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De Jure Segregation's Role in the Miseducation of African Americans: Protecting Affirmative Action Admissions Programs  
Goldie Bryant\*

I. Introduction

The crisis of unequal educational opportunities for African Americans continues to be a dilemma in the United States.<sup>1</sup> The transgenerational connection is unbroken between slavery, the systematic denial of education, mass incarceration, the depression of income and wealth accumulation through restricted job and homeownership opportunities, legal segregation in housing and in schools, and today's largely segregated educational system that is failing to educate African Americans.<sup>2</sup> Unconstitutional laws and policies at the federal, state, and local government levels sanctioned de jure segregation—segregation “existing by right or according to law.”<sup>3</sup> As a result of de jure segregation, African American students today disproportionately attend segregated schools with more concentrated poverty than white students.<sup>4</sup> Research shows that “systemic and racial isolation” in schools is widespread in American cities and is associated with the racial academic achievement gap.<sup>5</sup> Schools in poor communities have less resources, less

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<sup>1</sup> See Ronald Brownstein, *The Challenge of Educational Inequality*, ATLANTIC (May 19, 2016), <https://www.theatlantic.com/education/archive/2016/05/education-inequality-takes-center-stage/483405/>.

<sup>2</sup> See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 386–95 (1978) (Marshall, J., dissenting) (discussing the position of African Americans in America after “centuries of unequal treatment”).

<sup>3</sup> See Richard Rothstein, Commentary, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, ECON. POL'Y INST. (Nov. 12, 2014), <http://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/>. *De Jure*, BLACK'S LAW DICTIONARY (5th Pocket ed. 2016).

<sup>4</sup> Janie Boschma, *Separate and Still Unequal*, ATLANTIC (Mar. 1, 2016), <https://www.theatlantic.com/education/archive/2016/03/separate-still-unequal/471720/>; Brownstein *supra* note 1 (noting three-fourths of African American students attend majority low-income schools as opposed to only one third of white students).

<sup>5</sup> Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/>.

educated parents, and lower quality teachers with higher turnover rates.<sup>6</sup> The substandard segregated education provided to African Americans today is a lingering “badge” of slavery prohibited by the Thirteenth Amendment, and the failure of legislators to effectively address segregated educational inequality violates the equal protection of African Americans as promised in the Fourteenth Amendment.<sup>7</sup> Because government action promoted de jure segregation, which is responsible for the resulting miseducation of African Americans—as opposed to private societal discrimination, the government has a compelling interest in remedying the harmful effects of its actions.<sup>8</sup>

Despite the crisis of African American miseducation, the Justice Department’s civil rights division is focusing its limited resources on investigating affirmative action admissions policies at the university level.<sup>9</sup> In August 2017, *The New York Times* exposed a Justice Department document seeking internal lawyers for potential litigation in connection with “intentional race-based discrimination” in admissions policies.<sup>10</sup> The term “intentional race-based discrimination” suggests the new administration’s Justice Department intends to challenge existing affirmative action admissions policies that are considered by some to discriminate against white applicants.<sup>11</sup> The Justice Department’s actions, coupled with the likely appointment of one or more additional conservative Justices to the Supreme Court during the Trump administration, do not bode well for the protection of affirmative action admissions programs. Instead, the very foundation of affirmative action in higher education will be challenged by attacking Harvard College’s “holistic”

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<sup>6</sup> *Id.*

<sup>7</sup> U.S. CONST. amends. XIII, XIV. See RICHARD ROTHSTEIN, *THE COLOR OF LAW VIII–XI*, 195–97 (2017).

<sup>8</sup> See ROTHSTEIN, *supra* note 7, at 198.

<sup>9</sup> Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), [https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html?mcubz=0&\\_r=0](https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html?mcubz=0&_r=0).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

admissions program, the model affirmative action admissions program endorsed by Justice Powell's 1978 opinion in *Regents of the University of California v. Bakke*.<sup>12</sup>

The ironic trend of using the Equal Protection Clause of the Fourteenth Amendment to prevent discrimination against non-minorities as the basis for stifling affirmative action programs, which address the staggering educational inequality experienced by African Americans in the United States, will likely continue under the current administration's leadership.<sup>13</sup> Rather than using equal protection for necessary remedial reforms to uplift African Americans from the entrenched subordination they have been subjected to, the guarantee of equal protection is being used to maintain the "racial status quo."<sup>14</sup>

In addition to Supreme Court rulings over the past few decades limiting the consideration of race in admissions policies,<sup>15</sup> the backlash against affirmative action can be seen at the state level where eight states, so far, have banned the use of race-based affirmative action.<sup>16</sup> The combined actions of the Court, the federal government, and state governments indicate a serious threat to affirmative action admissions programs and, in turn, a serious threat to mitigating the unequal educational opportunities for African Americans.

Understanding the legislative intent behind the "reconstruction amendments" provides an essential historical context for understanding the unique relationship between the equal protection laws of the United States and African Americans.<sup>17</sup> Not only did the Thirteenth Amendment

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<sup>12</sup> 438 U.S. 265, 317 (1978).

<sup>13</sup> See Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781 (2012).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198 (2016); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>16</sup> Tamar Lewin & Richard Perez-Pena, *Colleges Brace for Supreme Court Review of Race-Based Admissions*, N.Y. TIMES (June 30, 2015), <https://www.nytimes.com/2015/07/01/us/politics/colleges-brace-for-supreme-court-review-of-admissions.html>.

<sup>17</sup> See Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020 93–95 (Jack M. Balkin & Reva Siegel eds., 2009).

abolish slavery, but the Supreme Court held that the amendment empowered Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>18</sup> This interpretation of the Thirteenth Amendment allows for the possibility of using the amendment for civil rights reforms, especially for African Americans who were the targeted beneficiaries of the amendment.<sup>19</sup> Despite the race-neutral language of the Fourteenth Amendment, as the Court and scholars alike have recognized, there is no question that its framers intended to protect the newly freed slaves from states that would use laws to deny the former slaves equal citizenship.<sup>20</sup> The Thirteenth and Fourteenth Amendments were specifically intended to abolish slavery, destroy all “badges and incidents of slavery” that would create second-class citizens, and prevent government actions that would violate the rights of African Americans.<sup>21</sup> The original promises of these amendments have yet to be fully realized for the descendants of slavery.

This Comment proposes a different approach to assessing the constitutionality of affirmative action admissions policies in relation to African Americans. It argues that remedying the impact of unconstitutional de jure segregation on the miseducation of African Americans is both a compelling government interest and a constitutional obligation that requires protecting affirmative action admissions programs benefitting African Americans under the Thirteenth and Fourteenth Amendments. Part II explores the evolving interpretation of the Equal Protection Clause as it relates to safeguarding African Americans’ rights. Part III reviews the history of race-based affirmative action admissions decisions, which were based on the faulty strict scrutiny

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<sup>18</sup> William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313 (2007) (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

<sup>19</sup> *Id.* at 1317.

<sup>20</sup> Balkin, *supra* note 17, at 93–94.

<sup>21</sup> *Id.* See also Carter, *supra* note 18, at 1313–15.

standard analysis and where the role of de jure segregation's impact was never addressed. Part IV examines how applying the strict scrutiny standard weakened affirmative action admissions policies by focusing on racial classifications rather than on the underlying structural inequalities facing African Americans. Part V analyzes the relationship between de jure segregation and the miseducation of African Americans. Part VI explains why the higher education of African Americans is a compelling government interest and a constitutional obligation. Finally, Part VII concludes that the government has an obligation to remedy the impact of unconstitutional de jure segregation on the miseducation of African Americans and that protecting and strengthening affirmative action admissions programs is critical to ensuring equality by dismantling the current unequal educational system.

## II. The Evolution of Equal Protection and African Americans' Rights

### A. The Separate but Equal Doctrine

The Supreme Court failed to protect the civil rights of African Americans in *Plessy v. Ferguson*.<sup>22</sup> By endorsing the "separate but equal doctrine," the Court ensured that white dominance would continue to be legally sanctioned so long as laws appeared to apply equally to the races.<sup>23</sup>

On June 7, 1892, Plessy, who was 7/8 Caucasian and 1/8 African, paid for first-class rail fare and attempted to sit in a whites-only section of an East Louisiana Railway car.<sup>24</sup> Plessy refused to comply with the conductor's orders to move to a colored section of the train, was forcibly removed, and was then imprisoned and charged under an 1890 Louisiana Act requiring

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<sup>22</sup> 163 U.S. 537 (1896).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

separate accommodations on trains for white and colored passengers, which had an exception for “nurses attending to children of the other race.”<sup>25</sup> Plessy challenged the act as unconstitutional on the ground that it violated both the Thirteenth and Fourteenth Amendments of the Constitution.<sup>26</sup>

The Supreme Court found that the act did not conflict with the Thirteenth Amendment because the Court interpreted the amendment as primarily abolishing slavery or involuntary servitude and not as protecting “coloreds” from laws imposing “onerous disabilities and burdens” or from laws interfering with their rights to “the pursuit of life, liberty, and property.”<sup>27</sup> The Court noted that legal distinctions between races were not only permissible in state statutes because the distinctions had no impact on legal equality but that they “must always exist so long as white men are distinguished from the other race by color.”<sup>28</sup> While this analysis of the Thirteenth Amendment narrowly defined its reach, the analysis clearly acknowledged the significance and legality of racial distinctions between whites and African Americans.

The Court, however, determined that the Fourteenth Amendment applied in this case because a “main purpose” of the amendment was to “establish the citizenship of the negro.”<sup>29</sup> The Court also stated that the amendment was intended to “enforce absolute equality of the two races before the law” while not abolishing racial distinctions or enforcing social equality.<sup>30</sup> Using a standard of reasonableness, the Court found that the enforced separation of the races (long held valid in the creation of separate schools for whites and “coloreds”) did not violate the Fourteenth Amendment because the two races were equal under the law and the state legislatures were allowed

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<sup>25</sup> *Id.* at 537–41.

<sup>26</sup> *Id.* at 542.

<sup>27</sup> *Id.*

<sup>28</sup> *Plessy*, 163 U.S. at 543.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 544.

to consider established customs and traditions in their efforts to preserve the “public peace” when creating laws.<sup>31</sup> Separate but equal was declared reasonable.<sup>32</sup> By allowing state legislatures to use customs and traditions to justify race-based laws, the Court gave states permission to continue creating legislation that maintained white dominance by effectively disenfranchising African Americans.

Justice Harlan, dissenting, acknowledged that the Louisiana statute’s obvious and known purpose was to keep colored people out of white coaches “under the guise of giving equal accommodation for whites and blacks.”<sup>33</sup> Justice Harlan objected to the statute as violating the “personal freedom of citizens” and reasoned that the “arbitrary separation of citizens” traveling on public highways because of race was a “badge of servitude” and was not equal protection of the law.<sup>34</sup> The Justice astutely predicted that the decision would lead to more state laws designed to defeat the purposes of the “recent amendments” to the Constitution, allowing “race hate” to be legally sanctioned.<sup>35</sup>

#### B. Separate Educational Facilities as Inherently Unequal

Six decades after the flawed decision in *Plessy*, the Court had another opportunity to assess the unconstitutionality of the “separate but equal doctrine” in *Brown v. Board of Education*, which involved class actions in four states where African American students sought admission to segregated public schools that either legally required or permitted racial segregation.<sup>36</sup> The plaintiffs challenged the segregated public schools as violating the Equal Protection Clause of the

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<sup>31</sup> *Id.* at 550–51.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 557.

<sup>34</sup> *Plessy*, 163 U.S. at 557, 562.

<sup>35</sup> *Id.* at 560.

<sup>36</sup> 347 U.S. 483, 487–88 (1954).

Fourteenth Amendment arguing that segregated public schools were “not ‘equal’ and cannot be made ‘equal.’”<sup>37</sup> The three decisions adverse to the plaintiffs cited the Court’s “separate but equal” doctrine announced in *Plessy* as justifying segregated public schools so long as the races were provided with “substantially equal facilities.”<sup>38</sup> A decision by the Supreme Court of Delaware was the sole opinion favorable to the plaintiffs.<sup>39</sup> The Delaware Court ordered admission of the plaintiffs into the white schools because they were superior to the “Negro” schools, even while agreeing with the “separate but equal” doctrine.<sup>40</sup> The Supreme Court granted certiorari to resolve the conflicting decisions.<sup>41</sup>

While the adoption of the Fourteenth Amendment was offered as evidence of the constitutional violation resulting from segregated public schools, the Court found the evidence inconclusive because the amendment’s intended effect on public education was not clear historically.<sup>42</sup> Given the evolution of education from the adoption of the Fourteenth Amendment in 1868, to the *Plessy* decision in 1896, and finally to 1954, when *Brown* was decided, the Court noted that it was necessary to consider present-day public education and its current place in American society.<sup>43</sup> Deeming education “perhaps the most important” state and local government function, Chief Justice Warren concluded that, where provided, the opportunity for a public education was “a right which must be made available to all on equal terms.”<sup>44</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 488.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Brown*, 347 U.S. at 489–90.

<sup>43</sup> *Id.* at 492.

<sup>44</sup> *Id.* at 493.

In deciding whether the “separate but equal” doctrine applied, the Court determined that the decision could not rest on simply comparing “tangible factors” of the segregated schools such as facilities, curricula, and teacher qualifications.<sup>45</sup> Instead, the Court decided that it was necessary to look at the “effect of segregation itself on public education.”<sup>46</sup> In evaluating the effects of segregation on African American children, the Court ironically relied on the Kansas court’s findings that legally sanctioned segregation had “a detrimental effect upon the colored children,” impedes their “educational and mental development,” and deprives them from benefitting from integrated schools.<sup>47</sup> The Court declared that “separate but equal” did not apply to public education because segregated public schools were “inherently unequal” and, therefore, segregated schools violated equal protection of the laws under the Fourteenth Amendment.<sup>48</sup>

The Court reasoned that public education evolved between 1868, when the Fourteenth Amendment was adopted, and 1954, when *Brown* was decided.<sup>49</sup> The Court, therefore, concluded that it must view public education through a contemporary lens.<sup>50</sup> This reasoning can and should be extended to the present when determining the effects of de jure segregation on public education and the role of public higher education in American society because today’s bachelor’s degree is arguably equivalent to the high school diploma of the 1950s. Given the continued evolution of education in American society from 1954 to today, the finding in *Brown* that education is one of the most important functions of state and local governments should be extended to public higher education and require equal access to all.

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<sup>45</sup> *Id.* at 492.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 494.

<sup>48</sup> *Brown*, 347 U.S. at 495.

<sup>49</sup> *Id.* at 492.

<sup>50</sup> *Id.*

### C. Modern Interpretation of Equal Protection: Maintaining the Status Quo

After the *Brown* decision, along with pressure from the Civil Rights Movement, Congress enacted laws and the Executive branch created school desegregation guidelines to dismantle the unequal, segregated public education system.<sup>51</sup> Equal protection laws promoting “fair procedures” and “individual liberty” acknowledged and addressed violations of the civil rights of African Americans and other subordinated groups.<sup>52</sup> The guarantee of “equal protection” as decided in *Brown* promoted reform across the nation.<sup>53</sup> The *Brown* decision and the reforms that followed led to a backlash and the election of presidents who promised to appoint Justices who would disrupt the trajectory of equal protection law.<sup>54</sup> The Nixon election in 1968 and re-election in 1972 followed campaigns incorporating anti-civil rights messages that appealed to white voters.<sup>55</sup> Nixon honored his campaign promises and appointed four Justices that changed the direction of the Supreme Court and equal protection law.<sup>56</sup>

Beginning in the 1970s, the Court redefined discrimination as “forbidden classifications” as opposed to the previous focus on legally sanctioned subordination.<sup>57</sup> Focusing on merely the use of racial classifications—and disregarding the underlying purpose of laws—served to equate laws meant to aid subordinated groups with laws that intentionally “advantaged dominant groups.”<sup>58</sup> As a result, the Court began subjecting to strict scrutiny all laws that classified on the basis of race.<sup>59</sup> At the same time, the Court made it extremely difficult to challenge facially neutral

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<sup>51</sup> See Balkin, *supra* note 17, at 97–99.

<sup>52</sup> *Id.*

<sup>53</sup> Haney-Lopez, *supra* note 13, at 1781.

<sup>54</sup> Balkin, *supra* note 17, at 95.

<sup>55</sup> Haney-Lopez, *supra* note 13, at 1799.

<sup>56</sup> *Id.*

<sup>57</sup> Balkin, *supra* note 17, at 95.

<sup>58</sup> *Id.* at 95–96.

<sup>59</sup> *Id.*

laws that discriminated against minorities by requiring challenges to show that any disparate impact upon minorities was motivated by state actors' actual malice—an almost impossible standard of proof.<sup>60</sup> This approach severely limited the relevance of laws' disparate impact on minorities.<sup>61</sup> The Court effectively began to use equal protection law to maintain the racial status quo of inequality by subjecting affirmative action policies to the highest level of scrutiny, strict scrutiny.<sup>62</sup>

The “colorblindness” approach to evaluating policies that use race-based classifications claims that the Constitution is colorblind, and that whether the motives behind race-based laws are benign or invidious is unknowable, and, therefore, the use of racial classifications is prohibited unless strict scrutiny standards are met.<sup>63</sup> Under this approach to judicial review, legitimate remedial goals of the challenged policies are considered irrelevant, and the policies will be suspect simply because of the use of race as a classification.<sup>64</sup>

Meanwhile, the Court made it nearly impossible for non-whites to prove discrimination from facially neutral laws under the “intent” doctrine, which requires plaintiffs to prove malice as the state of mind of the accused government actor.<sup>65</sup> Since this lenient standard of judicial review was announced in the 1970s, the vast majority of discrimination claims by non-whites have been rejected.<sup>66</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Haney-Lopez, *supra* note 13, at 1781–83.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

The same Court applied these two doctrines, “colorblindness” for affirmative action cases and “intent” for discrimination cases, and effectively operated “to defeat challenges to, and remedies for, discrimination against non-Whites.”<sup>67</sup> The combining of these doctrines, what Ian Haney-Lopez has collectively termed “intentional blindness,” led to a Court in the 1990s that did not see discrimination and ultimately allowed for the destruction of affirmative action.<sup>68</sup> Over the course of a few decades, equal protection law reversed direction in regards to protecting the rights of African Americans and other subordinated groups.

### III. History of Race-Based Affirmative Action Admissions Decisions

#### A. *Regents of California v. Bakke*<sup>69</sup>

While heralded as a champion for the “diversity rationale,” which allows for the use of race as a factor in admissions decisions to achieve a diverse student body, *Bakke* effectively “forced a decoupling of the value of diversity from the realities of race past and present.”<sup>70</sup> Justice Powell’s opinion deemed the historical racial experiences of African Americans irrelevant and merely endorsed the creation of a diverse student body as a compelling justification for affirmative action admissions programs.<sup>71</sup>

The Medical School of the University of California at Davis used two admissions programs: a regular admissions program to fill eighty-four places and a special admissions program to fill sixteen places for “disadvantaged” minorities.<sup>72</sup> *Bakke*, a white man, who was denied admission

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<sup>67</sup> *Id.* at 1784.

<sup>68</sup> Haney-Lopez, *supra* note 13, at 1784–89.

<sup>69</sup> 438 U.S. 265 (1978).

<sup>70</sup> Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 289 (2016).

<sup>71</sup> *Id.* at 283.

<sup>72</sup> *Bakke*, 438 U.S. at 272–76.

in 1973 and 1974, sued claiming the medical school's special program was discriminatory and violated his equal rights under the Fourteenth Amendment.<sup>73</sup> The medical school cross-complained for a declaratory judgment that its admissions program was constitutional.<sup>74</sup> The trial court ruled that the special admissions program was illegal because it used a racial quota system and that the university could not consider race in its admissions decisions.<sup>75</sup> It did not, however, order the school to admit Bakke.<sup>76</sup> The California Supreme Court affirmed the holding that the program violated the Constitution.<sup>77</sup> But the court reversed the lower court by shifting the burden of proof to the University to show that Bakke would not have been admitted to the school if the special program had not existed and ultimately ordered the school to admit Bakke.<sup>78</sup>

While acknowledging that the framers originally intended for the Fourteenth Amendment to address equal protection of the "Negro race," Justice Powell noted the Court's "crucial mission" in recent decades was to interpret the Equal Protection Clause as applying to all people.<sup>79</sup> Justice Powell refused to extend the same approval of preferential classifications as in cases involving school desegregation, employment discrimination, and sex discrimination to the University's special admissions program.<sup>80</sup> The Justice distinguished the medical school's special admissions programs from prior decisions that remedied "clearly determined constitutional violations" reasoning that the University failed to show that it had engaged in discriminatory practices requiring remediation.<sup>81</sup> Applying strict scrutiny because of the race-based classifications used in

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<sup>73</sup> *Id.* at 277–78.

<sup>74</sup> *Id.* at 278–79.

<sup>75</sup> *Id.* at 279.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Bakke*, 438 U.S. at 279.

<sup>79</sup> *Id.* at 293.

<sup>80</sup> *Id.* at 300.

<sup>81</sup> *Id.* at 300–305.

the special admissions program, Justice Powell determined that the medical school's goal of aiding minorities that the school "perceived as victims of 'societal discrimination'" did not justify any disadvantage on those, like Bakke, "who bear no responsibility" for the harms minorities have suffered.<sup>82</sup> Justice Powell failed to acknowledge or address why whites like Bakke had the right to benefit from unchecked white privilege resulting from centuries of African American subjugation.

Justice Powell ruled that the use of racial quotas in the medical school's special admissions program violated equal protection of individual rights.<sup>83</sup> Accepting the University's goal of attaining a diverse student body as a compelling interest, citing academic freedom and First Amendment concerns, Justice Powell reversed the lower court and declared that using race as a factor in admissions programs is constitutional as long as race is used as a "plus" factor and not a determining factor.<sup>84</sup> The Justice's non-binding opinion relied heavily on Harvard College's use of race in its holistic admissions program and held it out as an example of the successful use of race.<sup>85</sup>

Justice Marshall's powerful dissent declared that the current position of African Americans is the "tragic but inevitable consequence" of over two centuries of historical subordination of African Americans, beginning with slavery and continuing through Jim Crow laws, enforced segregation by the federal government under President Wilson, and the exclusion of African Americans from public graduate and professional schools.<sup>86</sup> Justice Marshall concluded that

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<sup>82</sup> *Id.* at 310.

<sup>83</sup> *Bakke*, 438 U.S. at 320.

<sup>84</sup> *Id.* at 315–20.

<sup>85</sup> *Id.* at 317.

<sup>86</sup> *Id.* at 387–95.

“meaningful equality remains a distant dream” for African Americans.<sup>87</sup> He argued that remedying the impact of the Nation’s past treatment of African Americans should not only be considered “a state interest of the highest order,” but that the Fourteenth Amendment was not intended to prevent remedial programs.<sup>88</sup> While the *Bakke* opinion failed to acknowledge the obvious and undeniable impact of historical subjugation on African Americans, Justice Marshall’s separate opinion powerfully demonstrated the relevance of both de jure segregation and past discrimination against African Americans in determining the existence of compelling government interests in race-based remediation.

B. *Hopwood v. Texas*<sup>89</sup>

Demonstrating the fragility of the diversity rationale endorsed in *Bakke*, in 1996 the Fifth Circuit rejected diversity as a compelling government interest when white applicants denied admission into the University of Texas School of Law sued alleging that the affirmative action admissions program violated their right to equal protection guaranteed by the Fourteenth Amendment.<sup>90</sup> The law school used separate admissions panels for whites and preferred minorities, which applied different threshold scores with the intention of increasing the enrollment of minority students.<sup>91</sup>

Applying strict scrutiny, the district court reviewed the admissions program and found that attaining a diverse student body and remediating past discrimination in the state’s secondary school

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<sup>87</sup> *Id.* at 395.

<sup>88</sup> *Id.* at 396–97.

<sup>89</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>90</sup> *Id.* at 938.

<sup>91</sup> *Id.* at 935–38.

system were compelling interests.<sup>92</sup> The district court, however, found that using separate admissions panels violated the plaintiffs’ equal protection rights.<sup>93</sup>

The Fifth Circuit reversed, holding that the University of Texas Law School could not use race as a factor in its admissions process to create a diverse student body, to improve a hostile environment, to repair the school’s reputation, or to mitigate effects of discrimination not directly committed by the law school.<sup>94</sup> While the district court found a compelling government interest in attaining a diverse student body to justify the admissions program, the Court of Appeals declared that achieving a diverse student body was not a compelling interest—declining to follow Justice Powell’s non-binding view in *Bakke*.<sup>95</sup> The court also limited the law school to addressing its own discrimination and declared it could not remedy past discrimination in education by the state of Texas more broadly even though eighty-five percent of the law students were residents of Texas and likely products of the Texas educational system.<sup>96</sup>

The Court of Appeals interpreted the ultimate goal of the Fourteenth Amendment to be the “end of racially-motivated state action” as opposed to remedying the effects of the de jure subordination of African Americans and other minorities.<sup>97</sup> The court further reasoned that because the de jure discrimination practiced by the law school, denying blacks admission, ended in the 1960s, the law school’s past discrimination was sufficiently addressed.<sup>98</sup> The court failed to explain exactly what “sufficiently addressed” the admitted de jure discrimination. The *Hopwood* court interpreted the Fourteenth Amendment as prohibiting racial classifications even

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<sup>92</sup> *Id.* at 938–39.

<sup>93</sup> *Id.* at 939.

<sup>94</sup> *Id.* at 962.

<sup>95</sup> *Hopwood*, 78 F.3d at 944.

<sup>96</sup> *Id.* at 935 n.2, 950.

<sup>97</sup> *Id.* at 947–48.

<sup>98</sup> *Id.* at 953.

when the intended purpose of the classification is to remedy the historical subordination of minorities.<sup>99</sup> The court failed to acknowledge the impact of historical de jure discrimination on present day outcomes including that whites, while they may not have directly caused the past discrimination, benefit from centuries of unequal treatment of African Americans and other minorities.

C. *Grutter v. Bollinger*<sup>100</sup>

The *Grutter* decision provided a lifeline to affirmative action admissions programs by finding a compelling interest in the diversity rationale.<sup>101</sup> After being denied admission to the University of Michigan Law School, Barbara Grutter, a white Michigan resident, sued alleging the law school's admissions policy discriminated against her because of her race violating her equal protection rights under the Fourteenth Amendment.<sup>102</sup> The Court of Appeals, en banc, reversed the district court, holding that the law school's goal of a diverse student body was a compelling interest and that the school's use of race was narrowly tailored.<sup>103</sup> The Supreme Court granted certiorari to resolve conflicting judgments by the courts of appeals regarding the question of whether achieving diversity is a compelling interest that can justify the use of racial classifications in public universities' admissions policies.<sup>104</sup>

Justice O'Connor, writing for the Court, endorsed Justice Powell's view that student body diversity is a compelling government interest, which justifies the use of race-based admissions policies and held that the law school's goal of achieving the educational benefits of a diverse

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<sup>100</sup> 539 U.S. 306 (2003).

<sup>101</sup> *Id.* at 343.

<sup>102</sup> *Id.* at 316–17.

<sup>103</sup> *Id.* at 321.

<sup>104</sup> *Id.* at 322.

student body was compelling.<sup>105</sup> Analyzing whether the admissions policy was narrowly tailored to pass strict scrutiny, the Court reiterated the requirement that race be used as one factor in a broader conception of diversity and that applicants must receive individualized consideration.<sup>106</sup> Continuing the narrow tailoring analysis, Justice O'Connor determined that the law school had considered race-neutral alternatives in order to achieve the desired diversity without sacrificing its selectivity.<sup>107</sup>

Importantly, Justice O'Connor recognized both the importance of access to public institutions of higher education and the reality that "race unfortunately still matters" in America.<sup>108</sup> Even though Justice O'Connor acknowledged the reality that race still matters, she went on to conclude that race-conscious admissions policies must necessarily be limited in order to comply with the Fourteenth Amendment's purpose of prohibiting "governmentally imposed" race-based discrimination.<sup>109</sup> She posited a twenty-five year expiration on the necessity of racial classifications although she did not address how the underlying entrenched structural inequalities would be resolved in such a short period.<sup>110</sup>

Justice Ginsburg, concurring, acknowledged that racial discrimination, both conscious and unconscious, remains a reality and that minorities continue to receive "inadequate and unequal educational opportunities" in inferior segregated schools.<sup>111</sup> While both Justices O'Connor and Ginsburg acknowledged the actual impact of systematic discrimination on the current state of African Americans, the Justices nevertheless suggested that a few decades or even one generation

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<sup>105</sup> *Id.* at 325, 328.

<sup>106</sup> *Grutter*, 539 U.S. at 334–35, 337.

<sup>107</sup> *Id.* at 340–41.

<sup>108</sup> *Id.* at 331, 333.

<sup>109</sup> *Id.* at 341.

<sup>110</sup> *Id.* at 341–43.

<sup>111</sup> *Id.* at 345–46.

should be long enough to address the entrenched subordination of African Americans and to dismantle white dominance.<sup>112</sup>

D. *Gratz v. Bollinger*<sup>113</sup>

In this companion case to *Grutter*, strict scrutiny was fatal to a program that was conceptually similar to the *Grutter* program. Here, two white Michigan residents rejected from the University of Michigan College of Literature, Science and the Arts (LSA) sued alleging the undergraduate admissions process discriminated against them because of their race and violated their equal protection rights.<sup>114</sup> The challenged admissions policy automatically awarded twenty points to the score of underrepresented minority applicants of the total one hundred points needed for admission to LSA.<sup>115</sup> In reviewing the policy under strict scrutiny, the Court determined that automatically giving twenty points to minority applicants was not a narrowly tailored method of achieving diversity and therefore violated the Equal Protection Clause of the Fourteenth Amendment.<sup>116</sup> The Court reaffirmed that race may be considered as a “plus” factor in admissions policies that provide for individual consideration of applicants, however, race cannot be the decisive factor.<sup>117</sup>

Justice Souter dissented, reasoning that the LSA admissions program resembled the constitutionally valid policy in *Grutter* because of its broad conception of diversity and its use of

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<sup>112</sup> *Grutter*, 539 U.S. at 343, 346.

<sup>113</sup> 539 U.S. 244 (2003).

<sup>114</sup> *Id.* at 251–52.

<sup>115</sup> *Id.* at 258.

<sup>116</sup> *Id.* at 275.

<sup>117</sup> *Id.* at 270–72.

race as one factor of many.<sup>118</sup> Justice Souter further asserted that it is impossible to determine whether race was the decisive factor for admissions.<sup>119</sup>

Justice Ginsburg, also dissenting, pointed to the legacy of racial oppression to justify a lesser standard of scrutiny for race-based actions meant to remediate centuries of legally sanctioned inequality.<sup>120</sup> Interestingly, Justice Ginsburg concluded that whether an action has the purpose of maintaining racial inequality or the purpose of preventing perpetual discrimination and undoing the effects of past discrimination is discernible and should dictate whether the Constitution should be “color blind” or “color conscious.”<sup>121</sup> The Justice concluded that the Constitution is “color conscious” when it comes to remedying the impact of past discrimination, which should not be confused with invidious race-based actions.<sup>122</sup>

E. *Fisher v. University of Texas at Austin*<sup>123</sup>

In response to the *Grutter* decision, which overruled *Hopwood* by allowing the use of race in admissions policies, the University of Texas at Austin adopted a new admissions program comprised of two components.<sup>124</sup> The first component was based on a state legislated Top Ten Percent Plan—offering admission to Texas high school students graduating in the top 10% of their class—and accounted for approximately 75% of the incoming freshman class, and the second component involved a holistic approach that considered race as one of several factors for admission.<sup>125</sup> The Top Ten Percent Plan was enacted in response to *Hopwood*, which declared

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<sup>118</sup> *Id.* at 295–96.

<sup>119</sup> *Gratz*, 539 U.S. at 295–96.

<sup>120</sup> *Id.* at 301.

<sup>121</sup> *Id.* at 301–02.

<sup>122</sup> *Id.*

<sup>123</sup> 136 S.Ct. 2198 (2016).

<sup>124</sup> *Id.* at 2205.

<sup>125</sup> *Id.* at 2205–07.

that public university admissions policies could not consider race, and guaranteed admission to the top 10% of high school graduates from Texas' segregated schools.<sup>126</sup> The second component of the admissions program, admitting the remaining 25% of the freshman class, incorporated a holistic review process modeled after *Grutter*, where race was “but a factor of a factor” and not the decisive factor.<sup>127</sup>

The University denied admission to Fisher, a white woman, who was not in the top ten percent of her graduating class.<sup>128</sup> Fisher sued claiming that the University of Texas' consideration of race in its holistic admissions review process disadvantaged her and other white applicants in violation of their equal protection rights under the Fourteenth Amendment.<sup>129</sup> The Supreme Court vacated the judgment in *Fisher I*<sup>130</sup> and remanded the case to the Court of Appeals so the admissions program could be properly evaluated under the strict scrutiny standard.<sup>131</sup> On remand, the Fifth Circuit affirmed the grant of summary judgment for the University.<sup>132</sup> Granting certiorari a second time, the Court held that the University's holistic admissions program was constitutional because (1) its pursuit of diversity was a compelling government interest, (2) the University showed that race-neutral alternatives did not work, and (3) the program was narrowly tailored.<sup>133</sup>

While this close decision upheld the University of Texas' affirmative action admissions program, the Court was divided.<sup>134</sup> Justice Thomas dissented, concluding that the use of race in admissions decisions is prohibited by the Fourteenth Amendment and that *Grutter* should be

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2207.

<sup>128</sup> *Id.*

<sup>129</sup> *Fisher*, 136 S.Ct. at 2207.

<sup>130</sup> *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S.Ct. 2411 (2013).

<sup>131</sup> *Fisher*, 136 S.Ct. 2198 at 2207.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2214.

<sup>134</sup> *Id.* at 2204.

overruled.<sup>135</sup> Justice Alito, dissenting, reasoned that affirmative action admissions programs were equivalent to “systematic racial discrimination” and that the University of Texas failed to provide an adequate explanation for its admissions program and did not pass the strict scrutiny test.<sup>136</sup>

The fact that the Justices, when presented with the same facts, studies, and history, can be so divided as to the legitimacy of affirmative action suggests such programs face a very uncertain future that will largely be determined by the Court’s composition. More importantly, the reluctance of conservative Justices to acknowledge the present-day impact of the legally sanctioned subjugation of African Americans over centuries makes it doubtful that the Court will allow equal protection law to dismantle white domination.

#### IV. The Strict Scrutiny Attack on Affirmative Action Admissions Policies

In the 1960s the Court applied strict scrutiny to race-based policies that “enforced segregation and white supremacy.”<sup>137</sup> Conservative leaning Courts began applying strict scrutiny to affirmative action programs in the 1970s and 1980s as a tool to strike down affirmative action programs as unconstitutional.<sup>138</sup> During this time period, the Court began to focus on the use of forbidden racial classifications rather than the underlying structural inequalities affecting African Americans and other minorities that the affirmative action policies were designed to address.<sup>139</sup>

In *Bakke*, the Court declared that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”<sup>140</sup> The Court rejected the University’s request that the Court use a more lenient standard of review based on the assertion

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<sup>135</sup> *Id.* at 2215.

<sup>136</sup> *Id.* at 2242–43.

<sup>137</sup> Balkin, *supra* note 17, at 97.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 95–96.

<sup>140</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

that white men were not “discrete and insular minorit[ies].”<sup>141</sup> The Court refused to accept the University’s claim that “discrimination against members of the white ‘majority’ cannot be suspect if the purpose can be characterized as benign.”<sup>142</sup> This decision equated policies designed to remedy racial discrimination and subordination with policies designed to achieve and maintain white domination by considering them equally suspect. The *Bakke* Court interpreted the Equal Protection Clause in accordance with its recent “crucial mission” of extending the clause to all persons, not just to African Americans.<sup>143</sup>

By applying strict scrutiny to affirmative action admissions policies, the Court created an exceptionally high bar for race-conscious policies to survive. In order to pass strict scrutiny review, race-based affirmative action policies must (1) demonstrate a compelling government interest and (2) show that the use of race is necessary and narrowly tailored.<sup>144</sup> The Court could have allowed for a more lenient standard of review for race-based programs created to remedy the impact of the unconstitutional subjugation of African Americans given the unique history of the United States and its ruthless subordination of African Americans over centuries.

In order for public universities to satisfy strict scrutiny, they must demonstrate a compelling government interest.<sup>145</sup> Under the Court’s approach, remedying private “societal discrimination” is not a constitutionally viable compelling interest.<sup>146</sup> Unless a public university can show that it engaged in past, intentional discrimination that has present effects, a public

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<sup>141</sup> *Id.* at 290.

<sup>142</sup> *Id.* at 294.

<sup>143</sup> *Id.* at 293–94.

<sup>144</sup> *Id.* at 305.

<sup>145</sup> *See, e.g.,* *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198, 2208 (2016).

<sup>146</sup> *Id.*

university cannot justify the use of race-based admissions policies to address the obvious inequities in access to public higher education, especially for African Americans.<sup>147</sup>

Oddly, the one compelling interest (other than a university's own past discrimination) that the Supreme Court has upheld for using race-based affirmative action policies is the attainment of the educational benefits of a diverse student body.<sup>148</sup> This compelling interest has become a "legal fiction" as universities are forced to contort their admissions programs to comply with a strict scrutiny standard that refuses to acknowledge the compelling government interest in remedying unequal educational opportunities for African Americans and other minorities. The reality of unequal educational opportunities for African Americans is evidenced regularly when educational outcome indicators are measured, yet the Court requires universities to ignore these realities.<sup>149</sup> The refusal to acknowledge how states have unconstitutionally, through law and policy, created and contributed to a new form of unequal and segregated education systems dramatically limits the scope of affirmative action policies.<sup>150</sup>

## V. De Jure Segregation and the Miseducation of African Americans

### A. Unconstitutional Government Policies and Laws Promoted De Jure Segregation

Federal, state, and local government laws and policies created America's segregated cities and neighborhoods that continue to exist today.<sup>151</sup> A prime example is Richmond, California, a shipbuilding center during World War II where the influx of wartime workers led to a housing

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<sup>147</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

<sup>148</sup> *Id.* at 315.

<sup>149</sup> See, e.g., NATIONAL CENTER FOR EDUCATION STATISTICS, US DEPARTMENT OF EDUCATION, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017 (July 2017).

<sup>150</sup> See ROTHSTEIN, *supra* note 7, at 184.

<sup>151</sup> *Id.* at 13–14.

shortage.<sup>152</sup> During this period, the black population alone grew from 270 to 14,000.<sup>153</sup> In response to the acute housing shortage and the need for the workers, the federal government provided public housing that was “officially and explicitly” segregated with substandard, temporary housing built for African Americans in the least desirable areas.<sup>154</sup> To limit the African American population in Richmond to only those who were “essential to the war effort,” black men were stopped on Richmond streets and arrested if they could not prove they had employment related to the war.<sup>155</sup>

In addition to providing segregated public housing, the federal government began to subsidize the whites-only movement to suburban communities across the nation. For example, the federal government recruited a developer to create a whites-only suburb for Richmond, called Rollingwood, and then financed the project with federally approved bank loans with the condition that African Americans could not buy any of the 700 homes.<sup>156</sup> This practice of government financing whites-only suburbs was not equal protection under the law. The patterns of segregation established by federally funded housing, both public housing and suburban housing, was widespread and persists today.<sup>157</sup>

Governments used racial zoning as another method to segregate African Americans. Beginning in 1910, racial zoning ordinances prohibited African Americans from buying houses in white areas.<sup>158</sup> In the 1917 case of *Buchanan v. Warley*, the Supreme Court struck down a racial

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<sup>152</sup> *Id.* at 5.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 8.

<sup>156</sup> ROTHSTEIN, *supra* note 7, at 6.

<sup>157</sup> *Id.* at 13–14.

<sup>158</sup> *Id.* at 44.

zoning ordinance in Louisville, Kentucky, as interfering with the right to “freedom of contract.”<sup>159</sup> Justifications for racial zoning ranged from keeping the public peace to preventing illegal interracial marriage.<sup>160</sup> Many racial zoning ordinances persisted into the 1960s (some longer) and these ordinances solidified segregation of the nation.<sup>161</sup>

The Federal Housing Administration (FHA) was created in 1934 to promote homeownership by middle-class families and required that eligible homes be in whites-only neighborhoods, officially mandating racial segregation to participate in the federal mortgage program.<sup>162</sup> The FHA financed Levittown, an enormous 17,500 home development, on the condition that the homes could only be sold to whites.<sup>163</sup> Only white World War II veterans could buy Levittown properties with no down payment and low-interest loans guaranteed by the government.<sup>164</sup>

In 1973, the U.S. Commission on Civil Rights found that the “housing industry, aided and abetted by Government, must bear the primary responsibility for the legacy of segregated housing.”<sup>165</sup> To attribute today’s segregation to merely private choices or societal discrimination, denies the reality that African Americans were systematically herded into specific neighborhoods and were denied equal access to jobs, education, housing, and financing for housing.<sup>166</sup>

## B. Segregation and Education

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<sup>159</sup> *Id.* at 45 (citing *Buchanan v. Warley*, 245 U.S. 60 (1917)).

<sup>160</sup> *Id.* at 45–48.

<sup>161</sup> *Id.*

<sup>162</sup> ROTHSTEIN, *supra* note 7, at 64–64.

<sup>163</sup> *Id.* at 70–71.

<sup>164</sup> *Id.* at 70.

<sup>165</sup> *Id.* at 75.

<sup>166</sup> *Id.* at 179–88.

The landmark 1954 case of *Brown v. Board of Education* was a crucial turning point in the relationship between equal protection law and African Americans.<sup>167</sup> This long overdue decision overruled the “separate but equal” doctrine of *Plessy v. Ferguson* that permitted states to use their laws to subordinate African Americans.<sup>168</sup> As a result of the *Brown* decision, equal protection of African Americans in the context of the right to educational opportunities led to reforms and schools integration.<sup>169</sup> This equal protection of African Americans, however, was short-lived due to a backlash against civil rights reforms and the ultimate change in direction of equal protection law described above.<sup>170</sup>

In *Parents Involved in Community Schools v. Seattle School District*, parents in Seattle challenged the school district’s use of white and nonwhite classifications in its assignment plan for oversubscribed high schools, and a parent in Kentucky challenged the assignment plan for elementary schools and transfer requests using “black” or “other” classifications.<sup>171</sup> The common issue was whether a public school district that had not previously maintained legally segregated schools or a previously segregated school district that was deemed integrated may voluntarily use racial classifications when making school assignments.<sup>172</sup> The Court concluded that these school cases were not governed by *Grutter* because the compelling interest in a diverse student body in the higher education context does not apply to race-based assignments in elementary and secondary schools where the court determined the racial classifications were simply used for illegitimate racial balancing.<sup>173</sup> The Court held that the districts failed to satisfy strict scrutiny by

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<sup>167</sup> 347 U.S. 483, 487–88 (1954).

<sup>168</sup> 163 U.S. 537, 537 (1896).

<sup>169</sup> See, e.g., Balkin, *supra* note 17, at 93–94.

<sup>170</sup> *Id.* at 95.

<sup>171</sup> 551 U.S. 701, 710–11 (2007).

<sup>172</sup> *Id.* at 711.

<sup>173</sup> *Id.* at 725–26.

showing the use of racial classifications in assigning students was necessary to achieve their goal of diversity.<sup>174</sup> Using a novel interpretation of *Brown*, Chief Justice Roberts reasoned that racial integration was not a compelling interest and concluded that the goal of voluntarily promoting and maintaining integration was unconstitutional.<sup>175</sup>

Justice Stevens, dissenting, noted the irony of Chief Justice Roberts' reliance on *Brown* and his rewriting of "the history of one of this Court's most important decisions."<sup>176</sup> Justice Breyer, also dissenting, noted that the majority's opinion "distorts precedent, it misapplies the relevant constitutional principles, and it announces legal rules that will obstruct" government efforts to contend with the problem of re-segregation of public schools.<sup>177</sup> This decision is a classic example of the Court changing the direction of equal protection law from remedying structural inequality resulting from centuries of subordination to merely focusing on the use of race as a classification. Chief Justice Roberts literally reinterpreted *Brown* to stand for the determination that voluntary integration is unconstitutional.

The impact of segregation on the education of African Americans should not be underestimated.<sup>178</sup> Educational policy alone cannot adequately address the unequal educational opportunities suffered by African American children; to successfully address the racial academic achievement gap, strategies must combat the economic isolation resulting from the segregation of African Americans in addition to school reforms.<sup>179</sup> The quality of education is linked to the segregation of African Americans.<sup>180</sup> Residential integration, school integration, and increasing

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<sup>174</sup> *Id.* at 747.

<sup>175</sup> *Id.* at 732–33.

<sup>176</sup> *Id.* at 798–99.

<sup>177</sup> *Parents Involved*, 551 U.S. at 803.

<sup>178</sup> *See* Brownstein, *supra* note 1.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

economic parity need to be effectively addressed to promote equal educational opportunities.<sup>181</sup> Racial and economic segregation of neighborhoods and schools are “key factors” in the racial academic achievement gaps found in American cities.<sup>182</sup>

## VI. Higher Education of African Americans as a Compelling Government Interest

Beginning with Justice Powell’s decision in *Bakke*, the Supreme Court began to recognize the goal of attaining the educational benefits of a diverse student body as a compelling government interest to justify the use of race in affirmative action admissions policies.<sup>183</sup> This is the one compelling interest where the Court has upheld the use of race in admissions policies, other than a university’s remedying the present effects of its own past discrimination.<sup>184</sup> Because the Court refuses to acknowledge the reality of unequal educational opportunities for African Americans that universities would like to address in their admissions policies, universities must create admissions policies that fit within this ill-fitting concept of “educational benefits of a diverse student body.”<sup>185</sup> Constitutionally, the government must remedy the present effects of its own past discrimination.<sup>186</sup> Therefore, the government’s past discrimination leading to systematic de jure segregation and resulting in the miseducation of African Americans should be considered a compelling government interest that can be remedied by public universities and private universities receiving public funding.

Originally, the Equal Protection Clause of the Fourteenth Amendment, along with the other reconstruction amendments, protected the rights of African Americans.<sup>187</sup> The federal, state, and

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<sup>181</sup> Boschma & Brownstein, *supra* note 5.

<sup>182</sup> Boschma, *supra* note 4.

<sup>183</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–20 (1978).

<sup>184</sup> *Id.* at 315.

<sup>185</sup> *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>186</sup> *See* ROTHSTEIN, *supra* note 7, at XV.

<sup>187</sup> Balkin, *supra* note 17, at 93–94.

local government action that promoted de jure segregation violated and continues to violate the constitutional rights of African Americans. The effects of de jure segregation flowing from such state action as discriminatory housing, employment, and education policies impact African Americans today and continue to manifest in the enduring unequal educational opportunities for African Americans.<sup>188</sup> Because government action is responsible for unconstitutional de jure segregation and the resulting miseducation of African Americans, the government has a compelling interest in remedying the harmful effects of its actions.<sup>189</sup> When applied to the context of affirmative action in admissions, perhaps one question is whether an individual has a slave ancestor to invoke equal protection remediation specifically obligated because of the government's unconstitutional treatment of African Americans.

As discussed in *Brown v. Board of Education*, the evolution of public education requires the Supreme Court to consider the present impact of segregation on public education and education's current place in American society.<sup>190</sup> Because a bachelor's degree today is arguably equivalent to a high school diploma of decades ago and there is a need for skilled workers in today's job market, the *Brown* decision should be extended to include public higher education.<sup>191</sup> Providing public higher education should also be viewed as a "most important function of state and local government" and as "a right which must be made available to all on equal terms."<sup>192</sup>

The question that must be addressed is whether African Americans are being equally protected under the law when it comes to higher public education. Are public universities

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<sup>188</sup> Brownstein, *supra* note 1.

<sup>189</sup> ROTHSTEIN, *supra* note 7, at 195–98.

<sup>190</sup> 347 U.S. 483, 492 (1954).

<sup>191</sup> See Boschma & Brownstein, *supra* note 5.

<sup>192</sup> *Brown*, 347 U.S. at 493 (quoting Chief Justice Warren).

segregated institutions that are intentionally keeping African Americans out? Given the unequal education of African Americans, is their right to equal protection violated by subjecting them to the same standards for standardized test scores as the privileged white class? By not addressing the reality of the multigenerational disparity in educational opportunities between white and black Americans, facially neutral admissions policies may really be the equivalent to “white affirmative action.”

## VII. Conclusion

The African American experience in America is relevant and must be considered when reviewing policies designed to mitigate the systematic oppression of African Americans as a result of unconstitutional government actions. Remediating the effects of de jure segregation on the miseducation of African Americans is a compelling government interest that supports the strengthening of affirmative action admissions programs to safeguard the rights of African Americans under the Equal Protection Clause. Given the level of education required to be successful in today’s workforce and the move towards free public higher education (e.g., New York State), higher public education must be open and accessible to African Americans. It is no longer sufficient to have access to only a primary and secondary education. Finally, the privileges of white domination enjoyed by and benefitting generations of whites cannot be left out of the analyses when determining the constitutionality of necessary reforms.