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All Things Not Being Equal: The Case for Race Separate School

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I. INTRODUCTION

Children in Detroit walk by crack houses every morning on their way to Woodward Elementary School where a janitor was killed in a drive-by shooting in 1990. Ninety percent of the children attending Detroit’s public schools are African-American. Thirty years of deterioration have rendered useless the science labs at East St. Louis High School, prompting one teacher to remark that “[i]t would be great if we had water.” Ninety-eight percent of the population of East St. Louis is African-American. The Milwaukee school board reports that eighty percent of its African-American male high school students’ grades average below a “C.” While only twenty-five percent of the Milwaukee public school student population is African-American, fifty percent of the students suspended annually belong to this group.

A. The Problem

The benefits of school desegregation are illusory to many

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2. Id.
3. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS 27 (1991) [hereinafter SAVAGE INEQUALITIES]. Between 1988 and 1990, Kozol traveled across the country, visiting schools and speaking to children in approximately 30 different neighborhoods. SAVAGE INEQUALITIES chronicles this journey. Kozol reports that “[w]hat startled [him] most . . . was the remarkable degree of racial segregation that persisted almost everywhere.” Id. at 2.
4. Id. at 7.
6. Id.
African-American children in the United States. Nationally, the high school dropout rate of African-Americans is twice that of white school children.7 The abysmal statistics reflect the harsh reality that many African-American children are relegated to life at the bottom of the socioeconomic scale. By all economic and social measures, African-Americans are significantly worse off than their white counterparts.8 Poverty rates for African-Americans are currently two to three times higher than the rates for whites.9 In addition, African-American unemployment rates are consistently double those of white individuals.10 The life expectancies of African-American men and women are appreciably less than those of white men and women.11 Half of all prison inmates are African-Americans, which is proportionately four times greater than their numbers in the overall population.12 They are also more likely to be the victims of crime than their proportion in the general population would indicate.13 African-Americans are six to seven times


8. For example, the median income of an African-American family is 57 percent that of a white family. In 1987, the median income for an African-American family was $18,098 annually, as compared to $32,274 for a white family. THE NEGRO ALMANAC: A REFERENCE WORK ON THE AFRICAN AMERICAN 482 (Harry A. Ploski and James Williams eds., 5th ed. 1989) [hereinafter THE NEGRO ALMANAC]. In 1984, the median net worth of a white household based on the value of its holdings was $39,135, as compared to $3397 for an African-American household. Therefore, for every dollar of wealth in the white household, the African-American household had nine cents. A COMMON DESTINY, supra note 7, at 292.

9. In 1987, 10.5% of the white population was living below the poverty line, while 33.1% of this country’s African-American population was similarly situated. THE NEGRO ALMANAC, supra note 8, at 503.

10. During the recession of 1981-82, the national unemployment rate peaked at 9.7%, while African-Americans were unemployed at a rate of 18.9%, which eventually rose to 19.5% in 1983. Id. at 605-06. In May 1988, the unemployment rate for African-Americans was recorded at an all-time low of 10.8%, but that figure was still double the rate for whites. Id. at 606. In the fall of 1988, a rise in the national unemployment rate to 5.6% was paralleled by an increase in the African-American unemployment rate to 11.3%. Id.

11. In 1985, the average life expectancy for a white person was 75.3 years, as compared to 71.2 years for an African-American. A white woman can expect to live for 78.7 years, as compared to 75.2 years for an African-American woman. An African-American man’s life expectancy is 67.2 years, while a white man’s is 71.8 years. Id. at 545.

12. The prison population in federal and state institutions in 1985 was comprised of 260,847 white inmates and 227,137 African-American inmates. Id. at 546.

13. Annual statistics compiled by the Department of Justice reveal that for the crimes of robbery, assault, burglary and household larceny, the victimization rates by race or ethnic group were: 234,000 whites; 324,000 African-Americans; 289,000 Hispanics; and 223,000 others. A COMMON DESTINY, supra note 7, at 464-65.
more likely to be the victims of murder, which is the leading cause of death among young African-American men.\textsuperscript{14}

Unfortunately, the situation has not improved much, if at all, in twenty-five years. The findings of the National Advisory Commission on Civil Disorders\textsuperscript{15} were equally devastating when published in 1968. In 1966, the median income for an African-American family was fifty-eight percent of the white family's median income,\textsuperscript{16} and 1967 unemployment rates of African-American males were more than twice those of white men.\textsuperscript{17} Crime rates were 4.9 times higher in the very low-income, African-American districts of Chicago than in the high-income white districts.\textsuperscript{18} Life expectancies of African-Americans were significantly lower than those of whites.\textsuperscript{19} The Commission concluded that the factors of racial segregation and economic isolation coalesced to create a destructive environment within the ghettoized inner city,\textsuperscript{20} where sixty-nine percent of the country's African-American population lived in 1967.\textsuperscript{21} The Commission recommended a plan of integration combined with various enrichment programs.\textsuperscript{22} In particular, the Commission advocated educational programs designed to encourage self-development and to overcome both feelings of powerlessness and a lack of self-respect.\textsuperscript{23}

B. A Solution

Recently, educators have become ingenious in their efforts to deal with the plight of the African-American child. Several Chicago

\textsuperscript{14} Id. at 498.
\textsuperscript{15} The National Advisory Commission on Civil Disorders was established by President Johnson on July 28, 1967, in the aftermath of two weeks of racial disorders in cities across the country. The Commission was convened to answer three questions: "What happened? Why did it happen? What can be done to prevent it from happening again?" NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 1968 REPORT 1 (1968).
\textsuperscript{16} Id. at 123.
\textsuperscript{17} In 1967, the unemployment rate for white persons was 3.4%, while 8.2% of the non-white labor force were unemployed. Id. at 124.
\textsuperscript{18} For example, in Chicago in 1965, 1038 property crimes were committed in a high-income white district, as compared to 2630 similar crimes in a very low-income, African-American district. Id. at 134.
\textsuperscript{19} At age 25, an 11% difference in life span existed; whites will live an average of 48.6 more years, while African-Americans will live an additional 43.3 years. Id. at 136-37.
\textsuperscript{20} Id. at 1.
\textsuperscript{21} Id. at 115.
\textsuperscript{22} The Commission proposed increased federal spending for education, housing, employment, job training and social services. Id. at 218-19.
\textsuperscript{23} Id. at 222-23.
public schools have established Afrocentric curriculums which teach African history and include special classes designed to instill self-esteem. In Los Angeles, a mentoring group called “100 Black Men” offers individual attention and encouragement as well as scholarship assistance for college to students in grades eight through twelve. The most controversial programs, however, are the African-American Immersion Schools, the single race male academies which have been proposed by the Detroit and Milwaukee school boards. The academies provide cultural role models and typically include an Afrocentric curriculum, mentoring programs, strict discipline, and academic instruction that is tailored to the cultural learning biases of the students. Extra classes, tutoring and mandatory extracurricular activities complete the program.

This note supports the adoption of the African-American Immersion School on a trial basis. There are a variety of factors which contribute to the current state of urban education; poverty and dysfunctional family structures loom large among them. The African-American Immersion School cannot and does not attempt to solve all the systemic problems faced by those living within the inner cities. Rather, the Immersion School addresses the specific problem of educational inequality. It is designed to provide academic and psychological preparation so that its students will become self-sustaining and contributing members of society. A better educated population will have a positive effect on social problems such as welfare dependency, the crime rate, drug abuse and teenage pregnancy.

The African-American Immersion School discussed in this note, while race-exclusive, is coeducational. The problems faced by African-Americans are not gender specific; therefore, it is inappropriate for the solution to exclude females. This note’s model

25. Id.
28. See SAVAGE INEQUALITIES, supra note 3, at 123 (acknowledging that while government is not responsible for creating or curing all social ills, it has undertaken responsibility for public education and fiscal equality will result in dramatic changes).
29. High school dropout rates are not appreciably different for African-American girls and boys. Recently, 44.6% of New Orleans’ dropouts were African-American males, as compared to 41.2% who were African-American females. Jacqueline Berrien, A Civil Liberties Must: High Quality Education for All Black Children, CIV. LIBERTIES, Fall, 1991, at
African-American Immersion School is open equally to African-American boys and girls on a voluntary admission basis. Up to half of the classes may be gender-exclusive as long as no child is foreclosed from taking any particular class.

Discipline will be strict, patterned on what has been considered the norm in parochial schools. Children will wear uniforms and be expected to meet certain behavioral standards. The school day will be extended to allow time for academic tutoring as well as mandatory participation in extracurricular and cocurricular activities. Both African and African-American culture and history will be emphasized to instill in each child pride in her or his culture. All of the school's teachers and administrators will be African-American in order to provide the children with positive cultural role models. A mentoring program in which each child will be assigned to work with an individual from the community completes the academic experience.

The goals of the African-American Immersion School are two-fold. The first aim is to provide each child with an adequate education to enable him or her to make informed decisions and participate in the political process. The second aim is to develop in each child a sense of self-worth to enable him or her to become a self-sustaining member of society. The overriding concern is to prepare African-Americans to compete in a society that is currently dominated by institutions controlled by the white population.

Critics complain that establishment of the African-American Immersion School will undermine efforts to eliminate segregation. They also argue that the school will further isolate African-American children from mainstream society. This note does not

7. In Detroit, 55% of the boys and 45% of the girls in urban schools drop out. Helen R. Neuborne, Girls Are Drowning, Too, N.Y. TIMES, Aug. 16, 1991, at A23. In response to the recent constitutional challenge to the Detroit all-male school, a district court judge ordered that girls be admitted also. The court found that "[t]here is no evidence that the educational system is failing urban males because females attend schools with males. In fact, the educational system is also failing females." Garrett v. Board of Educ. of the Sch. Dist. of Detroit, 775 F. Supp. 1004, 1008 (E.D. Mich. 1991). See also Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 140 (arguing that the concerns of African-American women are often neglected and theoretically erased from the political dialogue since these women's experiences result from the unique intersection of race and gender and, consequently, cannot be found in either feminist theory or anti-racist discourse).

30. See Merl and Harrison, supra note 5, at A1 (quoting Milwaukee NAACP President Chaney's comment, "I'm against all segregation - I don't care what kind it is.").

31. See Walters, supra note 27, at 8 (explaining that some believe that the concept of
challenge the theoretical model of integration. The African-American Immersion School is designed to supplement, not supplant, desegregation efforts. The school has particular value in those geographic areas where it is impossible to achieve integration because of segregated housing patterns.

Part II of this note argues that educational reform efforts must focus on the quality of education, and that racial separation may be appropriate in the pursuit of quality education. The African-American Immersion School, although segregated, will promote societal integration in the long-run by better educating children to be contributing members of society. Part III reviews the Supreme Court’s desegregation decisions beginning with Brown v. Board of Education and concludes that the African-American Immersion School does not undermine the goals of integration. This conclusion holds true despite the African-American Immersion School’s susceptibility to a constitutional equal protection challenge stemming from the use of race-conscious selection criteria. Part IV argues that an intermediate standard of scrutiny is the correct test to apply to an equal protection challenge in the educational realm. Part V argues that, even if strict scrutiny is the appropriate standard of review, the African-American Immersion School passes constitutional muster. This note concludes that the African-American Immersion School, as an experimental educational program, is constitutionally sound.

II. QUALITY EDUCATION AND RACIAL SEPARATION ARE NOT MUTUALLY EXCLUSIVE

A. Education is the Primary Goal

Historically, educational deprivation has been linked to the political oppression and social subjugation of African-Americans. As early as 1935, W.E.B. du Bois argued that “the Negro needs

32. 347 U.S. 483 (1954) [hereinafter Brown I].
33. Denise C. Morgan, What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education, 8 HARV. BLACKLETTER J. 99, 101-03 (1991) (beginning with the anti-literacy laws of the slavery era and continuing beyond the segregated Southern schools of the mid-twentieth century, African-Americans have been effectively deprived of the opportunity to influence social and political change in a way that educated people who are aware of their rights have not).
34. Du Bois (1868-1963) was a civil rights advocate and one of the founding members of the African-American male school is a retrogression for African-Americans, who in the long run must live in a heterogeneous society).
neither segregated schools nor mixed schools. What he needs is Education." Du Bois believed that education was essential to prepare African-Americans to live and compete in white society. Educational equity may be viewed as a way to achieve overall societal integration. The theoretical model of integration espoused by Brown I is very attractive. Integration has not failed; on the contrary, it has yielded positive results where properly implemented. Unfortunately, often because of residential segregation, integration is not a reality for many African-American school children.

The phenomenon of resegregation within desegregated schools has also hampered integration efforts. Even in those school systems in which statistical integration has been achieved, internal tracking programs often segregate African-American children within

of the NAACP. He is acknowledged to be one of the premier American scholars on racial issues. See Derrick A. Bell, Jr., The Legacy of W.E.B. du Bois: A National Model for Achieving Public School Equity for America's Black Children, 11 Creighton L. Rev. 409, 414-19 (1977) (focusing on du Bois' life and his theories of educational equity).

35. W.E.B. du Bois, Does the Negro Need Separate Schools?, 4 J. of Negro Educ. 328, 335 (1935). Twenty years prior to the desegregation mandate of Brown I, du Bois asserted that there was a difference between being admitted and being welcomed into an institution. Id. at 329. He believed that a "finer, better balance of spirit" would be achieved by educating children in schools-where they are wanted and happy and are, therefore, more likely to be inspired. Id. at 331.

36. Id. at 333 (asserting that "until American Negroes believe in their own power and ability, they are going to be helpless before the white world").

37. Brown I, 347 U.S. 483, 494 (1954) ("To separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

38. Research reveals gains on standardized achievement tests for African-American students attending desegregated schools, while the achievement of white students is unaffected. A COMMON DESTINY, supra note 7, at 373-74.

39. The greatest strides in school desegregation were made between 1966 and 1973. Further efforts have been stymied by shifts in residential housing patterns and court decisions that have limited the acceptable remedial measures. In 1980, African-American children comprised one-fifth of the public-school enrollment nationally, but almost two-thirds of these children attended schools where more than one-half of the students were minorities. Id. at 76. See also infra notes 70-91 and accompanying text for a discussion of the Supreme Court's desegregation decisions.

40. The most common resegregation practices include ability grouping, tracking of students into separate academic programs, and uneven disciplinary practices that fall disproportionately on minority students and, consequently, create racial imbalances within the classrooms. Resegregation has sometimes been so pronounced as to be called "two schools within a school." A COMMON DESTINY, supra note 7, at 82. Investigators studying 10 school districts under court-ordered desegregation concluded that, while the school districts were technically complying with desegregation orders, resegregation had occurred within most of the schools. Id.
the classrooms.\textsuperscript{41} In the academic community, tracking has become a euphemism for “sorting for success and failure.”\textsuperscript{42} Children in the upper tracks are prepared for college and ultimately secure higher paying jobs, while those in lower academic groups are more likely to be trained for the lesser paying vocational occupations.\textsuperscript{43} As a result, African-American children receive negative messages about their abilities and their potential, and these messages undermine their scholastic achievement.\textsuperscript{44} These children may be further disabled because they sometimes lack positive role models within their families and immediate communities.\textsuperscript{45} There is no apparent reward for persevering in school.\textsuperscript{46}

The time has come to ensure that every child in this country receives an education which will allow him or her to become self-sustaining and able both to make informed decisions and participate in the political process. The emphasis must be on educational outcomes. Positive outcomes may require the use of race-conscious instruction in the first instance to overcome racial segregation.

\textbf{B. Colorblind Principles Cannot Succeed in a Racist Society}

A real estate agency in Brooklyn, New York, is firebombed

\begin{footnotesize}
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\item See SAVAGE INEQUALITIES, supra note 3, at 119 (findings of the Public Education Association of New York reveal that “classes for the emotionally handicapped, neurologically impaired, learning disabled and educable mentally retarded are disproportionately black”).
\item Eva W. Chunn, Sorting Black Students for Success and Failure: The Inequity of Ability Grouping and Tracking, in BLACK EDUCATION: A QUEST FOR EQUITY AND EXCELLENCE, 93, 101 (Willy D. Smith and Eva W. Chunn eds., 1987). There is a positive correlation between a child’s race or socioeconomic status and the academic group into which the child is placed. Id. at 100. Research indicates that the highest academic groups are usually composed of students from the upper socioeconomic levels, while minority students, generally African-American males, and students from poorer families make up the lower-ability groups. Id. Race appears to weigh more heavily than socioeconomic status. High-achieving African-American students can often be found in the lower academic groups. Id. Conversely, lower-achieving but middle-class white students tend to be placed in higher-ability groups. Id.
\item Id. at 101.
\item See SAVAGE INEQUALITIES, supra note 3, at 99 (stating that children in these situations seem to understand intuitively that they are poor investments and come to behave as such).
\item See, e.g., Wilkerson, supra note 1, at A1 (noting that young African-American males from Detroit’s inner-city schools have few positive African-American male role models).
\item See A COMMON DESTINY, supra note 7, at 371-72 (finding that minority children, who are encouraged by their parents to do well and get a good education, often fail to do so because their perceptions are colored by the underemployment and unemployment which they see around them).
\end{enumerate}
\end{footnotesize}
because it shows homes in a predominately white neighborhood to prospective African-American purchasers.\textsuperscript{47} A former member of the Ku Klux Klan runs for governor of the State of Louisiana.\textsuperscript{48} The President of the United States is aghast to learn that the State of Mississippi continues to maintain a segregated state-funded university system.\textsuperscript{49} Public schools in Austin, Texas, have adopted as symbols of school spirit the Confederate Flag, the song of Dixie, and team names of Rebels or Rebelettes.\textsuperscript{50} An African-American lawyer, searching for an apartment for his family in New York, fills out an eligibility form and lists his annual income. The real estate agent wants to know how many people in the family work to make up the listed income. When the lawyer replies that the listed figure is comprised of his own salary as an attorney, the agent is noticeably embarrassed. She recognized that she automatically, subconsciously questioned this man’s income simply because of the color of his skin.\textsuperscript{51}

Principles of color blindness are only effective when society operates on a racially neutral basis. Such is not the case in the United States today. Despite the enactment of the Civil War Amendments between 1865 and 1870,\textsuperscript{52} the repudiation of the “separate but equal doctrine”\textsuperscript{53} in 1954,\textsuperscript{54} and the enactment of the Civil Rights Act of 1964,\textsuperscript{55} our society continues to treat people differently based on their race.\textsuperscript{56} The pervasive de facto segr-
gation in suburban residential areas and public school systems is evidence of a racist society. Achievement of the American dream remains outside the grasp of most African-Americans.\textsuperscript{57} For example, African-Americans are much less likely to attend college than are white high school graduates.\textsuperscript{58} The odds that the African-American student, once enrolled, will graduate with a college degree are about half those of the white student.\textsuperscript{59} Consequently, African-Americans are underrepresented in the professions\textsuperscript{60} and have diminished earning potentials.\textsuperscript{61} Taken to its logical conclusion, this means that African-Americans have less income to spend on housing and consumer goods.

While most individuals no longer engage in intentional acts of discrimination, as a society we collectively retain the vestiges of a history of legally sanctioned racism.\textsuperscript{62} Because the overt signs of

\textsuperscript{57} See Crenshaw, supra note 56, at 1379 (arguing that while the demise of the Jim Crow laws marked the end of legalized white supremacy, the white norm continues to dominate societal values); Geoffrey C. Hazard, Jr., Permissive Affirmative Action for the Benefit of Blacks, 1987 U. ILL. L. REV. 379, 388 (arguing that society is predicated on the ideal of equal opportunity, which is effectively denied to African-Americans who have little chance of upward mobility). See also supra text accompanying notes 8-14.

\textsuperscript{58} The rate of African-American high school graduates entering college fell from 48\% in 1977 to a low of 36.5\% in 1986, while the comparable white rate rose from 48\% in 1973 to 57\% in 1984. A COMMON DESTINY, supra note 7, at 338-39.

\textsuperscript{59} Statistics gathered in 1980 reveal that 12\% of African-American women and 11\% of African-American men graduated from college, as compared to 22\% of white women and 25.5\% of white men. Id. at 339-40.

\textsuperscript{60} In 1982, 32\% of working white men were employed in professional or managerial positions, compared to 20\% of nonwhites, which was the same percentage of white men so employed in 1950. Id. at 312. Thus, there is about a 30-year gap between the races in this regard. Among women, there is a similar lag of about two decades in the proportion of African-American women with professional or managerial jobs as compared to the number of white women in such positions. Id. at 313-14. In 1960, approximately 18\% of white women were employed in these higher ranking jobs, while by 1982, the proportion of nonwhite women in such positions had only reached 20\%. Id. at 312-13. Furthermore, African-Americans are overrepresented in occupations requiring low skill and paying low wages. Id. at 312. “[B]lack women are twice as likely as white women to work in service occupations” such as chambermaids, cleaners, or nurses’ aides. Id. at 314.

\textsuperscript{61} Even earning a college degree does not insure economic parity, however. In 1984, African-American male college graduates were earning only 74\% of what similarly situated white males were earning. Id. at 301. See also supra note 8.

\textsuperscript{62} Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987) (arguing that Americans are the products of a common history and culture that are permeated with racism and that they,
racism have been virtually eradicated, it is easy to conclude that racism only exists as an aberration. Prejudice, however, continues to operate on a subconscious level. African-Americans have faced a history of oppression unparalleled by that of any other racial or ethnic group in this country. The immigrant experience of other ethnic groups is not comparable to the African-American experience, which included not only slavery, but also hundreds of years of official, lawful segregation and oppression. Racial parity cannot be achieved through the application of color-blind principles in an atmosphere of racism. Reduced to a sim-

63. See Paul Delaney, Racial Climate Cooled Since '60s in Deep South, CLEVE. PLAN DEALER, Mar. 15, 1992, at 1-1 (writing of his impressions as an African-American on a journey through the modern-day Deep South, a trip he probably could not have made 30 years ago, and concluding that the Jim Crow social system has moved significantly toward a more homogeneous southern society today).

64. See Crenshaw, supra note 56, at 1384 (acknowledging that while the formal barriers against admitting African-Americans into mainstream society have been for the most part eliminated, this change has been symbolically, rather than materially, significant); Hazard, supra note 57, at 385 (stating that while most white Americans believe in the principle of equality, they still consider African-Americans to be socially inferior and that there are only a “handful” of self-acknowledged racists because it is socially and politically unacceptable to discriminate on the basis of race).

65. See Crenshaw, supra note 56, at 1373-74 (arguing that the white race has become associated with normatively positive characteristics, while black images are resoundingly negative); Lawrence, supra note 62, at 322 (stating that discriminatory behavior is caused by subconscious racial motivations derived from a historical and cultural heritage in which racism played a dominant role).

66. See, e.g., W. Haywood Burns, Law and Race in America, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 89, 89-95 (David Kairys ed. 1982) (chronicling the suppression of African-Americans by operation of law from the early seventeenth century through modern times); A COMMON DESTINY, supra note 7, at 57 (“Black-white relations in the United States have historically involved black subordination and exclusion from the major social institutions of society.”).

67. The most obvious example of legally sanctioned racism in United States history is that the Constitution, when ratified in 1788, provided that a slave count only as three-fifths of a person. U.S. CONST. art. I, § 2, cl. 3. It was not until 1868 that the Fourteenth Amendment was adopted, which gave the former slaves the same status as other citizens. U.S. CONST. amend. XIV. See Regents of Univ. of California v. Bakke, 438 U.S. 265, 395 (1978) (Marshall, J., concurring in the judgment in part and dissenting) (“The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”). But see Antonin Scalia, The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”, 1979 WASH. U. L.Q. 147, 152 (drawing comparisons between the history of African-Americans and the histories of the Irish and other ethnic groups immigrating to the United States).

68. See Aleinikoff, supra note 56, at 1125 (arguing that to ignore the factor of race denies the self-knowledge necessary to eradicate racism and achieve racial justice); Alan
ple proposition — it is impossible to correct a problem if one refuses to acknowledge that the problem exists. For these reasons, racial consciousness is essential, in the short run, to achieve a fully integrated society. Justice Blackmun, in a seemingly contradictory statement, perhaps put it best: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."

III. THE AFRICAN-AMERICAN IMMERSION SCHOOL DOES NOT RUN AFOUL OF THE SUPREME COURT’S SCHOOL DESEGREGATION DECISIONS

In 1954, the Supreme Court in Brown I, denounced segregation in public education by declaring that "[s]eparate educational facilities are inherently unequal." The separate but equal doctrine of Plessy v. Ferguson, which had prevailed for over half a century, was resoundingly rejected. The Court held that segregation deprived African-American school children of the equal protection of the laws under the Fourteenth Amendment. In reaching this conclusion, the Court did not merely rely on an assessment of the segregated schools' tangible characteristics. The Court's decision

David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1066 (1978) (arguing that a colorblind theory results in the denial of the legitimate, concrete demands of those who historically have been the victims of racial discrimination); Donald E. Lively, Color-Blindness and Social Blindness: Echoes from an Infamous Past, 33 HOW. L.J. 267, 283 (1990) (arguing that a colorblind standard advances form at the expense of substance when race is excluded from consideration in a society which is disposed to make racial distinctions).

69. See Crenshaw, supra note 56, at 1346-47 (stating that a purportedly colorblind society that, in reality, is built on subordination cannot correct the subordination since it fails to recognize it).
70. Bakke, 438 U.S. at 407 (Blackmun, J., concurring in the judgment in part and dissenting) (arguing that, in order to achieve equality, it is necessary to treat differently those who have been subordinated in the first instance).
72. 163 U.S. 537, 550-52 (1896) (holding that the purpose of the Fourteenth Amendment was to enforce political, not social, equality and that segregation on train cars according to race was not unreasonable when viewed in the context of current customs).
74. Id.
75. Id. at 492. See also Sweatt v. Painter, 339 U.S. 629, 632-34 (1950) (finding that substantially equal law school facilities for African-American students were not equal when intangible factors, such as the reputations of the professors and the position and influence of the alumni, were considered); McLaurin v. Oklahoma State Regents, 339 U.S.
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was predicated on the importance of public education\(^6\) and the detrimental, stigmatizing effect that segregation has on African-American children.\(^7\) Consideration of the intangible effects of segregation was at the heart of the decision.\(^7\) In a second decision rendered in *Brown*, the Court ordered the dismantling of dual school systems “with all deliberate speed.”\(^7\)

Over the course of the last four decades, the Court has attempted to refine and redefine what the Constitution requires in order to achieve desegregated school systems.\(^8\) In 1968, the Court refused to countenance the use of a freedom-of-choice plan as a viable vehicle to dismantle a segregated, dual school system.\(^8\) Freedom-of-choice plans were not per se unconstitutional.\(^8\) Rather, the particular plan under consideration had failed to effectuate a transition to a unitary school system.\(^8\) Later, in 1971,
the Court acknowledged a difference between de jure and de facto segregation.\textsuperscript{64} The evil prohibited by the Fourteenth Amendment is purposeful discrimination.\textsuperscript{65} In the first desegregation case to come out of a northern state, the Court refined this principle by holding that a constitutional violation will be found where students are segregated by informal school board policies rather than by force of law.\textsuperscript{66} Through these decisions, the Supreme Court afforded district courts broad remedial powers in cases where local authorities fail to carry out their affirmative duty to desegregate.\textsuperscript{67}

In 1974, in an apparent departure from these earlier decisions, the Court refused to allow interdistrict relief absent a finding of deliberate interdistrict segregation.\textsuperscript{68} Any remedy must be predicated on a constitutional violation.\textsuperscript{89} On rehearing, the Court approved a plan that was limited to compensatory and remedial educational programs,\textsuperscript{90} and ordered the state to pay half of the costs

\begin{itemize}
  \item 84. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14-15 (1971). De facto segregation is not the result of intentional acts by state or school authorities. Rather, it is caused by social or economic factors. BLACK'S LAW DICTIONARY 416 (6th ed. 1990). De jure segregation, on the other hand, is purposeful or is mandated by law. Id. at 425. See also Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) ("We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.").
  \item 85. Swann, 402 U.S. at 15. "It is not always necessary for each school in the system to reflect the racial composition of the whole, but single-race schools must be closely scrutinized to determine if they result from purposeful discrimination by school authorities." Id. at 25-26. Bizarre district lines and busing were held to be permissible tools for desegregation and within the district court's remedial powers to provide equitable relief. Id. at 27-31.
  \item 86. Keyes, 413 U.S. at 201-03. Although Denver, Colorado, did not operate a statutory dual school system, the Park Hill section of the city had been deliberately segregated through the use of gerrymandered attendance zones. Id. at 191-92, 198-200. A presumption of the existence of a dual school system can be established by showing that school authorities engaged in a systematic program of segregation within a "meaningful portion" of the school system. Id. at 208. The burden is on the board of education to prove that any other segregated schools within the system are not the result of intentionally segregative actions. Id. at 209.
  \item 87. See Swann, 402 U.S. at 15 ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); Brown II, 349 U.S. 294, 300 (1954) ("[C]ourts will be guided by equitable principles [which are] characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.").
  \item 88. Milliken v. Bradley, 418 U.S. 717, 745 (1974) [hereinafter Milliken I]. Because of residential segregation, the Court, in refusing to permit a remedy which encompassed the entire Detroit metropolitan area, effectively destroyed any hopes that integration would be achieved.
  \item 89. Id.
  \item 90. Milliken v. Bradley, 433 U.S. 267, 283 (1977) [hereinafter Milliken II]. In addi-
necessary to implement the plan. The African-American Immersion School is not antithetical to the decisions in Brown I and II, nor is it the first step on the slippery slope toward resegregation. Instead, Brown must be viewed within its historical context. The Supreme Court was compelled to order nationwide desegregation because, prior to 1954, a dual public education system was maintained with inferior facilities for African-American children. In Brown I, the Court was concerned with the broad effect that segregation had on these children. According to the Court, even substantially equivalent facilities would not legitimize segregation because segregation stigmatized African-American children and instilled in them a sense of inferiority. Similarly, the African-American Immersion School is particularly concerned with the effect that feelings of inferiority have on young children. However, because nationwide desegregation has not yet been achieved, the African-American Immersion School takes a different approach. The goal of the Immersion School is to inculcate in each child a positive, cultural self-image while meeting all academic requirements. For this reason, the argument that racially exclusive schools are unconstitutional under Brown I and II because of their debilitating effects is invalid in the case of the African-American Immersion School.

The Court sought to eradicate the maintenance of a compulsorily segregated school system. The African-American
Immersion School is a special academy designed as a remedial program for those African-American children whose needs are not being met in the traditional academic environment. It is not intended to circumvent the Court’s desegregation mandate. The African-American Immersion School is neither a disguise for purposeful discrimination nor will it create a segregated dual school system. Nor is the Immersion School the type of freedom of choice plan the U.S. Supreme Court found inadequate to remedy the segregation at issue in *Green v. County School Bd. of New Kent City.*

Here, students do not face the untenable situation in which integration will be achieved only if they seek admission to another school. Presumably, desegregation has already been achieved and the child is opting to attend the Immersion School in lieu of the regular school.

The Immersion School is particularly useful in those metropolitan area school systems that are de facto segregated and beyond the reach of an integration remedy as a result of demographic changes. In its post-*Brown* decisions, the Supreme Court limited the equitable powers of the federal courts to remedying instances of de jure segregation. Constitutional violations are predicated on intent; and because de facto segregation does not depend on a showing of intent, it is remediless. However, efforts to remedy de jure segregation through traditional methods of integration should not be abandoned.

It is possible to read the Court’s recent desegregation cases as a tacit understanding that the benefits of desegregation are not

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98. *Id.* at 438-39.
99. The Court in *Milliken I* found that, although the Detroit school system had long been de jure segregated, a shift in residential housing patterns meant that integration could now only be achieved through interdistrict busing. The Court concluded that interdistrict relief was precluded absent a finding of an interdistrict constitutional violation. 418 U.S. 717, 745 (1974). *Cf.* *Milliken II*, 433 U.S. 267, 289-90 (1977) (requiring only that the state take the necessary steps to dismantle state-imposed segregation).
100. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-209 (1973) (emphasizing that de jure segregation may be predicated on a “purpose or intent to segregate” by school authorities); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14-15 (1971) (the objective is to see that no child is excluded due to race but courts cannot account for other factors which may contribute to disproportionate racial concentrations in some schools); *cf.* *Milliken I*, 418 U.S. at 745 (interdistrict relief is only appropriate where the segregation was directly caused by a de jure interdistrict constitutional violation).
attainable in those areas where they are most needed — the urban inner cities.\textsuperscript{102} It matters little to the child subjected to segregation within a dual school system that the system is not purposefully maintained.\textsuperscript{103} The special curriculum of the African-American Immersion School is an alternative remedy that is designed to enhance the educational experience of children in unavoidably segregated situations.

Finally, the Court has acknowledged that school authorities have broader powers than federal courts to formulate educational policies.\textsuperscript{104} For this reason, local school authorities should be free to design a supplemental academic program tailored to the needs of disadvantaged African-American children if such a program is necessary to eradicate the effects of past segregation in education.\textsuperscript{105}

IV. MID-LEVEL SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW FOR RACIAL CLASSIFICATIONS EMPLOYED FOR AN EDUCATIONAL PURPOSE

A. The Supreme Court Currently Requires Strict Scrutiny

The African-American Immersion School is susceptible to

\begin{enumerate}
\item\textsuperscript{102} Bell, \textit{supra} note 34, at 423-24 (stating that in the face of demographic shifts and the discouraging lack of achievement by African-American children the Court may be emphasizing education over integration and looking to other educational opportunities as alternatives to desegregation).
\item\textsuperscript{103} See Lawrence, \textit{supra} note 62, at 319 (arguing that the victims of racial inequality are harmed regardless of the perpetrators' intentions, and asking, "Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind?").
\item\textsuperscript{104} See Swann, 402 U.S. at 16 (suggesting, for example, that the school board could prescribe that the ratio of African-American to white students should reflect the population for the whole district, while a court could not do so without finding a constitutional violation).
\item\textsuperscript{105} Segregation which is seemingly de facto may, in fact, be de jure. For instance, in \textit{Milliken I}, the record contained evidence of purposeful segregation by the Detroit school authorities. The district court found, however, that shifts in residential housing patterns precluded implementation of a traditional integration remedy. \textit{Milliken v. Bradley}, 338 F. \textit{Supp.} 582 (E.D. Mich. 1971). In essence, segregation which appeared to be de facto, resulting from a change in the area's population, was, at one time, the result of de jure segregation. There was actually a constitutional violation; it was just not readily apparent. Because of demographic shifts, desegregation was infeasible. School boards should be free to fashion an alternative remedy like the African-American Immersion School to counteract situations like that in Detroit and to bolster the quality of education in a segregated environment.
\end{enumerate}
challenge under the Equal Protection Clause of the Fourteenth Amendment because African-American students are treated differently from all other students. In a constitutional challenge, the relevant question is what standard of review applies. The Supreme Court has held that strict scrutiny is required in cases involving a suspect class or the deprivation of a fundamental right. Although recognizing that education is "perhaps the most important function of state and local governments," the Court has consistently refused to classify it as a fundamental right. It is likely that the current Supreme Court would invoke strict scrutiny in the case of the African-American Immersion School since the school uses race-conscious admissions criteria and directly involves a suspect class.


107. The Supreme Court has defined a suspect class to include any group that is classified on the basis of race or national origin. See Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 310 (1879) (striking down a law prohibiting African-American men from serving on juries and arguing that the equal protection clause affords special protection to those who have been discriminated against because of their skin color); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying the "most rigid" scrutiny and upholding a statute that provided for the interment of Japanese-Americans during World War II). Cf. Plyer v. Doe, 457 U.S. 202, 223 (1982) (holding that Texas school board which failed to provide education for children of illegal immigrants is not discriminating against a suspect class); Rodriguez, 411 U.S. at 28-29 (holding that distribution of wealth based on property taxes is not an indicator of a suspect class).

108. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (striking down statutes requiring a waiting period before obtaining welfare benefits because this requirement abridges the right of interstate travel, a restriction that is impermissible unless necessary to promote a compelling government interest); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (overturning statute requiring payment of a poll tax because the tax did not further a compelling state interest, and holding that restrictions which invade the right to vote must be closely scrutinized); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (overturning a law requiring the sterilization of convicted felons because it interferes with the fundamental right to procreate and does not serve a compelling state interest).


110. See Rodriguez, 411 U.S. at 34-35 (finding that the right to an education is neither explicitly nor implicitly protected by the Constitution, although acknowledging that it is of undisputed importance); Plyler, 457 U.S. at 221 (stating that while education is not a constitutional right, it is more than merely a benefit since it is necessary both to maintain a democratic political system and to provide individuals with the basic tools to lead economically productive lives).

111. See Korematsu, 323 U.S. at 216 (holding that the use of a burdensome racial classification is only permitted where a compelling governmental interest is achieved by a narrowly tailored statute).
The Court originally applied a strict scrutiny analysis to racial classifications to protect a minority group that had been foreclosed from participation in the political process. Justice Stone emphasized the importance of this procedural protection in his famous footnote in United States v. Carolene Products, which first gave credence to the notion that heightened scrutiny may be necessary in order to protect those who are unable to protect themselves. Admittedly, the guarantees of the Fourteenth Amendment extend to all persons regardless of whether they possess any distinguishing or immutable characteristic that results in a deprivation of procedural due process. Modern equal protection jurisprudence, however, focuses particularly on the potential to exploit and discriminate against those who are members of discrete and insular minority groups.

The strict scrutiny analysis consists of two prongs. First, the government must establish a compelling state interest, and second, the remedy must be narrowly tailored to further that state interest. Under the first part of the test, the Court has held that race-conscious relief may only be employed to remedy discriminatory practices that are identified with some specificity. Under

113. 304 U.S. 144 (1938).
114. "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Id. at 152 n.4.
116. See Wygant, 476 U.S. at 274 (describing application of the two-prong test in the context of racial classifications).
117. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989). Mere reliance on good intentions or generalized assertions of racial discrimination is not sufficient to establish a compelling state interest. Id. at 500; Wembly v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975). Nor is it enough that statistical disparity exists between the number of contracts awarded to minority firms as compared to the minority population of the entire city. Croson, 488 U.S. at 501. However, an inference of discriminatory exclusion may arise upon the establishment of a significant statistical disparity between the number of willing, qualified minority subcontractors and the number actually hired. Id. at 503. The Court emphatically stated that "[n]otwithstanding we say today precludes a state or local entity from
the second part of the analysis, the factors considered to determine whether the remedy is narrowly tailored include the efficacy of alternative remedies, the planned duration of the relief, and the effect on innocent third parties.\textsuperscript{118}

Programs employing the benign racial criteria have not been supported by a unanimous Supreme Court. Both past and present Justices have argued that the Constitution demands racial neutrality.\textsuperscript{119} A majority of the Court has agreed, however, that strict scrutiny applies to all racial classifications.\textsuperscript{120} Writing for the plu-
rality in *City of Richmond v. J.A. Croson Co.*, Justice O'Connor emphasized that the language of the Fourteenth Amendment provides that the equal protection of the laws is not to be denied to any person. She reiterated Justice Powell's earlier argument in *Regents of the University of California v. Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."  

B. The Case for a Lesser Standard of Review

The Court, espousing platitudes such as that quoted above from Justice Powell's opinion in *Bakke*, seemingly makes its decisions in a vacuum. A belief that the equal protection of the laws is guaranteed to all persons regardless of color appeals to our jurisprudential ideals of justice and equality but is not grounded in historical reality. The laws of this country have never been applied equally to persons of all races, regardless of their color. In view of existing discrimination, it is disingenuous to reject, as

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122. Id.
124. Id. at 289-90 (Powell, J., plurality opinion).
125. See, e.g., Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 Mich. L. Rev. 1729 (1989). Professor Rosenfeld argues that Justice O'Connor's analysis in *Croson* was derived through the process of decontextualization. Decontextualization occurs in a variety of ways, including "lifting race relations out of their historical setting . . . ; 'disaggregating' evidence so as to produce the impression that tightly linked and mutually reinforcing facts actually stand apart; and dealing with key conceptual constructs as though they were self-sustaining when actually they are dependent on particular theoretical assumptions and on the existence of certain specified sets of facts." Id. at 1732. Given this process, strict scrutiny is particularly inadequate in affirmative action cases. Id. Formalistic procedure trumps substance at the expense of justice. See also Dianne E. Dixon, *The Dismantling of Affirmative Action Programs: Evaluating City of Richmond v. J.A. Croson Co.*, 7 N.Y.L. Sch. J. Hum. Rts. 35, 52 (1990) ("Justice O'Connor's implication that the white citizens of Richmond have been so victimized by racial discrimination as to warrant suspect status and require strict scrutiny of the Richmond set-aside plan is the epitome of ignorance and/or sensitivity.").
126. Justice Marshall points out that the frequently-invoked principle that the Constitution is color blind is extracted from the opinion of the lone dissenter in *Plessy v. Ferguson*, where a "majority of the Court rejected the principle of colorblindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, by law, an individual could be given 'special' treatment based on the color of his skin." *Bakke*, 438 U.S. at 401 (Marshall, J., concurring in part and dissenting in part).
offensive to the Constitution, the very programs designed to remedy the resulting racial inequities because they make distinctions on the basis of race. Equal protection of the laws does not always mean equal treatment. The government should not sustain the effects of discrimination by failing to recognize that those differently situated must be treated differently in order to achieve relative parity among the majority.\textsuperscript{127} For example, requiring children to pay a fare for bus transportation to school has a disparate impact on those who cannot afford to pay and may deprive them of an education.\textsuperscript{128} Exempting poor children from paying the fares so that they are able to secure an education would support rather than spurn the mandates of the Equal Protection Clause.

Moreover, the current majority of the Supreme Court does violence to Justice Stone's analysis in \textit{Carolene Products}\textsuperscript{129} by turning the Equal Protection Clause on its head and using it to prevent the implementation of race-conscious programs that are designed to remedy a history of societal discrimination. It is important to remember that the purpose of remedial race-conscious programs is to benefit, not burden, the minority.\textsuperscript{130} Any burden that is created by these programs falls on the shoulders of the majority and is effectively distributed among those who are best able to bear it, those who can protect themselves by influencing the political process.\textsuperscript{131} Where a minority is not subject to invidious discrimination, it makes little sense to require the application of the

\textsuperscript{127} \textit{See} Jenness v. Fortson, 403 U.S. 431, 442 (1971) (upholding varying ballot access requirements for major and minor political parties by reasoning that "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike"). \textit{See also} MARTHA MINOW, \textit{MAKING ALL THE DIFFERENCE} 15 (1991). Professor Minow posits that this situation is the dilemma of difference. Although treating people differently emphasizes difference and tends to stigmatize, treating all individuals alike displays an insensitivity to difference and is also likely to stigmatize. She argues for a shift in societal perceptions of difference from one of distinctions between people to one of relationships between individuals.


\textsuperscript{129} United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (implying that "discrete and insular minorities" may be deserving of additional protection).

\textsuperscript{130} Benign racial classifications are those which employ race-conscious criteria to remedy past discrimination against the classified group. \textit{See} TRIBE, \textit{supra} note 128, at 1524 ("Racial antagonism, of course, is hardly the motive of today's minority set-aside programs.").

\textsuperscript{131} The Supreme Court has recognized and tolerated the fact that a policy of eradicating racial discrimination may necessitate that innocent persons bear some of the burden. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986).
rigid standard of strict scrutiny.

The African-American Immersion School should be reviewed under a standard of mid-level scrutiny which requires that a program using race-conscious criteria further a substantial state interest. The Supreme Court's adoption of a strict scrutiny standard for benign racial classifications has an anomalous result. The same Constitution that for much of the past 200 years permitted racial discrimination is now interpreted to prohibit a remedy designed to redress the effects of that discrimination. A lesser standard of review will avoid the "strict' in theory and fatal in fact" trap of strict scrutiny.

In Regents of University of California v. Bakke, Justices Marshall, Brennan, Blackmun and White urged that mid-level scrutiny should be the standard of review in cases of benign racial classifications. The Justices rejected low-level, rational basis

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132. Mid-level scrutiny would require that the racial classification serve an important governmental objective and be substantially related to the achievement of that objective. Id. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

133. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part). "[H]ad the Court been willing in 1896, in Plessy v. Ferguson, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978." Id. at 401.

134. Gerald R. Gunther, The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). Application of the standard of strict scrutiny almost always results in the regulation or classification being struck down as unconstitutional. For this reason, programs enacted for the general purposes of remedying societal discrimination and promoting integration will be overturned. Using a test of strict scrutiny, the Court has, since 1945, struck down all laws that have had the effect of burdening racial minorities.

135. 438 U.S. 265 (1978). The plaintiff, Bakke, was a white male whose application for admission to the University of California at Davis Medical School was rejected for two consecutive years. Plaintiff complained that the University's minority admissions program impermissibly discriminated against him on the basis of his race. 438 U.S. at 272-78 (Powell, J., plurality opinion).

136. A majority of the Court did not agree as to the appropriate level of scrutiny to be applied in "reverse discrimination" cases.
review since benign racial classifications carry with them the risk of invidious discrimination. They argued that a racial classification should be permissible as long as it serves an important governmental objective and does not stigmatize or burden any single group. A mid-level standard of review is appealing because it both permits affirmative action programs to survive constitutional challenges and safeguards against the possibility that the classification will be used to discriminate against the powerless and the under-represented. A history of societal discrimination is reason enough to afford a remedy by means of race-conscious programs in these situations.

Justices Marshall, Brennan, White, and Blackmun concluded that the University of California’s race-conscious admissions program passed the two prong test applicable under mid-level scrutiny. First, the racial classification served the important governmental interest of remedying the effects of past societal discrimination that impeded minority access to medical school. Second, the program did not impermissibly burden anyone or stigmatize the plaintiff. Bakke was not destined to suffer feelings of inferiority and inequality of treatment as a result of the rejection of his application in the same way that African-American children suffered from the effects of segregation. He would not be relegated to the status of a second-class citizen for life because of the color of his skin. The Justices also found that the medical school’s admission program did not stigmatize the successful minority candidates. They reasoned that, once admitted, all students must satisfy the same degree requirements to graduate.

Mid-level scrutiny is particularly appropriate in the realm of


138. Cf. *Lawrence*, supra note 61, at 323 (arguing that requiring proof of intentional discrimination ignores the reality of how racism has been internalized to become part of our collective unconscious).


140. Id. at 379.

141. Id. at 362.

142. Id. at 374-75.

143. See *Brown I*, 347 U.S. 483, 494 (1954) (arguing that the harm suffered by the African-American students included a perception of inferiority as to their place in society).

144. *Bakke*, 438 U.S. at 375 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

145. Id. at 376.
education. Rather than demand that the school board show specific, past discrimination in order to justify the use of a race-conscious remedial program, the appropriate test would inquire whether the school board's "action advances the public interest in educating children for the future." The Court has traditionally refused to meddle in the pedagogical affairs of local school systems absent the violation of a constitutional right. As long as the racial classification does not invidiously discriminate against a minority group, the school board is entitled to deference in the implementation and management of its academic programs. Subjecting school board decisions to mid-level scrutiny will adequately protect the interests of African-American children.

Another rationale for adopting mid-level scrutiny as the standard of review for race conscious programs is that a lower level of scrutiny encourages the development of progressive public policies. A majority of the Supreme Court has now adopted the myopic approach of allowing the use of race conscious programs only when establishing remedies for specific, identifiable incidents of discrimination. Requiring particularized remediation precludes political subdivisions from engaging in social planning that aims to effect a better society in the future. The Court has, in other con-

146. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (holding that a compelling government interest will be served only where there is a particularized showing of discrimination).
147. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting) (arguing that a finding of past discrimination is not necessary to support the use of race-conscious criteria to hire school teachers).
148. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (upholding the right of educators to exercise editorial control over school-sponsored newspapers where censorship is reasonably related to educational goals); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (indicating that a school district has the authority to prohibit students' use of offensively lewd and vulgar speech during assembly because such behavior by students undermines the school's educational mission); Bakke, 438 U.S. at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); Tinker v. Des Moines Indep. Sch. Sys., 393 U.S. 503, 514 (1969) (finding that school officials are not permitted to prevent students from wearing black armbands in political protest unless there was a substantial disruption of school activities because to do so would infringe students' free speech rights).
149. Cf. Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 111 S. Ct. 630, 637 (1991) (stating that local control over education allows for innovation and the creation of school programs to fit local needs); Milliken I, 418 U.S. 717, 742 (1974) (acknowledging the importance of local participation in and control over the educational needs of its community); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973) (recognizing that local control over school systems encourages "experimentation, innovation, and a healthy competition for educational excellence").
150. See Croson, 488 U.S. at 492.
texts, recognized the importance of allowing some discretion in
dealing with social and economic problems.\textsuperscript{151}

Current social problems that are the consequences of hundreds
of years of legalized racial discrimination are not amenable to
traditional modes of constitutional analysis.\textsuperscript{152} The Court's con-
cern that "the mutability of a constitutional principle, based upon
shifting political and social judgments, undermines the chances for
consistent application of the Constitution from one generation to
the next"\textsuperscript{153} has merit. The Court is also correct in presupposing
that there are instances in which benign racial classifications are
"in fact motivated by illegitimate notions of racial inferiority or
simple racial politics."\textsuperscript{154} The reconciliation of these legitimate
concerns, however, does not demand the application of strict scruti-
ny analysis to all race-conscious programs, a scheme that effective-
ly overturns ostensibly valid programs designed to eradicate soci-
etal inequities. Mid-level scrutiny, if properly applied, will ade-
quately ensure that affirmative action programs have neither an evil
purpose nor an adverse effect.\textsuperscript{155}

The African-American Immersion School, if analyzed under a
mid-level standard of review, will survive a constitutional chal-
lenge. The school serves an important governmental interest and
does not impermissibly disadvantage anyone. First, the articulated
purpose of remedying the effects of pervasive historical and soci-
etal discrimination is sufficiently important to justify using race
conscious admissions criteria. Certainly, the education of the
nation's children is a substantial government interest, particularly
given the strong indications that African-Americans are receiving
inferior educations and, consequently, are less able to participate

v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) ("To stay experimenta-
tion in things social and economic is a grave responsibility. Denial of the right to experi-
ment may be fraught with serious consequences to the Nation.").

\textsuperscript{152} See Bakke, 438 U.S. at 358 (Brennan, White, Marshall and Blackmun, JJ., concur-
ring in the judgment in part and dissenting in part) (the fact that so-called reverse dis-
 crimination cases do not fit into the customary analytic framework for race cases does not
mean that a loose rational-basis standard of review should be applied).

\textsuperscript{153} Id. at 299 (Powell, J., plurality opinion).

\textsuperscript{154} Croson, 488 U.S. at 493 (plurality opinion, Part III-A).

\textsuperscript{155} The significant risk that benign racial classifications will be misused demands that
an important and articulated purpose be shown to justify their use. Any regulation that
stigmatizes or imposes the burden of the program on those least represented in the politi-
cal process will be struck down. Bakke, 438 U.S. at 361 (Brennan, White, Marshall and
Blackmun, JJ., concurring in the judgment in part and dissenting in part).
effectively in mainstream society.\textsuperscript{156} The primary goal of the Immersion School is to develop the hearts and minds of African-American children so that they may become independent, participating members of society.

Second, the African-American Immersion School burdens no one. It does not burden white children who are not denied a quality education but are merely denied admission to the Immersion School. Moreover, white students are not denied the right to an education among a diverse student population. The African-American Immersion School admits its students on a voluntary basis and it is unlikely that every African-American child will opt to attend the segregated school. Any minimal impact on the white students is more than offset by the benefits of the race conscious measure to the African-American community and society overall.\textsuperscript{157}

The Immersion School will not have the effect of stigmatizing its students. On the contrary, the school is intended to engender the development of positive images of culture and self so that the students will have the confidence and ability to become productive members of society. It is plausible to conjecture that, in time, the Immersion Schools will develop reputations as strong academic institutions. The ultimate effect will be to eliminate African-Americans' feelings of inferiority.

V. THE SUPREME COURT'S DECISIONS ON THE USE OF RACIAL CLASSIFICATIONS DO NOT PRECLUDE ESTABLISHMENT OF THE AFRICAN-AMERICAN IMMERSION SCHOOL

Even if mid-level scrutiny is rejected as the standard of review for cases involving race-conscious educational programs, the African-American Immersion School would survive an equal protection challenge under the current strict scrutiny test for racial classifications.\textsuperscript{158} In \textit{Croson}, a majority of the Court agreed for the first

\textsuperscript{156} See \textit{supra} notes 7-14 and accompanying text.

\textsuperscript{157} \textit{Cf.} \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 280-82 (1986) (plurality opinion). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argues that remedial programs that burden innocent parties may be permissible if they are properly tailored to cure the effects of prior discrimination. For example, a distinction can be made between cases involving valid hiring goals and those requiring race-based layoffs. In the case of hiring goals, the burden on innocent individuals is diffused throughout society generally. Conversely, layoffs directly harm particular individuals. There is a difference between the denial of potential employment and the loss of current income.

time that strict scrutiny is the standard of review for race conscious programs.\textsuperscript{159} The Court invalidated the City of Richmond's plan, which required that thirty percent of every dollar in city-awarded construction contracts go to minority business enterprises.\textsuperscript{160} It mattered little to a plurality of the Court that the resulting benefit enriched African-Americans while the burden fell on white persons.\textsuperscript{161} According to the Court, a racial classification must (1) further a compelling state interest and (2) be narrowly drawn to promote that interest.\textsuperscript{162} The Court emphatically denounced the city's goal of remedying past societal discrimination. It claimed that this goal was not compelling enough to justify the use of a racial classification.\textsuperscript{163}

While the Court emphasized that "simple legislative assurances of good intention [would not] suffice" to establish a compelling state interest,\textsuperscript{164} it did not prohibit the use of all racial classifications. The plurality would permit remediation when minority contractors are systematically excluded from subcontracting opportunities.\textsuperscript{165} For example, an inference of systematic discriminatory exclusion may arise when there is a significant statistical disparity between the number of qualified minority contractors available to perform and those actually engaged in the performance of such contracts.\textsuperscript{166} The plurality agreed that "[i]n the extreme case, some form of narrowly tailored racial preference might be neces-

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160. Id. at 511.
161. Id. at 494 (plurality opinion, Part III-A).
162. Id. at 498-506.
163. Id. at 504-505 (the plan failed because the city failed to identify specific incidents of racial discrimination within the construction industry in Richmond, Virginia, and thus did not demonstrate a compelling government interest).
164. Id. at 500.
165. Id. at 509 (plurality opinion, Part V).
166. Id.
sary to break down patterns of deliberate exclusion."167

A state has a compelling interest in remediying violations of state constitutional guarantees.168 For example, several states have a constitutional guarantee providing for a minimum education.169 Thus, once a state makes a finding that the under-education of African-American children amounts to a violation of its constitution, its compelling interest in rectifying this wrong allows implementation of the Immersion School, even under a strict reading of Croson. As a result of this under-education many African-Americans are unable to sustain a minimal level of subsistence comparable to that of most white Americans.170 The African-American Immersion School does not pretend to solve all of society's race-related problems. In the face of these problems, many of which result from substandard education,171 the African-American Immersion School aims to provide previously neglected children with a solid education and to inculcate positive ethnocentric values and favorable self-images. In this way African-Americans will possess the tools necessary to advance in a society controlled predominantly by white institutions.172

The inference of discrimination found in the varying amounts of money allocated per pupil in urban schools, which are attended primarily by African-Americans, and suburban schools, which are

167. Id.
169. See, e.g., Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (holding unconstitutional a state statutory school-financing system that led to wide funding disparities between rich and poor school districts); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (school funding system held violative of Texas state constitution's provision for "efficient" public school system).
170. See Aleinikoff, supra note 55, at 1065-66 ("[i]n almost every important category, blacks as a group are worse off than whites"); see also supra notes 7-14 and accompanying text.
172. In an article discussing affirmative action in the context of higher education, the dean of the graduate school at Rutgers University made an appealing argument: a race-based admissions program is "a meritorious plan against obscene waste. We need to rethink it so that it can better bind and reweave the present. If we fail to do so, we will have pushed it further astray, to be devoured by its enemies or to atrophy on a diet of inertia." Catharine R. Stimpson, It Is Time to Rethink Affirmative Action, CHRON. OF HIGHER EDUC., Jan. 15, 1992, at A48.
attended by white children, provides a compelling state interest. The plurality in *Croson* emphasized in dicta that it would have considered evidence of a significant disparity between the number of minority contractors willing and able to perform a service and the number actually engaged in the performance of such subcontracts as an inference of discriminatory exclusion. Similarly, in the realm of education, the sizable differences in funding that fall along racial lines imply the existence of racially motivated discrimination. New York City, for example, spent an average of $7299 per student in the 1989-90 academic year to educate its students, while Great Neck, Long Island spent approximately $15,000 for each child. Under the strictures of *Croson*, the inference created by such statistics is enough to establish a compelling state interest that justifies race conscious remediation.

After examining the language of the statute being challenged in *Croson*, the Supreme Court concluded that the City of Richmond’s asserted interest in remedying past discrimination in the construction industry was disingenuous. The Court disapproved of the overinclusive nature of the statute, which defined minority group members as “[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.” Writing for the majority in *Croson*, Justice O’Connor argued that the seemingly indiscriminate wording of the statute “strongly impugn[ed] the city’s claim of remedial motivation.”

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173. SAVAGE INEQUALITIES, supra note 3, at 237. Similar funding gaps are found in other areas of the country. It costs the City of Chicago $5265 to educate each of its children while Niles Township High School, a suburban Chicago township, allocates $9371 per pupil. Camden, New Jersey spends $3538 on each child while Princeton spends $7725. Id. at 236. These funding disparities correspond to racial differences. According to the 1990 population census, 52.3% of New York City residents are white and 28.7% are African-American. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 CENSUS OF POPULATION, General Population Characteristics, Table 6. In Great Neck, 90.8% of the residents are white; 4.8% are African-American. Id. In Chicago, 45.4% of the residents are white; 39.1% are African-American. Id. In Niles Township, the percentages are 91.6% and 0.4% respectively. Id. Similarly, 19.0% of Camden residents are white and 56.4% are African-American, while 84.1% of Princeton residents are white and 6.9% are African-American. Id. Generally, those schools receiving the least funding are in cities with large African-American populations. It is not unusual for children in inner-city schools to be subjected to conditions that would not be tolerated by suburban parents, such as overcrowding, sharing of textbooks, leaking roofs, decrepit structures, and closets serving as classrooms. SAVAGE INEQUALITIES, supra note 3, at 85-86, 106, 114. 174. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).
175. Id. at 506.
176. Id. at 478.
177. Id. at 506; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 n.13
The African-American Immersion School does not suffer from a similar defect since it is limited in scope. It is designed to remedy the effects of discrimination which have been perpetrated against African-American citizens. The school is available to African-American students on a voluntary basis and is not concerned with minority students of other origins. The African-American Immersion School is seemingly vulnerable to the criticism that it is a reaction to general societal discrimination rather than particularized incidents of discrimination within the control of the school board. However, the members of the classified group have suffered for almost 375 years as the victims of discrimination. African-Americans today continue to suffer the effects of this history of discrimination. The Immersion School is an attempt to achieve social parity.

Justice Stevens' concurrence in Croson suggested two possible reasons for treating societal classes differently. Like the majority, he would permit disparate treatment of a particular group upon a showing that the members of that group have been the victims of unfair treatment in the past. Justice Stevens went a step further, however, and stated that he would also allow race conscious relief where members of a particular group are precluded from effectively competing in the future as a result of their disadvantages. He stated that "the Constitution requires us to evaluate our policy decisions — including those that govern the relationships among different racial and ethnic groups — primarily by studying their probable impact on the future."

The African-American Immersion School's impact on the future of its students as well as society will be positive. As a

(1986) (The haphazard inclusion of a diverse variety of racial groups "further illustrates the undifferentiated nature of the plan.").
178. History records 1621 as the year the African slave trade began in this country with the formation of the Dutch West Indies Company. This company imported slaves to serve on Hudson Valley Farms. Slaves were imported into Connecticut beginning in 1629, Maryland and Massachusetts in 1634 and New York in 1637. THE NEGRO ALMANAC, supra note 8, at 2.
179. See supra notes 7-23 and accompanying text.
180. Croson, 488 U.S. at 517 (Stevens, J., concurring in part and concurring in the judgment).
181. Id. (citing Justice Stevens' opinion in Fullilove v. Klutznick, 448 U.S. 448, 553 (1980) (Stevens, J., dissenting)).
182. Id. at 734.
183. Id. at 511 (Stevens, J., concurring in part and concurring in the judgment).
184. See Jean Merl and Eric Harrison, Schools Reach Out to Blacks; Efforts are Underway to Reverse the Discouraging Educational Track Record of Many Black Males. Role
result of the emphasis on academic rigor and discipline, Immersion Schools will likely develop reputations as exemplary educational institutions with proven records in academic achievement and the development of citizenship skills akin to that provided at private academies. Therefore, students will benefit by graduating from institutions of strong repute in addition to receiving solid academic backgrounds. Thus, the argument that the Immersion School’s resegregation will further stigmatize African-American youths is without merit. The Immersion School does not purport to solve all of society’s failings in the realm of race relations. While it has absolutely no control over the barriers that students will confront as they try to enter a world dominated primarily by white institutions, it will provide its graduates with tools that will better able them to overcome these barriers. The African-American Immersion School meets the compelling state interest standard as it is defined in Justice Stevens’ future impact doctrine. However, it is unlikely that this standard would garner enough support on the current Court to gain a majority.

The second prong of the strict scrutiny analysis demands that any program that uses racial criteria be narrowly tailored to remedy past discrimination. The *Croson* Court looked to the factors enumerated by Justice Brennan in *United States v. Paradise* to make this determination. In the context of a challenge to an affirmative action hiring and promotion plan, the relevant factors were: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the statistical relationship between the number of minorities employed and the number in the relevant population or work force; (4) the availability of waiver provisions if the plan cannot be met; and (5) the remedy’s effect upon innocent third parties.

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Models Have Been Helpful. One Experiment Inspires Both Hope and Fury, L.A. TIMES, Dec. 28, 1990, at A1 (reporting that attendance, behavior, self-esteem, and academic achievement among the students have improved).

185. See Traub, supra note 26 (arguing that resistance to resegregation is wasted since, as the result of demographic shifts, millions of African-American children do not enjoy the benefits of desegregation).


187. *Croson*, 488 U.S. at 507 (majority opinion).

188. *Id.*

189. *Id.* at 510.

190. *Id.* at 501.

191. *Id.* at 508.

192. *Id.* at 510.
Factors three and four have no bearing on the African-American Immersion School. Insofar as the efficacy of alternative remedies is concerned, integration of the schools is not a panacea and desegregation will not singlehandedly solve the problem of racial separation in American schools. In those school systems in which de jure segregation exists, the desegregation mandate of Brown I and II should be the foremost remedy for any constitutional violation. However, in school systems where there is evidence of de jure segregation and yet no desegregation remedy is available due to residential shifts, the African-American Immersion School is well within a court's equity jurisdiction. Where de facto segregation exists, the African-American Immersion School is a viable vehicle by which local authorities can eliminate the stigmatizing effects of segregation. Thus, the Immersion School is narrowly tailored as the most effective program to remedy past discrimination in specific factual circumstances.

The African-American Immersion School should be an experimental program designed to operate for an initial period of five years. The program would then be renewable for additional ten-year periods by agreement of the school board if the board's members decide that the school positively influences the students. Beyond the first five year period, the school would operate totally at the discretion of its administrators, satisfying the second factor of the Paradise analysis.

Justice Powell, in his concurring opinion, placed particular importance on the fifth factor of the Paradise analysis, consideration of the burden on innocent parties. He found that the burden imposed by a hiring and promotion plan, unlike that imposed by a layoff plan, was relatively diffused. The plan did not force the burden on a single individual and did not seriously disrupt the

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193. In Paradise, the state police department was not operating under a voluntary remediation program. Instead, it was seeking modification of a court order requiring that minorities be given preferential treatment in hiring and promotion practices. United States v. Paradise, 480 U.S. 149, 153 (1987) (Brennan, J., plurality opinion).

194. Justice Kennedy, in his concurring opinion in Croson, approved of strict scrutiny because it only permitted the use of racial classifications as a last resort. Croson, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). For those African-American school children receiving an inferior education in a segregated environment, the Immersion School is the last resort.

195. This is one of a number of factors considered by the Court in judging a hiring plan to be narrowly tailored. Paradise 480 U.S. at 179.

196. See id. at 188-89 (Powell, J., concurring).

197. Id.
lives of innocent parties.198 Similarly, the Immersion School does not burden or disrupt the life of any single person. The creation of the Immersion School does not seriously disrupt the lives of children who are not African-American and distributes the burden, if any, evenly among them. These children will continue to receive an education in a diverse environment that includes minority students, except for those African-Americans who choose to attend the Immersion School. For these reasons, the Immersion School is a narrowly tailored remedy under the Court's five factor analysis.

VI. CONCLUSION

Despite over 35 years of desegregation mandates, segregation and its effects continue to plague American education. In a segregated Boston classroom in 1964, a little girl cried upon hearing Langston Hughes' words, "[w]hat happens to a dream deferred? / Does it dry up / like a raisin in the sun?"199 In 1989, a teenager at East St. Louis High School, with wisdom beyond her years, tacitly understood, though she could not articulate why, that desegregation would not affect the lives of the students in the affluent, predominately white suburb of Fairview Heights across the river. If busing were ordered, she knew that the buses crossing the river into East St. Louis would be empty.200 The African-American Immersion School is a worthy experiment whose time has come. The school and its innovators should be given the opportunity to make a difference in the lives of so many of the nation's children.

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198. Id. at 189.
199. SAVAGE INEQUALITIES, supra note 3, at 1-2; LANGSTON HUGHES, Harlem, in SELECTED POEMS OF LANGSTON HUGHES 268 (1975).
200. SAVAGE INEQUALITIES, supra note 3, at 31-32.