

## SYMPOSIUM

### REEXAMINATION OF THE BENEFIT OF PUBLICLY FUNDED PRIVATE EDUCATION FOR AFRICAN-AMERICAN STUDENTS IN A POST-DESEGREGATION ERA

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Almost fifty years have elapsed since the Supreme Court rendered its historic opinion in *Brown v. Board of Education*.<sup>1</sup> That opinion launched American society into the desegregation era and became the catalyst for astonishing changes in race and race relations. Yet, despite the obvious advancement in race relations, our national agenda is still unable to escape conscious deliberations on racial matters. America is torn between recognizing and congratulating itself for unmistakable progress in eliminating its historic subordination of racial and ethnic minorities and being demoralized and dispirited over a lack of success.

As the Twenty-first Century unfolds, it is clear that America has moved into a post-desegregation era. The assimilation vision forged during the turbulent 1950s and 1960s—with its emphasis on integration and racial balancing as solutions to racial conflicts—has run its course. Throughout the country, school desegregation decrees issued in the 1960s, 1970s, and 1980s, which were one of the most important means used to desegregate American society, are being terminated. In addition to the termination of court-ordered integration, a number of lower federal courts have recently struck down the use of racial classifications to foster racially integrated student bodies in voluntary school desegregation plans. Federal courts, which had encouraged the use of such plans during the desegregation era, have reversed their position. They are finding the use of racial classifications in such plans to constitute violations of the Equal Protection Clause.<sup>2</sup>

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1. 347 U.S. 483 (1954).

2. See, e.g., *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998). District courts in Ohio and North Carolina have also addressed this issue. See *Capacchione v. Charlotte-Mecklenburg Schs.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999); *Enrollment Ass'n v. Bd. of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996). But see *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (upholding a voluntary school integration plan); *Hunter v. Regents of the Univ. of Calif.*, 197 F.3d 123 (4th Cir. 1999) (upholding a voluntary

It is too early to tell how the Supreme Court's decision regarding the University of Michigan Law School's affirmative action program in *Grutter v. Bollinger*<sup>3</sup> will apply to efforts to use racial classifications to promote voluntary integration by public elementary and secondary schools. This is a subject of a detailed article that I am currently working on. *Grutter* could have a beneficial effect on voluntary integration plans. The Supreme Court held that racial classifications could be used in an individualized admissions process as a means to pursue a diverse student body. If this holding without being significantly broadened is applied to elementary and secondary schools, then it will provide for the institution of some voluntary integration plans. It will not, however, restrict voluntary integration plans which tend to reflect more of a desire for racial balancing.

The logic that dictated resolutions to racial and ethnic conflicts of the 1950s and 1960s in public education no longer seems to apply. Now is a good time to revisit the solutions of the 1950s and 1960s to racial and ethnic conflicts with the benefit that comes from fifty years of experience with desegregation and the realization that the desegregation era is over.

In this Article I will look at one aspect of the changing landscape regarding race and education. I will revisit the issue of public funding for private school education and school vouchers, but I will do so from the perspective of the African-American community in this post-desegregation era.<sup>4</sup> I choose the

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school integration plan on very narrow grounds). One other recent district court case deserves to be mentioned. In *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (W.D. Ky. 2000), parents of students brought an action seeking to dissolve the school desegregation decree covering Jefferson County, Kentucky. *See id.* at 359-60. The court held that the school district's good faith compliance with a desegregation decree for twenty-five years warranted dissolution. *See id.* at 377. After the court determined that the school district had eradicated the vestiges of its prior de jure conduct, the court then addressed the continued use of racial classifications by the Jefferson County Public Schools to determine admissions to its various schools. *See id.* at 360. The district court concluded that the "voluntary maintenance of the desegregated school system should be considered a compelling state interest." *Id.* at 379. The court noted that "it [was] incongruous [for] a federal court ... at one moment [to] require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy." *Id.* The court determined that "[a]s among basically equal schools, the use of race would not be a 'preference.'" *Id.* at 380. Thus, the School Board "would not be prohibited from using race in its general student assignments to maintain its desegregated school system, even to the extent of some racial guidelines." *Id.* But with respect to the school district's magnet programs, the situation was different. *See id.* They offered educational "programs that are not available at other high schools." *Id.* Thus, this is not a situation where the education was fungible. *See id.* at 380-81. As a consequence, the court required the School Board to revise its admissions policies at its magnet schools. *See id.* at 381.

3. No. 02-241, 2003 U.S. LEXIS 4800 (U.S. June 23, 2003).

4. I want to make it clear that my personal preference is for racially and ethnically integrated schools based upon true multicultural education. I write this comment, however, in recognition that American public education is in an era of resegregation and not increased racial and ethnic

perspective of the black community because from the very beginning school desegregation was described as primarily for the benefit of black school children and the rest of the black community.

Important social values tend to take on a life of their own. Often they arise as the solution to a significant social conflict and afterwards become sustained by bonds of traditions. There is always value as a critique in going back to the beginning of the generation of a significant social value and pointing out the actions, the deviations, or the calculations that gave rise to it. This tends to be the first step in the process of the reevaluation of the value and assessing whether it still retains its merit in light of new social conditions.

The first widespread use of public funding of private education occurred in efforts by white segregationists to prevent integration of the public schools. School vouchers were initially understood as efforts to maintain the system of segregation and the concomitant oppression of the black community. So many changes have occurred in the last twenty years regarding the interpretation of the Equal Protection Clause and the educational situation of black school children, however, that a reexamination of school vouchers that takes into account these new developments will present this issue in a completely different social context.

Another reason that now is a good time to reexamine the issue of school vouchers from the perspective of the black community is the Supreme Court's opinion in the summer of 2002 in *Zelman v. Simmons-Harris*.<sup>5</sup> Due to the efforts

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integration. Thus, I write this comment with heavy heart because I recognize that the educational world that I would like to come into existence will not occur.

5. 536 U.S. 639 (2002). In *Zelman*, the Supreme Court addressed a pilot program set up by the state of Ohio designed to provide educational choices to families with children who reside in the Cleveland City School District. In 1995, a federal district court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. *See Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1995). Not long after the court acted, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." *See Zelman*, 536 U.S. at 644 (quoting Cleveland City School District Performance Audit 2-1 (Mar. 1996)). The Cleveland school district had failed to meet any of the eighteen state standards for minimal acceptable performance. The condition in the schools was so bad that only one in ten ninth graders could pass a basic proficiency examination. Students at all levels performed dismally when compared with students in other school districts in Ohio. The graduation rates in Cleveland were also horrific. More than two-thirds of high school students failed to graduate. A full 25% of the students who reached their senior year still failed to graduate. Few of the graduates of Cleveland schools could read, write, or compute at levels comparable to their counterparts in other cities.

The State of Ohio responded by passing a law that provided for a program to provide financial assistance to families in any Ohio school district that is or has been under federal court order requiring supervision and operational management of the district by the state superintendent. Cleveland is the only Ohio school district to fall within that category. There are two basic kinds of assistance provided for students and their parents. First, tuition aid is provided for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. Second, the program provides

of southern segregationists to thwart school desegregation, when public funding of private education was first proposed it was viewed primarily as a constitutional issue dealing with the Equal Protection Clause. Federal court hostility to school vouchers and the growing acceptance of the obligation to desegregate public schools moved the school voucher issue into the background. The issue of school vouchers reemerged during the 1980 presidential campaign when it was championed by Ronald Reagan.<sup>6</sup> By this time, Supreme Court opinions interpreting the Establishment Clause of the First Amendment in the 1970s had created new concerns about the constitutionality of school vouchers. As a result, for much of the past twenty years the legality of school vouchers has been discussed primarily in terms of religious liberty. In *Zelman*, the Supreme Court affirmed the constitutionality of a voucher program adopted by the state of Ohio to benefit certain students in the Cleveland public schools against an Establishment Clause challenge.<sup>7</sup> The Supreme Court's opinion may not be the last word on the issue of public funding of private school choice. It appears, however—at least for now—that a well crafted school voucher proposal can

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tutorial aid for students who choose to remain enrolled in public school.

Any private school, whether religious or nonreligious, can participate in the program so long as the school is located within the boundaries of a covered district and meets statewide educational standards. These private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. Public schools that are located adjacent to a covered school district can also participate in the program. The tuition aid plan provides a maximum benefit of \$2250 to low income students and \$1875 to other participants in the program.

In the 1999-2000 school year, while none of the adjacent public school districts decided to participate in the program, fifty-six private schools participated, forty-six (or 82%) of which had a religious affiliation. Over 3700 students participated in the scholarship program with 96% enrolled in religiously affiliated schools. A General Accounting Office report of the program filed for the 1998-99 school year revealed that 70% of families with children participating in the program were headed by single mothers, with average family incomes of \$18,750; 73.4% of the children who participated were minorities and 26.6% were white. United States General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, GAO-01-914, at 14 (Aug. 2001) (Table 1: Characteristics of Cleveland Families with Students in the Voucher Program or Public Schools and Table 4: Racial and Ethnic Composition of Cleveland Public School Voucher School Students, School Year 1998-99). The Sixth Circuit reported that 60% of these families were at or below the poverty level. *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (2000).

The GAO Report also noted that approximately 3400 voucher students were enrolled in fifty-two private schools. These schools received approximately \$5.2 million in publicly funded payments for the 1999-2000 academic year. In contrast, the cost for educating the remaining 76,000 students in Cleveland's 121 public schools was \$712 million or about \$9368 per student.

6. Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 392 (1997).

7. 536 U.S. 639 (2002).

survive an Establishment Clause challenge.<sup>8</sup>

The central historical experience of African-Americans in the United States up to the Supreme Court's opinion in *Brown v. Board of Education* was that of a group of variegated peoples united by race and compelled to live constantly and consistently under unfavorable material, psychological, and spiritual conditions. Racial subordination was an oppressive force that met African-Americans in every aspect of life. It met them in the fields, at the factory or the office when they were assigned a job, when they applied for a job, when they had a job and when they lost a job. It met them in the marketplaces when they sought to purchase goods or services from others or sell goods and services to others. It met them in the neighborhoods where they lived and in the schools their children attend. It met them at the doctors office, at the hospital, and at the funeral home. It filled the air that they breathed from the cradle to the grave. This historical experience of oppression created a cultural perspective for coordinated action that viewed the primary purpose, goal, and objective of collective action as the liberation of black people from racial domination. Thus, the perception of the social world was conceptualized as populated primarily by involuntary racial and ethnic groups. The black individual was not viewed as discrete, distinct, autonomous nor living a separate isolated existence, but as a member of an organic connected community. This connection was involuntary and could not be severed by the choices of individual blacks. The result was that every black person regardless of their religious creed, social or economic status, level of education, gender, the region of the country from which they hailed, sexual orientation or associational or political affiliations were under a never-ceasing obligation to fight for the liberation of African-American people.

The original proposals for public funding of private school choice were from southerners who desired to maintain the oppressive grip of segregation on the black community. From the perspective of the African-American community, support for desegregation of public education and concomitant opposition to the use of public funds to provide private education was easily justified. Desegregation of public schools was an important aspect in the effort of black people to dismantle the oppressive structures of segregation and foster the integration of the entire American society. School vouchers were associated with the most virulent form of racism against the black community. Though integrating public schools required tremendous sacrifice by black parents, school children and teachers, that sacrifice was in the long term interest of the black community.

Almost fifty years after the Supreme Court's opinion in *Brown v. Board of Education*, the social conditions of the black community regarding the education of black school children have changed drastically. The termination of school desegregation decrees and the striking down of voluntary integration plans mean

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8. See, e.g., Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 1 (2002); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1398-89 (2003); John Gehring, *Voucher Battles Head to State Capitals*, EDUC. WK., July 10, 2002, available at <http://www.edweek.org>.

that America's public schools are becoming increasingly resegregated. In addition, the condition of the black public school teacher has changed significantly. Prior to desegregation half of the black professionals were public school teachers. Concern about their interest was vitally important to the African-American community. But with the opening of so many opportunities outside of public education for talented African-Americans, public school teachers have lost some of the importance and status they formerly held in the black community. For example, in 1995-96 only 7.8% of bachelor's degrees awarded to African-Americans were in the field of education.<sup>9</sup> There were almost three times as many African-Americans who received bachelor's degrees in business and management than education.<sup>10</sup> In addition, losses of black teachers during desegregation coupled with reduction in the percentage of black teachers compared to black students as a result of educational reform movements in the past twenty years, have reduced the ranks of black teachers. Only 7.3% of public school teachers are black<sup>11</sup> despite the fact that black children constitute 17.2% of public school students.<sup>12</sup> In fact, while only 60.3% of public school students are white non-Hispanic,<sup>13</sup> they constitute 90.7% of public school teachers.<sup>14</sup> Finally, African-American students continue to lag behind other racial/ethnic groups in almost all educational achievement criteria in public education. It is not clear that public education effectively serves the interest of black school children.

The basic assertion of this Article is that since the first time the issue of public funding of private education occurred, many changes affecting the educational situation of black school children have transpired. Today there is much less reason to object to public funding of private education in terms of the continuing struggle of the black community for its liberation. The result is that from the perspective of the black community's struggle against racial oppression, school vouchers are better viewed in terms of the educational interest of the affected individual black school children and their parents at a particular place that is considering the issue at the time the issue is being discussed, not in terms of the liberation of the black community. In many such circumstances, school vouchers could increase the educational choices that individual parents have available and thereby increase the chances of finding the best educational placement for their school children.

Part I briefly distinguishes school vouchers from other forms of choice in public schools. In particular, it distinguishes school vouchers from another

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9. Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics 337, table 266 (1998).

10. *Id.*

11. See U.S. Dep't of Commerce, Bureau of the Census, *Percentage Distribution of Public School Students Enrolled in Kindergarten to Grade 12, 1972-2000*, at [http://nces.ed.gov/programs/coe/2002/images/tables/t03\\_1.gif](http://nces.ed.gov/programs/coe/2002/images/tables/t03_1.gif) [hereinafter *Percentage Distribution, 1972-2000*].

12. Beth Aronstamm Young, *Public School Student, Staff, and Graduate Counts by State School Year 2001-2002*, at <http://nces.ed.gov/pubs2003/snf-report03#2>.

13. *Id.*

14. See *Percentage Distribution, 1972-2000*, *supra* note 11.

popular method of fostering school choice, charter schools. Charter schools are a viable alternative to school vouchers for responding to the educational needs of black school children. Since they are still public schools, however, there are constitutional limitations that will affect their educational programs that would not apply to private education.

Part II recounts the initial introduction of public funding of private education in the 1950s and 1960s. School vouchers were first proposed by southern segregationists who sought to avoid their obligation to desegregate their public schools. Thus, objection to public funding of private education and maintenance of the public school system was initially associated with efforts to dismantle segregation and overcome the oppression of the black community.

Part III focuses on the desegregation of public schools. Supreme Court opinions, particularly in the case of *Green v. New Kent County School Board*<sup>15</sup> and *Swann v. Charlotte-Mecklenburg*,<sup>16</sup> fostered a significant increase in the amount of school desegregation from 1968 to 1972. But this trend of Supreme Court cases fostering integration came to an abrupt halt with Supreme Court opinions in *Keyes v. School District No. 1*<sup>17</sup> in 1973, *Milliken v. Bradley*<sup>18</sup> in 1974, and *Pasadena v. Spangler*<sup>19</sup> two years later. These three opinions helped to constrain the amount of school desegregation that would occur during the 1970s and 1980s. Thus, even at the pinnacle of the integration of public schools 62% of black school children attended majority-minority schools and 32.5% were in schools that were at least 90% minority.<sup>20</sup>

Part IV focuses on the sacrifice of black parents, students, and teachers in the desegregation of America's public schools. The African-American community has always struggled against oppression. From the perspective of the black community, this struggle is a collective one which often requires the sacrifice of the interest of individual blacks for the betterment of the community. During the desegregation era, black school children and black educators were part of the foot soldiers who paid the cost for the desegregation of public schools. What justified their sacrifice was the belief that the end of segregation would be a tremendous benefit to the black community. Objections to public funding of private

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15. 391 U.S. 430 (1968).

16. 402 U.S. 1 (1971).

17. 413 U.S. 189 (1973).

18. 418 U.S. 717 (1974).

19. 427 U.S. 424 (1976).

20. GARY ORFIELD & JOHN T. YUN, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (Jan. 2003). In the 1980-81 school year, 62.9% of black kids attended majority-minority schools. This figure rose slightly to 63.3% in the 1986-87 school year. In the 1980-81 school year, 33.2% of black school children attended schools that were at least 90% minority. This figure decreased slightly to 32.5% in the 1986-87 school year. For Latinos, however, segregation has been increasing since the 1968-69 school year. At that time, 54.8% were in majority-minority schools and only 23.1% were in schools that were at least 90% minority. Their segregation in the schools has consistently increased over the past thirty-three years, each year finding them increasingly more segregated. *See id.* App. C at 77.

education was part of this struggle. Even if school vouchers could help the educational interest of individual black school children and their parents, vouchers worked against the interest of the black community's struggle against racial subordination by attenuating school integration.

Part V focuses on the developments in education that have affected the attractiveness of public funding of private education from the perspective of the black community. During much of the 1960s and 1970s, America continued to pursue the integration of public schools. But as America began to move into the 1990s, the commitment to integrated education had begun to wane. The tide has turned and America's public schools are in the process of resegregation. In addition to the resegregation of public school children, the condition of the African-American educators has also changed. During the first two decades after the Court's decision in *Brown*, large numbers of them were fired or demoted. The educational reform movements that began to sweep the country in the 1980s have also disproportionately affected black public school educators. Finally, any examination of the issue of school vouchers from the perspective of the educational interest of black school children must focus on the current educational condition of black children in public schools. While significant opportunities have opened up in American society for African-Americans who are educated, a disproportionately large percentage of blacks continue to struggle in elementary and secondary public education.

#### I. DISTINGUISHING SCHOOL VOUCHERS FROM OTHER FORMS OF SCHOOL CHOICE

Currently, school vouchers are a relatively minor aspect of school choice. There were three publicly-funded voucher programs in operation in Cleveland, Ohio; Milwaukee, Wisconsin; and the State of Florida at the time of the Court's opinion in *Zelman*.<sup>21</sup> In both Cleveland and Milwaukee, the private school vouchers can be used only within the city limits. The Cleveland program provides for the use of the vouchers in consenting suburban public schools, but as of the Supreme Court's opinion in *Zelman*, no suburban school had volunteered to accept vouchers.<sup>22</sup> In Florida, vouchers are given to students in persistently failing schools and may be used at any public or private school, provided that space is available.<sup>23</sup> Transportation is provided, however, only if students choose a public school within their home districts. Only Colorado, whose plan was initiated in April 2003 and is being challenged in the courts, has

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21. Dan D. Goldhaber & Eric R. Eide, *What Do We Know (and Need to Know) about the Impact of School Choice Reforms on Disadvantaged Students?*, 72 HARV. EDUC. REV. 157, 158 (2002).

22. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2047 (2002).

23. To this point the program is small because only two schools have "qualified" as persistently failing. There are only fifty-two students currently receiving vouchers. *Id.*

adopted a voucher program since the Court's decision a year ago.<sup>24</sup>

Publicly funding private educational choice is only one aspect of choice in American education. The primary method of school choice is through residential housing.<sup>25</sup> Normally, parents can choose the public school they wish their child to attend by moving into that school's residential district. Beyond residential choices, the concept of school choice is a varied one. It could broadly be defined as educational policies and practices that allow a student to attend a school other than his or her neighborhood school. With this broad definition, there are a number of methods to increase choice within the public school system. There are a few public school districts that participate in interdistrict school choice programs. These tend to be expensive because transportation generally must be provided. The sending district, which is usually an urban district, may have to reimburse the receiving district for students that transfer.<sup>26</sup>

Most public school choice plans are intradistrict, meaning students can choose schools within a particular school district but cannot cross district lines to attend schools in another school district.<sup>27</sup> Intradistrict public choice often began as part of the remedy for actions by school officials that led to a segregated school system. The passage of the Civil Rights Act of 1964 (the "Act") had an important impact on school desegregation. One provision of the Act banned discrimination in all federally-aided programs. The secretary of Health, Education, and Welfare (HEW) was empowered to deny federal funds to any school district found in violation of this provision. When the Act was passed, however, federal aid to public education was insignificant. At the time, education and its funding were considered primarily an obligation of state and local government. The following year Congress passed the Elementary and Secondary Education Act of 1965. This Act provided funds for schools with a disproportionate number of economically disadvantaged children for remedial assistance in reading and math. Due to the poverty that existed in the deep south, a large portion of these funds were ear marked for the very states that had resisted school desegregation the most. In order to be eligible to receive these funds, however, school systems had to comply with guidelines for what constituted a non-discriminatory school system established by HEW. The existence of this pot of money provided an additional incentive for school systems to desegregate. The HEW guidelines allowed school systems to be considered non-discriminatory if they instituted certain freedom of choice plans. Even though the Supreme Court ruled in *Green v. New Kent County*<sup>28</sup> that such

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24. Associated Press, *Growth of Vouchers Slow Year After Court Decision* (June 28, 2003), available at <http://www.cnn.com/2003/education/06/28/school.vouchers.ap/index.html>.

25. For a good discussion of residential school choice, see Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY* 13, 14-17 (Stephen D. Sugarman & Frank Kemerer eds., 1999).

26. See Angela Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 281 (1995).

27. Ryan & Heise, *supra* note 22, at 2046.

28. 391 U.S. 430 (1968).

freedom of choice plans do not satisfy the constitutional obligation to dismantle a dual school system if they do not produce integrated schools, school choice continued to be an important means to advance desegregation.

School choice within a given public school district normally falls into one of three different types. Some school districts allow students to transfer to any other public school of their choice under certain circumstances. In order to aid the desegregation effort, race, and ethnicity of the student seeking to transfer and the racial and ethnic mix of the sending and recipient schools were normally important considerations in addressing these transfer requests. A second type of intradistrict school choice program are magnet schools. Magnet schools were developed primarily to help foster voluntary integration. Magnet programs target specific schools, spend significant amounts of money to upgrade the quality of the physical plant and the curricular offering in such schools, and usually change the academic focus of the school to concentrate on a given subject area. The educational programs of magnet schools are normally centered around foreign languages, reading, science, math or the arts. In order to advance desegregation there are normally racial and ethnic limits used to determine the appropriate mix of the student body. Charter schools are a third type of intradistrict choice option. The concept of charter schools varies across states.<sup>29</sup> The number of charter schools has grown to nearly 1700.<sup>30</sup>

Charter legislation will vary from state to state, but generally, it allows for private persons and institutions to develop and implement plans for a given school. Charter schools differ from magnet schools in that charter schools focus on educational reform rather than integration.<sup>31</sup> Most charter school legislation correctly defines them as public schools,<sup>32</sup> but they are under less supervisory control than traditional public schools and can often operate somewhat independently of the public school authorities. Charter schools are intended to foster new approaches to education with innovative curriculum and instruction. The unique focus of charter schools is the primary means of attracting parents and their school children to the school.

Charter schools do not charge their students tuition, but instead receive per pupil public dollars to fund their educational efforts. They are a viable alternative to school vouchers. Charter schools can provide parents of black school children the opportunity to become more involved with the design of their children's educational program.<sup>33</sup> Since they are still public schools, however, constitutional limits placed on public school authorities will still apply.

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29. For a brief basic primer about charter schools, see Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 *TULANE L. REV.* 563, 574-77 (2001).

30. See Center for Education Reform 2000, *Charter School Highlights and Statistics*, available at <http://www.edreform.com/pubs/chglance.htm>; see also Goldhaber & Eide, *supra* note 21, at 172.

31. Robin Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 *YALE L.J.* 2375, 2404 (1997).

32. For a brief basic primer about charter schools, see Parker, *supra* note 29, at 605.

33. See Barnes, *supra* note 31.

Educators will have to respect the students rights to privacy<sup>34</sup> and freedom of speech.<sup>35</sup> These constitutional limitations will also affect the educational programs of charter schools. Thus, religious instruction will be prohibited.<sup>36</sup> In addition, students are typically selected on a first-come, first-served basis and if the school is oversubscribed then a lottery must be conducted to determine the student body.

Restrictions on public officials derived from the Equal Protection Clause will also apply to charter schools. From the perspective of the black community, one potential educational reform movement that was prevented, due in part to the conclusion that it would violate the Equal Protection Clause, was the development of so called "African-American Male Academies." In an effort to respond to the belief that black males had become an endangered species which was evidenced by high homicide rates, high rates of imprisonment, an increase in the rate of suicide, and a decrease in life expectancy, some public school districts brought forth proposals in the late 1980s and early 1990s to establish African-American male classrooms or academies.<sup>37</sup> The intention was to separate black male students from other students, provide them with black male teachers and mentors, and use alternative educational techniques and strategies directed at generating academic success. Proposals for such education surfaced in a number of cities, including Baltimore, Detroit, Miami, Milwaukee, and New York,<sup>38</sup> but legal and constitutional objections put a quick end to this developing

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34. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

35. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

36. See *Edwards v. Aguillard*, 482 U.S. 578, 581, 583, 585, 612 (1987) (striking down a statute requiring teachers to teach creation science whenever they taught the theory of evolution); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985) (striking down an Alabama statute authorizing a one minute period of silence for meditation or prayer); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (*per curiam*) (striking down a statute providing for posting of the Ten Commandments, paid for by private funds, on the walls of each public classroom in Kentucky); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a statute that prohibited the teaching of evolution in public schools in Arkansas).

37. This issue was first brought to the attention of the black community in a special issue of *Ebony* magazine, published in August 1983. Walter Leavy proposed the provocative question: Is the black male an endangered species? Walter Leavy, *Is the Black Male an Endangered Species?*, *EBONY*, Aug. 1983, at 41. There have been debates and discussions about the survivability and viability of the African-American male. See generally *BLACK MEN* (Lawrence E. Gary ed., 1981); *YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES* (Jewelle Gibbs et al. eds., 1988); Symposium, *The Impact of the Judicial System on the Status of African-American Males*, 23 *CAP. U. L. REV.* 1 (1994).

38. For an extended discussion of this issue, see Kevin Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males*, 23 *CAP. U. L. REV.* 63 (1994).

educational trend.

Miami abandoned its plan to establish experimental separate schools for African-American males after receiving a letter from the Department of Education indicating that it was the Department's position that such schools were illegal.<sup>39</sup> Detroit went forward and prepared to open its African-American Male Academies for the start of the 1991-92 school year. However, in *Garrett v. Board of Education*,<sup>40</sup> a federal district court in August 1991 granted a preliminary injunction against the Detroit School Board's proposal for male academies. The American Civil Liberties Union of Michigan and the National Organization of Women Legal Defense and Education Fund represented the plaintiffs. The plaintiffs challenged the gender-based exclusion of women from the schools.<sup>41</sup> The district court enjoined the implementation of the male academies, concluding that the Detroit plan would violate state law as well as Title IX,<sup>42</sup> the Equal Educational Opportunities Act,<sup>43</sup> and the Fourteenth Amendment.<sup>44</sup>

While the push for African-American Male Academies was contained, many public schools modified their educational curriculum to make it Afrocentric. An Afrocentric curriculum is an emerging educational concept and educators will determine what passes as truly Afrocentric over the course of time. In a vague sense, an Afrocentric curriculum teaches basic courses by using Africa and the sociohistorical experience of Africans and African-Americans as its reference points.<sup>45</sup> An Afrocentric story places Africans and African Americans at the center of the analysis. It treats them as the subject rather than the object of the discussion.<sup>46</sup> However, this perspective is not a celebration of black

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39. See Letter from Jesse L. High, Regional Civil Rights Director, Office of Civil Rights, U.S. Department of Education, to Dr. Joseph A. Fernandez, Superintendent of Schools, Dade County Public Schools (Aug. 31, 1988) (on file in the University of Iowa College of Law Library); Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 850 n.153 (1993).

40. 775 F. Supp. 1004 (E.D. Mich. 1991).

41. *Id.* at 1005.

42. Title IX of the Education Act, Amendments of 1972, 20 U.S.C. § 1681 (1990).

43. 20 U.S.C. § 1701 (1990).

44. The district court specifically noted it "[was] not presented with the question of whether the Board can provide separate but equal public school institutions for boys and girls." *Garrett*, 775 F. Supp. at 1006. n4.

45. Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1294 (1992).

46. See Robert K. Landers, *Conflict Over Multicultural Education*, in EDITORIAL RESEARCH REPORTS 682, 691 (Cong. Q. Inc. 1990). See generally MOLEFI K. ASANTE, AFROCENTRICITY (1988); MOLEFI K. ASANTE, AFROCENTRICITY: THE THEORY OF SOCIAL CHANGE (1980); MOLEFI K. ASANTE, THE AFROCENTRIC IDEA (1987); C. TSEHLOANE KETO, THE AFRICA CENTERED PERSPECTIVE OF HISTORY AND SOCIAL SCIENCES IN THE TWENTY-FIRST CENTURY (1989). The Afrocentric perspective rests upon the premise that it is valid to posit Africa as the geographical and cultural starting base for peoples of African descent. When the discussion is limited to

pigmentation. An Afrocentric perspective does not glorify everything blacks have done. It evaluates, explains, and analyzes the actions of individuals and groups with a common yardstick, the liberation and enhancement of the lives of Africans and African-Americans.<sup>47</sup> This Article could be viewed as one written from an Afrocentric perspective.

An Afrocentric curriculum provides black students with an opportunity to study concepts, history, and the world from a perspective that places their cultural group at the center of the discussion. Such a curriculum infuses these materials into the relevant content of various subjects, including language arts, mathematics, science, social studies, art, and music.<sup>48</sup> Students are provided with both instruction in the relevant subject and a holistic and thematic awareness of the history, culture, and contributions of people of African descent. For example, from an Afrocentric perspective the focal point of civilization is the ancient African civilization that developed in Egypt (known as "Kemet" or "Sais") as opposed to Ancient Greece.<sup>49</sup> Therefore, Egypt, not Greece is the origin of basic concepts of math and science. This is done to show African-American students

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reconstructing the history of African-Americans, however, the Afrocentric perspective becomes an African-American centered perspective.

47. KETO, *supra* note 46, at 31. Afrocentric materials can be written by anyone, regardless of race or ethnicity. Africans and African-Americans, however, having personally experienced the reality of being black, are in a better position than non-African-Americans to express this perspective.

48. Portland, Oregon, for example, began using African-American baseline essays which were first developed in 1982 as part of a multicultural program. Portland has developed similar materials on the history, culture, and contributions of five other geo-cultural groups: Asian-Americans, European-Americans, Hispanic-Americans, Indian-Americans, and Pacific Island-Americans. *Id.* at vi. For example, the mathematics section begins by pointing out that many programs avoid the African basis for mathematics. Egyptian mathematics began in 580 B.C., almost 2000 years before history acknowledges the start of mathematics in Greece. This section also argues that geometry and trigonometry began in ancient Egypt. The Pythagorean Theorem may have been formulated by the ancient Egyptians 1000 years before it was discovered by Pythagoras. Euclid, one of the greatest mathematicians of his era, though pictured as a fair European Greek, was actually an Egyptian. *Id.* at M5.

The Portland essays have been the inspiration for Afrocentric curriculum in Atlanta, Baltimore, Detroit, Indianapolis, Milwaukee, Philadelphia, Pittsburgh, Richmond, Washington, D.C., and other cities. See Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for Judicial Review*, 40 N.Y.L. SCH. L. REV. 311, 319 (1996).

49. A number of scholars have argued that Egypt was a black African nation whose culture influenced the development of the philosophy, science, math, religion, and culture of the ancient Greeks. See generally YOSEF A. BEN-JOCHANNAN, *AFRICA: MOTHER OF "WESTERN CIVILIZATION,"* (1971); 1 MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION* (1987); 2 MARTIN BERNAL, *THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION* (1991); CHEIKH A. DIOP, *THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY* (Mercer Cook ed. & trans., 1974); WILLIAM N. HUGGINS, *AN INTRODUCTION TO AFRICAN CIVILIZATIONS* (1969); GEORGE M. JAMES, *STOLEN LEGACY* (1954).

that they can maintain their cultural identity and still succeed in their studies.

There are charter schools established with an Afrocentric curriculum.<sup>50</sup> There have not been any legal challenges to Afrocentric education.<sup>51</sup> Some scholars, however, argue that such education is potentially vulnerable to constitutional challenges. One commentator has already speculated that culturally centric charter schools may, in certain circumstances, be unconstitutional.<sup>52</sup> Others have raised questions about the legality of teaching public school students certain claims made in some of the Afrocentric materials.<sup>53</sup>

Charter schools may provide educators with the ability to respond to the educational interest of African-American children. However, since they are also public schools, it may be that the educational flexibility will ultimately be too restricted by constitutional limitations on the structure and content of their educational program. These limitations do not apply to private schools.

## II. HISTORY OF VOUCHERS IN THE CONTEXT OF PUBLIC SCHOOL DESEGREGATION

Contemporary discussions of the issue of school vouchers normally start their historical analysis of this issue with Milton Friedman's 1955 essay.<sup>54</sup> But to understand the arguments against vouchers that focus on their impact for the African-American community, it is necessary to focus on the history of vouchers that predates the economic professor and Nobel Laureate's proposal.

As the 1950s unfolded, it became increasingly clear in southern circles that the Supreme Court might soon move to require integration of public elementary and secondary schools. In September 1950 prominent black Atlanta attorney Austin T. Walden and Thurgood Marshall, Director Counsel of the NAACP Legal Defense and Educational Fund, Inc., filed a claim in federal district court

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50. For example, Harvest Preparatory School is a charter school in Minneapolis. It uses an Afrocentric curriculum with an emphasis on basic skills. See John Ramsay, *A Direct Challenge: An Irresistible Question Presented Itself as an Educator Studied an Urban School's Highly Touted, but Controversial, Reading Program: Would It Work for His Preschooler?*, STAR TRIB. (Minneapolis), July 9, 1998.

51. See Brown, *supra* note 39.

52. Parker, *supra* note 29.

53. See Siegel, *supra* note 48, at 319 (noting that some Afrocentric scholars and educators have propounded the theory that blacks are a genetically superior race because the high concentration of melanin in the skin makes possible superior mental cognitive abilities). The author concludes by arguing that there is a legitimate and limited role for the judiciary in addressing claims in ethnocentric curriculum. These would include the constitutional power to strike down the establishment of schoolwide ethnocentric curriculum that promotes segregation.

54. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955). Long range historians note that Adam Smit seems to have been the first social theorist to propose that the government finance education by giving money to parents to hire teachers. See, e.g., *Education Vouchers: A Report on Financing Elementary Education by Grants to Parents*, from the Center for the Study of Public Policy, at vii (1970).

on behalf of two hundred black school children and their parents in Atlanta. The suit sought either the equalization of educational resources for the black children or the admission of black children to white schools.<sup>55</sup> In response to the filing of this lawsuit Roy Harris predicted, in the *Augusta Courier*, that if the courts ordered the desegregation of public schools, white Georgians would stop taxing themselves to support public education and eventually place their children in private schools.<sup>56</sup> Harris argued that if the public school system would mean the destruction of the system of segregation that was so predominant in the South, then the state of Georgia should do away with the public school system. Harris went on to suggest a publicly funded private school plan.<sup>57</sup>

Within months of Harris' article, the Georgia General Assembly considered legislation that would cut off funds and thus close all public schools if black children were allowed to integrate the former all-white schools. The General Assembly had the power to turn state-owned property over to private individuals for educational purposes and indicated a willingness to do so. The General Assembly also set up a program that would provide grants to individuals for educational purposes. These grants could be used at private schools chosen by the recipient.<sup>58</sup>

The actions of the Georgia legislature were followed in November 1952 by South Carolina. Voters there approved a constitutional amendment that eliminated the state's duty to educate all children.<sup>59</sup> This meant that education could be handled as a private matter. Governors of two other states, Mississippi and Virginia, considered similar proposals.<sup>60</sup>

After the Supreme Court rendered its opinion in *Brown v. Board of Education*,<sup>61</sup> resistance to school desegregation, particularly in the deep South was massive. The Court's opinion in *Brown* struck down segregation statutes in twenty-one states. The states of Arizona, Kansas, New Mexico, and Wyoming only permitted local school districts to adopt racial segregation. These states generally complied with the Supreme Court's decision that state-mandated segregated schools were unconstitutional without much difficulty.<sup>62</sup> Six other states—Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia—along with the District of Columbia, also complied with the desegregation decision without much opposition. But the eleven states that had formerly been part of the Confederacy employed various methods to minimally

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55. See Thomas V. O'Brien, *Aron v. Cook and the NAACP in Georgia Before Brown*, 23 J. MIDWEST HIST. EDUC. SOC'Y 129, 129-32 (1996).

56. Roy V. Harris, *Strictly Personal*, AUGUSTA COURIER (Georgia), Oct. 9, 1950, at 1.

57. For a discussion of Roy Harris as the original proponent of publicly funded private education, see O'Brien, *supra* note 6, at 374-85.

58. *Id.* at 385.

59. *Id.*

60. *Id.*

61. 347 U.S. 483 (1954).

62. CIVIL RIGHTS AND AFRICAN-AMERICANS 453 (Albert P. Blaustein & Robert L. Zangrando eds., 1968).

comply or avoid compliance with their constitutional obligation to desegregate their public schools.<sup>63</sup>

In June 1954, one month after the Supreme Court's decision in *Brown*, eight governors and three representatives sent by the governors of Arkansas, Tennessee, and Texas met in Virginia. They unanimously vowed not to comply voluntarily with the Supreme Court's decision.<sup>64</sup> On March 12, 1956, a group of southern senators and congressmen presented the Southern Manifesto in which they asserted their intention to use every legal tactic possible to resist desegregation.<sup>65</sup>

Measures passed by the states resisting school desegregation included the denial of state funds to schools attended by pupils of different races; threats to close the public schools in the event they were integrated; delegation of control of the public schools to the governor or the state legislature, in hopes of frustrating federal court orders; abolition of compulsory schooling; criminal penalties for teaching in or attending an integrated school; and firing teachers who advocated desegregation.<sup>66</sup> Another tactic which assisted in resistance to school desegregation decrees was using public funds to provide private education. A number of southern jurisdictions proposed privatizing education as a way to defeat school desegregation.

Little Rock, Arkansas, was one of the first communities below the Potomac to make preparations for compliance with *Brown's* requirement to desegregate the schools. Little Rock was considered a moderate southern city without a record of political extremism on racial issues. The city had already desegregated

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63. *Id.*

64. See NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S*, at 77 (Louisiana St. Univ. Press 1969) (citing RICHMOND NEWS LEADER, June 11, 1954).

65. MARY FRANCES BERRY, *BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* 139 (1994).

66. DIANE RATIFICH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-1980*, at 133 (1983). See also *Griffin v. Sch. Bd. of Prince Edward County*, 337 U.S. 218 (1964) (invalidating a scheme by Prince Edward County where the county closed its public schools and at the same time contributed grants of public funds to white children to attend private schools); *Goss v. Bd. of Educ.*, 373 U.S. 683, 688 (1963) (invalidating a procedure which allowed students to transfer from a school where their race was in the minority to a school where their race was in the majority); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting a request by Little Rock, Arkansas School Board for a two-and-one-half year delay in implementing a court-approved desegregation program; the school board had sought the delay because of "extreme public hostility" towards desegregation engendered by the governor of Arkansas, who dispatched units of the Arkansas National Guard to block the school board's planned desegregation of a local high school).

The history of resistance by southern schools has been chronicled by a number of authors. See, e.g., EARL BLACK, *SOUTHERN GOVERNORS AND CIVIL RIGHTS: RACIAL SEGREGATION AS A CAMPAIGN ISSUE IN THE SECOND RECONSTRUCTION* (1976); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974); Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 *LAW & CONTEMP. PROBS.* 7, 13-28 (1975).

the city buses without opposition and it was assumed that school desegregation would proceed without much opposition either.<sup>67</sup>

Three days after the first *Brown* opinion, the Little Rock District School Board adopted a policy statement indicating that it was their responsibility to comply with the Federal Constitution and intended to do so when the Supreme Court of the United States outlines the methods to be followed. On May 24, 1955, the school board approved a gradual desegregation plan, seven days before the Supreme Court's implementation decision in *Brown II*.<sup>68</sup> Desegregation would start in September 1957 at the high school level and involve grades ten to twelve. A total of nine blacks were assigned to the all-white Central High School which had over 2000 students. The school board also announced that it would proceed to the junior high and elementary level with complete desegregation of the school system accomplished by 1963.

Governor Orval Faubus, however, ordered units of the Arkansas National Guard to Central High School on September 3, 1957, the day before the start of school, to prevent attendance by the black students.<sup>69</sup> When the black students attempted to enter Central High School, the Arkansas National Guard forcibly prevented them. Public hostility to the integration of Central High School increased. Mobs of angry whites began gathering at Central High to meet the black students as they came to the school. The black students were not able to enter Central High School until President Eisenhower ordered federal troops to Little Rock.<sup>70</sup> While Eisenhower was able to withdraw the federal troops on November 27, federalized National Guardsmen remained in Central High School throughout the remainder of the school year.

Due to the hostility generated by the Governor's resistance to school desegregation, the Little Rock School Board went back to the federal district court in February 1958 and requested a two and half year delay in its duty to desegregate. The school board argued that the effect of the governor's actions was to harden the core of opposition to the desegregation plan and to cause many persons who reluctantly accepted the plan to believe that there was some power in the State of Arkansas which could be exerted to nullify federal law. Shortly before the start of the school year in September 1958, the Supreme Court in *Cooper v. Aaron*<sup>71</sup> rejected the requested delay stating that preventing race conflicts, as desirable as it may be and as important as it is in the preservation of the peace, can not be accomplished by means which deny rights created or protected under the Constitution.

The Supreme Court's decision in *Cooper v. Aaron* did not end the controversy in Little Rock. On the same day of the Court's decision, Governor Faubus signed into law two measures that had been passed earlier by the

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67. See Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 190–93 (1997).

68. 349 U.S. 294 (1955).

69. See *Cooper*, 358 U.S. at 9.

70. See Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

71. 358 U.S. 1 (1958).

Arkansas General Assembly.<sup>72</sup> These measures allowed him to close the schools in Little Rock. In addition, the Governor was also empowered to withhold state educational funds and money from the County General School Fund from any school district in which he ordered the schools closed. The monies withheld could then be made available, on a per capita basis, to any other public school or any non-profit private school accredited by the state board of education (of which the governor was a member), which should be attended by students of a closed school.<sup>73</sup>

Pursuant to these new statutes, the Governor ordered the schools closed in Little Rock. The schools remained closed during the entire 1958-1959 school year. During that school year, approximately \$500,000 was withheld from the Little Rock school district. A significant portion of the funds were used to pay for white students that enrolled in a private school, Raney High School.<sup>74</sup>

Virginia was another state that attempted to use public funding for private education as a means to avoid the duty to desegregate its schools. The Virginia Constitution was amended in 1956 to authorize the General Assembly and local governing bodies to appropriate funds to assist students who would rather go to nonsectarian private schools than public schools.<sup>75</sup> The General Assembly also met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools and to extend state retirement benefits to teachers in newly created private schools.<sup>76</sup>

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72. *Aaron v. McKinley*, 173 F. Supp. 944, 947 (D.C. Ark. 1959). For a discussion of several statutes the Arkansas legislature adopted to maintain school segregation, see Raymond T. Diamond, *Confrontation as Rejoinder to the Compromise: Reflections of the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L.J. 151, 155 (1989).

73. See *Aaron*, 173 F. Supp. at 947.

74. According to the district court,

\$350,586 in funds allocable to the Little Rock School District had been withheld up to May 4, 1959. The total amount which will be withheld by the end of the 1958-59 school year, if these Acts remain in effect, will be slightly in excess of \$510,000. Of the funds withheld, \$187,768 has been paid to other schools, public and private. Of this amount, \$71,907.50 was paid to the private Raney High School.

*Id.* at 952.

After the Arkansas Supreme Court upheld the statutes upon which Faubus acted in *Garrett v. Faubus*, 323 S.W.2d 877, 884 (Ark. 1959), his actions were challenged in federal district court by a class action brought by school age black children and their parents and guardians. In June of 1959 the federal district court declared the state statutes which Governor Faubus relied upon unconstitutional. The Supreme Court affirmed the decision per curiam without a hearing. *Aaron*, 173 F. Supp. at 944, *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959).

75. Virginia tuition grants originated in 1930 as aid to children who had lost their fathers in World War I. The program was expanded until the Supreme Court of Appeals of Virginia held that giving grants to children attending private schools violated the Virginia Constitution. *Almond v. Day*, 89 S.E.2d 851 (Va. 1955). It was then that Section 141 was amended.

76. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221-22 (1964).

Governor Almond of Virginia closed schools in three counties to prevent them from being integrated. The Virginia Supreme Court, however, ruled in 1959 that the legislation closing racially mixed schools and cutting off funds to such schools violated Virginia's Constitution.<sup>77</sup>

One of the companion cases to *Brown v. Board of Education* came from Prince Edward County, Virginia.<sup>78</sup> In the implementation decision a year later, Prince Edwards County was placed under a duty to convert to a "racially non-discriminatory school system with all deliberate speed."<sup>79</sup> As early as 1956, however, the Supervisors of Prince Edward County concluded that they would not operate public schools where black and white children were taught together. In June 1959, the United States Court of Appeals for the Fourth Circuit directed the federal district court (1) to enjoin discriminatory practices in Prince Edward County schools, (2) to require the county school board to take immediate steps toward admitting students without regard to race to the white high school in the school term beginning September 1959, and (3) to require the board to make plans for admissions to elementary schools without regard to race.<sup>80</sup> The supervisors, however, refused to levy school taxes for the 1959-60 school year. As a result the schools of the county did not open in the fall of 1959. They were to remain closed until the Supreme Court addressed this situation with its 1964 opinion in *Griffin v. County School Board*.<sup>81</sup>

In order to provide education for the white children, the Prince Edward School Foundation was formed. The Foundation built its own school and started operation when the public schools were closed. While an offer was made to set up private schools for the black school children, this was rejected by the African-American community which preferred litigation. Thus, the black school children were without any formal education from 1959 to 1963 until federal, state, and county authorities cooperated to have classes for blacks and whites in school buildings owned by the county.

During the 1959-60 academic school year the Foundation's schools, set up for the white children, were completely supported by private funds, without any public contributions. In 1960 the General Assembly, however, adopted a new tuition grant program. Every child in the state regardless of race was eligible for tuition assistance of \$125 or \$150 to attend a nonsectarian private school or a public school outside his locality. The legislation also authorized localities to provide their own education grants to students attending private schools or public schools outside the district. After this legislation was passed, the Prince Edward County Board of Supervisors adopted an ordinance providing tuition grants of \$100. Thus, each child in Prince Edward County attending the Foundation's

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77. See *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959).

78. This case was actually argued in front of the Supreme Court by Governor Almond when he was attorney general for the State of Virginia.

79. 349 U.S. 294, 301 (1955).

80. *Allen v. Sch. Bd. of Prince Edward County*, 266 F.2d 507, 511 (4th Cir. 1959).

81. 377 U.S. 218, 222-23 (1964). The other public schools in every other county in Virginia remained open.

schools received a total of \$225 if in elementary school or \$250 if in high school. These grants constituted the major source of funding for the Foundation schools in the 1960-1961 academic school year. The Prince Edward County Board of Supervisors also passed an ordinance allowing property tax credits up to 25% for contributions to any nonprofit, nonsectarian private school in the county.

In 1961 the black petitioners filed a supplemental complaint with the district court adding new parties and seeking to enjoin the refusal by county officials to operate the public schools and to enjoin payment of public funds that helped to support private schools which excluded students on account of race. The district court concluded that "the end result of every action taken by that body [Board of Supervisors] was designed to preserve separation of the races in the schools of Prince Edward County, and enjoined the county from paying tuition grants or giving tax credits so long as public schools remained closed."<sup>82</sup> The district court, however, did not address the issue of whether the public schools of the county could be closed. Rather the district court abstained on this issue pending determination by the Virginia courts of whether the constitution and laws of Virginia required the public schools of be kept open. Eleven months later, however, the district court issued a ruling without waiting for the Virginia courts to decide the question in which it held that "the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers."<sup>83</sup>

Not long after the district court's ruling, the Prince Edward County Board of Supervisors and the School Board filed for a declaratory judgment in a Virginia circuit court. Having filed for the declaratory judgment, the County Board of Supervisors and the County School Board asked the federal district court to abstain from further proceedings until the state court suit was resolved. The district court declined. The Fourth Circuit reversed, with Judge Bell dissenting. The Fourth Circuit concluded that the district court should have waited for the state court to rule on the validity of the tuition grants, the tax credits and the validity of the closing of the public schools.<sup>84</sup>

By the time the United States Supreme Court rendered its opinion the Supreme Court of Appeals of Virginia had ruled in the case.<sup>85</sup> The Virginia high court upheld the state law used to close the Prince Edward County public schools, the state and county tuition grants for children who attend private schools, and the county's tax concessions for those who make contributions to private schools.<sup>86</sup> The Supreme Court of Appeals of Virginia concluded that each county had the option to operate or not to operate public schools.

The United States Supreme Court concluded that it could not be clearer that Prince Edward County public schools were closed and private schools operated

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82. *Allen v. Sch. Bd. of Prince Edward County*, 198 F. Supp. 497, 503 (D.C.E.D. Va. 1961).

83. *Allen v. Sch. Bd. of Prince Edward County*, 207 F. Supp. 349, 355 (D.C.E.D. Va. 1962).

84. *Griffin v. Bd. of Supervisors of Prince Edward County*, 322 F.2d 332 (4th Cir. 1963).

85. *Sch. Bd. of Prince Edward County v. Griffin*, 133 S.E.2d 565 (Va. 1963).

86. *Griffin*, 377 U.S. at 229-30.

in their place with state and county assistance, for one reason—to ensure that white and colored children in Prince Edward County would not go to the same school. The Supreme Court went on to state that “whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”<sup>87</sup>

The State of Louisiana provides another example. May 25, 1960, the federal district court in Louisiana entered an order restraining and enjoining the St. Helena Parish School Board and its superintendent from continuing the practice of racial segregation in the public schools under their supervision. The district court order went on to require the School Board to make necessary arrangements for the admission of children to such schools on a racially non-discriminatory basis with all deliberate speed. The Fifth Circuit affirmed this judgment on February 9, 1961.<sup>88</sup> The Fifth Circuit also delivered opinions affirming desegregation rulings of the Baton Rouge public schools and five state trade schools in February 1961.<sup>89</sup>

On the same day the Fifth Circuit affirmed the district court order regarding St. Helena Parish schools, the Governor of Louisiana called an Extraordinary Session of the Louisiana Legislature to act regarding the education of the school children of the State. He proposed emergency legislation designed to continue racial segregation in the public schools despite the orders of the federal courts. The legislation allowed public schools under desegregation orders to be changed to private schools. These schools would be operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as they were when they were public schools. The legislation also required that school boards of the parish where the public schools had been closed to furnish free lunches, transportation, and grants-in-aid to the children attending the private schools. This legislation was struck down by the federal district court.<sup>90</sup>

As this brief history is intended to show, the first major appearance of the concept of public funding of private education was in the context of thwarting efforts to integrate public schools. Thus, with regard to the experience of the African-American community, the first appearance of publicly-funded private school education was not linked to an effort to improve the educational situation of school children as suggested by Milton Friedman. Rather, it was linked to the worst aspects of racism and efforts to maintain the oppression of the black community. Support for school vouchers was thus tantamount to perpetuation of racial oppression of the black community.

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87. *Id.* at 231 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)).

88. *St. Helena Parish Sch. Bd. v. Hall*, 287 F.2d 376 (5th Cir. 1961).

89. *See Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 651 (D.C. La. 1961).

90. *Helena Parish Sch. Bd. v. Hall*, 368 U.S. 515 (1962); *Hall*, 197 F. Supp. at 651.

### III. DESEGREGATION OF PUBLIC EDUCATION

The first ten years after the Supreme Court's decision in *Brown I* were marked by massive resistance to the obligation of public schools to desegregate. Part of that resistance included efforts to provide private education at public expense. Resistance had been so effective that by 1964, only 2.14% of the black students in the eleven states in the deep South attended desegregated schools.<sup>91</sup>

In the 1968 opinion in *Green v. New Kent County School Board*,<sup>92</sup> the Supreme Court articulated the position that the duty placed on school boards by *Brown I* and *II* required compulsory integration. The Court announced that school boards which had operated a dual school system had an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated, root and branch, and to do it now.<sup>93</sup> The Court rejected freedom of choice school attendance plans that failed to produce integrated schools. The duty imposed on school boards was to obtain racial balance in every facet of school operations including existing policies and practices with regard to students, faculty, staff, transportation, extra-curricular activities and facilities.

Three years after the decision in *Green v. New Kent County School Board*, the Supreme Court faced the question of what was the appropriate limit on the duty to desegregate a school system. In their opinion in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>94</sup> the Court rejected a limit on desegregation to simply redrawing neighborhood school attendance zones and placed the obligation on school boards to achieve the maximum amount of desegregation possible. As a means in which to pursue this obligation, the Supreme Court also approved the busing of school children beyond the nearest school to their residence.

The impact of these decisions was dramatic and immediate. After *Green*, school desegregation decrees typically required that school systems take account of race and ethnicity of students, teachers and administrators in order to produce integrated public education. In 1967, only 13.9% of blacks students attended majority white schools; but by 1972 that figure had jumped to 36.4%.<sup>95</sup> While 64.3% of black students attended schools that were at least 90% minority in 1968-69 school year, that percentage dropped to 38.7% in the 1972-73 school year.<sup>96</sup>

In segregationist states, which were primarily the border states and the states

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91. See U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY 46 (1975).

92. 391 U.S. 430 (1968).

93. *Id.* at 437-38.

94. 402 U.S. 1, 13 (1971).

95. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, RESEGREGATION IN AMERICAN SCHOOLS 13 (1999), available at <http://www.law.harvard.edu/civilrights/publications/resegregation99.html>.

96. *Id.* at 14.

of the old Confederacy, prior to 1954 school segregation was accomplished pursuant to state statutes. In the 1973 case of *Keyes v. School District No. 1*,<sup>97</sup> the Court for the first time addressed a desegregation case that came from a state that did not segregate students pursuant to state statute in 1954. *Keyes* required the court to specify when segregation in the public schools violated the Constitution. The Supreme Court noted that what is or is not an unconstitutionally segregated school will necessarily depend upon the facts of each particular case.<sup>98</sup> The Court concluded that whether the racial and ethnic separation in the public schools of these jurisdictions violated the constitution depended upon the cause of the separation. *De jure*, and not *de facto* segregation violated the Constitution. Unlike *de facto* segregation which could be established by showing racial concentration of students in the public schools, *de jure* segregation was defined as a "current condition of segregation resulting from intentional state action directed specifically to [segregate schools]."<sup>99</sup> While the *Keyes* Court rejected *de facto* segregation as the basis of the constitutional harm, it also adopted a procedural rule that made proving *de jure* segregation easier. If plaintiffs establish intentional segregation in a significant portion of the school system, then unlawful segregation is presumed to exist throughout the school system.<sup>100</sup> This presumption removed the enormous burden that could have been placed on plaintiffs of establishing unlawful segregation for each school in the system in order to justify a system-wide remedy.

*Keyes* meant that in the states that were in the north and the west, it was necessary to demonstrate that the segregation was the result of intentional governmental conduct. But, if this could be established in a significant portion of the school district the entire school district was tainted and the desegregation remedy would be district wide. Since *Keyes* rejected *de facto* segregation it could be viewed as the case where the Supreme Court's trend at increasing desegregation in the schools was halted. Regardless of how one views *Keyes*, the next year the Supreme Court rendered its opinion in the Detroit school segregation case of *Milliken v. Bradley*.<sup>101</sup>

In *Milliken*, the Court addressed an interdistrict school desegregation plan for the first time. After concluding that the Detroit public schools were unconstitutionally segregated, the district court imposed an inter-district desegregation plan that included the City of Detroit and fifty-three of its surrounding suburban school districts. The district court felt that there were not enough white students in the Detroit public schools to successfully integrate the student body. White students comprised 36.2% of Detroit's 1970 public school enrollment.<sup>102</sup> In order for meaningful integration to occur, it was necessary to

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97. 413 U.S. 189 (1973).

98. *Id.* at 196.

99. *Id.* at 205-06.

100. *Id.* at 208-09.

101. 418 U.S. 717 (1974).

102. *Bradley v. Milliken*, 338 F. Supp. 582, 585-86 (E.D. Mich. 1971), *aff'd in part and vacated in part*, 484 F.3d 215 (6th Cir.), *rev'd*, 418 U.S. 717 (1974).

include the predominantly white suburban school systems in the desegregation decree. The district court felt justified in including the suburban school systems, because it viewed local school districts as creations of the state of Michigan. Since the district court found that agencies of the state were also responsible for the segregated schools in Detroit, it seemed logical to include these state created school districts in the remedial plan to cure the constitutional violation that infected the Detroit public school system. The Supreme Court, however, rejected the inclusion of the suburban schools in the desegregation remedy. The Supreme Court concluded that absent a showing that a constitutional violation within one school district produced a significant segregating effect in another, there was no justification for cross district remedies.

The *Milliken* decision was a full retreat from the efforts to integrate public schools. By providing an incentive for any parent who wanted to avoid a school desegregation decree to simply move to a suburban school district, the decision encouraged white flight. Since the overwhelming majority of suburban school districts were of relatively recent origins, few of these school systems would be included in desegregation orders. Thus, the general rule was that a desegregation remedy would stop at the boundary of the offending school district.

The consequences of the Supreme Court's decision in *Milliken* was that many urban school districts with high concentrations of minority students were never desegregated. Subsequent Supreme Court decisions, such as the Court's decision in *Pasadena v. Spangler*<sup>103</sup> two years later, further limited the potential for America to desegregate our public schools. Even though at one point over 500 school districts were operating under school desegregation decrees,<sup>104</sup> at the height of school desegregation 62.9% of black students still attended majority-minority schools and 32.5% were in schools that were at least 90% minority.<sup>105</sup>

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103. 427 U.S. 424 (1976) (holding that once a school district has implemented a racially-neutral attendance pattern for students, a district court cannot require continued adjustments in order to maintain a certain amount of desegregation). The subsequent resegregation of students is not part of the original constitutional violation if it is primarily the result of choices of individuals to relocate. As a result the district court does not have the authority to remedy it. *Id.*

104. James S. Liebman, *Desegregating Politics: All-out School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-66 (1990).

105. ERICA FRANKENBERG ET AL., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? THE CIVIL RIGHTS PROJECT* (Harvard Univ.) (Jan. 2003). In the 1980-81 school year, 62.9% of black kids attended majority-minority schools. This figure rose slightly to 63.3% in 1986-87 school year. In 1980-81 school year 33.2% of black school children attended schools that were at least 90% minority. This figure decreased slightly to 32.5% in 1986-87 school year. For Latinos, however, segregation has been increasing since 1968-69 school year. At that time 54.8% were in majority-minority schools and only 23.1% were in schools that were at least 90% minority. There segregation in the schools has consistently increased over the past 33 years which each year finding them increasingly more segregated. *See id.* App. C, at 77.

#### IV. THE SACRIFICE OF DESEGREGATION BY THE AFRICAN-AMERICAN COMMUNITY

The Africans that made it to the shores of the United States were people from various tribal groups including Adanse, Akwamu, Akyem, Asante, Bambara, Bantu, Bono, Dagomba, Denkyira, Efik, Ewe, Fante, Fons, Fulani, Ga, Gonja, Hausa, Ibo, Mandingo, Susu, Twifo, Yorba, Wasa, and Wolof. They were from a hundred different ethnic groups and thousands of different villages. In the United States they were brought together by the common trait of their race and compelled to live constantly and consistently under unfavorable material, psychological, and spiritual conditions. Up until the Supreme Court's opinion in *Brown I* the central historical fact of the experience of blacks in America is the reality of a group of people who constantly dealt with the force of racial subordination. Not only did racial subordination meet them in the schools that their children attended, but it met them in every aspect of life. It met them in the fields, at the factory or in the office, when they applied for a job, when they had a job, and when they lost a job. It met them in the marketplaces where they bought goods or services from others or sold goods and services to others. It met them at the doctors office, at the hospital, and at the funeral home. It met them from the cradle to the grave.

In response to living with this reality, African-Americans developed ways of fighting back against racial subordination when they were in positions to do so. This was especially true during the desegregation era. Every black person could be called upon to assist in the struggle to liberate African-American people from oppression. Both African-American school children and black educators paid a very high price for the integration of public schools. Part of what justified their sacrifice was the benefit to be derived by the black community through the end of segregation.<sup>106</sup>

##### *A. Children in the Struggle Against Segregation*

The brief history about the introduction of school vouchers points to a reality of the desegregation of America—black students and children were expected to sacrifice as part of the struggle. The brave struggles and sacrifices by the black children who integrated Little Rock's Central High School were repeated all over the country.<sup>107</sup> In Prince Edward's County black school children went without education for four years in an effort to compel the integration of the public schools in the county.<sup>108</sup> Black children were also called upon in the wider struggle against segregation. In February 1960 four students from the African-American college of North Carolina A & T demanded to be served at a whites-only lunch counter in Greensboro, North Carolina. These sit-ins helped to fuel protest against segregation throughout the country. The sit-in movement soon

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106. GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 103 (1996).

107. *See supra* notes 67-74 and accompanying text.

108. *See supra* note 81 and accompanying text

spread to targeting segregation of facilities such as theaters, churches, swimming pools, retail stores, and drive-in movies.

Reverend Martin Luther King, Jr. called upon the children of Birmingham to desegregate that city in the spring of 1963. They were arrested and jailed by public safety director, Bull Connors. Connors also had water from fire hoses turned on them as well as police attack dogs released on them. During this struggle a bomb went off at the Sixteenth Street Baptist Church killing four little girls.

The best evidence of the sacrifice of the educational interest of black children in order to foster the desegregation of American society was the early realization that desegregation might not substantially increase the academic performance of black school children. As indicated above, the Supreme Court did not actually require mandatory racial mixing as the principle means to remedy the harm of segregation in public elementary and secondary schools until its 1968 decision *Green v. County School Board*.<sup>109</sup> While there was a belief that desegregation could improve academic achievement of black students, prior to *Green*, the results of the "Coleman Report" had cast serious doubt on that belief.

As part of the Civil Rights Act of 1964, Congress commissioned a study, commonly referred to as the "Coleman Report," to determine the "lack of availability of equal educational opportunity" for individuals of different race, color, religion, or national origin.<sup>110</sup> In the fall of 1965, a research team led by James Coleman of John Hopkins University and Ernest Campbell of Vanderbilt University surveyed some 4000 public elementary and secondary schools.<sup>111</sup> The research team not only scrutinized educational facilities, materials, curricula, and laboratories, but also analyzed educational achievement as determined by standardized tests.<sup>112</sup>

After noting that tangible equality had been substantially achieved between the public schools for African-Americans and the public schools for Caucasians, the Coleman Report concluded that African-American students in desegregated schools did only slightly better than African-Americans in segregated schools on standardized achievement test.<sup>113</sup> In order to determine the effect of desegregation on student achievement, the Coleman Report compared the achievement levels of four groups of African-American students: (1) those in majority-white classes; (2) those in classes that were half black and half white; (3) those in majority-black classes; and (4) those in all black classes.<sup>114</sup> The report stated that African-American students in the first group generally received the highest scores on standardized tests, although the differences from group to group were small.<sup>115</sup> Because there was no court-ordered busing when the

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109. 391 U.S. 430 (1968).

110. JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY, at iii (1966).

111. *Id.* at 1.

112. *Id.* at iii.

113. *Id.*

114. *Id.* at 31-32.

115. *Id.* at 29.

Coleman Report was conducted in 1965, the African-Americans who attended majority-white schools presumably lived in integrated neighborhoods. Their slightly better performance may, therefore, have simply reflected their more privileged socioeconomic position.<sup>116</sup> African-American students' achievement did not rise in proportion to the presence of white classmates. Although African-American students in majority-white classes generally had the highest scores, black students in all-black classes actually scored as high or higher than those in half-black or majority-black schools.<sup>117</sup> Moreover, in the Midwest, some African-American students in all-black classes outperformed even those African-Americans in majority-white classes.<sup>118</sup>

Some proponents of desegregation cited the Coleman Report as vindicating desegregation as the appropriate means in which to increase academic achievement by African-Americans. This is because Coleman noted that the academic achievement of children from lower socioeconomic backgrounds, be they white or black, was benefitted by being in schools with children from higher socioeconomic backgrounds (black or white). This statement, when added to the assumption that whites in general are of a higher socioeconomic background than blacks, led to a belief that desegregation would benefit African-Americans academically.

Coleman himself was concerned about the misuse of the report by those arguing for desegregation as a means to increase the academic achievement of African-Americans. In a letter he sent to *The New York Times*, Coleman expressed this concern.

My opinion . . . is that the results [of the Coleman Report] . . . have been used inappropriately by the courts to support the premise that equal protection for black children is not provided unless racial balance is achieved in schools. I believe it is necessary to recognize that equal protection, in the sense of equal educational opportunity, cannot be provided by the State.<sup>119</sup>

Measures of the benefits of desegregation are normally based on analysis of standardized test scores. During the desegregation era, social scientists tried for years to establish that desegregation alone would lead to significant increases in the educational achievement of African-Americans. Many of these studies, however, have not been able to consistently establish significant educational benefits for African-Americans derived from racial mixing alone.<sup>120</sup> Even

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116. If so, then the academic performance of black students in majority-white classes adds force to one of the major findings of the study, that the socioeconomic status of the student was a strong determinant in academic achievement.

117. *Id.* at 31.

118. *Id.* at 32.

119. JAMES S. COLEMAN, *THE PUBLIC INTEREST* 127-28 (Summer 1972).

120. *Court Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess.* 150 (1981) (statement of Herbert J. Walberg, Professor of Education,

without demonstrated academic improvement for black students, desegregation was still justifiable to the black community. The desegregation of American society, which created enormous opportunities for African-Americans, was not possible without desegregating schools.

### *B. Sacrifice of Black Educators During Desegregation*

The position of the African-American public school educator had actually begun to improve prior to the Supreme Court's opinion in *Brown I*. Beginning in the mid-1930s the NAACP took "separate but equal" as a given and filed many lawsuits attacking unequal salaries for black teachers in the black schools. Up to the mid-1940s the NAACP's education cases were primarily salary equalization lawsuits. Thurgood Marshall filed his first teacher salary equalization lawsuit on behalf of a black principal of a small school in Montgomery County, Maryland, in late 1936. Eight months later that suit ended with an agreement by the school board to equalize the salaries of black teachers.<sup>121</sup> Over the next year, Marshall traveled to counties all over the state

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University of Illinois, Chicago); ROBERT L. CRAIN, MAKING DESEGREGATION WORK 70 (1982); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievements in Desegregated Schools*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 103-25 (Christine H. Russell & Willis D. Hawley eds., 1983); see Green, *Thinking Realistically About Integration*, 16 NEW PERSPECTIVES 35 (Fall 1984); Rita E. Mahard et al., *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, 85 PSYCHOL. BULL. 217 (1978); *School Desegregation: Lessons of the First Twenty-Five Years*, LAW & CONTEMP. PROBS. 1, 1-133 (Summer 1978); S.W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420 (1979).

Later research that began to appear in the 1990s argued that the goal of desegregation should be seen, not in terms of performance on standardized tests, but in terms of improving the life chances of black students by moving them into an opportunity system much more likely to lead to success in American society. Segregation was thereby viewed as separation from mainstream opportunities—a self-perpetuating process which had lifelong and intergenerational effects that institutionalized inequality. Within this notion, then desegregation and integration were ways of breaking out of the isolation into a full range of middle-class opportunities affecting higher education, employment, and choice of community in which to live and raise children. These studies showed that there was a marked difference in college success for students who attended desegregated schools and they were much more likely to settle in integrated neighborhoods. See ORFIELD ET AL., *supra* note 106, at 105-06. This line of research would be promising, if America was not in a post-desegregation era.

In addition, while studies of individual school systems undergoing desegregation did not establish large increases in the performance of standardized tests, there was a significant improvement in the performance of African-American school children that occurred during the 1970s and 1980s. This was the height of the desegregation of American public schools. DAVID GRISSMER ET AL., THE BLACK-WHITE TEST (Christopher Jencks & Meredith Phillips eds., 1998); see also *infra* notes 177-83 and accompanying text.

121. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 21-22 (1994).

of Maryland drumming up support for salary equalization lawsuits.<sup>122</sup> Later the NAACP became involved in salary equalization cases all over the South including Norfolk, Virginia; Birmingham, Alabama; Little Rock, Arkansas; New Orleans, Louisiana; Tampa, Palm Beach, and Miami, Florida; Atlanta, Georgia; and Dallas, Texas.<sup>123</sup>

Prior to the desegregation litigation in public schools, black teachers typically taught black school children. They were generally believed by whites to be too poorly educated to teach white school children. The Supreme Court's opinion in *Brown I* seemed to add credence to that notion. In one of the most quoted phrases from *Brown I*,<sup>124</sup> the Court said, "[t]o separate [African-American youth] 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."<sup>125</sup> The Court went on to quote approvingly from the district court in Kansas:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children . . . for the policy of separating the races is usually interpreted 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 . . . .<sup>126</sup>

Presumably, since segregated schools had harmed black children in ways unlikely to ever be undone, the harm also impacted black adults.<sup>127</sup> Because school boards and judges who crafted the desegregation plans considered black schools to be educationally inferior to white schools, the disproportionate impact on black school teachers and administrators should have been expected. Closing black schools, firing African-American teachers, and demoting black principals could be perceived not as discriminatory acts, but as reasonable efforts to increase the quality of education for all students, including the black ones.<sup>128</sup>

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122. *Id.* at 21-25.

123. *See id.* at 116-21.

124. Professor Derrick Bell notes that proponents of integration quoted this phrase repeatedly in order to justify their belief that integration provides the proper route to equality. Derrick A. Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281, 285 (1981).

125. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The social science evidence cited by the Court was specifically intended to prove that segregation produced a psychological harm to African-Americans. *See id.* at 494 n.11.

126. *Id.* at 494.

127. In one of my early articles, I criticized the implicit racism upon which the Supreme Court's school desegregation jurisprudence was based. *See* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992).

128. In some ways what happened to African-American schools was a repeat of the events of 100 years earlier when the Massachusetts state legislature attempted to desegregate the Boston public schools. Because whites would not send their children to black teachers, black school

Thus, the impact of the assumption that *de jure* segregation harmed only African-American school children expressed itself early in the process of desegregating public schools in the disproportionately high price that the black educators paid for desegregation.<sup>129</sup> Samuel Etheridge reported that between 1954 and 1972, over 70,000 black teachers lost their jobs in the southern and border states.<sup>130</sup> Testimony before the United States Senate revealed that 96% of the African-American principals lost their jobs in North Carolina, 90% in Kentucky and Arkansas, 80% in Alabama, 78% in Virginia, and 77% in South Carolina and Tennessee.<sup>131</sup>

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teachers and assistants were fired. For a discussion of the desegregation of the Boston schools in the 1850s, see Arthur O. White, *The Black Leadership Class and Education in Antebellum Boston*, 42 J. NEGRO EDUC. 504, 513 (1973).

Not all courts were oblivious to this situation. The Fifth Circuit, for example, in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1218 (5th Cir.), *rev'd*, 396 U.S. 290 (1970), specified criteria to use in the event it was necessary to reduce the number of principals, teachers, teachers aides, or other professional staff employed by a school district. The Fifth Circuit stated that any dismissal or demotions must be based upon objective and reasonable nondiscriminatory standards.

In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

*Id.*

129. For a further discussion of this issue, see Pamela J. Smith, *Our Children's's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 178-87 (1999); see also ALVIS V. ADAIR, DESEGREGATION: THE ILLUSION OF BLACK PROGRESS (1984); DERRICK BELL, AND WE ARE NOT SAVED 109 n.3 (1987) (citing Amicus Curiae Brief filed by the National Educational Association in *United States v. Georgia*, 445 F.2d 303 (5th Cir. 1971) (for empirical data on burden borne by black teachers, administrators, and students because of school integration)); JAMES E. BLACKWELL, THE BLACK COMMUNITY 158-60 (2d ed. 1985); and HAROLD CRUSE, PLURAL BUT EQUAL 22 (1987); HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, LAW AND SOCIAL CHANGE 94-97 (1972); David G. Carter, *Second-Generation School Integration Problems for Blacks*, 13 J. BLACK STUD. 175-88 (1982).

130. See Samuel B. Etheridge, *Impact of the 1954 Brown v. Topeka Board of Education Decision on Black Educators*, 30 NEGRO EDUC. REV. 213, 223-24 (1979). Another source put the number at more than 31,000 in southern and border states. Smith & Smith, *Desegregation in the South and the Demise of the Black Educator*, 20 J. SOC. & BEHAV. SCI. 28-40 (1974).

131. *Displacement and Present Status of Black School Principals in Desegregated School Districts: Hearings Before the U.S. Senate Select Comm. on Equal Educational Opportunity*, 92d Cong. (1971) (Statement of Benjamin Epstein). In addition, Epstein also testified that 50% of the African-American principals lost their jobs in Georgia and 30% did so in Maryland. *Id.*

V. DEVELOPMENTS IN EDUCATION INCREASING THE ATTRACTIVENESS  
OF PUBLIC FUNDING OF PRIVATE EDUCATION AS A RESPONSE TO  
THE EDUCATIONAL CONDITION OF BLACK SCHOOL CHILDREN  
SINCE ITS INITIAL INTRODUCTION

We are now fifteen years beyond the time where America's public schools achieved the maximum amount of racial integration for African-Americans. Two developments since that time have begun to contribute to the resegregation of public schools. After having operated under school desegregation of plans for some time, a number of school districts are terminating federal court supervision. The termination of these desegregation plans allows school authorities to institute student assignment policies that are no longer motivated by a desire to maintain integrated schools. In addition, some lower federal courts have struck the use of racial classifications by public schools to promote voluntary school integration plans. The impact of these trends means that racial and ethnic separation in public schools will increase for the foreseeable future.

America's public school students are also becoming more racially and ethnically diverse. Unfortunately, the desire to increase the number of minorities in teaching has collided with the educational reform movement that began in the 1980s. Many reform panels placed a good deal of the blame for the failure of public education on school teachers. The result has been increased use of standardized testing of prospective teachers to screen out so called "unqualified" individuals from obtaining a degree in education or a teaching certificate. But since racial and ethnic minorities, particularly African-Americans, do considerably worse on the standardized tests these tests are functioning to screen out many potential black public school teachers. The result is that the number of African-American teachers has not kept up with the increases in black students.

Finally, the current state of performance of African-Americans in public schools is deplorable. Many educational statistics point to the reality that public education is failing to effectively educate the nation's black youth.

The educational situation of black school children has radically changed in the fifty years since white segregationist first proposed public funding of private education as a way to respond to attempts to integrate schools. New methods to respond to the educational crisis of African-American students now seem warranted. While public funding of private education may not be the answer for all black students, it could very well provide a very legitimate alternative for some African-American students.

*A. Resegregation of Public Schools*

There are two developments that are at work in public education that are leading to an increase in the amount of racial and ethnic separation in public schools. These trends are likely to continue for the foreseeable future. The result is that "we have already seen the maximum amount of racial mixing in public

schools that will exist in our lifetime."<sup>132</sup>

The first trend relates to the termination of school desegregation decrees. In 1986, Norfolk, Virginia, became the first school district operating under federal court supervision to receive approval to dismantle its desegregation plan.<sup>133</sup> The dissolution of the desegregation decree allowed Norfolk to adopt a neighborhood school attendance policy and thereby create ten nearly all-black elementary schools.<sup>134</sup> Following Norfolk's lead, a number of school districts all over the country have terminated or are in the process of terminating their school desegregation decrees.<sup>135</sup> These include school districts of Buffalo, New York; Broward County (Fort Lauderdale), Florida; Clark County (Las Vegas), Nevada; Nashville-Davidson County, Tennessee; Duval County (Jacksonville), Florida; Mobile, Alabama; Minneapolis, Minnesota; Cleveland, Ohio; San Jose, California; and Wilmington, Delaware.<sup>136</sup> The dissolution of desegregation decrees allows school boards to adopt new student assignment measures, such as neighborhood school assignments or freedom of choice policies, that are not motivated out of a desire to maintain integrated student bodies. Since integrated student bodies is no longer the goal of these new student assignment policies, the inevitable result, like in Norfolk, is an increase in racial and ethnic segregation in the public schools.

The second trend points to the tremendous change in the interpretation of the Equal Protection Clause that has occurred over the past fifteen years. Since 1995, a number of lower federal courts have addressed equal protection challenges to the use of racial classifications of students for the purpose of fostering integrated student bodies when such efforts are not *required* to remedy a segregated school system.<sup>137</sup> These lower courts analyzed the constitutionality of the use of racial classifications by applying strict scrutiny. Most of the court decisions concluded that the state or local school officials failed either to articulate a compelling state interest to justify their admissions policies or, that the policies were not narrowly tailored. Thus, in one of the most stunning

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132. James S. Kunen, *The End of Integration*, TIME, Apr. 29, 1996, at 40 (quoting Kevin Brown, Professor, Indiana University School of Law—Bloomington).

133. *Riddick v. Sch. Bd. of City of Norfolk*, 784 F. 2d 521 (4th Cir. 1986).

134. For a discussion of the effects of the termination of school desegregation in Norfolk, see Susan E. Eaton & Christina Meldrum, *Broken Promises: Resegregation in Norfolk, Virginia*, in ORFIELD ET AL., *supra* note 106, at 115-41. The author noted that the termination of the desegregation plan increased segregation in Norfolk schools, failed to increase parental involvement in the segregated schools—in fact, PTA membership actually declined in those schools; test scores of black students remained extremely low; and the achievement gap may actually have widened.

135. In *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), the Supreme Court turned its attention to determining when a public school system complied with the equal protection mandate of eradicating the vestiges of segregation. The *Dowell* opinion has been followed by two other school desegregation termination opinions, *Missouri v. Jenkins*, 515 U.S. 70 (1995), and *Freeman v. Pitts*, 503 U.S. 467 (1992).

136. ORFIELD & YUN, *supra* note 95.

137. See, e.g., cases cited *supra* note 2.

reversals of constitutional adjudication in recent memory, federal courts which had encouraged voluntary integration plans in the 1960s, 1970s, and 1980s, are now finding those same plans to be unconstitutional.

The Supreme Court has never directly addressed the issue of the power of states and local school officials to take account of race and ethnicity of public school students in a context without an allegation of *de jure* segregation. This issue, however, was always in the background of the Supreme Court's school desegregation jurisprudence. This jurisprudence of the 1970s and 1980s assumed that state and local school officials could go further in terms of desegregating their public schools than the federal courts could order.<sup>138</sup> The principle that limited the power of federal courts enacting and approving school desegregation decrees was that the scope of the remedy is determined by the nature and extent of the constitutional violation.<sup>139</sup> But this limitation did not apply to state and local school officials.

The 1971 landmark opinion in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>140</sup> was the most direct statement from the Supreme Court recognizing that school officials had broad powers to maintain integrated student bodies, while the remedial power of the federal courts was limited. Chief Justice Burger's unanimous opinion for the Court set out the guidelines for integrating schools, including approving busing as a tool to further that end.<sup>141</sup> He warned federal courts that unless a skewed enrollment pattern is caused by unconstitutional student assignment practices, federal courts must defer to school officials' discretion and refrain from imposing remedies.<sup>142</sup> Burger noted that the remedial power of federal courts extends only on the basis of a constitutional violation.<sup>143</sup> This authority, however, "does not put judges automatically in the shoes of school authorities whose powers are plenary."<sup>144</sup> Burger also noted that

[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .<sup>145</sup>

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138. For a detailed explanation of this point, see Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 7-23 (2000).

139. *Milliken v. Bradley*, 418 U.S. 717, 714 (1974).

140. 402 U.S. 1 (1971).

141. *Id.* at 22-31.

142. *Id.* at 16.

143. *Id.*

144. *Id.*

145. *Id.*; see also *McDaniel v. Barresi*, 402 U.S. 39 (1971) (unanimously reversing the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was per se invalid because it was not color-blind.)

Until the last few years, lower courts accepted that public school authorities possess broad powers to take steps to promote integrated public schools.<sup>146</sup> But this acceptance began to erode in 1995 when the Supreme Court decided *Adarand Construction Co. v. Peña*.<sup>147</sup> In *Adarand* the Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."<sup>148</sup>

The effect of these developments on racial and ethnic segregation in public schools can be seen in the statistics on school integration. Racial and ethnic mixing among student bodies held fairly consistent from the early 1970s until the late 1980s, but it has been on the increase over the past decade. Recent figures released by the Civil Rights Project of Harvard show that the trend of increasing racial and ethnic separation continues.<sup>149</sup> The percentage of white students in the schools of the average black student has declined since 1988 and in 2000 it is actually lower than in 1970.<sup>150</sup> As of 2000, 72% of black school children attend schools where minorities constitute a majority of the student population.<sup>151</sup> The percentage of black students in schools that are more than 90% minority has increased to 37.4% in 2000.<sup>152</sup> These two figures are significant increases from the 1996-97 school year where 68.8% of black school children attended majority minority schools with 35% attending schools that are at least 90% minority.<sup>153</sup>

It is too early to tell how the Supreme Court's decision upholding the University of Michigan Law School's affirmative action program in *Grutter v. Bollinger*<sup>154</sup> will apply to efforts to use racial classifications to promote voluntary integration by public elementary and secondary schools. This is a subject that I am currently working on for another article. *Grutter* held that racial classifications could be used in an individualized admissions process as a means

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146. See, e.g., *Vaughns v. Bd. of Educ.*, 742 F. Supp. 1275, 1301 (D. Md. 1990) (justifying the efforts to maintain integrated faculty assignments); *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416, 1422 (E.D. Wis. 1987) ("It is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574 (2d Cir. 1984); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705 (2d Cir. 1979).

147. 515 U.S. 200 (1995).

148. *Id.* at 227.

149. FRANKENBERG ET AL., *supra* note 105.

150. *Id.*

151. *Id.*

152. *Id.* Latinos actually experience higher rates of segregation than blacks. The percentage of Latinos in predominately minority schools is 76% and the percent in schools that are over 90% minority is also 37%. *Id.* at 33.

153. ORFIELD & YUN, *supra* note 95, at 14.

154. No. 02-241, 2003 U.S. LEXIS 4800 (U.S. June 23, 2003).

to pursue a diverse student body. If this holding is applied to elementary and secondary schools without modification, then some voluntary integration plans will survive. But this limited endorsement of school integration falls far short of the broad powers to promote integrated student bodies recognized by the Supreme Court in *Swann v. Charlotte-Mecklenburg v. Board of Education*.<sup>155</sup>

*B. Condition of African-American Public School Teachers and Administrators*

The role and position of the black educator in public schools has changed drastically over the past fifty years. In the days before the end of segregation, there were few occupational options for college-educated blacks except for the ministry and public education. In the 1950s half of all black professionals were public school teachers.<sup>156</sup> Because of the increased opportunities in American society today equally talented blacks have far more options. The teachers of the 1950s are the black lawyers, doctors, accountants, engineers, and business professionals of today. The black educator has lost the role of the preeminent professional in the black community.

The number of the black educators has been affected by more than the opening of other occupational options for talented blacks. About a decade after the losses in the number of black teachers caused by desegregation, another development occurred that has prevented the number of black school teachers from bouncing back—the educational reform movements of the past twenty years. Even as America's public school students are becoming more racially and ethnically diverse, the desire to increase the number of minority teachers is being thwarted by the education reform movement.

In 1983, the National Commission on Excellence in Education published its influential report *A Nation At Risk*.<sup>157</sup> In the report, the Commission stated that public schools were failing in their mission to educate students and were creating "a rising tide of mediocrity that threaten our very future as a Nation and a people."<sup>158</sup> This report and the educational reform movement it helped to spawn placed a good portion of the blame for the problem of public education on school teachers.<sup>159</sup> The typical criticism of teaching is that it does not attract high caliber students. The solution is to raise the academic standards for education majors and provide them with more rigorous training.

The call for higher teaching standards has frequently been answered through enforced teacher testing. Yet testing prospective teachers has had a devastating

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155. 402 U.S. 1 (1971).

156. See Sabrina Hope King, *The Limited Presence of African-American Teachers*, 63 REV. EDUC. RES. 115, 124 (1993).

157. DAVID P. GARDNER ET AL., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

158. *Id.* at 5.

159. See, e.g., *Carnegie Forum on Education and the Economy, A Nation Prepared: Teachers for the 21st Century* (1986).

impact on African-Americans interested in the profession because blacks are less likely to perform well on standardized tests. A 1997 report by the Educational Testing Service conducted between the years of 1994 and 1997 of over 300,000 people who took one or both of the Praxis tests revealed the difficulty minority teachers have in passing standardized tests, which have become the gateway for a public school teaching certificate.<sup>160</sup>

The Praxis Series of tests are the only national teacher-testing program.<sup>161</sup> The Praxis I test assesses reading, writing, and math ability. Passing this test is a prerequisite for acceptance into many degree-granting college programs in education. The Praxis II tests focus on content and pedagogical knowledge in specific subject areas. These tests are often used by states to determine qualifications for the initial teaching certificate. All minority groups, African-Americans, Hispanic, Asian American, Asian, Native American and Other, scored lower on both Praxis test than whites.<sup>162</sup> Of the African-Americans who took the Praxis I test only 53.5% passed compared to 83.7% of all test takers and 86.7% of white test takers.<sup>163</sup> Thus, while blacks constituted 7.3% of those who took the test, they constituted only 4.6% of those who actually passed.<sup>164</sup> The

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160. See Educ. Testing Serv., *The Academic Quality of Prospective Teachers: The Impact of Admissions and Licensure Testing* (1999).

161. The report looked at a three-year window from 1994 to 1997 of those who took the Praxis test. There were almost 600,000 tests takers during that period. *Id.* at 3. The report created two parallel data sets: one for candidates who took the SAT and one for candidates who took the ACT. They searched both SAT and ACT data sets from 1977 to 1995 and matched the most recent SAT/ACT scores with the Praxis scores and background information that came from the Praxis questionnaire and the SAT and ACT background questionnaire. Individuals who took both Praxis I and Praxis II during the 1994 to 1997 period were counted in both data sets. The report thus dealt with some 300,000 people who were in the teaching pipeline between 1994-1997. The authors of the report concluded that there was no compelling reason to believe that the sample's overall profile was skewed substantially with respect to that of the overall prospective teaching population. *Id.* at 13.

162. *Id.* at 18, 21.

163. *Id.* at 18, Table 4. The table actually breaks test takers down into those who took the SAT and those who took the ACT. There were a total of 33,770 people who took the SAT and Praxis I, of which 3603 were black and 27,506 were white and 54,797 people took the ACT and Praxis I of which 2829 were black and 49,548 were white. There was a total of 26,115 who took the SAT and Praxis I who passed, of which 1650 were black and 22,537 were white. There was a total of 48,036 who took the ACT and Praxis I who passed, of which 1790 were black and 44,293 were white. The total number of those who passed the test was 74,151 (26,115 + 48,036) out of a total of 88,567 (33,770 + 54,797) for a pass rate of 83.7%. The total number of blacks who passed Praxis I exam was 3440 (1650 + 1790) out of a total of 6432 (3603 + 2829) for a pass rate of only 53.5%. The total number of whites who passed Praxis I was 66,830 (22,537 + 44,293) out of a total of 77,054 (27,506 + 49,548) who took the exam for a pass rate of 86.7%.

164. *Id.* at 18, Table 4. The table actually breaks test takers down into those who took the SAT and those that took the ACT. There were a total of 33,770 people who took the SAT and Praxis I of which 3603 were black and 54,797 who took the ACT and Praxis I of which 2,829 were black.

same results can also be seen for the Praxis II tests as well. Of the blacks who took Praxis II 65.2% passed compared to 88.3% of test takers overall and 91.8% of whites.<sup>165</sup>

There is a body of research which establishes a link between teacher verbal ability as measured by standardized tests and their student's achievement on standardized tests.<sup>166</sup> Scholars have also identified several important reasons why students of color stay in school longer and achieve more when they have teachers that look like themselves.<sup>167</sup> Teachers of color provide students of color with invaluable role models and examples of success that they can emulate.<sup>168</sup> More

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Of the test takers there were a total of 26,115 of those who took the SAT and Praxis I who passed of which 1650 were black and 48,036 who took ACT and Praxis I of which 1,790 were black who passed. Those the total number of blacks who took the test were 6,432 (3603 + 2829) out of a total of 88,567 (33,770 + 54,797) or 7.3%. There were a total of 3,440 (1,650 + 1,790) blacks who passed Praxis I out of 74,151 (26,115 + 48,036) or 4.6%.

165. *Id.* at 21, Table 7. The table actually breaks test takers down into those who took the SAT and those that took the ACT. There were a total of 159,270 people who took the SAT and Praxis II of which 11,510 were black and 135,035 were white and 111,591 who took the ACT and Praxis II of which 11,111 were black and 98,846 were white. Of the test takers there was a total of 139,245 of those who took the SAT and Praxis II who passed of which 7984 were black and 122,534 who were white. There were a total of 99,804 who took ACT and Praxis II who passed of which 6757 were black and 88,583 were white. The total number of those who passed the test were 239,049 (139,245 + 99,804) out of a total of 270,861 (159,270 + 111,591) for a pass rate for all test takers of Praxis II of 88.3%. The total number of blacks who passed Praxis II exam was 14,741 (7984 + 6757) out of a total of 22,621 (11,510 + 11,111) for a pass rate of only 65.2%. The total number of whites who passed Praxis II was 211,117 (122,534 + 88,583) out of a total of 229,881 (135,035 + 94,846) who took the exam for a pass rate of 91.8%.

166. Educ. Testing Serv., *supra* note 160.

167. Rebecca Gordon et al., *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools* 21 (2000). Teachers of color also provide important benefits for white children as well. I am not discussing those benefits because of the general thesis of the comment.

168. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Supreme Court rejected the argument that providing role models for minority public school students was a compelling state interest. In 1972 because of racial tension in the community, the Jackson Board of Education considered adding a layoff provision to the Collective Bargaining Agreement between it and the Jackson Education Association (Union). The provision would protect certain minority groups of teachers against layoffs. The Board and the Union eventually agreed on a new provision for its collective bargaining agreement, which provided that

in the event that it becomes necessary to reduce the numbers of teachers through layoff from employment by the Board, layoffs teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.

*Id.* at 270. When layoffs became necessary in 1974 it was obvious that adherence to this provision meant that some majority teachers with more seniority would be laid off in order to keep minority

particularly, teachers of color provide students of color with models of academic success where students of color are often expected not to succeed.<sup>169</sup> Teachers of color also share their students' cultural and life experiences and thus may be better able to respond to the particular difficulties that minority students face both in public school and in American society in general. They can reach out and work successfully with parents of students of color who are more likely to trust their judgment and evaluation of their children.<sup>170</sup> It may also be that teachers of color will hold higher expectation for students of color. Many studies have demonstrated that teacher expectations have a significant impact on how well students learn.<sup>171</sup>

Despite the evidence of benefits of teachers of color for students of color, the above trends suggests that the number of black educators will remain disproportionately low in relation to the percentage of black students. As of the spring of 1996, whites constituted 90.7% of public school teachers with blacks making up only 7.3%.<sup>172</sup> In the 1993-94 school year 10.1% of school principals were African-Americans.<sup>173</sup> In contrast, the percentage of African-Americans in public schools in 2001-02 was 17.2%.<sup>174</sup>

### C. Current Education Condition of Black Students

The first place to look at in focusing on the educational condition of black students is the standardized tests scores. These tests have become the measures for much of our determination of a given student's academic success and ability. While standardized tests should not be the only means used to determine whether students are learning in public schools, the importance of these tests in

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teachers with less seniority.

The Board's argument for the layoff provision was its interest in providing minority role models for minority students as an attempt to alleviate the effects of societal discrimination. The Court viewed the role model theory as analogous to societal discrimination. The plurality opinion noted that since the role model theory was not intended to be remedial it did not bear any relationship to the harm caused by prior discriminatory hiring practices. *Id.* at 283-84.

169. J. Stewart et al., *In Quest of Role Models: Change in Black Teacher Representation in Urban School Districts 1968-86*, 58 J. NEGRO EDUC. (1989).

170. John U. Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspectives*, in MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES 3-33 (Margaret A. Gibson & John Ogbu eds., 1991).

171. See, e.g., Robert T. Tauber, *Good or Bad, What Teachers Expect from Students They Generally Get!*, ERIC DIGEST 97-7, at [http://www.ericsp.org/pages/digests/good\\_or\\_bad.html](http://www.ericsp.org/pages/digests/good_or_bad.html); L. Jussim & J. Eccles, *Teacher Expectations: II. Construction and Reflection of Student Achievement* 63 J. PERSONALITY & SOC. PSYCHOL. (1992); and T.L. Good, *Two Decades of Research on Teacher Expectations: Findings and Future Directions*, 38 J. TEACHER EDUC. (1987).

172. Nat'l Ctr. for Educ. Statistics, *Selected Characteristics of Public School Teachers*, at <http://nces.ed.gov/pubs2002/digest2001/tables/dt070.asp>.

173. *Id.* at 95, Table 88.

174. See Young, *supra* note 12.

determining academic success is huge. The primary reason is that these tests are designed to assess the skills that are believed to be important to understanding a student's comprehension of various subject materials or to assess skills that are important to a student's success in school. It is thought that this cannot always accurately be done by focusing solely on grades because of the wide variations that exist in different courses taught in different schools by different teachers.

Despite the fact that high school GPA is a better predictor of success in colleges and universities, the SAT and the ACT are the tests that tend to determine where students will attend college or university.<sup>175</sup> The difference between the average SAT scores based on race (and ethnicity) is still dramatic. According to the College Board's 2001 National Report profiling SAT test takers, the gap between the SAT scores of African-Americans and that of whites is 201 points (1060 and 859, respectively).<sup>176</sup> After falling through the 1970s and 1980s,<sup>177</sup> the disheartening aspect is that the gap between the mean scores of African-Americans and whites has slightly increased over the past ten years.<sup>178</sup> Significant racial gaps can also be seen in the performance of blacks and whites on the ACT where the average score of African-Americans was 16.8 compared to whites at 21.7.<sup>179</sup> This gap held fairly consistent over the past five years.<sup>180</sup>

The SAT and the ACT are tests taken by students who desire to attend post-secondary education. To get a hint of the existence of racial gaps for all elementary and secondary students, it is necessary to focus on other standardized tests. The National Assessment of Educational Progress was a program created by Congress in 1969. The purpose of the program has been to assess the trends in elementary and secondary student progress in certain academic areas, including reading, math and science. Since 1971 three age groups of students in

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175. Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL'Y 201, 206 (2002).

176. African-Americans constitute about 11.2% (120,506 of the 1,074,016) of those who take the SAT. See *The College Board, 2001 College-Bound Seniors: A Profile of SAT Program Test Takers 6* (2001).

177. In 1975-76 the gap between the average SAT scores of African-Americans and whites was 257 (687 in comparison to 944). BLACK AMERICANS: A STATISTICAL SOURCEBOOK 106 (Louise L. Hornor ed., 2000) [hereinafter BLACK AMERICANS].

178. For the 1990-91 assessment year the gap was only 187 points (1031 as opposed to 846). In the 1996-97 assessment year the gap had increased to 195 points (1052 as opposed to 857) and in 1999-2000, it was 198 (1058-860). See Nat'l Ctr. for Educ. Statistics, *Scholastic Assessment Test (SAT) Score Averages by Race/Ethnicity*, at <http://nces.ed.gov/pubs2002/digest2001/tables/dt134.asp>.

179. ACT National and State Scores, at <http://www.act.org/news/data.html> (last visited June 18, 2003).

180. For students graduating in 1997 for example, the average ACT score for blacks was 16.4 compared to 21.2 for whites. All racial/ethnic groups American Indian, Mexican-American, Asian-American and Other Hispanic all scored lower on the ACT than Caucasians (18.0, 17.8, 20.4 and 18.1, respectively). See ACT National and State Scores, *The 1997 ACT High School Profile Report—National Normative Data*, at <http://www.act.org/news/data/97/t5-6-7.html>.

school—nine-, thirteen-, and seventeen-year-olds—have been tested. In reading, all three black age groups showed progress in closing the gap with white students on the tests from 1971 to 1988. The test scores of black students was increasing while the scores of white students remained essentially the same.<sup>181</sup> These gaps began to widen thereafter as the scores of all black age groups fell while the scores of whites showed a modest rise.<sup>182</sup> The gap in the performance on the science tests fell for all three age groups from 1970 to 1986 but it also began to rise during the 1990s.<sup>183</sup> While there were also significant gaps in the math scores, these gaps have remained generally constant since 1990.<sup>184</sup>

In addition to the relatively poor performance of black students on standardized tests in public schools perhaps a more significant problem exists with school dropout rates. This problem cannot be completely separated from the performance on standardized tests because so many states now require passing a standardized test in order to receive a high school diploma. More than half of the states have exit exam policies in place, with six states require passage of a test to be promoted to the next grade level.<sup>185</sup> According to the United States Department of Commerce Bureau of the Census, 13.1% of African-Americans between sixteen and twenty-four dropped out of high school compared with only 6.9% of whites.<sup>186</sup> But these dropout rates may under-reflect high school dropout

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181. The average scores of black nine-year-olds increased from 170 to 189, thirteen-year-olds from 222 to 243 and for seventeen-year-olds from 239 to 274. The corresponding scores of whites were 214 to 218, 261 to 261 (no change) and 291 to 295. See Nat'l Center for Educ. Statistics, *Trends in Average Reading Scale Scores, by Race, Age and Score Quartile*, <http://nces.ed.gov/programs/coe/2002/section2/tables/t08.asp>.

182. From 1988 to 1999 the scores of black nine-year-olds decreased from 189 to 186, thirteen-year-olds from 243 to 238 and for seventeen-year-olds from 274 to 264. The corresponding scores of whites went from 218 to 221, 261 to 267 and 295 to 295 (no change). As a result, the racial gaps for black nine-year-olds increased by six points; for thirteen-year-olds by eleven points; and for seventeen-year-olds by ten points. See *id.*

183. From 1970 to 1986 the gap in the scores of black nine-year-olds decreased from fifty-seven points to thirty-six points, thirteen-year-olds from forty-nine points to thirty-eight points and for seventeen-year-olds from fifty-four points to forty-five points, respectively. From 1986 to 1999 the gaps increased thirty-six points to forty-one points, thirty-eight points to thirty-nine points and forty-five points to fifty-two points, respectively. See *id.* at Table 13-3.

184. See Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card, NAEP 1999 Long-Term Trend Mathematics Summary Data Tables for Age 9 Student Data*, at <http://nces.ed.gov/nationsreportcard/tables/Ltt1999/NTM11011.asp> (last visited June 19, 2003); Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card, NAEP 1999 Long-Term Trend Mathematics Summary Data Tables for Age 13 Student Data*, at <http://nces.ed.gov/nationsreportcard/tables/Ltt1999/NTM21011.asp> (last visited June 19, 2003); Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card, NAEP 1999 Long-Term Trend Mathematics Summary Data Tables for Age 17 Student Data*, at <http://nces.ed.gov/nationsreportcard/tables/Ltt1999/NTM31011.asp> (last visited June 19, 2003).

185. See Mueller, *supra* note 175, at 2009.

186. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION SURVEY, *Dropout Rates in the United States* (July 2001). The gap is larger for black males (15.3% dropout

rates because they include those who left school but later received GED credentials as high school completers. Four-year high school completion rates by race/ethnicity were reported by twenty-eight states in the 1997-98 school year. No state reported the African-American completion rate at higher than Maine's 83.3%. A total of sixteen states reported their four-year graduation rates for African-Americans in their schools at less than seventy percent. Those sixteen states (with corresponding figures for whites were as follows: Georgia 63.3% (71.4%); Idaho 65.3% (75.1%); Illinois 57.8% (84.9%); Iowa 67.6% (89.5%); Louisiana 53.7% (66.5%)<sup>187</sup>; Missouri 60.1% (80.0%); Nebraska 56.3% (86.8%); Nevada 56.8% (69.4%); New Mexico 62.4% (77.9%); Ohio 60% (83.7%); Oklahoma 68.9% (80.2%); Pennsylvania 60.8% (88.6%); South Dakota 67.1% (88.1%); Utah 50.4% (83.6%); Wisconsin 54.8% (93.6%); and Wyoming 68.1% (79.0%).<sup>188</sup>

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rate contrasted with 7.0% for white males), than it is for black females (11.1% as opposed to 6.9%). Hispanics are reported to have substantially higher dropout rates (27.8%) than blacks.

187. Effective with the 1995-96 school year, Louisiana changed its dropout data collection which increased the number of their dropouts. In calculating the completion rates, 1995-96 data were used in place of older data.

188. See U.S. Department of Education, National Center for Education Statistics, Common Core of Data.

A study of high school graduation rates prepared for the Black Alliance for Educational Options was recently revised. See JAY P. GREENE, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES (2002). In the foreword to the study Kaleem Caire notes that current measures of high school dropouts which calculates those who receive GEDs as graduates understates the dropout rate. *Id.* at page 5. The author of the study calculates high school dropout rates by taking the 8th grade public school enrollment for each jurisdiction and sub-group from the fall of 1993 and the number of graduates from the Spring of 1998. To adjust for the possibility that students moving into or out of a school district would distort the graduation rate, he adjusted the 1993 figures to account for population change. The formula used to calculate the graduation rate was:

$$\text{graduation rate} = \frac{\text{regular diplomas from 1998}}{\text{adjusted 8th grade enrollment from 1993}}$$

$$\text{adjusted 8th grade enrollment} = \text{actual 8th grade enrollment} \times (\text{percentage change in total or ethnic sub-group enrollment in the jurisdiction between 1993-4 and 1997-8})$$

According to the study, of the eighth graders who entered high school in 1994-95 school year only 56% of African-Americans graduated compared to 71% of all students and 76% of Caucasian students graduated four years later. No state in the nation had an African-American graduation rate that exceeded the state average. Those states that were blacks were the closest were Arizona (5%), Arkansas (5%), New Mexico (7%) and North Carolina (8%). But even in these states the gap between black and white high school graduation rates were large, 16%, 7%, 16% and 13%, respectively. See Table 1 (revised April 2002). The lowest graduation rates for African-Americans were reported to be Wisconsin (40%), the same state which had the Milwaukee school voucher program. Wisconsin also had the third highest overall graduation rate (85% for whites 92%). Thus, the disparity between the graduation rates for blacks and whites were the largest in Wisconsin. The next lowest were Minnesota at 43% (compared to 82% overall, for whites 87%); Tennessee and Georgia both at 44% (compared to overall of 60% and 44% respectively and for whites of 64% and

Basic skills required in high school are almost essential for any type of economic success in the workforce. The failure to obtain a high school diploma is likely to have dire long term consequences. Among those over twenty-five years old who failed to complete high school or receive a GED, 55% report no earnings in the 1999 Current Population Survey of the U.S. Census, compared with only 25% of those with at least a high school diploma or a GED certificate.<sup>189</sup> In addition students who do not graduate from high school are also more likely to find their life leading to reliance upon public assistance and prison.<sup>190</sup>

There is also evidence that African-American school children are victimized by a number of educational policies and practices in public schools that will affect their educational career. In 1999 community organizations in several U.S. cities undertook a study of their local school districts to see how they measured up in terms of racial justice. The organizations gathered data from twelve different cities.<sup>191</sup> Two of the cities did not have any appreciable number of black students. Blacks were disproportionately suspended or expelled (and whites were under-represented in the number of those suspended or expelled) from school in every community that reported these figures.<sup>192</sup> In addition, of the other ten school districts that were included, nine reported on the racial and ethnic percentage of students placed in gifted and talented programs. African-Americans were under-represented and whites were over-represented in every community.<sup>193</sup> National figures from the 1993-94 school year demonstrate that

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61% respectively). In Ohio, the location of the Cleveland voucher program, the gap between high school graduation was also large. The graduation rate for African-Americans was only 49% compared to a state wide average of 77% and an average for whites of 82%. Florida's overall graduation rate of 59% was one of the worst in the country. Only Georgia (54%) and Nevada (58%) had lower overall graduation rates.

The study also reported graduation rates for selected cities. Milwaukee's was reported as 34% for blacks compared to 43% overall and 73% for whites. Cleveland's was 28% overall compared with 29% for blacks and 23% for whites. The graduation rates for whites in several cities was below 50% including Chicago School District 299 (45%); Clark County (49%); Cobb County (47%); Columbus City (45%); DeKalb County, Georgia (46%); Memphis City (39%); New York City (42%); Indianapolis, Indiana (44%); Newark, New Jersey (48%); Oakland (39%). *Id.* at Table 6.

189. See GREENE, *supra* note 188, at 6.

190. Phillip Kaufman et al., *Dropout Rates in the United States: 1999*, NAT'L CTR. EDUC. STATISTICS, at 1 (Nov. 2000).

191. Gordon et al., *supra* note 167, at 21. The cities included in the study were Austin, Texas; Boston, Massachusetts; Chicago, Illinois; Columbia, South Carolina; Denver, Colorado; Durham, North Carolina; Los Angeles, California; Miami-Dade, Florida; Missoula, Montana; Providence, Rhode Island; Salem, Oregon and San Francisco, California.

192. The greatest disproportions were in San Francisco 56%(18%); Austin, Texas 36%(18%); Los Angeles 30% (14%); and Providence, Rhode Island 39% (23%). *Id.* at 8.

193. *Id.* at 15. The largest under representations were in Boston 27% (55%); Durham 26% (58%); Providence 9% (23%); San Francisco 5% (18%); and Miami-Dade, Florida 23% (33%).

blacks are much more likely to be tracked into academically inferior education. The result of this is that they are exposed to a less rigorous academic experience.<sup>194</sup>

### CONCLUSION

It is not clear that school vouchers will lead to significant improvement in the educational outcomes of African-American school children.<sup>195</sup> There are legitimate fears that school vouchers may undermine the institution of public education. This concern, when it is expressed, is normally articulated in terms that discuss the effect of leaving poor (and often minority, including black) students in schools that are in disarray.<sup>196</sup> It is therefore a concern phrased—at least in part—in terms of the educational interest of black school children. But the problem with this concern is that it ignores the failure of public education to respond to the needs of African-American school children as a group. As educational statistics demonstrate, African-Americans as a group do not perform particularly well in public schools. From the perspective of the African-American community's struggle against its oppression, the failure of public education to adequately serve the interest of black school children may not alone be a reason to favor school vouchers. During the desegregation of public schools, the educational interest of countless African-American students and teachers was sacrificed in an effort to integrate American society. That sacrifice was justified due to the belief that the long term interest of the black community would be advanced by such a sacrifice.

When public funding of private education was first proposed, it was proposed by southern segregationists who sought to defy court-ordered integration. Supporting school vouchers and the possible consequence of the dismantling of public education was tantamount to siding with the most radical element of the segregationist movement. In this context, rejection of publicly funded private education was unquestionably in the best interest of the African-American community that was seeking to throw off the shackles of segregation.

We are almost fifty years after the Supreme Court's decision in *Brown v. Board of Education*, which generated the initial push for privatizing public education. America's schools are not moving towards greater racial and ethnic integration, but towards more racial and ethnic separation. Public schools today are more segregated than they were in 1970 and the trend is toward increasing that separation. In addition to the increasing segregation in public schools, the position of black public school teachers has changed drastically in the past fifty years. When the Supreme Court decided *Brown*, half of the professionals in the

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194. For additional discussions of tracking but focusing on statistics from the 1993-94 school year, see Smith & Smith, *supra* note 130, at 197-203.

195. THOMAS L. GOOD & JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS* 105-10 (2000).

196. See, e.g., PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 128 (1994); GOOD & BRADEN, *supra* note 195, at 105-10.

African-American community were public school teachers. Along with ministers, teaching was one of the few professional occupations open to college-educated African-Americans. As a result, they were among the intellectual elites in the black community. But now with so many African-Americans who have become doctors, lawyers, accountants, engineers, college professors, business managers, and other professional occupations, the public school teacher no longer stands at the same pinnacle in the African-American social hierarchy. Thus, the preservation of the black public school teacher is not as important to the advancement of the African-American community as it was during the *Brown* era. Even if it was, the educational reform movement over the past twenty years has been undermining the position of the black public school educator. In efforts to "improve" the quality of public school teachers, many educational programs and states require successful passage of standardized tests in order to obtain a diploma in education or a public school teaching certificate. The result is that while only 7.3% of public school teachers are black, 17.2% of public school students are black. (What may be even more startling is that 90.7% of public school teachers are non-Hispanic whites in contrast to only 60.3% of public school students.) This under representation of black public school teachers is unlikely to change given the disparate success rate on standardized tests necessary to receive an educational diploma and a teaching certificate.

In this Article, I am not seeking to advocate for or against school vouchers. The purpose of this Article is to point to the changes in American law and society that have occurred since the time when vouchers were first proposed fifty years ago. These changes have altered the nature of the debate regarding school vouchers and public education from the perspective of the African-American communities continuing struggle against its subordination. The end of school desegregation, the significant shortage of black teachers in public schools (at least in comparison to black students) and the continued failure of public education to close the gap in the educational performance of black school children have eliminated the obvious arguments that public funding of private education is contrary to the effort to eradicate racial subordination.

Simply put, the African-American community may no longer have a strong vested interest in objecting to the privatization of public education. The result should be that the interest of (black) parents choosing the best educational situation for their children should be the dominant consideration in the debate about school vouchers. African-Americans parents, like others, have always been concerned about their children receiving a quality education. A 1998 report underscored, moreover, the complexity of attitudes of African-American parents towards integration. It concluded:

For African-American parents, the most important goal for public schools-the prize they seek with single-minded resolve-is academic achievement for their children. These parents believe in integration and want to pursue it, but insist that nothing divert attention from their overriding concern: getting a solid education for their kids. And despite jarring experiences with racism over the years, their focus is resolutely on the here and now. They want to move beyond the past and prepare

their children for the future.<sup>197</sup>

The desire of African-American parents to obtain a quality education for their children is justified because of the huge payoff derived from educational attainment and achievement. A recent U.S. Census Bureau report indicated that the average annual earnings of workers between twenty-five to sixty-four varies substantially based on educational attainment. For all workers with a professional degree their average annual income is \$99,300; for a master's degree \$54,500; for a bachelor's degree \$45,400; for an associate's degree \$33,000; some college \$31,200; high school graduate \$25,900; and for a non-high school graduate \$18,900.<sup>198</sup> These differences translate into huge differences in earnings over a lifetime. The comparable figures for African-Americans (with corresponding figures for whites) are \$2.5 million for a professional degree (\$3.1 million); bachelor's degree \$1.7 million (\$2.2 million); associate's degree \$1.4 million (\$1.6 million); some college \$1.2 million (\$1.6 million); high school \$1.0 million (\$1.3 million); non-high school graduate \$800 thousand (\$1.1 million).<sup>199</sup> Whether a student is fortunate enough to obtain college degree or a graduate degree begins with a good elementary and secondary education.

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197. STEVE FARKAS & JEAN JOHNSON, *TIME TO MOVE ON*, PUBLIC AGENDA FOUNDATION (1998).

198. See *THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATE OF WORK-LIFE EARNINGS 2* (July 2002). The income gaps based on educational attainment increase when the focus is only on full-time year-round workers. Comparable income figures limited to full-time year-round workers is \$109,600; for a master's degree \$62,300; for a bachelor's degree \$52,200; for an associate's degree \$38,200; some college \$36,800; high school graduate \$30,400; and for a non-high school graduate \$23,400. See *id.*

199. *Id.* at 6. The percentage of African-Americans enrolled in professional schools and graduate programs steadily increased during the 1990s from 5.9% and 5.9% in 1990 to 7.6% to 9.3% in 1999. See Nat'l Ctr. for Educ. Statistics, *Participation in Education Table 6-2*, at [http://nces.ed.gov//programs/coe/2002/section1/tables/t06\\_2.asp](http://nces.ed.gov//programs/coe/2002/section1/tables/t06_2.asp). The college completion rate for African-Americans over the age of 25 in 2000 was 16.5% (compared with 28.1% of whites). See Table 7, *Educational Attainment of the Population 25 Years and Over by Sex, and Race and Hispanic Origin: March 2000*, at <http://www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt>. Where males hold a majority of the bachelor's (50.9% of the 24,331,000) and advanced degrees for whites (55% of the 12,734,000), black females hold 55.5% of the 2,279,000 blacks with bachelor's degrees and 58.1% of the 1,026,000 advanced degrees held by African-Americans. The percentage of blacks age eighteen to twenty-four enrolled in higher education was 29.8% in 1997. But as impressive as this increase has been, it does not equal the percentage increase of whites over the same period. The percentage of non-Hispanic whites enrolled in college increased from 27.4% to 40.6% and the percentage over the age of twenty-five that had completed college increased from 11.6% to 28.1%. BLACK AMERICANS, *supra* note 177, at 114. The 2000 figures come from the U.S. Census Bureau, *Current Population Survey, Mar. 2000, Racial Statistics Population Division*, at <http://www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt> (Feb. 22, 2001).

