CHAPTER 3

AFRICAN AMERICANS

The Rehnquist Court, the Resurrection of Plessy, *and the Ever-Expanding Definition of "Societal Discrimination"*

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My education cases take me to towns like Gadsden, Alabama, where echoes of the Civil War still reverberate under the mighty Coosa River's steel bridge from whose beams black men were once lynched. In Gadsden, I am litigating a school desegregation case, filed more than three decades ago by my predecessors at the NAACP Legal Defense and Educational Fund (LDF), which is aimed at forcing compliance with Brown v. Board of Education's *mandate that separate and unequal schools be eradicated.*†

After decades of federal court supervision, one might assume that schools in places like Gadsden would have moved further toward achieving racial equality. In 2004, however, many Gadsden children still attend a middle school named after Nathan Bedford Forrest, the uneducated, slave-owning, first Grand Wizard of the Ku Klux Klan. When my colleagues and I argued that such a name might alienate African American students, school officials resisted in a vociferous manner similar to the self-righteous resistance exhibited in most southern districts in the wake of Brown.

Our nation's history of slavery and apartheid is still reflected in symbols like a high school using a rebel gun-toting soldier as a mascot, as well as in the disparities evident in the largely segregated schools. On one of my first visits to the predominantly African American public high school in Gadsden, I saw broken desks

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† For additional discussion of the Gadsden case, see Lia B. Epperson, Resisting Retreat: The Struggle for Educational Equity in the Post-Brown Era, *66 U. Pittsburgh L. Rev.* 131 (2005) 1.

and leaking roofs. Bathrooms lacked sufficient toilet paper and soap. The chemistry lab lacked running water and the equipment necessary to carry out the experiments listed in lesson plans. Students had fewer opportunities to take the upper level and specialized classes that were available at other schools and that make students more attractive candidates to colleges and universities.

Unfortunately, the situation facing Gadsden children is not unique. Black and brown students nation-wide experience similar patterns of segregation and inequities in facilities and curricular offerings. Few recognize, however, that educational equity has been thwarted at many turns. Fewer still understand how the Supreme Court has made it harder to achieve that ideal.

This chapter will examine how the Court has rolled back the civil rights of African Americans in the areas of educational opportunity, affirmative action, voting rights, fair employment, and disparate impact litigation.

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So far as the colored people of the country are concerned, the Constitution is but a stupendous sham…keeping the promise to the eye and breaking it to the heart.…They have promised us law and abandoned us to anarchy.

Frederick Douglass

For more than sixty years, the NAACP LDF has been active in safeguarding the civil rights of African Americans and other disenfranchised groups. While LDF's early litigation strategy helped bring down Jim Crow laws, the promise of equality remains unfulfilled. I represent African American children for whom the racial equality promised in *Brown* remains a dream. They attend segregated schools in decaying buildings, where they struggle to learn the skills necessary to access the economic, political, and social networks long open to whites. Despite continuing racial disparities, recent Supreme Court decisions rolling back civil rights have made it even harder for those with the most at stake to have a voice. If allowed to continue, this Federalism Revolution—the campaign to dismantle federal protections for individual rights and upend fundamental notions of fairness and democracy—may well render the Equal Protection Clause of the Fourteenth Amendment the "stupendous sham" that Frederick Douglass deemed it at the close of the nineteenth century.

History

Over the last decade, the Supreme Court has mounted a two-pronged attack on the civil rights of African Americans, chipping away at their scope and

limiting remedies available to address their violation. This rollback has been undertaken in the seemingly neutral name of federalism—restoring the balance of power between the federal and state governments, and maintaining states' rights. In reality, however, the Rehnquist Court's Federalism Revolution has enabled states to evade federal anti-discrimination laws in a manner far beyond the intent of the Constitution, has impeded Congress's ability to enact anti-discrimination laws, and has narrowed the ability of private individuals to seek remedies for discrimination.

None of this, however, is new. Rather, the Federalism Revolution is eerily reminiscent of the dark time in American history when people were fighting to preserve the "peculiar institution" of slavery. At the Constitutional Convention of 1787, delegates from southern slave-trading states fought hard to limit the federal government's power, and won concessions protecting state sovereignty to maintain the institution.[1] The same type of federalism reemerged after Reconstruction in the *Civil Rights Cases* in 1883 when, with slavery not yet cold in the grave, the Court reasserted the specious mantle of states' rights, abandoning African Americans to Klan terrorism and state-sanctioned racism. The Court held that the Thirteenth and Fourteenth Amendments did not afford Congress the authority to enact the Civil Rights Act of 1875 (prohibiting discrimination in public accommodations), because the constitution "does not invest Congress with power to legislate upon subjects which are within the domain of state legislation…."[2] Indeed, the Court almost castigated African Americans for expecting the federal government to assure them the same rights long afforded to whites. Justice Joseph Bradley stated "[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[3] Thirteen years later, the Court concretized this deathblow to African American civil rights in *Plessy v. Ferguson*[4] by formalizing a system of state-sanctioned apartheid that remained in place for two generations until *Brown*.[5]

Although we no longer live in a time of slavery or Jim Crow, we still live with their legacy. By the time *Brown* was decided in 1954, the systematic subjugation of African Americans was firmly entrenched in governmental policy.[6] The racial hierarchy that has resulted from decades of oppression by public and private actors continues to pervade every facet of American life. These discriminatory policies and customs are directly linked to the structural inequalities that continue to limit the educational, employment, and asset-build-

ing opportunities of African Americans.[7] Unfortunately, the rollback of civil rights threatens to make these injustices permanent.

The Federalism Revolution: The "New" Retreat from Civil Rights Enforcement

The Federalism Revolution is a chilling echo of the states' rights doctrine that prevailed at the end of the nineteenth century. Just five decades after the separate-but-equal doctrine was struck down in *Brown*, the Supreme Court has initiated a massive retreat from established civil rights protections for African Americans.

While no single case heralded this change, one central strand of the Court's reasoning stems from *City of Richmond v. Croson* in 1989, a case in which the majority of justices undermined the legal struggle against racial discrimination. In the case, a white general contractor challenged the constitutionality of a Richmond city ordinance that required city construction contractors to set aside at least thirty percent of the contract's dollar amount for minority-owned subcontractors (businesses owned or controlled by "Blacks, Spanish-speaking [people], Orientals, Indians, Eskimos, or Aleuts").[8] For the first time, the *Croson* Court rejected race-conscious remedies in favor of a color-blind approach to the law by holding that courts should subject state and local affirmative action measures to the same strict scrutiny test applied to laws designed to promote white supremacy. The strict scrutiny test is difficult to pass because it requires that the race-based measure be both justified by a "compelling government interest" and "narrowly tailored" to achieve that interest.

In language paralleling that in the *Civil Rights Cases* a century before, the Court held that detailed congressional findings of racial discrimination in the construction industry merely showed the existence of amorphous "societal discrimination," and were, therefore, insufficient to prove the lingering effects of unconstitutional race-based discrimination.[9]

> To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.[10]

Noting the irony of the fact that the case arose in Richmond, VA—the former capital of the Confederacy and a city renowned for strict state-imposed segregation—Justice Thurgood Marshall could not fathom his colleagues' refusal to acknowledge that African Americans suffered discrimination in the construction industry.[11] Like in *Plessy*, the majority in *Croson* accepted the notion that racial discrimination is a social practice that neither the courts, nor Congress, nor the states have an obligation to change. This holding goes directly against the guarantees of the Fourteenth Amendment and the *Brown* decision, both of which authorized affirmative relief to overcome any continuing effects of racial apartheid. Indeed, the *Croson* opinion established an ever-expanding category of "societal discrimination" in educational opportunity, the vote, and fair employment.

School Desegregation

Nowhere is the Rehnquist Court's attack on the civil rights of African Americans more evident than in the area of school desegregation and education. Opening the doors to education means opening the doors to social, economic, and political opportunity—the very reason that LDF set about dismantling public school segregation in the early twentieth century. Yet the promise of *Brown* remains stymied by intransigent school districts, disinterested local judges, and intractable racist attitudes.

The Court's current approach to equal education differs markedly from its decisions during the twenty years following *Brown* when it expressed frustration with the sluggish pace of desegregation and required that school districts eliminate the dual school systems "root and branch."[12] In the late 1960s and early 1970s, the Court was not satisfied with merely removing the laws that required dual school systems, and instead imposed an affirmative duty on school districts to eliminate all vestiges of racial discrimination. Furthermore, the Court acknowledged that outside of racial segregation in schools, a system of residential segregation existed that was deeply tied to the country's history of racial oppression.[13] So long as substantial housing segregation persisted, therefore, a return to "neighborhood schools" would also mean a return to segregated schools.

Recent desegregation opinions by the Rehnquist Court have resurrected the question of the Court's commitment to the constitutional guarantee of equal protection for African Americans. In the 1990s, the Court began to release school districts from their obligation to desegregate public schools. In a trilogy of cases—*Board of Education v. Dowell* in 1991,[14] *Freeman v. Pitts* in 1992,[15] and *Missouri v. Jenkins* in 1995[16]— the Court concluded that school systems had achieved "unitary status," and that federal court desegregation or-

ders were to end. These opinions subordinated the constitutional rights of the victims of racial discrimination to local interests, and restored the system of neighborhood schools and local control that had allowed segregation to flourish in the first place.

The principle of local control is inextricably linked to racial subordination. It is not mandated by the text or the tradition of the Fourteenth Amendment, and is antithetical to the aims of the Equal Protection guarantee. Many whites favor local control, however, because their children attend resource-rich suburban schools. In contrast, African American children are more likely to attend under-resourced urban schools. The Court's reliance on local control is similar to color-blindness—both standards treat blacks and whites as if they are similarly situated, ignoring the pervasive vestiges of historical segregation.

Courts have also begun to question the legality of voluntary school desegregation programs. At least one appellate court has ruled that school boards cannot consider race as they make school assignment decisions—a ruling that prevents well-meaning educators from implementing programs to desegregate schools.[17] This attack on educational diversity and the corresponding extension of the color-blind notion runs counter to thirty years of Court decisions that acknowledged the constitutionality of race-conscious public school assignments, ignores the fact that this is a multiethnic nation with serious educational and social disparities, and threatens to exacerbate the harm already inflicted upon millions of children.

The simple and awful truth is that U.S. schools remain separate and unequal. Indeed, through the 1990s, public schools became substantially more segregated.[18] While fifty years have passed since *Brown*, I see in my work that much of its guarantee remains unfulfilled. If we are to see its promise realized, we must understand that while the law no longer commands race and class apartheid, society tolerates segregation and the resulting inequities.

Affirmative Action

In 1978, the Court held that race-conscious affirmative action policies were constitutional as long as they were crafted to remedy past discrimination or promote diversity.[19] In *Adarand Constructors v. Pena* in 1995, however, a bare majority struck down a federal program designed to promote affirmative action, reiterating the color-blind position that the Court first took in *Croson* (that race-conscious programs designed for a remedial purpose must satisfy the same standard of judicial review as programs designed to subjugate minorities).[20] *Adarand* ignored the fact that Section 5 of the Fourteenth Amendment gives Congress the authority to enact legislation to combat racial dis-

crimination against African Americans, and required strict scrutiny of *every* racial remedy, irrespective of whether it was created by federal or state legislation. Under *Adarand*, if a state university wanted to give special admissions preference to viola players, children of alumni, or athletes, it could do so without fear of judicial scrutiny. If those same state actors gave a preference to African Americans, however, the Court held that the Fourteenth Amendment would likely forbid it. As one academic noted, this doctrine of "color-blindness actually denies to racial minorities a privilege enjoyed by virtually every other minority group in the political system."[21]

The language used by Justice Clarence Thomas in his concurring opinion is hauntingly similar to that in *Plessy*. Compare Thomas's charge that "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law"[22] with *Plessy's* "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities.…Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."[23] Both opinions ignore the history of racial oppression that continues to affect educational and economic opportunities for African Americans.

More recently in the 2003 cases *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court again addressed the issue of the constitutionality of affirmative action in university admissions.[24] While the University of Michigan Law School defended its affirmative action policy by showing that racial diversity served a compelling government interest, LDF argued that the admissions policy, which included race as one of many considerations, was also necessary to remedy the continuing effects of racial segregation and discrimination. In an uncharacteristic break from its push for color-blindness, the Court upheld the use of race in admissions policies in order to further diversity.

The *Grutter* victory was due, in part, to the effort of a broad coalition of lawyers, academics, activists, community groups, businesses, and military officials. Millions of Americans expressed their support for affirmative action by submitting briefs to the Court, offering testimony, and protesting. As a result, the justices were forced to recognize the need for affirmative action in colleges and universities.

Voting Rights

In 1965, Congress enacted the Voting Rights Act, ending a century of African Americans being denied the right to vote. The next major challenge was to address the scourge of vote dilution, which requires the election of candidates at large rather than through districts (some of which are largely African American), and the drawing of district lines that splinter African

American communities and minimize their voting strength. In 1982, Congress enacted an extension to the Voting Rights Act, dispensing with the need to prove that vote dilution was intentional. Under the extension, one need only show that the challenged mechanism had the effect of diluting minority votes.

Beginning in 1993, however, the Rehnquist Court issued an opinion that, drawing on the logic of the *Croson* decision, began to chip away at the meaning of the Voting Rights Act. In *Shaw v. Reno*, white voters challenged a North Carolina reapportionment plan that, for the first time since Reconstruction, included two congressional districts in which a majority of the population was African American. Even though the plaintiffs did not claim that the plan impaired their ability to participate in the electoral process or diluted their votes, the 5-4 conservative majority upheld the white plaintiffs' Equal Protection claim. Writing for the majority, Justice Sandra Day O'-Connor invoked a new standard by declaring that race could not be the "predominant concern" in drawing district lines. Citing *Croson*, O'Connor argued that any color consciousness, regardless of its intent, was antithetical to the Constitution: "Classifications of citizens solely on the basis of race… threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.… These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race'."[25]

The most disturbing thing about *Shaw v. Reno* was that the Court abandoned settled law and fashioned a new legal standard. In a cutting dissent, Justice Byron White stressed that it was "both a fiction and a departure from settled equal protection principles" for the majority to void a redistricting plan that allowed North Carolina to send its first African American representatives to Congress since Reconstruction.[26]

Prior to the enactment of the Voting Rights Act extension, many African American voters encountered inferior voting equipment, improper purges from the voting rolls, and voter intimidation. While the influence of minority voters has clearly increased since that time, racial inequities in voting remain. In the 2000 presidential elections, for example, many African Americans were denied the right to vote because of improper purges from the voting rolls, outdated voter equipment, and insufficient staffing at polling sites in African American precincts. It is a constant challenge to ensure that civil rights legislation is not reduced to empty words. Federal law must safeguard the voting rights of African Americans.

Fair Employment

In *Wards Cove Packing Company v. Atonio* in 1989,[27] the Court's conservative 5-4 majority undermined the 1971 *Griggs v. Duke Power Co.* decision (which had governed employment law for more than fifteen years) by extending the *Croson* color-blind rationale to fair employment. In *Griggs*, a unanimous Court held that Title VII of the Civil Rights Act of 1964 barred employment practices that adversely impact minorities or women.[28] In other words, once an employment discrimination plaintiff statistically proved that a practice adversely impacted his or her group, the employer could be required to explain its business need. Without a satisfactory explanation, the plaintiff would win—the court did not need to find that the employer intended to discriminate. *Griggs* therefore opened the doors to employment opportunities in law enforcement and white-collar occupations that had previously been shut to minority applicants because of discriminatory procedures or testing mechanisms.

In *Wards Cove*, however, the Court held that even after a plaintiff in an employment discrimination case established that a practice had an adverse impact, he or she still had the burden of persuading the Court that the practice was illegitimate. Furthermore, business necessity did not require the practice to "be 'essential' or 'indispensable' to the employer's business for it to pass muster."[29] This decision turned a blind eye to the purpose of Title VII that the Court had endorsed in *Griggs*: to prohibit employment practices that have discriminatory effects as well as those that intend to discriminate. As Justice Harry Blackmun wrote in his dissent, "[o]ne wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[30]

In *Patterson v. McLean Credit Union* in 1989,[31] the same 5-4 majority rejected a woman bank teller's claim that she had been verbally abused at her job because of her race, further curtailing the rights of minorities to seek redress for employment discrimination. The Court held that § 1981, a post-Civil War statute that gives minorities the same rights as whites to make and enforce contracts, did not extend to her employment contract's terms and conditions. This decision ignored the fact that Congress had enacted the statute out of concern both for the employment conditions of newly-freed slaves and the continued existence of racial injustices in the workplace.

In 1991, Congress enacted new civil rights legislation that revised the *Wards Cove* and *Patterson* decisions and reversed other Supreme Court cases that had hobbled the enforcement of civil rights protections in employment (discussed in chapter 22). The 1991 Civil Rights Act demonstrates how African Americans can help garner bipartisan support for a bill; even Republican senators

understood the rising power of African Americans and did not want to be viewed as opposing equal opportunity. Unfortunately, recent Federalism Revolution opinions that eviscerate Congress's ability to legislate may imperil even statutes enacted with bipartisan majorities.

Disparate Impact Litigation

In *Alexander v. Sandoval* in 2001, the Supreme Court employed the *Croson* color-blind rationale in holding that suits brought by private individuals under Title VI (a provision prohibiting discrimination by recipients of federal funding) can be brought only for *intentional* discrimination rather than institutional, structural, and systemic racism. This form of discrimination is almost impossible to prove. The decision reversed nearly thirty years of precedent—including the unanimous views of all federal circuit courts—that helped people of color gain equal access to federal programs and reinforced the constitutional fiction that continued racial inequities are the result of a private discrimination that no court is required to acknowledge or correct.

The ability of private individuals to seek justice for institutional or systemic discrimination has been essential to the enforcement of civil rights laws. For example, students wishing to challenge a public school system's discriminatory funding scheme have used this impact standard (public school funding litigation is discussed in chapter 12).[32] Likewise, African Americans have used this impact standard to contest the disproportionate placement of toxic sites in their neighborhoods (environmental justice litigation is discussed in chapter 14).[33] Now, thanks to the *Sandoval* decision, that form of remedy is lost.

The Federalism Revolution

Croson's impact has been magnified by the Federalism Revolution decisions which, although appearing to have nothing to do with racial matters, significantly affect the quality of life for many African Americans. The Court has struck down several congressional statutes that attempt to protect citizens against wrongdoing by state officials. Further, the Court has used an expanded reading of the immunity from suit accorded to states by the Eleventh Amendment, and a contracted reading of the powers conferred on Congress by the Fourteenth Amendment to invalidate suits that affect many disenfranchised groups. In many respects, this Court's activism far exceeds any of the purportedly activist opinions under Chief Justice Earl Warren.[34]

In the last decade, the Court has invalidated significant portions of the Americans with Disabilities Act,[35] the Age Discrimination in Employment

Act[36] (allowed state employees to recover damages when the state unlawfully discriminated on the basis of age or disability) (discussed in chapters 7 and 8), the Violence Against Women Act (allowed victims of gender-motivated violence to sue their attackers) (discussed in chapter 6),[37] the Brady Act (directed local law enforcement officers to do background checks for possible criminal convictions of prospective gun purchasers), and the Gun Free School Zones Act (prohibited possession of a firearm within one hundred feet of a school).[38] Indeed, between 1995 and 2001, the Court declared nearly thirty federal statutes unconstitutional in whole or in part. In the two hundred years before, the Court had struck down only 127 statutes as unconstitutional.[39]

Conclusion

As the Supreme Court continues to dismantle federal protections against racial discrimination, it becomes increasingly obvious that the federal government can no longer be looked to as a sanctuary for civil rights. Perhaps the new challenge is to look below (state and local law) and above (international human rights law) the Constitution for other remedies.

State and local law could be one venue for the enforcement of civil rights protections. State constitutions and statutes often provide civil rights protections and remedies that can be vindicated in state courts or agencies.[40] The use of federalism principles might also provide political strength to minorities when, for example, they gain control of school boards or city councils. In addition, state constitutions recognize education as a function of the state; some explicitly prohibit discrimination or the implementation of educational policies with discriminatory effects, and others guarantee a minimum level of education. Civil rights organizations are mounting grassroots campaigns to enact similar legislation in other states.[41]

We may also be able to draw support from international human rights law for domestic civil rights enforcement. Several international human rights standards relate to racial equity, including the Universal Declaration of Human Rights, the Covenant Against Discrimination in Education, the International Covenant on Economic, Social, and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.[42] Although these standards are not binding, courts turn to them for guidance in defining rights provided under law.

Struggles over racial equality have always acted as a barometer of broader rights. For example, the Civil Rights Movement paved the way for movements promoting equal rights for women, the disabled, and gays and lesbians. The

Rehnquist Court's reversal of civil rights protections for African Americans presaged reversals we are now seeing in other areas. The Court's strength has always been that unlike elected bodies, the justices can act out of constitutional principle rather than fear in interpreting the meaning of the Constitution. Of late, however, the Rehnquist Court has abandoned the true promise of equality under the Constitution, impeding the civil rights of many who have historically been left out of educational, economic, and asset-building opportunities. African Americans are thus caught in a double bind of oppression: the racial injustice itself, and the Court's systematic denial of responsibility for that reality. If the Court continues on its current path, we will have more to fear in the coming years.

Endnotes

1. See e.g. U.S. Const. art. I, §2 (amended by U.S. Const. amend. XVI); U.S. Const. art. I, §9; U.S. Const. art. III, §1; U.S. Const. art. IV, §2 (affected by U.S. Const. amend. XIII). Southerners strongly supported federalism, hoping that it would serve as a shield against attacks on slavery by the federal government. Constitutional convention delegate Charles Cotesworth Pinckney, one of the major advocates of the southern position, provided this interpretation of the constitutional compromises to his fellow South Carolinians:

> We have a security that the general government can never emancipate [the slaves], for no such authority is granted and it is admitted, on all hands, *that the general government has no powers but which are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.* In short, considering all circumstances, we made the best terms for the security of this species of property it was in our power to make.

Joseph J. Ellis, Founding Brothers: The Revolution Generation (Knopf 2000) 95 (emphasis added, citation omitted).

2. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

3. Id. at 25.

4. 163 U.S. 537 (1896).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. For example, provisions of the Social Security Act excluded domestic servants and agricultural workers more than sixty percent of whom were African American from old-age pension coverage and unemployment benefits. Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (1998) 44; When Congress adopted the Fair Labor Standards Act in 1938, it incorporated these same exemptions. Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, *65 Tex. L. Rev.* (1987) 1335, 1351–53; For decades beginning in the 1930s, the Federal Housing Administration and mortgage insurance policies of federal agencies denied home loans to blacks and overlooked those devices adopted by neighborhood organizations and private citizens to maintain residential segregation. See e.g., Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of*

the United States (1985) 196–218; Gary Orfield, Federal Policy, Local Power, and Metropolitan Segregation, *89 Pol. Sci. Q.* (1975) 777, 784–90.

7. Blacks continue to be the most residentially isolated ethnic group in this country. See e.g., John Iceland, Daniel H. Weinberg, and Erika Steinmetz, U.S. Census Bureau, *Racial and Ethnic Segregation in the United States: 1980–2000* (2002) 3–4; Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) 235; Similarly, black students are more racially isolated today than anytime in the last thirty years. Erica Frankenberg, Chungmei Lee, and Gary Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? Harv. Univ., *The Civil Rights Project* (Jan. 2003) 8, at http://www.civilrightsproject.harvard.edu/research/reseg03/ AreWeLosingtheDream.pdf. As many as two million minority and female workers continue to face employment discrimination. Alfred W. Blumrosen and Ruth G. Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America—1999* (1999) 230, at http://www.eeo1.com/1999_NR/Chapter17.pdf. And as of 2000, 22.1 percent of African Americans lived below the poverty line, compared with only 7.5 percent of white non-Hispanics. Joseph Dalaker, U.S. Census Bureau, *Poverty in the United States: 2000* (Sept. 2001) 4.

8. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

9. Id. at 531–36 (Marshall, J., dissenting) (citing congressional findings).

10. Id. at 505–6.

11. In a sharply worded dissent, Justice Marshall wrote "a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past.…I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges.…In constitutionalizing its wishful thinking, the majority today does a grave disservice." Id. at 552–53.

12. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

13. In 1971, the Supreme Court found that planned segregation of schools led to segregated housing, with families clustered around those schools that accepted their children. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *Cf. Milliken v. Bradley*, 433 U.S. 267 (1977).

14. 498 U.S. 237 (1991). In *Dowell*, the Supreme Court held that once a "unitary" system could be established, the federal court's desegregation order should end even if it meant a resegregation of schools. Although the schools at issue remained segregated for a full seventeen years after *Brown*, the Court held that if the board "has complied in good faith" and "the vestiges of past discrimination have been eliminated to the extent practicable," the desegregation decree should be ended. Id. at 249–50. The majority held that "[l]ocal control over the education of children" is preferable. Id. at 248.

15. 503 U.S. 467 (1992). In *Freeman*, the Supreme Court held that once a portion of a desegregation order is met, the federal court should cease its efforts as to that part and remain involved only as to those aspects of the plan that have not been achieved. The majority held that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." Id. at 490. While extolling the benefits of local control, the Rehnquist majority was simultaneously stripping away the role of the federal government in upholding democracy and removing from the Court any responsibility or accountability for the continued existence of racial injustice.

16. 515 U.S. 70 (1995). In *Missouri v. Jenkins*, the Supreme Court ordered an end to a school desegregation order for Kansas City schools. In the opinion, Chief Justice Rehnquist reminded us that the "end purpose" of desegregation decrees "is not only 'to remedy the

violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." Id. at 102 (citation omitted). Rehnquist shows that in his view, racial inequality is a social condition; the government has no responsibility to remedy that inequality absent strict proof that the government created the inequities. What is more, he appears to see racial discrimination largely as a thing of the past.

17. See *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (per curiam), *cert. dismissed*, 529 U.S. 1050 (2000); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000). It is unclear how the Supreme Court's recent decisions upholding the use of race in college and university admission policies may ultimately affect the use of race in K-12 assignment plans. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (discussed infra). Currently, there is a lower court split. See e.g., *Comfort v. Lynn Sch. Committee*, 2005 WL 1404464 (1st. Cir.); *Parents Involved in Community Sch. v. Seattle Sch. Dist.*, 377 F.3d 949 (9th Cir. 2004); *McFarland v. Jefferson County Public Sch.*, 330 F.Supp.2d 834(2004).

18. In fact, American public schools have become continually *more* segregated in the past decade. One-sixth of all black students and one-fourth of black students in the Northeast and Midwest are educated in schools with almost no white students, limited resources, and enormous poverty. Erica Frankenberg et al., *supra* note 7 at 4–5, at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pfd. On average, such segregated schools have lower average test scores, fewer advanced courses, and less qualified teachers. Id. at 11.

19. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

20. *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

21. Jed Rubenfeld, The Anti-Antidiscrimination Agenda, *111 Yale L.J.* (2002) 1141, 1170.

22. *Pena*, 515 U.S. at 240.

23. *Plessy*, 163 U.S. at 551.

24. Members of our organization, the Legal Defense Fund, have been working to promote and defend such affirmative action policies for the better part of the last two decades. In *Gratz*, LDF represented African American and Latino students who served as interveners in the case. In *Grutter*, we authored an amicus brief to the Court. In both *Grutter* and *Gratz*, the Court upheld the use of race in admissions in order to further the compelling government interest in student body diversity. Yet the Court struck down the particular admissions policy at issue in *Gratz* on the grounds that it was not sufficiently narrowly tailored to withstand strict scrutiny.

25. *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

26. *Shaw*, 509 U.S. at 659 (White, J., dissenting).

27. 490 U.S. 642 (1989).

28. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

29. *Atonio*, 490 U.S. at 659.

30. Id. at 662.

31. 491 U.S. 164 (1989).

32. *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999).

33. *S. Camden Citizens in Action v. N.J. Dep't of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001).

34. With respect to the Warren Court, the activism was to elevate civil liberties and civil rights over governmental abuses. In contrast, the Rehnquist Court seeks to reestablish the

failed states' rights doctrines of the past—the very doctrines that led the nation to Civil War and a system of state-sanctioned apartheid. See e.g., Brent E. Simmons, The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on the Fourteenth Amendment Protections of Individual Rights, *11 Seton Hall Const. L.J.* (Spring 2001) 259, 374.

35. *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

36. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

37. *United States v. Morrison*, 529 U.S. 598 (2000).

38. *United States v. Lopez*, 514 U.S. 549 (1995).

39. See Seth P. Waxman, Defending Congress, *79 N. Carolina L. Rev.* (2001) 1073, 1074–75.

40. See e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (state court required that the state remedy the extreme racial and ethnic isolation in the public schools, placing affirmative responsibility on the state legislature to remedy segregation regardless of whether it was *de jure* or *de facto*); *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878 (Cal. 1963).

41. See e.g., The Racial Justice Acts as promulgated by the NAACP, at http://www.naacp. org/.

42. Off. of the United Nations High Commissioner for Human Rights, at http://www.ohchr.org/english/law/index.htm.