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Race and the Struggle for Education in American Schools

> Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race.[1]
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> ***Blyew v. United States* (1871)**

> The [Mississippi] Constitution divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow and black races, on the other.[2]
>
> ***Gong Lum v. Rice* (1927)**

Black parents have waged a centuries-long legal battle to gain a proper education for their children. Yet, today, most Black children receive their education in segregated and underfunded public schools. This chapter examines the legal obstacles faced by Black parents from slavery to the present day. The enslaved African in America was deemed chattel or moveable property without need of formal education. The societal arguments were twofold. Blacks were believed to be "uneducable."[3] Yet, Whites feared that an enslaved person who learned to read would be rendered unfit for slave labor.[4] Learning to read and write were deemed dangerous enough to be criminalized. In Georgia, the financial penalty when Whites taught a slave to read was 50 percent higher than for willfully castrating or cutting off the limb of a slave.[5]

The Early Fight for Education: *Roberts v. Boston*

Although slavery was abolished in Massachusetts as early as 1781, racism persisted.[6] Black children in Boston were excluded from public school education. Prince Hall, a Black Mason, led the first recorded campaign by free Black parents to gain access to public schools.[7] In 1787, Hall presented a petition to the Massachusetts Legislature requesting that the City of Boston provide an education for the children of Black taxpayers.[8] In it he and other free Black parents argued that they paid taxes that supported the public schools. Therefore, their children should have the benefit of those schools. Hall stated that:

> ...as by woeful experience we now feel the want of a common education. We, therefore, must fear for our rising offspring to see them in ignorance in a land of gospel light...and for not other reason can be given this they are black...[9]

Although Hall's petition was denied, Black children were eventually admitted into Boston's public schools with few restrictions.

However, once admitted, Black children were treated so poorly by White teachers and White classmates that Black parents requested a separate school for their children. The physical and emotional discrimination against Black children led to the creation in 1798 of the Smith School, a private school for Blacks. At that time, Black parents could choose between the ill-treatment of Boston's public schools or a private school. Soon thereafter the City of Boston enacted legislation to require racially separate schools, precluding Black children from attending any school other than one designated for Blacks. Blacks petitioned the legislature "that schools for colored children might be abolished" as early as 1846.[10] In response, the primary school committee of Boston passed a resolution stating "the regular attendance of all such children...is not only legal and just, but is adapted to promote the education of that class of our population."[11]

In 1850, Benjamin F. Roberts filed suit on behalf of his daughter, Sarah. *Roberts v. Boston* is the earliest reported education case brought by Blacks in America.[12] Roberts argued that separate schools violated the rights of Black children.[13] The Massachusetts court disagreed, ruling that:

> Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law in this Commonwealth to equal rights, constitutional, political, civil and social, the question then arises whether the regulation in question which provides separate schools for colored children is a violation of any of their rights.[14]

Roberts also argued that separate schools perpetuated caste distinction. To this argument the court responded that "this prejudice, if it exists, is not created by law, and probably cannot be changed by law."[15]

The Black community in Boston was divided on the issue of segregated schools. There was considerable disagreement within the Black community as to whether attending schools with hostile Whites was the most beneficial environment for Black children.[16] Black civic leaders in favor of desegregated education continued to seek relief in the Massachusetts legislature.[17] In 1855, the legislature repealed public school admission requirements based on race as well as color and religion. Unfortunately, the *Roberts v. Boston* decision, sustaining racial separation, would form the cornerstone of future court decisions legally segregating children in public schools.

Reconstruction and the Quest for Education: The Freedmen's Bureau

A relative handful of Africans in America were college graduates during slavery. These include Fannie M. Jackson Coppin, who in 1836 graduated from Oberlin College in Ohio, and Edward Jones, who graduated from Amherst College in 1826.[18] Northern states allowed varying degrees of liberty. However, any education for Africans in America was subject to the whim of Whites. Colleges, created for free Blacks by White missionaries, among those Lincoln University and Wilberforce University founded in 1854 and 1855, respectively, educated the Black elite.[19] The Civil War brought the issue of legal rights, educational opportunity, and civil liberties of Blacks to the fore. When the Thirteenth Amendment to the U.S. Constitution abolished slavery in 1865, Blacks had the freedom to seek an education.[20] In 1868, under the Fourteenth Amendment, Africans in America were

granted due-process rights and equal protection of the laws, as well as privileges and immunities of U.S. citizenship as a birthright allowing them access to public education.[21] With the ratification of these amendments and the Civil Rights Act of 1866, millions of formerly enslaved and manumitted Africans were free to seek an education in earnest without the constant fear of reprisal by Whites.

Blacks understood the necessity of education. Despite confronting issues of postslavery homelessness and oppression, these Blacks hungered for education.[22] Thousands of teachers arrived from the North determined to provide an education.[23] By 1870, there were nearly two hundred fifty thousand Blacks attending over four thousand schools across the South.[24] Churches established schools. Hundreds of organizations were created in the 1800s by Blacks to fund educational initiatives, lobby political forces, protect Black children, and remove obstacles to progress.[25] Elementary and high schools, trade schools, and colleges were created to teach the millions of newly freed Black people who had been denied formal education.[26] Hampton Institute (1868), Howard University (1867), Philander Smith College (1877), and St. Augustine's University (1867) were among the many colleges founded during Reconstruction to teach African Americans.[27]

From 1880 to 1910, illiteracy among Blacks in the South decreased from 70 percent to 33 percent.[28] The short-lived Freedmen's Bureau was established to oversee the process.[29] The Freedmen's Bureau, formerly known as the Bureau of Refugees, Freedmen and Abandoned Land, was created by an act of Congress in 1865.[30] The bureau was established despite political hostility and the opposition of President Andrew Johnson.[31] Although initially intended to assist former slaves only, the bill would have been defeated without the inclusion of Whites. The success of the Freedmen's Bureau was undermined by politics, limited staff, and a scarcity of funds. In actuality, there was relatively little money or motivation on the part of American society because educating Blacks represented a change in social status and a challenge to the established socioracial hierarchy.[32] A North Carolina newspaper warned "Education has but one tendency: to give higher hopes and aspirations"; "we want the negro to remain here, just about as he is—with mighty little change."[33]

Initially, a public education for Black children equal to that of White children was not universally opposed. In 1868, the constitution

of South Carolina provided for a system of universal education with both races educated in the same school.[34] General Oliver Otis Howard, commissioner of the Freedmen's Bureau, lobbied Congress for additional funds to educate children former slaves. However, support for Black education was short-lived. W. E. B. DuBois wrote of the opposition to educating Blacks:

> [T]he South believed an educated Negro to be a dangerous Negro. And the South was not wholly wrong; for education among all kinds of men always has had, and always will have, an element of danger and revolution, of dissatisfaction and discontent. Nevertheless, men strive to know. It was some inkling of this paradox, even in the unquiet days of the Bureau, that allayed an opposition to human training, which still to-day lies smoldering, but not flaming. Fisk, Atlanta, Howard, and Hampton were founded in these days, and nearly $6,000,000 was expended in five years for educational work, $750,000 of which came from the freedmen themselves.[35]

Howard was dismissed from the Freedmen's Bureau by President Andrew Johnson. Reconstruction ended. Southerners of the former Confederacy received presidential pardons from President Johnson. The bureau was left in shambles by 1870.[36] Federal troops were withdrawn from the South, placing Blacks in positions of physical and economic vulnerability.

The withdrawal of federal troops left Blacks vulnerable to retribution by Southerners enraged by the loss of the war and drastic economic circumstances. "Black Codes" were enacted under which homeless or jobless Blacks were arrested for trespass and vagrancy.[37] Constitutional protections and civil rights statutes became meaningless as Whites forced free Blacks into shareholding and political disfranchisement reminiscent of slavery. Laws restricting segregating Blacks from Whites were enacted around the country, particularly in the South.[38] Laws such as these effectively relegated Blacks to a subordinated status of second-class citizen. Racially segregated education became the practice in the North as well as the South. In 1883, a Brooklyn, New York, court considered the question of racial segregation in education in the case of *King v. Gallagher*.[39] That court ruled that a Black child could not attend the school of her choice when a school designated for Blacks was made available.[40]

Similar state court decisions consistently quashed efforts by Black parents to overturn laws segregating public schools. In *State ex rel. Garnes v. McCann*, the Ohio Supreme Court had to decide whether a statute segregating school children by race violated their equal-protection rights.[41] That court relied on *Roberts v. Boston* in its support of segregated public schools.[42] As in *Roberts*, the school board was given broad discretion to decide the needs and wants of the district.[43] State courts across the country, presented with the viability of race laws, upheld education statutes racially segregating students. These decisions were among a wave of hundreds of segregation laws enacted in response to the emancipation of Blacks.

A Separate and Unequal Education: *Plessy v. Ferguson*

Blacks in Louisiana refused to accept a newly enacted statute segregating the seating on the local train. It was the challenge to the Separate Car Act relegating Blacks to the soot-filled front car of the local railroad that was at issue in *Plessy v. Ferguson*.[44]

Plessy argued that the act violated his Thirteenth and Fourteenth Amendment rights and that a badge of inferiority would be placed on Blacks forcibly segregated away from the general population. Plessy's claims were roundly rejected.[45] The Court relied on previous state court decisions upholding racial segregation, placing particular emphasis on *Roberts v. Boston*[46] and *People v. Gallagher*.[47] The *Plessy* decision provided the states with the power to regulate social interaction between the races instituting "separate but equal" with special regard to education.[48] The Court states:

> [The] *establishment of separate schools for white and colored children*...has been [deemed] a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.[49] (author's emphasis)

Dismissing Plessy's argument that a badge of inferiority would be placed on Blacks segregated away from the general population, the Court continues:

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[50]

Justice John Halan's dissent provides early insight into the path America could have taken had she the fortitude:

> The white race deems itself to be the dominant race in this country. And so it [is], in prestige, in achievements, in *education*, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.[51] (author's emphasis)

Soon after the *Plessy* decision, the U.S. Supreme Court was presented with the case of *Cumming v. Richmond County Board of Education* (1899).[52] In *Cumming*, Black parents raised the same question at issue in *Roberts v. Boston*: why pay taxes for schools their children cannot attend? The high schools in this Georgia county were restricted to White students. Black parents were forced to pay tuition for a private Black high school as well as taxes that supported the public high school for Whites. A Georgia statute required tax dollars from all residents to support free public schools. But, "separate schools shall be provided for the white and colored races."[53] The Richmond County School Board had converted the only Black high school into a primary school on the grounds that Blacks needed only "the rudiments of education."[54] The U.S. Supreme Court denied the equal-protection claims of Black parents in Richmond. The Court determined that the interest and convenience of the White majority did not require a high school for Blacks. Furthermore, as in *Roberts*, the state could decide how it would distribute its funds.[55]

In 1908, the Supreme Court upheld the conviction and sentence of several White administrators of Berea College who chose to operate a racially integrated college. In *Berea College v. Kentucky*, the U.S. Supreme Court entrenched racial segregation in education.[56] Berea

College, a private college, was established to promote the cause of Christ and provide an education to all persons. However, a Kentucky statute made it "unlawful to operate any college, school or institution where persons of the white or negro races are both received as pupils for instruction."[57] Violators would be arrested and fined $1,000 and fined another $100 per day of continued offense. In affirming the convictions of Berea College administrators, the Supreme Court swept away the ability of Whites to choose to cross the color line without suffering criminal as well as societal penalties.

In 1909, the National Association for the Advancement of Colored People (NAACP) was formed to construct a strategy to address the conditions under which Blacks endured in America.[58] The NAACP began as the Conference on the Status of the Negro with two divergent conceptions of itself: "the first, as primarily a white organization dedicated to African-American uplift through well-financed suasion; the second, as an interracial phalanx challenging the mainstream public to accept ever-greater civil and social rights for the nation's historic minority."[59] The NAACP was formed from the Niagara Movement, comprised of Black and politically powerful Whites.[60] W. E. B. DuBois, the prominent intellectual and most vocal member of the NAACP, arose as its formidable leader.[61]

Under the *Plessy* doctrine, school children were treated as either Black or White. In 1927, Martha Lum, a Chinese student, was classified as colored and denied admission to a Whites-only Mississippi public school.[62] Her father, Gong Lum, brought legal action, alleging that forcing Martha to attend the school for Blacks violated her equal-protection rights under the Fourteenth Amendment. She lost in the Mississippi state courts and appealed to the U.S. Supreme Court. The U.S. Supreme Court affirmed her exclusion. William Howard Taft, chief justice and former president of the United States, wrote the opinion for the majority:

> [This] case reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity of a common school education in a school which receives only colored children of the brown, yellow or black races.[63]

The Court left the placement in racial categories to the discretion of each state.[64] As in *Roberts v. Boston* and *Cumming v. Richmond County*, the logistics of separating the races in public schools was an exercise of state legislative powers.[65] However, by this logic, if the state segregated its public school students by race, then it was responsible for building dual facilities. It was a double-edged sword, and a successful legal strategy would be based squarely on the financial burden building and maintaining a dual system would cause state governments.

Building the Case: *State of Missouri Ex Rel. Gaines v. Canada* and *Sipuel v. Oklahoma*

In Missouri, Lloyd Gaines graduated from Lincoln University, the designated Black college. Gaines wished to attend law school at the racially restricted University of Missouri-Columbia.[66] He was denied admission due to his race. A Missouri statute afforded him the opportunity to attend a school out of state if facilities could not be provided within the state of Missouri. Gaines challenged the decision in *State of Missouri Ex Rel. Gaines v. Canada* (1938).[67] He argued that "separate but equal" meant either admitting him into the University of Missouri or building a Black law school at Lincoln University financed by the state of Missouri. Government officials offered promises of a law school for Blacks.

In 1938, the Supreme Court decided Gaines should be admitted to the University of Missouri School of Law until such a school was built at Lincoln University.[68] Missouri chose to admit one Black student into its law school rather than build an entire facility that would develop Black lawyers. In his dissent, Justice McReynolds condemned the Court's decision to integrate the law school. He states that "to break down the settled practice concerning separate schools [would]...damnify both races."[69] McReynolds notwithstanding, the decision was a major victory for civil rights advocates, equal education, and the Black community.

Gaines was a legal weapon against the separate but equal doctrine. Under the leadership of Charles Hamilton Houston, a legal strategy was implemented that consisted of laying an incremental foundation

of Supreme Court jurisprudence that would lead unequivocally to an end to racial segregation.[70] Houston described the work of lawyers as that of "social engineers or leeches."[71] Their primary target would be education. Most states practicing segregation in higher education lacked a separate Black graduate school, medical school, or law school; this failure became the impetus for court challenges on behalf of those Black applicants.[72] By 1947, cases challenging segregation were pending in Oklahoma, Texas, Louisiana, and South Carolina.[73]

The success of *Gaines* led to victory in *Sipuel v. Board of Regents* (1948).[74] Ada Lois Sipuel was deemed qualified for law school by the trial court.[75] However, she was denied admission to Oklahoma's law school because of her color.[76] Without a state law school for Blacks in Oklahoma, the Supreme Court ruled that Sipuel must be admitted to the University of Oklahoma. She was offered a roped off area of the capitol building with separate teachers and classes and only permitted to use the library at the state capitol. Both Sipuel and Gaines were treated poorly once admitted. However, the *Sipuel* and *Gaines* cases established Supreme Court precedent for admitting Blacks into graduate school programs.

In *McLaurin v. Oklahoma* (1950), George W. McLaurin, a Black applicant, was admitted to graduate school at the University of Oklahoma. As in the case of Ada Sipuel, McLaurin was segregated from the other students in the classroom and forced to sit at a special table in the library and cafeteria.[77] The Supreme Court ruled against the state university, finding that such an isolated environment prevented McLaurin from gaining full educational benefits in violation of his equal-protection rights.[78] In an effort to circumvent Court-mandated desegregation, state legislatures quickly created professional schools especially for Black students. However, in *Sweatt v. Painter* (1950), a makeshift law school for Blacks created by the state of Texas was deemed unequal in its resources, staff, and facilities, leading to the integration of the University of Texas Law School by Herman Marion Sweatt.[79]

Considered by many to be the home of the Confederacy, Alabama and its segregation laws were dealt another blow when the Supreme Court decided the state could not prevent Autherine Lucy and Polly Anne Myers, Black college applicants, from attending the

all-White flagship college, University of Alabama. In 1952, Lucy and Myers were denied admission to the university based on their race. The Supreme Court decided *Brown v. Board of Education* in 1954. Despite the Court's decision, William Adams, dean of admissions at the University of Alabama, refused to admit Lucy and Myers. Attorneys from the NAACP represented the women in their appeal to the U.S. Supreme Court. In *Lucy v. Adams*, 350 U.S. 1 (1955), the Court ruled that the university must admit the women. The victories in *Sweatt, Gaines, McLaurin, Lucy,* and other cases cleared the path for the Court to decide *Brown v. Board of Education of Topeka*, striking a fatal blow to segregated education in public schools.

A Blow to Segregation: *Brown v. Board of Education of Topeka*

In 1954, the U.S. Supreme Court handed down *Brown v. Board of Education of Topeka*.[80] *Brown*, a class-action, was consolidated with cases filed on behalf of Black children in Delaware, Virginia, and South Carolina relegated to schools segregated.[81] The cases were premised on slightly different facts. But, the common legal question was the validity of separate public schools for Black and White children.[82]

The all-White public school was within a few blocks of the home of Linda Brown, the plaintiff in *Brown v. Board.* She was a Black public school student forced to attend the all-Black school located across dangerous railroad tracks miles from her home. The Kansas Supreme Court denied the claims of *Brown*, upholding *Plessy.* Leading a team of civil rights attorneys, Thurgood Marshall, of the NAACP, appealed the case to the U.S. Supreme Court. The NAACP focused on Justice Harlan's dissent in *Plessy* to form the basis for its legal arguments against segregation.[83] Social scientists led by Black psychologists Drs. Kenneth and Mamie Clark presented studies that demonstrated the invidious emotional scars ("badge of inferiority") left on Black children attending segregated schools.[84]

The *Brown* opinion was, by some accounts, a politically driven decision.[85] The country was in the midst of the Cold War with the Soviet Union and international criticism surrounding the treatment of Blacks in America was of growing concern to the State Depart-

ment.[86] President Harry Truman signed Executive Order 9981 desegregating the military in 1948.[87] Chief Justice Earl Warren, former governor of California, ascended to the Court in 1953 as a nominee of President Eisenhower.[88] Although Chief Justice Warren was himself resolutely against racial segregation, the Constitution, as interpreted by the Court in prior decisions, supported de jure segregation.[89] The *Brown* case, having originated in the Midwest, offered the Court an opportunity to overturn *Plessy* without directly implicating the South.

Given the high stakes, Chief Justice Warren needed to draft the legal argument in a manner that would result in unanimity on the Court due to the social and political obstacles awaiting the decision.[90] The Supreme Court wrestled with the breadth of the Fourteenth Amendment and the legislatures' intent at the time of its ratification.[91] The Court's decision turned on the ignorance of Justice Brown and his colleagues in the majority—specifically, ignorance regarding the psychological effects of racial segregation.[92] Using the psychological evidence presented by the NAACP, the Court assumed that if Justice Brown and the *Plessy* majority had been aware of the emotional damage caused by separating Black children, that Court would have ruled differently. In 1896, the Court refused to accept that racial segregation would place a badge of inferiority on Blacks. In 1954, the Court decided that racial segregation in public schools violated the Fourteenth Amendment. Segregation is declared inherently unequal in public schools.

Brown v. Board became a social, political, legal, and spiritual symbol of concerted Black efforts for full citizenship. The *Brown* decision is attributed with the commencement of a twentieth century civil rights movement. After *Brown*, Blacks organized regionally or nationally to strategically challenge legal segregation in every aspect of American life.

A Prior Legacy in Kansas: *Williams v. City of Parsons*

Brown stemmed from a strong legacy of school cases in the state of Kansas. Within a year of the abolition of slavery, Kansas enacted a

statute giving local boards of education the power to choose to racially segregate schools. Most major school districts were not segregated until the *Plessy* decision. In 1881, Leslie Tinnon, a Black student, sued the city of Ottawa, Kansas, to permit him to attend a racially integrated high school.[93] The Ottawa administrators had recently decided "colored children...be place[d] in the frame school house and a teacher of their own color be employed to instruct them; [this would] remedy the evil complained of."[94] The Kansas Supreme Court ruled in favor of the plaintiff. The ruling had little to do with justice for Tinnon, turning instead on whether a small, second-class city such as Ottawa could racially segregate children. Based on Kansas common law, only first-class or large cities such as Topeka could segregate their students. Nonetheless, it was a victory.

In 1903, the Kansas Supreme Court decided *Reynolds v. Topeka*.[95] The suit involved William Reynolds, who sued because he was denied admission into a school for Whites only. Quoting from Brooklyn's *King v. Gallagher* case, in which the Black child was denied access to the Whites-only school, the Kansas Supreme Court asked the rhetorical question:

> [C]onceding, therefore, the fullest manner, that colored persons, the descendants of Africans, are entitled...to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provided separate schools for colored children, is a violation of any of these rights....[96]

The response, at that time, was a resounding no. Topeka could segregate its schools without violating the Constitution. The Kansas state court then taunted Black parents, bragging that their failure to appeal segregation in public education to the U.S. Supreme Court "disclose[d] a remarkable consensus of opinion...as to the [negative] result of such an appeal."[97]

Then, in *Williams v. Board of Education of the City of Parsons*, decided in 1908, the Kansas Supreme Court found in favor of Black students challenging the school district's segregation policy.[98] The Court found inequality based on travel distance as opposed to race. The children were forced to walk to a school designated for Blacks located across thirteen train tracks over which one hundred trains of

the Texas Railway Company passed daily. Then, they crossed another eight tracks over which the St. Louis and San Francesco Railroad Company ran its trains. In *Thurman Watts v. Coffeyville* (1924),[99] a Black student was denied admission to the high school due to lack of space. The school board claimed if one Black were admitted to the White school, all of them might want to attend, causing future space problems in the building. The Kansas Supreme Court agreed.[100]

Post-Brown Battles: *Brown v. Board of Education of Topeka II* and *Green v. New Kent County School Board*

Unfortunately, Linda Brown and other Black school children in the initial *Brown v. Board I* case would have to wait for integrated schools.[101] In 1955, the NAACP argued *Brown v. Board of Education of Topeka II*. In that case, the NAACP called for immediate integration of public schools. Instead, the U.S. Supreme Court ruled that the school districts would develop their own plans for implementing desegregation monitored by the local federal courts.[102] School districts were under a mandate to desegregate their schools "with all deliberate speed."[103] This theoretical timeline meant little to school boards where racism was embedded in the culture and politics. If *Brown I* was a declaration of war on White-centered American life, then *Brown II* offered a reprieve from any immediate change in the *status quo*. For Blacks, the *Brown II* decision undermined *Brown I* and turned desegregation efforts into an exercise in futility impacting generations of Black school children.

The ruling in *Brown II* was a legal disappointment.[104] Once again, the Court had sought a compromise on the backs of Black people.[105] *Brown II* provided a list of criteria that the U.S. District Courts were to follow in making a determination that school districts were complying in "good faith" with the Court's order.[106] However, without a specific time-frame for implementation, state governments, school boards, and White parents vigorously resisted any plan that would result in real desegregation.[107] In response to *Brown*, state legislatures across the South enacted at least forty-two segregationist laws.[108] In *Southern Manifesto*, segregationists set forth resistance to *Brown*, which they considered an unconstitutional violation of states' rights.[109] The drafters of the *Southern Manifesto* advocated only "lawful means" should be used to reverse it; however, terrorism and violence remained tactics as well.[110]

After inciting White parents, the Little Rock school district used the volatile situation as a pretext for abandoning desegregation of its schools. In 1957, in the case of *Cooper v. Aaron*, the Supreme Court upheld desegregation of the Little Rock, Arkansas, public schools, in spite of threats of violence.[111] The school district refused, arguing that desegregation was dangerous and any efforts to do so would certainly lead to loss of life.[112] When school opened, few White students enrolled in schools with a majority of Black students and Blacks who attempted to enroll in White public schools were assaulted and threatened.[113] When civil rights leader Fred Shuttlesworth attempted to enroll his daughter in an all-White public school, he was brutally beaten by a White mob.[114] Arkansas Governor Orval Faubus called forth the state's National Guard to *prevent* Black children from enrolling in White public schools.[115]

When he discovered that the Black students were secretly enrolled anyway, Faubus allowed an angry White mob to surround the school.[116] President Dwight Eisenhower, former Army general, reluctantly sent in the 101st Airborne paratroopers to restore order. The military had to provide a daily escort to protect Black children attending Central High School in Little Rock.[117] President Eisenhower stated that the enforcement of *Brown* "should not be allowed to create hardship or injustice [for Whites]."[118] There is little evidence that the Black children and adults injured while attempting to attend a desegregated school were ever financially compensated by state or local governments.

Resistance

School boards resisted desegregation at every turn. The Prince Edward County School Board in Virginia decided to close its public schools and contribute financial support to the private, segregated White schools in the county.[119] Upon receiving the Court's edict to desegregate, the school board refused to appropriate money to finance public schools, rationalizing:

> The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle and, at the same time, maintain an atmosphere conducive to the educational benefit of our people.[120]

Other school districts attempted to twist Justice Harlan's dissent in *Plessy* against the plaintiffs by producing an alleged "color-blind" school assignment plan.[121] These so-called desegregation plans tried but failed to allow White students to voluntarily attend the school of their choice.

Although states resisted desegregation, there were certain victories. Within months of the *Brown I* decision, challenges against segregated colleges in Florida and Louisiana were decided in favor of the Black plaintiffs.[122] After a decade of protest and litigation, a Philadelphia private K–12 school restricted to "White male orphans" was desegregated. In that case, deceased steel magnate Stephen Girard provided in his will that only White orphans could receive an education at Girard College. However, the will stated that the trustees of the school must be appointed by the City of Philadelphia. In *Commonwealth of Pennsylvania v. Board of Directors of City Trusts*, the Supreme Court held that the trustees under the will of Girard, appointed by the City of Philadelphia, could not discriminate against Black male orphans.[123] The court reasoned that the will created a trust account from Girard's private fortune, however, the Fourteenth Amendment applied to the operation of the trust by the City of Philadelphia. Public control was evident in that the trustees of the Girard Trust were publicly appointed trustees in complete control of the operation of a privately endowed trust.[124] The desegregation of Girard College served notice as to the breadth of creativity required by the Court to meet the recalcitrance of White school leaders.

School districts attempted to produce an alleged "color-blind" school assignment plan.[125] The color-blind plan was defeated because the Court began to appreciate that with "the background of segregation," such a "limit on remedies would render illusory the promise of *Brown*."[126] Such color-blind plans included offers to White students to voluntarily attend the school of their choice. Of course, they did not choose to attend schools in which the majority of students was Black.

In *McDaniel v. Barresi* (1971), the U.S. Supreme Court held that voluntary desegregation plans are tantamount to maintaining a segregated system.[127] In *Monroe v. Board of Commissioners* (1968), White students were assigned to Black schools and then allowed to transfer.[128] That plan failed. The Supreme Court was presented with the depth of racial bigotry wrought by *Plessy*. Given the history and background of segregation, tepid remedies would render illusory the promise of *Brown*.[129] In *Green v. New Kent County School Board* (1968), the Supreme Court directed school districts to develop affirmative plans to desegregate their schools and evenly distribute the district's resources.[130] The previous dual school systems—one Black, one White—had to be replaced with a unitary, single school system with equal facilities and resources.[131] Transportation, extracurricular activities, faculty and staff salaries, buildings, and the like should bear no evidence of racial distinction.[132]

Busing

After several years of court battles, busing was implemented as a means of desegregating schools. In *Swann v. Charlotte–Mecklenburg*, decided in 1971, the Supreme Court upheld the Charlotte–Mecklenburg, North Carolina, school board's busing policy as a legitimate method for integrating public schools.[133] The Court had demanded a busing plan that "promises realistically to work, and promises realistically to work now."[134] However, busing for integration purposes was a controversial short-lived success. The tactics of evasion practiced by the school districts would continue for decades as lawyers and Black parents were enmeshed in time-consuming and resource-draining litigation.[135] Black communities bore the brunt of busing efforts.

Black public schools built during segregation were demolished. Black students were then bused to the formerly all-White schools. In order to attend those schools, Black students rose early and returned

home late.[136] "White flight" proliferated. White parents removed their children from public schools to newly created private Christian academies.[137] Black children were denied admission to these private schools. In *Runyon v. McCrary* (1976), the Supreme Court found that Virginia's racially discriminatory admission to private schools violated a federal civil rights statute.[138] Millions of White parents moved to the suburbs. Legal remedies were sought that would reach suburban schools. However, in *Jenkins v. Missouri* (1995), the Court decided that suburban school districts had not violated the rights of Black urban school children.[139] Therefore, any attempts by city school districts to fashion an interdistrict school assignment plan reaching into the suburbs were unconstitutional.[140]

Desegregation orders were necessary to integrate schools in the North as well as in the South. Schools in California were separated by race and categories—Indian children or children of Chinese, Japanese, or Mongolian parents; Latinos were not permitted to attend schools with White students.[141] Latinos have been subject to segregation and isolation based on poverty and language.[142] Until 1947, the California Education Code provided:

> § 8003. *Schools for Indian children, and children of Chinese, Japanese, or Mongolian parentage: Establishment.* The governing board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage.
>
> § 8004. *Same: Admission of children into other schools.* When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school.[143]

However, post-*Brown* busing for desegregation purposes was resisted.[144]

In *Gomperts v. Chase* (1971), the San Mateo, California, school board was unceremoniously voted out after it submitted a viable busing plan. Another school board replaced it, which then approved a voluntary student assignment plan similar to the ineffective plans initiated in the South.[145] Parents of Black and Latino students requested an injunction to stop the new plan.[146] They argued:

> California's Bayshore Freeway effectively isolated the Blacks and resulted in a separate and predominantly Black high school.
> State planning groups fashioned and built the Black community around that school.
> Realtors licensed by the state kept "White property" White and "Black property" Black.
> Banks chartered by the state shaped the policies that handicapped Blacks in financing homes other than in Black ghettoes.
> Residential segregation, fostered by state-enforced restrictive covenants, resulted in segregated schools.[147]

The Court sympathized with the plaintiffs.

The Court observed that public schools for Blacks and Latinos were "subnormal" and unequal to those of White students.[148] However, the injunction was denied because there was not enough time available to develop a workable plan before the start of school. In another California case, *Guey Heung Lee* (1971), the Court stated that it was apparent that the force of segregation remained even after the statute providing for the establishment of separate schools had been repealed.[149] The San Francisco School Board continued to draw school assignment districts meticulously along racial lines.[150] More urgent measures were needed to remove segregation from the public schools root and branch.

Yet, after the state's highest court developed a busing remedy for de facto (by tradition) segregation in Los Angeles public schools, California voters amended the state's constitution, thus nullifying the court's ruling. Mary Ellen Crawford, the lead plaintiff in this case action, appealed to the Supreme Court, arguing that the state's referendum, Proposition I, was a violation of the Fourteenth Amendment. Proposition I was crafted as if the major concern was "enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment."

Poorer Schools: *San Antonio School District v. Rodriguez*

Public schools in low-income communities evidence generations of discrimination and the lack of investment in children of color. A legal strategy to equalize financing of public schools was rebuffed by the U.S. Supreme Court. In 1973, the Supreme Court was presented with a Texas school district's appeal of a finding that schools financed by property taxes favored the wealthy while leaving poor neighborhoods with struggling schools and less than adequate educational opportunities. In *San Antonio v. Rodriguez*, the district court found in favor of the Latino student plaintiffs who had been disadvantaged by underfunded schools.[151] That court found that wealth was a suspect class and education was a fundamental right. However, on appeal, the U.S. Supreme Court, led by Chief Justice Warren Burger, reversed the decision.[152] In an opinion authored by Justice Louis Powell, a public school education was not deemed a fundamental right guaranteed under the U.S. Constitution, economic status did not rise to the level of analysis under the strict scrutiny standard, and therefore, the state's property tax system used for funding schools did not violate the equal protection clause of the Constitution.[153]

In *Crawford v. Board of Education of Los Angeles*, 458 U.S. 527 (1982), Justice Powell, on behalf of the Court, wrote that the state must have the power to decide how to best use its resources; racial segregation was not mandated by state law.[154] The Court sustained Proposition I as a nonracial exercise of the voter's political will. Unsure whether future desegregation efforts might become reality, White residents of Los Angeles fled to the suburbs.

White Flight

In similar fashion, public schools in cities across the country were attended mainly by minorities.[155] White parents opposed to busing and desegregation left the cities in "White flight." White havens were created in suburbs that precluded Blacks[156] (see Chapter 3). Racial integration became one of a number of reasons to abandon public schools for private ones.[157] Between 1968 and 1980, White student

enrollment declined in all major city schools.[158] For example, Atlanta's White student enrollment dropped from 62 percent in 1962 to 12 percent in 1975.[159]

CITY	% DECLINE IN WHITE STUDENTS
New York City	45.7
Los Angeles	63.4
Chicago	62.1
Philadelphia	41.2
Detroit	77.8
Houston	62.8
Baltimore	58.0
Memphis	54.6
San Diego	37.9
Washington, D.C.	59.9
Milwaukee	58.2
New Orleans	71.0
Cleveland	66.3
Atlanta	85.7
Boston	63.3
Denver	58.7

De facto (by tradition) segregation replaced de jure (legal) segregation in America's schools as school districts in the North and South refused to comply with court orders to integrate.[160] In the South, federal courts upheld the rights of the Ku Klux Klan to hold regular meetings in a Baton Rouge, Louisiana, public school.[161]

For many urban school districts in the North, busing for desegregation within the city is no longer practicable given the small number of White students.[162] Urban school boards and the courts focused extraordinary resources on coaxing White students from the suburbs or private schools into public city schools.[163] At city schools, underachievement resulted from overcrowded classrooms, limited resources, and inequitable funding levels.[164] Black and Latino students have become more racially segregated.[165] The urban middle-class tax base is dwindling. Too many schools for children of color are now in communities of poverty, "associated with low parental involvement, lack of resources, less experienced and [less] credentialed teachers with high teacher turnover—all of which combine to exacerbate educational inequality for Black

students."[166] For decades, desegregation efforts, specifically busing, overshadowed the education of Black students.

In 2002, President George W. Bush signed the No Child Left Behind Act. This legislation, intended to raise the academic standards of all children in public education, directed especially at those children in "failing" schools.[167] Unfortunately, there is relatively little federal funding for states to reach the problems and fully implement the program. The New York State Appellate Court made clear where children in schools in the New York City public school system with a majority of minorities enrolled fell within the socioracial hierarchy. In *Campaign for Fiscal Equity, Inc. v. State of New York* (2002), that court ruled New York State need only provide an eighth-grade education to meet the state's mandate of an adequate education.[168] That court explained that "the skills required to enable a person to obtain employment, vote and serve on a jury are imparted between grades 8 and 9..."[169] The presumption is that Black and brown children need preparation for employment and political engagement of the most basic type suitable for the lowest rung of the socioracial ladder. Poor educational facilities are an important characteristic of insular poverty. These schools prevent participation in economic life at a substantive level.[170] Poorly prepared in underfunded schools, Black children are often made fodder for a waiting criminal justice system.

Affirmative Action/Reverse Discrimination: *Bakke* and *Grutter*

One hundred years after the Emancipation Proclamation and nearly ten years after the *Brown* decision, disfranchisement remained a reality for Black school children in America. A civil rights movement challenged post-*Brown* segregation. In March of 1963, hundreds of thousands of protesters marched through Washington, D.C., for jobs and freedom. Their hopes lay with President John F. Kennedy's call for social reform. However, President Kennedy was assassinated in 1963 leaving his vice president, Lyndon Baines Johnson, a Southerner, to usher in major civil rights legislation. President Johnson signed the Civil Rights Act of 1964 as well as the Voting Rights Act of 1965.

In September of 1965, Johnson issued Executive Order 11246. That order required government contractors to take "affirmative action" in hiring minority employees. His successor, President Richard Nixon, initiated the Philadelphia Plan, an experiment to guarantee the hiring of Blacks in construction and craft unions. The 1969 initiative did not impose quotas. But, it required affirmative action in meeting employment goals. The federal government recognized the connection between American history and present economic obstacles.

However, by 1978, the country was in economic distress brought about by a global recession. America's economic woes made it difficult to recall the connection between the history of American racism and the need for affirmative action. In the North, busing Black school children in Boston led Whites to riot. In the South, Black parents grew frustrated with recalcitrant school systems relying on a time factor of "all deliberate speed" to stall integration. Legal decisions such as those in Denver, Georgia, and Oklahoma promised desegregation, only to disappoint in practice.[171]

In California, a White applicant, Allen Bakke, was denied admission to the medical school of the University of California at Davis. Bakke claimed he was denied admission based on "reverse discrimination" in violation of the equal-protection clause of the Fourteenth Amendment.[172] Under a special admissions program, Black and minority applicants were given an allotted sixteen out of a total of hundreds of spaces in the medical school. The school reasoned that Black doctors were needed and most likely to practice medicine in medically underserved areas. The Court had to decide whether voluntary measures at the University of California Medical School, intended to remedy the present effects of their past discrimination, were constitutional.[173] The Court found that the admissions policy prevented Whites from competing.[174]

The Supreme Court struck down the program, stating it could not support a remedy in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.[175] Unless the medical school could provide evidence of its own discrimination, the school could not provide a remedy for Black applicants. A plurality made up of Justices Stevens, Burger, Stewart, and Rehnquist held in *Bakke* that the admissions program violated Title VI of the Civil

Rights Act of 1964. Another plurality made up of Justices Brennan, White, Marshall, and Blackman dissented.[176] Justice Powell cast the critical vote approving the use of race in school admissions but only if there is a proven compelling government interest. He did not find such an interest, assessing the affirmative action program under challenge as an unconstitutional violation of Bakke's Fourteenth Amendment rights.

Despite a history replete with disfranchisement, the state must have a compelling reason to create an affirmative action plan and race can only be one factor in that plan.[177] The very hard-fought cases used to gain educational benefits for Blacks were now applied against affirmative action efforts.[178] In interpreting the Fourteenth Amendment, Justice Powell stated:

> Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.[179]

Powell's analysis would become the standard by which affirmative action policies in education would be judged.[180]

The Supreme Court was presented with a number of reverse discrimination cases not directly related to education. In *United Steelworkers of America v. Weber*, the Court upheld an affirmative action plan challenged by White steelworkers.[181] In *Fullilove v. Klutznick*, a set-aside program benefiting Blacks, Hispanics, Asians, Native Americans, and Eskimos was upheld by the Court in 1980.[182] In *Firefighters Local Union No. 1784 v. Stotts*, the Supreme Court found that Blacks recently hired under an affirmative action program could be laid off first because they lacked seniority.[183] In *Local 28 of the Sheet Metal Workers v. Equal Employment Opportunity Commission*, the Supreme Court upheld an affirmative action hiring plan challenged by White union members because the plan benefited more than the specific Blacks harmed by their discrimination.[184]

In *United States v. Paradise*, decided in 1987, the Supreme Court upheld a challenge to a court-ordered affirmative action plan. The plan required Alabama to promote Black state troopers. Prior to that decision, none of the 232 state troopers with a rank above corporal were Black.[185] However, Black teachers in Jackson, Michigan, would not fare as well. In *Wygant v. Jackson Board of Education*, the Supreme Court ruled in favor of White teachers challenging a collective bargaining agreement that allowed the Jackson School District to retain Black teachers during layoffs in order to maintain racial balances in the faculty.[186]

With the election of a conservative Republican, President Ronald Reagan, in 1980, the country entered an era of social conservatism. Reagan and his successor, George Bush, established an anti-affirmative action agenda. "Reverse discrimination" law suits were brought by Whites in education as well as employment and federal contracts. The legal standards that would allow affirmative action were made narrower in each case. In 1989, in *Croson v. City of Richmond*, the Supreme Court struck down an affirmative action program that set aside a percentage of government contracts for Black construction companies.[187] The Court determined that an affirmative action plan that could not be linked to specific acts of past governmental discrimination in that particular area was unconstitutional.[188] There must be a compelling governmental interest and a narrowly tailored plan. A government's attempt to address racism now must be directly linked to specific instances of past racism. Because the City of Richmond failed to identify a need for remedial action in the awarding of its public construction contracts, its affirmative action plan violated the equal-protection rights of White contractors.[189] America's socioracial hierarchy is conveniently forgotten. Attacks on affirmative action continue.

A few years later, Cheryl Hopwood, a White law school applicant, was denied admission to the University of Texas Law School. Hopwood argued that she had been discriminated against solely because of her race.[190] The trial court agreed. The law school appealed. The U.S. Court of Appeals ruled that the school's consideration of race in admissions violated Hopwood's equal protection rights.[191] The law school appealed to the U.S. Supreme Court. The school understood the need for an affirmative action plan. However, in 1992, the Supreme Court refused to review the decision. The Court let stand the appellate court's ruling as properly decided.[192] Despite the legacy

of *Sweatt v. Painter*, the court found no justification for an affirmative action policy at the University of Texas Law School.[193] The threat of reverse discrimination had a chilling effect, preventing the development of affirmative action efforts in education.

Hopwood and *Croson* undermined efforts to create affirmative action plans. Colleges and professional schools feared protracted and costly reverse discrimination litigation. In public schools, busing and desegregation plans were challenged as a violation of the equal-protection rights of White students.[194] In 1995, the Supreme Court struck down another government affirmative action policy. A nonminority company, Adarand Constructors, Inc., challenged a federal government program that provided incentives to encourage contracts with minority-owned business enterprises.[195] The "strict scrutiny" legal standard, the Court's most rigorous, was applied.[196] Adarand won.

In a prior case, *Wygant v. Jackson Board of Education*, the Court decided that strict scrutiny must be applied in cases alleging race discrimination by a governmental entity.[197] In *Adarand*, Justice Sandra Day O'Connor indicated that the strict scrutiny theory did not necessarily doom affirmative action. Justice O'Connor explained that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[198] However, the *Adarand* decision appeared only to embolden affirmative action opponents. As with any advancements by Blacks in America, the backlash was brutal.

In 1996, the State of California passed Proposition 209. This statewide referendum prohibited affirmative action in public education, public employment, and public contracting.[199] Once enacted, the anti-affirmative action legislation was challenged by Blacks, Latinos, women, and coalitions comprising educators, unions, and public officials.[200] The Supreme Court denied a request for review. Thus, the decision was allowed to stand without review.[201] The number of Black and Latino students attending graduate school, law school, and colleges in California plummeted.[202]

In 2003, the Supreme Court was presented with two reverse discrimination cases against the University of Michigan. The Supreme Court had last addressed the use of race in public higher education

over twenty-five years earlier in the *Bakke* case. The Michigan cases were brought by White applicants challenging their denial of admission to the University of Michigan.[203] Jennifer Gratz challenged the admissions program at the University of Michigan's College of Literature, Science and Arts.[204] The college admissions process awarded twenty points to applicants from underrepresented minority groups.[205] Barbara Grutter challenged the use of race in admissions at the University of Michigan Law School,[206] which used race as one factor among a list of criteria in admissions.[207] Black applicants as well as other candidates of color benefited from the program.

The Supreme Court, in a divided opinion delivered by Justice O'Connor, struck down the use of race by the college in *Gratz* as unconstitutional.[208] Giving points was deemed a "quota system," which allegedly shielded Black applicants from competing with their White peers.[209] In *Grutter*, the Supreme Court found that the University of Michigan School of Law had a compelling interest in having a diverse student body.[210] The Court reasoned that law schools are a training ground for our country's future leaders. The state of Michigan needed to expose law students "to widely diverse people, cultures, ideas, and viewpoints" in order to equip them for leadership in an increasingly global business world as well as a diverse American society.[211]

The divergence in the Supreme Court's decisions in *Grutter* and *Gratz* demonstrates the complexities of any efforts made to address centuries of racism and ongoing discrimination in education. Diversity is now the key word. Maintaining diversity is a compelling state interest. The handful of Black students who are admitted based on a formula where race is only a single factor are performing a civic function. Their classmates are future White leaders of the free world who need to associate with a diverse population. It brings an appearance of "legitimacy in the eyes of the citizenry."[212] The words are taken with sincerity in their support of diversity and affirmative action. However, despite numbing oppression, Blacks have presented their case to the courts century after century, yet, decades after *Brown* their presence through an affirmative action program is justified only because the presence of Blacks will benefit White students.

Affirmative action for Whites in America has taken many shapes. After World War II, the G.I. Bill provided Whites with low-cost

mortgages and tuition grants, points on government examinations, and low-interest business loans.[213] Another such affirmative action program was introduced by President Franklin D. Roosevelt in the 1930s, called the New Deal.[214] The spoils of these affirmative action programs (homes, real estate, social position, corporations) are now the inheritance of generations of White offspring.

Affirmative action programs were provided to Whites at a time when Blacks were forcibly segregated and precluded from any direct benefit from the programs.[215] Given the abbreviated history of affirmative action for Blacks, Justice Harlan's words of dissent in the *Civil Rights Cases* of 1883 still ring true: "It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws."[216]

Present-Day Vestiges: Segregated and Underfunded Public Schools

Governmental failures and entrenched racism continue to undermine the centuries-long effort of Black parents and White advocates to gain an equal education for Black children. Progress made by legal challenges is undermined by social upheaval and continued prejudice. White flight has left public schools across the country with a majority of minority students.[217] Historically, public schools attended predominantly by Blacks were underfunded. Racism endemic in systemic underfunding continues today. In 2004, Alabama held a referendum to repeal a provision of its constitution that mandates racially segregated schools. The vote was merely symbolic, given the decisions of the Supreme Court and Congressional acts. This is fortunate because the referendum was soundly defeated by those who would maintain segregated schools. *Brown* presented American society an opportunity for positive change, which has been consistently resisted. This worthy battle has continued into the new millennium with *Meredith v. Jefferson* and *Parents Involved in Community Schools v. Seattle School District, No. 1.* In 2007, the Supreme Court decided when it is legally appropriate to use race as a factor in public school admissions.[218]

Following emancipation, Herculean efforts were made by Blacks to become literate. But, a lack of political will, fear of competition, and racial prejudice stymied federal financial support for Black

achievement in education. It is a tale retold with great consistency. Commencing with *Roberts*, Blacks have faced numerous obstacles in the struggle to obtain an equal education for their children. Despite *Brown*, governmental failures, social tradition, entrenched racism, and an uncertain Supreme Court have prevented the realization of *Brown*. For most Black children, the path to education still leads to segregated underfunded public schools. One is reminded of the Bible verse, "there is no straw given unto thy servants and they say to us, make bricks."[219] Blacks and other racial minorities, must continue the struggle against educational disfranchisement by law and tradition. The education of future generations of children depend upon it.