenty-five years there would be a further increase that would be sufficient to cease racial preferences. *Id.*

[269] U.N. Comm. on the Elimination of Racial Discrimination, *Third Periodic Reports of States Parties Due in 1999: United States of America*, ¶ 61(a), U.N. Doc. CERD/C/351/Add.1 (Sept. 21, 2000) [hereinafter CERD Report].

[270] *Id.* ¶ 398.

[271] *Id.*

[272] *Id.*

[273] *Id.* ¶ 402.

[274] *Id.*

[275] *Id.* If these non-adversarial methods do not work, then judicial methods are sought. *Id.*

[276] *Id.* ¶ 403.

[277] *Id.* ¶ 399.

(NAEP), addressing disparities in education. The U.S. government refers to these assessments as "The Nation's Report Card."[278] Instead of focusing on disparities between schools, these assessments allow the Department of Education to analyze the progress of various sects of the population based on categories of race, ethnicity and gender.[279]

3. The Reality of Re-segregation Today

"Over the past two centuries there has not been a single year in American history in which at least half of the nation's black children attended schools that were largely white."[280] Whites still attempt to flee areas with high minority populations, seeking out nearby areas with higher white populations in schools.[281] On average, Americans move once every six years.[282] Thus, despite increasing numbers of minority students in American educational institutions, schools are more segregated than in the past.[283]

All of the twenty-five largest school districts in the United States are predominantly non-white.[284] In eighteen of those school districts, less than 20% of the students are white.[285] The majority of white children attend schools "with an average of 7% black enrollment."[286] A Harvard report in 1997 showed that if a school was composed of 90% minorities, then approximately 88% of the children would be poor.[287]

The United States government has admitted that de facto segregation exists.[288] In its 2000 report to the Committee on the Elimination of Racial Discrimination (hereinafter "the Committee"), the U.S. reported:

> While the scourge of officially sanctioned segregation has been eliminated, de facto segregation and persistent racial discrimination continue to exist. The forms of discriminatory practices have changed and adapted over time, but racial and ethnic discrimination continues to restrict and limit equal opportunity in the United States. For many, the true extent of contemporary racism remains

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[278] U.S. Department of Education, National Center for Education Statistics, http://nces.ed.gov/nationsreportcard/about/ (last visited Oct. 29, 2007).

[279] *Id.* The Department of Education provides the example of female Hispanic students as one category it would assess. *Id.*

[280] IRONS, *supra* note 10, at 338.

[281] ORFIELD, *supra* note 5, at 8.

[282] *Id.* at 9.

[283] *Id.* at 17.

[284] IRONS, *supra* note 10, at 289.

[285] *Id.*

[286] *Id.* at 293.

[287] *Id.*

[288] CERD Report, *supra* note 269, ¶ 18.

> clouded by ignorance as well as differences of perception. Recent surveys indicate that, while most Whites do not believe there is much discrimination today in American society, most minorities see the opposite in their life experiences.[289]

Additionally, the government reports that the main problem with race relations and discrimination is the inadequate distribution of information on race, ethnic issues and protection of civil rights.[290] Further, there is a disparity of opportunities in education since "white flight" from inner city public schools results in minority students attending under-funded, and thus low-quality, schools. [291] Minority children are less prepared to compete for jobs and university admissions.[292]

The Committee recommended in its concluding observations that the United States government take measures to eradicate all discrimination even if it is caused by policies without discriminatory intent.[293] The Committee also reports that while Convention on the Elimination of Racial Discrimination [hereinafter CERD] does not require affirmative action measures to be taken, it does require special measures if discrimination persists.[294]

4. Summary of the Waning Enforcement of Segregation

The second time that *Brown* was brought before the Supreme Court, the Court issued a mandate that desegregation occur "with all deliberate speed,"[295] because schools refused to comply with the original decision. White flight to the suburbs also impeded the process of integration. Ultimately, the Supreme Court decided that integration measures could be halted unless there was evidence that a school district had previously been segregated and had not complied with the *Brown* mandate. Schools that made appropriate measures to integrate did not have to achieve racial balance in their schools, particularly if the racial composition changed Post-*Brown*. Thus, school districts that were never de jure segregated have no obligation to take measures to integrate.

In the cases after *Brown*, the Court returned to its assertion that it could not control the racism that develops within society that was at issue in

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[289] *Id.*
[290] *Id.* ¶ 71.
[291] *Id.*
[292] *Id.*
[293] U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 393, U.N. Doc. CERD/A/56/18 (2001).
[294] *Id.* ¶ 399.
[295] Brown v. Bd. of Educ. 349 U.S. 294, 301 (1955).

Plessy.[296] The Court limited the obligation of schools to rectify harm that resulted from de jure segregation.[297] A similar purpose is not stated but could be implied regarding the rulings of the Supreme Court in matters of higher education. Since separate black facilities often did not exist or were completely inadequate, and African Americans were frequently barred from higher education institutions that white students attended, affirmative action is necessary in admissions to rectify past injustices. However, the Supreme Court suggested an expiration date of twenty-five years on these methods for integration.[298]

D. Summary of Past Trends

It seems clear that the early purposes of segregation were so heinous in the eyes of the Court that it declared this policy unconstitutional. Since slave owners sought to prevent black education entirely, and later whites continued discrimination by forcing blacks to have separate facilities, the educational policies based on segregation were inextricably intertwined with racism and the slave trade. The only way to create the possibility of equality was to eliminate the separate facilities that were themselves a source of discrimination. However, *Brown* has not lead to integrated schools. De facto segregation has occurred as a result of white flight, and the Supreme Court has returned to the mindset of *Plessy*, that the Court has no power over discriminatory social trends. Further, the Office of Civil Rights in the Department of Education focuses on the creation of 'equal' education not integrated education. Therefore, it is time to examine whether integration is possible. It also must be determined whether or not integration is desirable.

V. PROJECTION OF FUTURE TRENDS

Achieving racial diversity in primary and secondary classrooms is improbable and maybe impossible under the present interpretation of the law and the Constitution. The Supreme Court has ceased to require states to enforce the mandate of *Brown* to desegregate. Additionally, the court has focused on the limited resources of primary and secondary schools. While higher education institutions do not possess unlimited funds, they have financing from both private sources (tuition and private donation) and

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[296] *See* discussion *supra* Part IV.C.1–2. For example, consider that the court did not believe the law should be used to rectify the de facto segregation that occurred in Detroit schools. *Milliken*, 418 U.S. 746–747.

[297] *Id.*

[298] *Grutter*, 539 U.S. at 342.

public sources (the government), and have more resources to create racial diversity.

Higher education institutions can also be differentiated from primary or secondary institutions in the fact that higher education has a process of admission, whereas public schools are free and compulsory, open to all children. Thus, higher education is a process of exclusion, a set of institutions that individuals are privileged to attend. Historically, blacks were denied access to higher education institutions of whites *and* there were no separate facilities for blacks. Therefore, rectifying past discrimination can only be achieved through increasing access of minority students to the education they were once denied. Conversely, while primary and secondary schools have been available to black students since the passage of the 14th amendment, they were inadequate and separate. Thus, the discrimination in primary and secondary schools can be remedied by making schools equal in quality.

The Supreme Court expressed the expectation that the consideration of race in higher education admissions would only be temporarily necessary to further the compelling interest of diversity.[299] It seems significant that the Court only expects this consideration to be permissible for twenty-five years from the *Grutter* decision, as opposed to requiring such positions to be implemented for twenty-five years. This distinction shows that the Court is unwilling to take a proactive step to interfere with segregation or force racial diversity unless it is a result of the failure of the state to implement desegregation measures. When the Court has held in favor of racial diversity, it has only been to state that affirmative action measures are permissible but not required, or that schools must desegregate if they were de jure segregated. The Court has never held that such schools need to achieve any particular level or standard of diversity (i.e., requiring that the composition of schools reflect the ethnic composition of the area, the applicants or the U.S. population). In fact, the Court has struck down such measures as unconstitutional.[300]

Even with state interference, there has never been a time in history where racial balance has been achieved in American institutions. Therefore, with the "expiration" of desegregation requirements, integration is unlikely to be achieved, since unrestrained social trends have resulted in white flight to the suburbs. Thus, history indicates that the future is likely to bring more of the present, including continued white flight and continued de facto segregation.

Further, the Department of Education focuses on improving black scores on standardized tests, and U.S. education generally focuses

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[299] *Grutter*, 539 U.S. at 342.
[300] *Gratz,* 539 U.S. 274–76.

Eurocentric aptitude measures. American education will most likely continue to deny equal or integrated education to African Americans and will ignore culturally sensitive issues and deny the contributions of African Americans to society and history.

The Supreme Court has the opportunity to change its interpretation of what constitutes an equal education. It could declare that racial diversity is a compelling interest in primary and secondary schools, as well as law schools. However, the question is, should it? If it should, what does diversity mean?

VI. CLARIFICATION OF GOALS

A. Recognition of the Right to Culture under International law

As previously mentioned, it is difficult to reach a national consensus on the definition of equal education. In its history, the United States has not focused on culture as an essential element of education. However, the international community has numerous agreements and declarations that recognize cultural rights, including the necessity of cultural protection within educational institutions. Since the United States purports itself to be a land of opportunity, it should afford its citizens this basic right, a right that is recognized around the world. This is particularly true as the right to culture and a culturally sensitive education are natural extensions of the obligations of the United States under certain international agreements.

1. Binding International Obligations

a. Convention on the Elimination of Racial Discrimination

The only international convention that the U.S. is party to that directly recognizes a right of minorities to education is the Convention on the Elimination of All Forms of Racial Discrimination.[301] The Convention also provides that every state should condemn and seek to eliminate racial segregation within its territory.[302] In its general comments, the Committee on the Elimination of Racial Discrimination stated that part of that

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[301] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2007), http://www.ohchr.org/english/bodies/ratification/2.htm (last visited Oct. 29, 2007). The Special Rapporteur on the Right to Education also states that minority peoples in general need to have an education that reflects their diversity and respects their beliefs. U.N. Comm'n on Hum. Rts., *Report of the Special Rapporteur on the Right to Education,* ¶¶ 98-99, U.N. Doc. E/CN.4/2005/50 (Dec. 17, 2004).

[302] International Convention on the Elimination of all Forms of Racial Discrimination Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD], art. 3.

obligation is to rectify segregation that has occurred as a result of past discrimination on the part of the state.[303] The Committee acknowledges, however, that racial segregation is not always the result of State action.[304] When the actions of private individuals result in segregation, states are to monitor the factors that lead to segregation and determine what negative consequences result from that segregation.[305]

States are to ensure that all races equally enjoy all rights, including the right to education and cultural rights.[306] Further, states are to "adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups . . . ."[307]

The Committee interpreted article 2 of the CERD to mean that "[g]overnments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens."[308] To achieve this end, the Committee recommended that States consider providing minorities with the right to engage in activities to preserve their culture.[309] In response to this article of the Convention, the United States reported that the First Amendment to the Constitution included "the expression of one's cultural identity" in the guarantees of free speech and peaceably assembly.[310]

The Committee also stated that all persons have the right to self-determination under CERD. They clarified that this term should not be interpreted as a right to secession; rather it stands for the right to "pursue freely their economic, social and cultural development without outside interference."[311] This includes the right to preserve their culture.[312] The Committee stated that governments should take these rights into consideration when they develop policies.[313]

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[303] U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 19: Racial Segregation and Apartheid*, ¶ 2, U.N. Doc A/50/18 (Aug. 18, 1995).

[304] *Id.*

[305] *Id.* ¶ 4.

[306] CERD, *supra* note 302, art. 5.

[307] *Id.* art. 7.

[308] U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 21: Right to Self-Determination*, ¶ 10, U.N. Doc. A/51/18 (Aug. 23, 1996) [hereinafter CERD General Recommendation XXI].

[309] *Id.*

[310] CERD Report, *supra* note 269, ¶ 415.

[311] CERD General Recommendation XXI, *supra* note 308, ¶ 9.

[312] *Id.* ¶ 10.

[313] *Id.*

b. International Covenant on Civil and Political Rights

The United States is also a party to the International Covenant on Civil and Political Rights (ICCPR).[314] Though this document does not directly address the right to education, it includes several rights that are relevant to the issue of segregation in education.

First, the ICCPR contains the right to self-determination for all peoples.[315] The right to self-determination includes both the right to determine their own political status and to "freely pursue their economic, social and cultural development."[316] Second, the right to freedom of religion is included in the ICCPR.[317] As briefly addressed above, one of the components of African culture that is affected by the structure of U.S. education is religion. The ICCPR protects the right of the individual to chose, share and manifest his or her religion.[318] Third, the ICCPR provides the right to non-discrimination and equality before the law.[319] To this end, states should prohibit discrimination based on race, color, religion and on several other grounds.[320] Fourth, the ICCPR addresses the rights of minorities.[321] The Convention phrased this right in negative terms, that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise [sic] their own religion, or to use their own language."[322] Although expressed negatively, the Human Rights Committee has clarified that positive measures may also be necessary to ensure the rights of minorities under this provision.[323] Additionally, the rights of minorities are rights that protect the collective identity and culture of those minorities because they are valuable to society as a whole.[324] In order to protect these rights, a State is permitted to treat minorities differently, as long as their rationale is reasonable and objective.[325]

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[314] Status of Ratifications, International Covenant on Civil and Political Rights, http://www.ohchr.org/english/bodies/ratification/4.htm (last visited Oct. 23, 2007).

[315] International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[316] *Id.*

[317] *Id.* art. 18.

[318] *Id.*

[319] *Id.* art. 26.

[320] *Id.*

[321] *Id.* art. 27.

[322] *Id.*

[323] U.N. Comm'n on Hum. Rts., General Comment 23: Rights of Minorities, U.N. GAOR, U.N. Comm'n Hum. Rts., 50th Sess., reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 6.2, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

[324] *Id.* ¶ 9.

[325] *Id.* ¶ 6.2.

The ICCPR created the Human Rights Committee to review State reports on implementation of the Convention.[326] In response to its last report, the Human Rights Committee requested that the United States provide "information on measures taken by the State Party to reduce de facto segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated."[327] The United States has not yet responded to these issues.

2. Nonbinding International Interpretations

While the U.S. has very limited obligations under international law pertaining to the right to education or protection of minority culture, the international community can be looked to in order to determine the standard for quality education for America's children. The Convention Against Discrimination in Education, the Universal Declaration on Cultural Diversity, the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights all provide guidance on the issue of segregation in education.

a. Convention against Discrimination in Education

The Convention against Discrimination in Education permits the construction of schools to separate students by language and religion.[328] However, this Convention provides a right to bilingual and bicultural education.[329] It states that students from minority cultures have a right to receive an education in their own language and culture; however, they also have a right to receive an education in the language and culture of the majority.[330] To comply with this provision, the Convention says that States should give students an option of which institution to attend.[331] The purpose of education in majority language and culture is to provide the opportunity for minorities to allow minorities to participate in the activities of the community as a whole.[332] The Convention also states that students

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[326] ICCPR, *supra* note 315, art. 40.

[327] U.N. Comm'n on Hum. Rts., *List of Issues to be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America,* ¶ 14, U.N. Doc. CCPR/C/USA/Q/3 (Apr. 26, 2006). The Special Rapporteur on the Right to Education also recognized that segregation may not exist in law in the United States, but it exists in practice. Segregation continues on the basis of money, race, and residence. U.N. Comm'n on Hum. Rts., *Report of the Special Rapporteur on the Right to Education,* ¶ 56, U.N. Doc. E/CN.4/2004/45 (Jan. 15, 2004).

[328] Convention against Discrimination in Education art. 2(b), Dec. 14, 1960, 429 U.N.T.S. 93.

[329] *Id.* art. 5(1)(c)(i).

[330] *Id.*

[331] *Id.* art. 2.

[332] *Id.* art. 5(1)(c)(i).

cannot be forced to undertake religious or moral instruction that is contrary to their personal beliefs.[333] To this end, minorities have the right to establish and attend their own educational institutions and provide instruction in their own language, so long as these facilities are equal with other institutions in that state.[334]

b. Universal Declaration on Cultural Diversity adopted by United Nations Educational, Scientific and Cultural Organization

The Universal Declaration on Cultural Diversity [hereinafter Universal Declaration] does not directly address diversity in education. However, it states that diversity is essential to a person's "intellectual, emotional, moral and spiritual existence."[335] Further, the Universal Declaration asserts that diversity is inseparable from human dignity.[336] The Universal Declaration states that "cultural diversity is as necessary for humankind as biodiversity is for nature."[337]

c. Convention on the Rights of the Child

The United States is not party to the Convention on the Rights of the Child [hereinafter CRC], and it is only one of two States with such a status.[338] The CRC also states that children have the right to an identity[339] and an education.[340] Part of this education includes the right to preserve the cultural identity and traditional languages of the child.[341]

d. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic Social and Cultural Rights [hereinafter ICESCR] includes the right to education in article 13.[342] Though other rights in the ICESCR are subject to progressive realization, the right to non-discrimination in enjoyment of these rights must be

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[333] *Id.* art. 5(1)(b).

[334] *Id.* art. 5(1)(c).

[335] U.N. Econ., Soc. & Cultural Org., 31st Sess., *Universal Declaration on Cultural Diversity*, art. 3 (Nov. 2, 2001), available at http://unesdoc.unesco.org/images/0012/001271/127160m.pdf (last visited April 23, 2007).

[336] *Id.* art. 4.

[337] *Id.* art. 1.

[338] The only other state not party to the CRC is Somalia, which has also signed but not ratified the Convention. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Status of Ratifications of the Principal International Human Rights Treaties*, http://www.unhchr.ch/pdf/report.pdf (last visited Oct. 30, 2007).

[339] U.N. Convention on the Right of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3.

[340] *Id.* art. 28.

[341] *Id.* art. 29(i)(c).

[342] International Covenant on Economic, Social and Cultural Rights, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

applied immediately.[343] However, separate standards and separate schools are permitted for disadvantaged groups to create de facto equality.[344] States are obligated to take other measures to eliminate de facto inequality as well, and the necessary measures are to be determined by monitoring the patterns in spending and the programs and policies in education to identify disparities.[345]

The components of a proper education can be evaluated on four criteria: availability, acceptability, adaptability and accessibility.[346] Acceptability includes a culturally appropriate education and adaptability means that education must reflect the changing social and cultural diversity of the State.[347] The Committee on Economic, Social and Cultural Rights affirms that the creation of separate institutions is acceptable to protect linguistic, moral, and religious differences.[348] Additionally, parents have the right to choose to send their children to separate schools that comply with minimum standards set out by the State.[349]

3. Summary of International Law

There are several things to be taken away from international law that pertain to the role of segregation to protect culture of African Americans. First, as illustrated above, several international conventions recognize the right to culture and the right to diversity in education. Diversity in education and cultural sensitivity do not exist for African Americans, as they are ignored or stigmatized by educational materials and subject to de facto segregation. Second, the international community has recognized the right, and sometimes the duty, to develop special measures to protect minorities from discrimination in education.[350] In particular, although the CERD requires State parties to condemn racial segregation and apartheid, the ICESCR and the Convention Against Discrimination in Education recognizes that separate schools for religious and linguistic minorities can be appropriate. Religion and language are two components of the larger cultural context that African Americans need to be connected to. Third, and foremost, the international community placed the obligation on States to eliminate racial discrimination. The CERD Committee has commented

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[343] U.N. Comm. on Economic, Social and Cultural Rights, *General Comment 13: Implementation of the ICESCR, The Right to Education*, 21st Sess., ¶ 31, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter CESCR].

[344] *Id.* ¶ 32, 33.

[345] *Id.* ¶ 37.

[346] CESCR, *supra* note 343, ¶ 6.

[347] *Id.* ¶ 6(c).

[348] *Id.* ¶ 3.

[349] *Id.* ¶ 29.

[350] *See* pp. 43–45.

that States are obligated to examine and influence even private factors that lead to racism.

Read together, these provisions clarify that racial diversity alone should not be the goal of the United States. The Supreme Court should analyze the unique context of race relations in the United States to determine whether segregation or integration best suits the needs of all parties. Freedom from discrimination and right to culture are two things among many that must be considered to conclude what will satisfy those needs.

B. Alternatives

Any adequate, alternate solution to a problem should have the goal of addressing that which people value, and it should seek to achieve the greatest access to the things people value by the greatest number of people.[351] The values at issue in determining the role of segregation in American education are primarily power[352] and respect.[353] The recommendation chosen should increase access to both of these values, rather than force African Americans to choose between the two.

1. Pursuing Integration

One of the alternatives to the problems facing African American education is to seek integration in new ways. Proponents of integrated education could lobby Congress to change the laws regarding requirements for educational institutions. The Supreme Court could require temporary quotas in primary and secondary educational facilities, which once existed in higher educational institutions. Alternatively, the Supreme Court could prohibit de facto segregation and require schools to take measures to ensure racial diversity in their districts.

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[351] These goals come from the value categories utilized in policy oriented jurisprudence to develop recommendations that maximize "access for all to all the values humans desire." Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence, in* INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE, 28, 29–30, 32 (2004).

[352] In this context, power means the ability to have influence within the community and the government. *Id.* at 30. In particular, there must be a balance between protecting the ability of African Americans to have access to power within the community and, at the same time, have the ability to learn about and enjoy their right to culture. Thus the structure of education must have the ability to ensure that power and culture do not conflict with one another.

[353] Respect means the recognition of the right of a group of individuals to freely make choices and have those choices respected. *Id.* The reference to respect is made in the sense of a collective right to recognition of validity of African culture and the right of African children to an Afro-centric education.

Rectitude is another value that could be considered at issue in this equation because of the discrimination against African religions and forced conversions of African slaves. Rectitude includes the ability to celebrate religious or ethical norms and to "formulate and apply standards of responsibility" *Id.* For example, to enjoy the value of rectitude, African Americans should be able to practice and discuss their religion openly.

However, as noted in previous sections, a case forcing integration is unlikely to succeed. Further, recent efforts by the Department of Education have illustrated that the focus of the American government is not on achieving an integrated education, but rather on improving the quality of education by creating an even standard of education throughout the nation.[354] Additionally, while integration would address any residual inferiority that African Americans feel due to white flight and de facto segregation, integration alone does not address the issues related to the cultural education of African Americans. The United States must change the curricula of primary and secondary schools to reflect the diversity of American culture in order for African Americans to experience the value of respect for their collective culture and history.

2. De Facto Segregation

As previously mentioned, there are parts of society that are tired of trying to achieve equality through integration. Efforts for integration have been largely unsuccessful and have resulted in a return to segregation. One alternative to addressing the problem of cultural education is to leave the racial composition of schools as they are and focus on changing educational structure to meet the needs of their current populations. In this alternative, the institutions that are currently segregated into largely black populations would develop Afro-centric curricula and schools with mostly white populations would retain their Euro-centric curricula.

This alternative also does not create a proper system for students to experience respect. The students that are the minority in their particular district (whether they are white students attending schools with an Afro-centric curriculum or black students attending a school with a Euro-centric curriculum) will not experience proper reinforcement of the value of their culture to the development of civilization and history. Additionally, there is no cross-cultural education, so students do not receive respect if they are the minority within their particular institutions, and there is no environment fostered in educational institutions for achieving community respect for diversity.

C. Recommendation

Obviously, government imposed educational programs have been extremely unsuccessful for African Americans. African Americans have been promised educational equality but have witnessed only white flight to

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[354] *See generally* No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

the suburbs and the resulting re-segregation. Without action, they stand as the perpetual victims, denied the integrated education that they have been seeking for over fifty years. It is time that a new approach is taken to empower minorities to have a choice. The solution to the problems facing African cultural education needs to be a mixture of altering the mainstream education and providing the opportunity for African Americans to attend segregated institutions.

In the *Plessy* decision, the Supreme Court firmly placed the ability to determine a person's race and a person's identity in the hands of the state. Voluntary segregation would take the power to decide a person's identity away from the government and place it in the hands of that individual. Minorities would have a choice of whether to seek separate institutions that centered the curriculum on their languages, beliefs and customs; or whether to attend public institutions with white children and other minorities. Therefore, voluntary segregation does not preclude those that choose to assimilate from doing so. However, it protects the rights of those that are seeking a connection with their culture to achieve it in all forms.

Truly segregated institutions would require an overhaul of the funding and testing procedures of U.S. schools to a system that gives adequate control to minority communities to structure the way that their children are educated, without losing a minimum standard of education for all children. There would have to be funds set aside for segregated facilities, either by African American scholars and leaders or by the federal government itself to ensure the quality of these facilities. Further, any standardized tests distributed to the students in segregated schools would have to be adjusted to include the culturally relevant information that segregated children would be tested on.

As noted previously, segregation based on race is not impeded by the existence of interracial relationships. All persons with traceable African heritage could be a part of segregated communities. Segregation can be particularly beneficial to biracial children, because segregation would unite black people without regard to ranking on basis of lightness or darkness. Europeans have historically given biracial people privileges in integrated societies, causing hatred between blacks due to disparity in opportunities.[355] Segregation would take away the incentive to conform to white culture and intermarry with white people solely for the basis of economic and political enhancement. Without white interference, blacks could base their moral judgments on internal beliefs within black communities rather than seeking to take actions that will allow them to

[355] *See* WILLIAMS, *supra* note 15, at 294.

compete in majority culture, thus creating access to the value of respect for African culture, at least within and among the black community.[356]

Can segregation be accomplished? The United States reports that it emphatically condemns racial segregation and apartheid and prohibits any such practice in all territories under its jurisdiction."[357] The United States also has a controversial history in the issue of segregation. Opposition to the idea would likely be extensive at first. Public awareness campaigns would need to be conducted and town forums held to discuss the positive aspects and the future of segregation in this country. The black leaders should be the ones delineating the positive aspects of segregation so it doesn't feel like another ploy to create unequal education for African American children.

How can segregation be accomplished? Are blacks to remove themselves to some remote location and fence themselves off with signs that say "No Whites Allowed"? No. This is entirely unnecessary. The answer to achieving segregation is to stop chasing whites as they flee from black people and stop chasing the long-denied dream of integration.[358] If blacks cease to seek integration, segregation will naturally occur and continue. Then, with the goal of integration out of the equation, blacks are free to focus on the betterment of their own schools independent of whites.[359]

However, segregation in and of itself is not the end; it is not the goal. Offering the option of segregation is not sufficient because segregation alone will not address the value of respect because it does not permit people to interact with one another as they choose and it forces African Americans to choose between their cultural values and power because they are unlikely to advance in American society if African Americans hold on to their culture and express it in a society that still views it as barbaric and foreign. Additionally, acceptance of African traditions and values, and the recognition of the place of Africans in history are necessary for African Americans to enjoy the value of power. Education of their own culture and customs is useless if they are later presented with obstacles against achieving any status within their careers or the community due to prejudice against their beliefs and lifestyle. Thus changing standards of education nationwide to require cultural inclusion must accompany the option of segregation.

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[356] The recommendation of voluntary segregation and cultural education also best facilitates access to the value of rectitude because within these segregated educational facilities, African Americans would be able to instruct their children in African traditions as done in Brazil. Thus, tolerance for African traditions would be promoted in segregated schools and in multicultural education in integrated schools.

[357] CERD Report, *supra* note 269, ¶ 281.

[358] WILLIAMS, *supra* note 15, at 327.

[359] *Id.*

Brazil provides a positive example of the steps the United States could take to make its educational system more culturally appropriate. The Brazilian constitution recognizes the right to culture and includes an obligation of the government to facilitate cultural expressions.[360] To this end, Brazil established the Palmares Cultural Foundation, an organization which protects and documents the contributions of Afro-Brazilians to Brazilian national culture. [361]

Discriminatory materials about Afro-Brazilians are forbidden in Brazilian textbooks and Brazil requires historical instruction in slavery in Brazil.[362] These materials are present and required in classrooms of secondary schools, universities, and in military training.[363] Instruction in Afro-Brazilian religion is included in the curricula of primary education and colleges.[364] Some Brazilian States formed ecumenical commissions[365] to develop the structure of religious instruction.[366] Currently, educational programs include instruction in the fundamentals of Candomble[367] in all public schools.[368] Further, Brazilian universities teach classes that instruct the student in "how to prepare the offering to *orixas*, dance and celebrations."[369]

The United States should follow the example of Brazil. Textbooks degrading or ignoring Africans or African Americans need to be removed from the classroom and African centralized curriculums need to be developed. African cultural practices need to be discussed in American classrooms. African American children need to have the opportunity to learn African languages to create a balance with the European languages

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[360] U.N. Econ. & Soc. Council, *Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Brazil,* ¶ 810, U.N. Doc. E/1990/5/Add.53 (Nov. 20, 2001).

[361] U.N. Comm. on the Elimination of Racial Discrimination, *Seventeenth periodic reports of States parties due in 2002: Brazil*, ¶ 49(c), U.N. Doc. CERD/C/431/Add.8 (Oct. 16, 2003).

[362] *Id.*

[363] MIGENE GONZALEZ-WIPPLER, SANTERIA: THE RELIGION 252 (Llewellyn Publications 1999) (1983).

[364] This requirement has been in place since 1993. FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 99 (Kevin Boyle & Juliet Sheen eds., 1997).

[365] Ecumenical commissions are organizations representing groups of religious bodies. Historically, this term was used primarily to refer to Christian commissions. However, today, ecumenical commissions are more commonly used to represent organizations seeking unity between all world religions.

[366] Boyle & Sheen, *supra* note 364, at 99.

[367] Candomble is an Afro-Brazilian religion that is based on the traditions of the Yoruba people. During slavery, Candomble was prohibited through laws against slave gatherings. Paul Christopher Johnson, *Law, Religion, and "Public Health" in the Republic of Brazil*, 26 LAW AND SOC. INQUIRY 9, 13 (2001). There are records of slaves being arrested for participation in Candomble ceremonies. *Id.* Later, it was persecuted as a threat to the "public health" of the people of Brazil through laws against the "sorcery" practiced by Candomble priests and followers. *Id.* at 30.

[368] GONZALEZ-WIPPLER, *supra* note 363, at 252.

[369] Boyle & Sheen, *supra* note 364, at 99.

taught in American schools.[370] These languages should include both traditional tribal African languages and languages that are spoken widely throughout Africa today, such as Arabic and Swahili.[371] Further, the United States needs to develop and sponsor programs that provide black children with the opportunity to travel to Africa.

VII. CONCLUSION

Historically, segregation has been used within the United States to prevent blacks from commingling with whites, to provide them with an education tailored to domestic labor, and to keep them in their subservient position in society. Educational institutions were drastically unequal in their physical quality and the discriminatory attitude underlying their creation caused a feeling of inferiority, even among young children. Segregation reflected the social stigma that permeated all aspects of American life.

However, integration has been further detrimental to African Americans. De facto segregation continues to place black children in unequal and inadequate institutions. A Euro-centric curriculum teaches children that the contribution of African Americans and Africans to history is inconsequential, and it denies them the ability to fully explore their own culture and heritage.

In order for black children to receive an appropriate education, they must learn more about their people than the perpetual portrayal of African Americans as victims of slavery and racism; something positive must be introduced into a world of discrimination and unequal access. The Supreme Court should not hold that diversity is a compelling interest in primary and secondary students. Diversity of students will not benefit African American students if it is not accompanied by diversity in materials and the possibility for education in an Afro-centric curriculum. Voluntary segregation and development of a multicultural education should be considered to rectify the problems with African American education. A more culturally appropriate curriculum would give black

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[370] Other African Americans have advocated for programs to be developed to teach African American languages and send black children to Africa. *See* Nzingha, *supra* note 19, at 313; WILLIAMS, *supra* note 15, at 331.

[371] The purpose of offering a diversity of language courses related to Africa is twofold. First, learning traditional African languages serves the purpose of assisting African Americans in connecting to their African heritage. Second, learning African languages facilitates more truthful, more accurate research on African history. For example, most graduate school programs in history require a graduate to be fluent in at least one other language that pertains to their area of concentration because there are some materials that have not yet been translated or are untranslatable (most speakers of multiple languages will agree that some things simply cannot be translated from one language to another because there are not adequate words).

children access to respect for their own culture and heritage within their own community and within American society, without sacrificing the access to power that comes with mutual understanding between races.