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RETURNING TO PLESSY

RODNEY J. BLACKMAN*

I. INTRODUCTION

The United States Supreme Court's efforts to desegregate American public schools and other aspects of public life, while eminently desirable, have, from a practical perspective, ended in failure.

Following a brief history of several Supreme Court decisions concerning racial issues, the first section of this Article will examine why the Court's efforts have been desirable. The most notable accomplishment has been ending the government's formal acceptance of the racial segregation that formerly characterized American life. Over time this proscription has enabled the races to commingle more comfortably in our society and has allowed minorities to move into previously unavailable jobs, schools, and neighborhoods.

The second section will explore why the Court's efforts can be regarded as having failed. Despite the Court's attempts to desegregate, and possibly because of them, many of our urban centers continue to be largely divided along racial lines. Although the earlier divisions within our urban centers were primarily between blacks and whites, the current divisions have become more complex. At present, inner cities consist mainly of relatively impoverished minorities, particularly African-Americans and Hispanics. In contrast, the surrounding suburbs are populated predominantly by more affluent whites. The two groups often have little contact with each other.

In the third section, this Article suggests that, to the extent the Court's efforts have been a failure, the result has largely been unavoidable given the reality of our social and political life. First, the federal courts are poorly equipped to remedy the problems that reinforce the racial divisions in society. Second, in a democratic society where the white majority is reluctant to engage itself in the problems of the urban and often minority poor, any extensive efforts the federal courts undertake to deal with these problems may well be undone by majoritarian white voting.

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Finally, the fourth section of this Article will discuss how the Court, despite its limitations, could have been more helpful in promoting equality of educational opportunity.

II. COURT HISTORY

Before examining whether the Court's attempts to desegregate American public schools and other aspects of public life have been a success or a failure, it is important to recount the history of significant Supreme Court decisions involving racial issues. In 1896, in *Plessy v. Ferguson*, the United States Supreme Court found that the Equal Protection Clause of the Fourteenth Amendment allowed for separate but equal public accommodations for the black and white races. In this decision, the Court acquiesced to the white society's desire to separate itself from the minority African-American population in various aspects of life— including transportation, housing, and schooling. This separation was particularly noticeable in the Southern states of the old Confederacy where segregation of the races was formally incorporated into law. However, segregation also existed in Northern and Western states in more subtle forms.

2. *Id.* In a manner that strikes the contemporary reader as blatantly racist, the Court in *Plessy* reasoned as follows:

   We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

   *Id.* at 551-52.
4. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (administratively imposed segregation in Denver, Colorado, school district found unconstitutional); Jim Crow in Boston (Leonard W. Levy & Douglas L. Jones eds., 1974) (outlining nineteenth century racial segregation in the Boston public school system, where segregation was based on neither state law nor city ordi-
The racial segregation that the *Plessy* Court endorsed reinforced the subordination of African-Americans that had existed since the beginning of the black slave experience in this country. The formal freeing of blacks from slavery could not produce any real racial equality as long as the white majority used their levers of power to refuse to integrate with the minority. The "separate but equal" law announced in *Plessy* maintained the impositions placed on blacks during the slavery and Reconstruction eras. The Supreme Court not only sanctioned segregation but, along with the lower courts it also failed to enforce the state statutory requirement upheld in *Plessy*—that the separate conditions for blacks be equal to that of whites. In 1954, in *Brown v. Board of Education*, the Warren Court attempted to undo the legacy of *Plessy* by holding that legally enforced separation of the races in public schools was inherently unequal. Integrated public schooling became the law of the land. Two major cases decided during the Burger Court era fleshed out and reinforced the mandate of *Brown* to desegregate public schooling. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court accepted a federal district court plan that promoted the integration of a segregated southern school system. This plan used the racial composition of the entire school system as a guideline for determining the racial

5. For instance, the Supreme Court articulated the barriers for African-Americans to obtain accommodations:

Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964) (citation omitted).

In addition, the Court examined obstacles for African-Americans to basic social amenities: A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. . . . This diminutive spending spring[s] from a refusal to serve Negroes and their total loss as customers. *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (citations omitted).


7. The phrasing in *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (Brown II) was that school desegregation was to be achieved with "all deliberate speed." *Id.* at 301. Desegregation of other public facilities was also required. *E.g.* Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); New Orleans City Park Improvement Ass'n v. DeTiege, 358 U.S. 54 (1958) (per curiam) (parks).

8. *402 U.S. 1 (1971).*
composition of many individual schools. The district court also drew some
school boundary lines in an "awkward, inconvenient and even bizarre"9
fashion in order to promote integration within each district. In addition,
the district court required the busing of school children up to thirty-five
minutes to and from school.10

The other important Burger Court case that promoted integration was
Keyes v. School District.11 Keyes, unlike Swann which involved southern
school districts, dealt with a northern and western school district (Denver)
which previously had not separated the races by statutory law.12 In reality,
however, a fair amount of racial separation existed in the district’s public
schools. The federal district court found that, in one portion of the school
district, the school board had engaged in a deliberate policy of racial segre-
gation by manipulating attendance zones and school site selection. Also,
the district court found that the schools in the inner city reflected the heavy
concentration of African-American students in the area. This concentra-
tion occurred despite the non-existence of a deliberate school district segre-
gation policy. Nevertheless, the Supreme Court reached the same result
that it reached in Swann. Because the school board administrators had seg-
regated part of the school district, integration of the entire school district
would be required to the degree feasible. The Court held that when the
school district purposefully segregated schools in a substantial portion of
the city, the entire school district would have to be integrated (spacial inte-
gration) because the intentional segregation of one area is probative of the
intentional segregation in others.13 Keyes showed that segregation was ille-
gal whether it occurred by a southern statute or by a northern school dis-

The Supreme Court continued to enforce the illegality of segregation
and promote integration when, in Columbus Board of Education v.
Penick,14 and Dayton Board of Education v. Brinkman (Dayton II),15 it re-
quired any school district administration that had intentionally segregated
schools when Brown was decided in 1954 to affirmatively promote integra-
tion. Even if it had done nothing in the interim to promote segregation
(temporal integration), the school board could be required to desegregate its
schools twenty years after any illegality had occurred. The test of whether

9. Id. at 28.
10. Id.
12. Id. at 203.
13. Id.
a school board was under a continuing affirmative obligation to integrate its schools was whether its earlier conduct had the continuing effect of promoting segregated schools.  

These cases caused school districts around the country to bear an ongoing administrative responsibility to affirmatively desegregate schools that had previously been segregated. Seemingly, the Burger Court vigorously carried out the Warren Court's mandate to end purposeful government segregation of public schools with "all deliberate speed." This vigorous enforcement, however, proved deceiving. The Burger and later Rehnquist Courts decided other cases that had the effect of returning the nation to the discarded era before Brown v. Board of Education, the era of separate and unequal schooling.

One of the most important decisions that had this effect was Washington v. Davis. In Davis, the city of Washington, D.C., hired a higher percentage of white police officers than African-Americans. This disparity resulted because a higher percentage of white applicants passed a written examination. The Court articulated a standard for determining whether a violation of the Equal Protection Clause had occurred: Was the written test a "purposeful [governmental] device to discriminate against" African-Americans? Although the test had the effect of allowing the city to hire a larger percentage of whites, it would pass constitutional muster so long as it was neutral on its face and rationally served a purpose that the government was constitutionally empowered to pursue. The Court held in Davis that the city could constitutionally pursue the purpose of improving the verbal skills and communicative abilities of its police officers.

Arlington Heights v. Metropolitan Housing Corp. involved a similar legal analysis by the Court. In this case, a suburb of Chicago which had previously zoned its housing for single families, was not required to rezone its housing to multiple-family units to attract low and moderate income tenants because the Court found no evidence of a purpose to discriminate. The Court held that the suburb's officials were motivated by a concern for

16. Id. at 538.
17. Brown II, 349 U.S. at 301.
19. U.S. CONST. amend. XIV. More accurately, the decision was rendered under the equal protection provision of the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954).
21. Id.
22. Id. at 250.
24. Id. at 259.
the integrity of the zoning plan, rather than by racial discrimination. The effect of the refusal to rezone the suburb—exclusion of impoverished African-Americans—did not constitute a violation of the Equal Protection Clause because no proof was offered to show a government purpose to discriminate along racial lines.\(^{25}\)

The Supreme Court refined the purposeful discrimination requirement in *Personnel Administrator v. Feeney*.\(^{26}\) In this case, the Court addressed the question of whether a state's preferential hiring of veterans constituted purposeful discrimination against women. The Court held that, in order for state action to constitute purposeful discrimination, the state would have to take a "particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."\(^{27}\)

These decisions effectively weakened the possible scope of *Brown v. Board of Education*—to promote integration for the sake of the "hearts and minds" of the school children.\(^{28}\) It may be argued that the new focus was implied by the language of *Brown* itself.\(^{29}\) Still, given several possibilities the Court undertook a narrow focus, confining its analysis to whether the local school board had at one time been involved in the purposeful segregation of schools, and if so, how to cleanse the school board of this constitutional violation.

Given that *Davis* made "purpose" rather than "effect" the test of whether a governmental violation of the Equal Protection Clause had occurred, the fact that most public schools in metropolitan areas were largely of one race was now irrelevant. If the segregation had occurred without government involvement, then it did not violate the Constitution. Assuming that the school districts had not been purposefully created or maintained by the state in order to promote racial segregation, and that the school districts did not themselves purposefully segregate their schools or

\(^{25}\) *Id.* at 265.

\(^{26}\) 442 U.S. 256 (1979).

\(^{27}\) *Id.* at 279.

\(^{28}\) *Brown II*, 349 U.S. at 494.

\(^{29}\) The Court quoted the district court's opinion, which emphasized the law's impact on segregation:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the *sanction of the law*; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the *sanction of law*, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

*Brown II*, 347 U.S. at 494. (citations omitted) (emphasis added).
their school children, no violation resulted when people choose to live within certain school districts.

Feeney further weakened Brown by increasing a plaintiff's burden of proof.\(^3^0\) Assume that a state has created or maintained separate school district lines for the suburbs surrounding its cities. Assume further that this results in African-Americans and other minority students attending all minority city public schools while at the same time, whites in the surrounding suburbs attend all white public schools. To prevail on an Equal Protection Clause claim, a plaintiff must show that the state created or maintained these school district lines, not just with an awareness of their effect in promoting de facto segregation, but with the purpose that it would have that very effect. School district lines were created before integration of schools became an issue, and the lines have been maintained for a number of reasons, including presumably the economic advantage to the existing school bureaucracies. Therefore, it would be virtually impossible for a plaintiff to prove that the largely minority city schools were segregated from the largely white suburban schools because state officials sought to purposefully promote racial separation. And, as Arlington Heights indicates, the suburbs surrounding a city have no obligation to rezone districts in order to provide housing for low income blacks so that they could work more easily in the suburbs and send their children to the local public schools.\(^3^1\)

Still, the Burger and Rehnquist Courts have followed the rationale of the Warren Court's general analysis of the Equal Protection Clause in the public school context. Milliken v. Bradley\(^3^2\) holds that a city (Detroit) whose public school administrators had previously segregated its public schools previously, had an ongoing obligation to undo governmental segregation, even though the white population attending these schools had become too insignificant for meaningful integration. Suburban schools with a large white student body, as long as the schools were in a different district, would have no obligation to participate in this integration if the district had not been involved in the prior purposeful discrimination.

The result of the Milliken case was that, at least in Northern and Western schools where the violations of the Equal Protection Clause occurred as a result of school district administrative policy rather than by statute, the Court would confine any requirement of integrating public schools to the

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30. Feeney, 442 U.S. at 273-74.
31. The effect of this decision on poor minorities is mitigated, however, to the extent that the U.S. Department of Housing and Urban Development can be required to build low income housing in the suburbs surrounding the inner city area. See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976).
If white parents were to move from the cities where integration was required due to prior segregation to the surrounding suburbs whose separate school districts had never had significant minority school children, then their children could be placed in suburban public schools where there would be few minority school children and no judicially imposed integration. If white parents were tempted to move to the surrounding suburbs for various reasons, including the chance to own a home, to have additional space, greenery, cleanliness, reduced crime, and better schools, then those white parents who would prefer their children to go to schools with few minority students would have a court added incentive to move to the suburbs. Regardless of their rea-

33. This Article deals only with those urban areas where the inner city has a different school district from the surrounding suburbs. The majority of urban areas follow this pattern:

According to the 1990 census of the 200 largest metropolitan areas, about two-thirds follow the characteristic patterns of modern American urban apartheid.

Most poor blacks and Hispanics are penned up in inner cities. They are surrounded by suburbs that are at least 90% white. The number of jobs in the cities is declining, while suburban jobs grow. City incomes have dropped to 88% of suburban incomes. Public education has fragmented into multiple school systems, separating children by race and class.

But about 60 of the metropolitan areas have significantly lower levels of racial and economic segregation. A dozen of these are "cities without suburbs" like Albuquerque N.M., Colorado Springs and Huntsville, Ala., which have aggressively annexed emerging suburbs. In such cities, typically 74% of the metropolitan population lives and pays taxes in the city (as against 33% for all other central cities). Incomes of city residents are 113% those of suburbanites. Public services and facilities are more adequate. City planning and zoning encourage affordable housing throughout the area. School districts are well integrated.

About 50 other metropolitan areas have developed almost without central cities. Places like Fort Lauderdale-Hollywood-Pompano Beach, Fla. and Vallejo-Fairfield-Napa, Cal. are really "suburbs without cities." Their dominant, unifying institutions are strong county governments and large, sometimes county-wide school systems. Low-income minorities have not been highly ghettoized, and middle class families have no place and no reason to flee. If the poor and middle class are not always neighbors, they are still taxpayers and citizens in common.


34. A consensus has emerged that desegregation produced a decline in white enrollment of 8-10% in the implementation year in school districts that were more than 35% black. Results vary depending on several factors, including the nature of the desegregation plan and the distance of the busing involved. KENNETH J. MEIR, ET AL., RACE, CLASS, AND EDUCATION, THE CONSEQUENCES OF SECOND-GENERATION DISCRIMINATION 127 (1989).

"White flight" may take three basic forms: parents may simply move their residence to a school system unaffected by a desegregation plan, parents may enroll their children in private schools, or parents may move to another attendance zone within the same school system in which there are still white schools. EVERETT F. CALDADO, ET AL., SCHOOL DESEGREGATION POLICY: COMPLIANCE, AVOIDANCE, AND THE METROPOLITAN REMEDY 1-2 (1978).

The District Court in Freeman v. Pitts "heard evidence tending to show that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20%
sons, millions of whites have moved from the cities to the suburbs since Brown was decided, and many cities have become predominately minority-populated.

The Supreme Court has also held that, once a school district has desegregated its public schools, there is no longer an Equal Protection Clause violation. Demographic changes within a school district that result in the resegregation of schools do not justify a federal district court's demand for an ongoing desegregation of school districts. Thus, even within the school district itself, once the Equal Protection Clause violation has been corrected, the fact that white or minority parents move to areas where they will be in the majority is of no concern to the federal courts.

In addition, the Supreme Court held in San Antonio Independent School District v. Rodriguez that state reliance on local property taxes to fund local schools did not constitute a violation of the Equal Protection Clause, at least where "no charge fairly could be made that the [state] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary..." Applying the rational basis test with minimal judicial scrutiny, the Court found that the local property tax funding of local schools was justified as a means of promoting participation and control of each district's schools at the local level. Although some state supreme courts have held that the local tax method of financing public schools is


Even integration efforts between a city and surrounding suburbs under a large-scale metropolitan plan can produce white flight. See George Judson, Expert Links Mandatory Desegregation to 'White Flight,' N.Y. TIMES, Feb. 6, 1993, at § 1, 26.

35. See Pasadena City Bd. of Educ. v. Spangler, 423 U.S. 1335 (1975). See also Oklahoma City Pub. Sch. v. Dowell, 111 S.Ct. 630 (1991) (holding that once a school district complied in good faith with desegregation decree and Equal Protection Clause and was likely to continue to comply, federal district court's desegregation decree would be dissolved); Freeman, 112 S. Ct. at 1430. (holding that a federal district court could relinquish remedial control over a school district with respect to those categories where it had achieved a unitary school system status in compliance with Equal Protection Clause even though the court retained remedial control over school district with respect to other categories where Equal Protection compliance had not been achieved).


37. Id. at 37.

38. Id. at 40. The Court justified applying the rational basis test on the grounds that wealth was not a suspect classification and education was not a fundamental right. Id. at 28-29.
violative of their respective state constitutions,\textsuperscript{39} those states that had not so held encountered no constitutional difficulty in using such a tax program. The result is that the wealthier suburban school districts, using their property tax base, can afford to spend more per child within their educational system than the poorer city school districts can.\textsuperscript{40}

III. Analysis

What emerges from these relatively recent Court decisions is a judicial acquiescence to the status quo as constitutionally permissible. This status quo consists of relatively wealthy suburbs, with public school districts made up of largely white students, surrounding relatively impoverished cities in separate public school districts made up of largely minority students. Many good jobs are moved out of the cities and into the suburbs without any constitutional requirement\textsuperscript{41} that adequate transportation be developed be-

\begin{itemize}
\item 39. See Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (Serrano II), cert. denied, 432 U.S. 807 (1977) (local property tax method of funding state public schools held violative of equal protection provision of California Constitution); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) (local taxation method of financing state public schools held violative of New Jersey constitutional provision requiring state to furnish thorough and efficient system of public schooling); Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (local property tax method of financing public education held violative of Connecticut constitutional requirement that state provide substantially equal educational opportunity to its youth in public schools); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (special excess levy scheme at district level for funding of basic program of public education held violative of Washington constitutional requirement that state make ample provision for education of all resident children); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980) (local property tax method of financing public schools failed to afford equal protection in violation of Wyoming Constitution); Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983) (state funding of public schools which is dependent on local tax base held violative of Arkansas constitutional guarantee of equal protection and its requirement that state provide a general, suitable and efficient system of education); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (local district financing of state public schools held violative of Texas constitutional requirement that an efficient system of public schools be created to provide for general diffusion of knowledge); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989) (local levy system of funding state public schools which resulted in funding disparities held violative of Montana constitutional guarantee of equality of educational opportunity).
\item 40. In an earlier version of the case in which the California Supreme Court declared the property tax method of financing schools violative of the Equal Protection Clause of the U.S. Constitution, that court found that per pupil expenditures during the 1969-70 school year ranged from a low of $407/pupil to a high of $2,586/pupil at the elementary school level, and from a low of $722/pupil to a high of $1,767/pupil at the high school level. Serrano v. Priest, 487 P.2d 1241, at 1247 n.9 (1971) (Serrano I). Before holding that local district financing of public schools violated the state constitution, the Texas Supreme Court found that during the 1985-86 school year a 700 to 1 ratio existed between the value of taxable property in the wealthiest and poorest school districts and district spending per student varied from $2,112 to $19,333. Edgewood Indep. Sch. Dist., 777 S.W.2d at 392.
\item 41. This is meant as a descriptive statement and not to prescribe how the Court should have treated these issues.
\end{itemize}
between the cities and the suburbs, or that moderate housing be made available in the suburbs for less wealthy citizens seeking to move from the cities. The urban poor, usually minorities, remain stuck in the cities without jobs or good schools while the affluent suburbanites, usually whites, have access to both. The judicial acceptance of this pattern raises

42. But see Hills v. Gautreaux, 425 U.S. 284 (1976) (holding that U.S. Department of Housing and Urban Development, which was not governmentally restricted to a specific urban geography (Chicago), could be required to select sites for public housing in suburbs as well as in core urban area).

43. Citing a study by the National League of Cities, one author points out that American suburbs have been growing richer in per capita income while inner cities have grown poorer. The study reveals that the exodus of wealth to the suburbs tends to cause a slowdown in inner city economies in terms of a slowdown of economic growth and a drop in employment. Id.

44. See EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (holding that the relevant labor market in an EEOC employment discrimination case was that of proximity to the job site within the city (Chicago) rather than the city as a whole, even though this could result in changing the statistical percentage of theoretically eligible available minority employees).

45. While beyond the scope of this article, several recent Court decisions have added to the employment difficulties of urban African-Americans and other minorities. In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Burger Court upheld a federal set-aside requirement for qualified minority-owned businesses as part of its financial assistance to state and local governments in their building of public facilities. The Court held that Congress, even without explicit findings, could create a limited program to remedy building trade discrimination under its power to enforce the Equal Protection Clause under Section 5 of the 14th Amendment. More recently, however, the Rehnquist Court struck down a similar program enacted by the city of Richmond in Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). Applying strict scrutiny, a majority of the Court, fearing racial politics in the context of a city that was 50% African-American and where a slight majority of the city council was African-American, rejected the city's evidence that there had been discrimination by anyone in the city's construction industry which it was entitled to remedy. It is not clear from the Court's analysis whether under any circumstances the city could have made its case. Perhaps the city would have succeeded if it had provided explicit findings of past discrimination in the city's construction industry and remedial action were limited to the minority allegedly discriminated against (here, African-Americans), excluding other minorities as to whom there was no evidence of discrimination (Spanish-speaking, Orientals, Native Americans, Eskimos, or Aleuts). Further, it is unclear whether, because of the constitutionally created difference between Congress and state or city legislatures (as created by Section 5 of the 14th Amendment), in the future only Congress will be able to effectively fashion a remedy for societal discrimination. Nevertheless, the result of Croson is that in the future (at least in the absence of federal legislation or very explicit findings of evidence of discrimination in the local construction industry) cities will find it difficult, if not impossible, to help create and nurture an African-American entrepreneurial class through set-aside programs that also presumably would have the effect of increasing black urban employment.

Furthermore, United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984), although not an equal protection case, adds to the woes of urban African-Americans. The Court stated that a city (Camden, New Jersey) requirement that at least 40% of its contractors and subcontractors on city projects be city residents presumptively violates the Privileges and Immunities Clause of Art. IV, Sec. 2, even though a similar government action (via executive order of the mayor of Boston) had been sustained a year earlier against a dormant Commerce Clause challenge in White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983). Although this case is formally applicable to suburban projects where whites predominate,
several questions; (1) what, if anything, has Brown v. Board of Education and the cases following it changed from Plessy v. Ferguson; and (2) was the Court wise in deciding the cases the way it has? As will be developed in the following two sections, from a theoretical perspective, much has changed for the better because of the way Brown and subsequent cases were decided. From a practical perspective, however, not much has changed. And, as will be developed in the third and fourth sections, for the most part, these Court decisions have been wise.

A. The Court's Effort Theoretically Viewed as Successful

As mentioned above, the answer to the first question—what, if anything, have the post-Brown\textsuperscript{46} cases changed from Plessy\textsuperscript{47}—must be analyzed from both a theoretical and a practical perspective. Theoretically, everything has changed. African-Americans cannot be separated by government mandated action from the rest of society in schools, transportation, housing, or in the workplace. If a residue of segregation remains in society, it is not a result of contemporary government action. A tremendous difference exists between government-forced separation of the races and separation based on as well as urban projects where blacks predominate and, therefore, in form, it is not harmful to the interests of urban African-Americans, there are three reasons why this decision might well prove harmful to the interests of the urban African-Americans: (1) urban centers, being population centers and meccas, probably produce more government projects than suburban ones (such as airports and convention centers); (2) to the extent that suburbanites generally travel longer distances without public transportation and, therefore, have greater need for cars and also have greater wealth for purchasing them, they are more likely to have the means to transport themselves to work on urban projects than urbanites have the means to transport themselves to work on suburban projects; and (3) to the extent that urbanites are more likely to be less educated blue collar workers than suburbanites, they would need the blue collar jobs created by government building projects more than suburban workers would need them.

It should also be noted, however, that although no showing had been made that the local government entity had engaged in discrimination, the Court sustained local government efforts to hire more women in Johnson v. Transportation Agency, 480 U.S. 616 (1987), and to promote more minorities in Local No. 93 Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986). Still, in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), the Court, applying an Equal Protection analysis, struck down a city's effort to remedy societal discrimination by laying off white school teachers with more seniority rather than the more recently hired African-Americans.

The general thrust of most of these recent cases is to substantially reduce the opportunities for urban entities to engage in affirmative efforts to promote employment and entrepreneurial activity among African-Americans and other minorities. When the writer later asserts his reluctant concurrence in most of the Burger and Rehnquist Court decisions discussed in this Article, he is not intending to include by inference any reference to the cases mentioned in this footnote. The writer regards this aspect of the problem as beyond the analytic contours he has created for himself in this Article, namely, how the Court has contributed to a dual society, a largely urban minority and largely suburban majority, reminiscent of the Plessy era.

\textsuperscript{46} 347 U.S. 483 (1954).

factors such as voluntary choice and economic constraints. During the Plessy period, the government segregated people based on race, determining where African-Americans could live, work, and send their children to school. Thus, the government limited the African-American’s economic, social, and educational prospects.

Further, because the white race had previously enslaved the black race, the economic and social effects of such prior dominance and subordination continued even though the law in Plessy\(^4\) declared the two races equal. Despite the formal equality, the force of the government was on maintaining the economic and social effects of the status quo as it was during slavery. The choices of minorities as to where to live, where to work, and the quality of one’s education were severely limited. This limitation followed from the active role of the government in maintaining the separation of the races given the social, political, and economic dominance of the majority over the minority in society at large.

By contrast, in the post-Plessy era, once the government was no longer allowed to support the separation of people based on race,\(^4\) whatever separation occurred resulted from individual choices such as where to live, work, and educate children. True, such choices are limited in a capitalist society by one’s income level. But, income level is determined by how much society is willing to pay for goods and services, or how much wealth has been accumulated. In such a capitalist state, what others will pay for what one produces, or the capital that one has accumulated, determines what economic and social choices are available. Thus, the fact that one lives within a political entity that is fairly economically and ethnically homogeneous is a result of one’s own choices (or one’s relatives’) or one’s ability (or inability) to produce goods or services or to accumulate wealth to a degree that would enable one to live elsewhere. It is not the state that determines where we live, where we work, and where we are educated, but to a large degree our own choices or those of other persons including our parents. An African-American born in such a state is not necessarily to be permanently consigned to inferior conditions, for theoretically one can

\(^4\) Plessy, 163 U.S. at 537-38, allowed for separate but equal facilities under the Equal Protection Clause, but, in fact, during the Plessy era the separate facilities were almost always physically unequal.

\(^4\) This is not a complete analysis of our legal system. Even under the strict scrutiny analysis of the Equal Protection Clause, it would be theoretically possible for the government to take race into consideration in a limited number of instances, such as, to note the racial characteristics of alleged criminals in order to more readily apprehend them. See Korematsu v. United States, 323 U.S. 214 (1944). Also, in some cases the government might be justified in taking race into consideration inremedying a prior discrimination. See Fullilove v. Klutznick, 448 U.S. 448 (1980).
work one's way up the social, economic, and educational ladder into the high rent mainstream.

B. The Court's Effort Practically Viewed as a Failure

It takes no special discernment, to note that if one is born into an impoverished African-American family, one's chances of getting a decent education are fairly limited. In the absence of some special good fortune, the limited education, together with the racism remaining in society, will reduce one's chances of getting a decent job. Not having a well paying job will limit one's residential mobility and limited residential mobility will limit the possibility that one's children will be able to escape the poverty under which their lives have been spent.

Thus, although the Court's undoing of Plessy v. Ferguson's separate but equal doctrine theoretically gives African-Americans choices as to where to live, where to work, and where to have their children educated that did not exist before, if they cannot, in fact, get a decent education because of where they live, they are likely to have limited life possibilities

50. Despite their socioeconomic disadvantages:

[A]s a group, blacks begin school with test scores that are fairly close to the test scores of whites their age. The longer they stay in school, however, the more they fall behind; for example, by the sixth grade blacks in many school districts are two full grade levels behind whites in achievement. This pattern holds true in the middle class nearly as much as in the lower class. The record does not improve in high school. In 1980, for example, 25,500 minority students, largely black and Hispanic, entered high school in Chicago. Four years later only 9,500 graduated, and of those only 2,000 could read at grade level. The situation in other cities is comparable.


Urban high schools face far greater challenges of student developmental and cultural diversity and environmental complexity than high schools do in other settings. Urban high schools are responsible for educating higher proportions of students with serious learning disabilities than the national average, while still retaining responsibility for educating students of exceptional promise. Tensions among faculty, many of whom are trained to teach the average student, increase as the proportion of students who require highly individualized help increases. The vast cultural diversity among urban high school students is evidenced by the presence of many students who speak little or no English and by large numbers of poor and minority students. Bilingual programs and multi-lingual groups create additional complexity and greater subdivisions among students and faculty. Typically, the average teacher is white, while the average student is a minority; this magnifies normal gaps between teachers and students, making it harder for teachers to understand students' special problems or needs. Urban high schools exist in a more complex environment than suburban or rural schools, often involving court-ordered desegregation, special interest groups, high violent crime rates, gang-related crime, and turbulent urban politics.


51. For example, having and using outstanding athletic or entertainment talent, or getting a scholarship or having a wealthy mentor would qualify as good fortune.

52. 163 U.S. 537 (1896).
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(employment, housing, education) as much as they would if Plessy were still good law. Even though government is no longer allowed to formally separate people on the basis of race, Court decisions that have allowed largely white suburban public school students to avoid being integrated with urban African-American students help to keep the latter in the urban schools where the educational opportunities are reduced and impoverishment is likely to be perpetuated from one generation to the next. The separate and inherently unequal system which Brown v. Board of Education\(^5\) decried as the legacy of Plessy ironically remains the legacy of Brown as interpreted by the Burger and Rehnquist courts.

C. The Court Decisions as Largely Wise

Whether the Court should have decided the post-Brown cases differently than it did in order to more cleanly break the legacy of Plessy is questionable. This Article reluctantly suggests that, with one important exception, the Court probably made wise choices.

The first and most important choice that the Court made was to require a showing of purposeful discrimination or differentiation in order for there to be a violation of the Equal Protection Clause.\(^4\) This result was not a foregone conclusion, for the Court could have focused on a discriminating or differentiating effect, rather than purpose, as the basis for an equal protection violation.\(^5\) If the Court had chosen a discriminating effect analysis,

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55. Indeed, in one early, aberrant case, the Court appeared to adopt an effects test in holding that a city could close a previously segregated municipal swimming pool. Palmer v. Thompson, 403 U.S. 217 (1971) overruled by Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). See also Griggs v. Duke Power Co., 401 U.S. 424 (1971). As noted below in this footnote, the Court has understood Title VII of the 1964 Civil Rights Act as allowing for an effects test to determine whether the statute has been violated. This interpretation is consistent with the thrust of the text above, which states that when the Court examines whether there has been a violation of the Equal Protection Clause, it applies a purpose test. The logic is consistent, because when the Court allows Congress to use the effects test, it is doing so in the context of deferring to a Congressional use of its enforcement power to pass legislation under Section 5 of the 14th Amendment to remedy discrimination. When the Court determines whether a violation of the Equal Protection Clause has occurred, it applies the purpose test; when the Court defers to a Congressional enactment, it allows Congress to use the effects test to remedy discrimination. This rationale parallels the situation where the Court upholds the use of the effects test when a federal district court has properly found that there is a need to remedy a state government violation of the Equal Protection Clause.

As mentioned above, the Court has applied a disparate impact analysis to ascertain whether facially neutral employment practices are nevertheless discriminatory under Title VII of the Civil Rights Act. This test uses "statistical evidence showing that an employment practice has the effect of denying members of one race equal access to employment opportunities." Connecticut v. Teal, 457 U.S. 440, 450 (1982) (quoting New York Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979)).
it may have had undesirable results. For example, in equal protection cases involving alleged racial or ethnic discrimination, it would follow that the Court must either explicitly or implicitly decide whether disparity is by itself probative of such discrimination. If disparity of effect alone is prima facie support for the claim of discrimination, then to avoid a claim of discrimination, one would have to avoid disparity in effect. The one sure way to do this is to rig the result of any program by systematically accepting proportionate representatives of each racial and ethnic group in all aspects of each program involved.

The result of such an alteration would mean that the government would have an incentive to base all of its choices on the demographic make-up of the relevant community without regard to other factors. In the public school context, for example, if busing long distances were required to integrate urban and suburban schools, then busing would be employed even if the result were to keep the students traveling so long during the school day that it reduced the quality of their education. If these integrated schools then became segregated once more due to new demographic changes, perhaps even more busing would be required. Given the mobility of many parents in society, the disruptive effect on students, as well as school boards, could continue indefinitely.6

The Court has reasoned that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.” Griggs, 401 U.S. at 432. In applying the disparate impact analysis, the Court has referred to Congress' objective in removing arbitrary barriers to employment when the barriers operate invidiously to favor identifiable groups of white employees. Id. at 429-30.

But note that the Court's inquiry is whether the employment practice is discriminatory, not whether the employer has a statistically balanced workforce. Statistical imbalance is a basis from which one may infer discrimination, but statistical balance alone does not mean that discrimination is absent. See also Teal, 457 U.S. at 442 (Court rejected defendant's "bottom line" defense of a balanced workforce, when a promotional test was at issue). Courts must still require, as part of a prima facie employment discrimination case, a demonstration that the statistical imbalance complained of results from one or more employment practices. The plaintiff "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). An unlawful employment practice based on disparate impact is established under the Civil Rights Act of 1991 only if the complaining party demonstrates that a respondent using a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity. 42 U.S.C. 1981 § 105 (1991).

56. The Supreme Court has held that:

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the
Similar difficulties could arise in the personnel context. Under a discriminatory effect analysis, for example, a baseball coach at a state university who wanted to avoid being charged with racial or ethnic discrimination would place on the team and play members of every ethnic and racial group in proportion to their percentage on the campus. If African-Americans constituted ten percent of the state university class, one out of every ten members of the baseball team would be African-American. This would be so even if the ten most talented athletes that one could find for the team were, in fact, African-American.

This example is chosen because the writer believes that, regardless of one's view of the larger issues raised in this article, one would intuitively support the proposition that the baseball coach should be able to choose the best baseball players rather than produce a less competent, but racially and ethnically balanced team. This may be because the sport of baseball probably seems to most to be a relatively trivial pursuit, unlike work, housing and education. Another reason is that, to a fair degree, one can recognize excellence in baseball, so that the arbitrariness inherently involved in choosing the "best" players is reduced by one's ability to apply objective criteria, such as batting averages and fielding percentages. Also, even though baseball is a relatively trivial aspect of our total lives, the quality of the game is important to most sports fans. We are more likely to follow it if we think that the quality is high. The most important reason why the baseball example seems intuitively supportive of the notion that the state college coach should be able to choose the best players is that, regardless of our racial and ethnic identity, those likely to read this article (namely, lawyers and law students) do not have as much emotional identification with how well "our kind" does at playing the game. Our self-identity is not significantly weakened by the coach's refusal to place representative numbers of "our kind" on the team.57

Unlike sports, education, jobs, and housing are commonly viewed as important to the totality of our lives. There is probably a fair degree of consensus as to what positions are important in society, such as the positions of power in the military, industrial, and political complex, the hard sciences, the professions, and the elite universities. If minorities are not

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57. This assertion would not be true for every possible reader and for every sport. For years, in boxing promoters could substantially increase the gate at a championship heavyweight fight if they could produce a credible white challenger to whoever was the reigning black champion.
substantially represented in these important positions, this could have a negative psychological impact on the children from these communities. Why is "our kind" not proportionately represented within these groups? Is it because "they are keeping us down?" Is it because of government discrimination, or is it because, for the most part, minorities are lacking some of the qualifications needed for success? The answers to these questions are very disturbing. If minorities think that "they" (the white majority) are keeping minorities down or that government discriminates against minorities, then minorities are likely to become bitter and paranoid. If minorities come to think that they are often lacking qualifications, are they not likely to think that this is tantamount to an admission that they lack ability? Either way, psychological damage is to be expected as a result. These kinds of concerns led the Court in Brown to assert that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." 

Of course, these are not the only answers to the question: Why is it that minorities, such as African-Americans, Hispanic-Americans, and Native Americans are under-represented in most of the American elites? Many members of all three groups suffer from poverty. This poverty makes it difficult to escape the ghetto, the barrio, or the reservation and move into the mainstream. In the cases of African-Americans and Native Americans, the poverty was originally imposed mainly as a result of government action. But, (perhaps apart from government policies concerning Indian reservations) today the poverty is largely self-perpetuating and not substantially reinforced by active or purposeful government action. An assertion that people are poor is not equivalent to an assertion that they are incompetent.

58. Brown v. Board of Educ., 347 U.S. 494 (1954) (citation omitted). This analysis is not to deny other aspects of the problem, particularly the possibility that the majority white population in general might perceive African-Americans as less likely to be as qualified for positions of importance as members of their own group. If so, they might be less inclined to fully accept and appoint African-Americans to positions of importance. Further, this could reasonably lead African-Americans vying for such positions to feel they are stigmatized or potential losers while in the very process of competing for these positions. This would, in turn, reduce their chances for success. See Steele, supra note 50, at 68.

59. The government created the legal status of slavery which paralleled the actual status imposed by whites on African-Americans. And, the government made and often broke one-sided treaties with Native Americans. While the effects of these and other government actions remain, (with the possible exception of its treatment of reservation Indians) the government is no longer actively involved in official and purposeful discrimination against minorities.

60. In his play, The Curse of the Starving Class, Sam Shepard seems to be asserting that certain mores often accompany poverty. These mores alienate middle class persons and make it that much more difficult for impoverished persons to move up the economic ladder. These mores
Also, in the case of African-Americans, a more pronounced breakup of the family structure has occurred than in the general population. The absence of a stable family structure containing a positive male "father" model likely contributes to the difficulty many young African-American males have in overcoming their economic and social status. Being born into an impoverished lifestyle without having successful, nurturing fathers (or parents) is not a reflection on one's innate ability or potential for dealing with life's challenges. However, it probably will have an adverse effect on whether one will use this ability constructively.

Being born into the drug culture is another environmental factor that has a limiting effect on one's opportunities. To the extent that minority mothers are not able to properly nourish their fetuses and babies because of their own impoverishment, drug dependency, or inability to obtain proper medical care, the children will have a more difficult time escaping their economic and social status. Again, this has nothing to do with innate ability, only circumstances.

Also, if the urban ghetto society tends to be an area plagued by gang violence and high crime, then the problems of just surviving day to day take precedence over any incentive to get ahead. This is so even if one has no desire to be caught up in the cycle of violence and crime which permeates neighborhoods. Being brought up in an environment hostile to development is also not reflective of one's innate ability.

For Hispanic-Americans there is also a language barrier. To the extent that mastery of English is a precondition for economic and social success outside the barrio, that one's circumstances make it difficult to obtain this mastery is no reflection on one's ability.

Thus, it can be argued that if a race is not proportionately represented among the elites, a negative psychological impact on minority youth could have nothing to do with ability. Sam Shepard, The Curse of the Starving Class in Sam Shepard: Seven Plays. (1976).

61. Sixty-six percent of African-Americans are born out of wedlock as compared to 16% of whites. See Andrew Hacker, The Myths of Racial Division, New Republic, Mar. 23, 1992, at 21. Perhaps the cause of this more pronounced breakup can be traced to the slave experience. If so, the government's legal acceptance of slavery has been a causal factor in an ongoing problem. Even if this is so, it is difficult to see what government could do to undo its original involvement. While not a solution to the family disintegration problem, government financial aid might alleviate some of the burden imposed by family disintegration as well as poverty. But if this is so, the question arises whether such aid should be provided by the courts as a redress for a government violation of the Equal Protection Clause or by Congress. It is suggested that the better governmental route for providing such aid is Congress, because the causal connection between the government action and the current problem is rather tenuous, and because, as will be argued infra, Congress is the more appropriate governmental entity to authorize such aid.
result, causing them to feel that society and government discriminates against them, that they lack the ability to succeed, or both. Even so, a number of environmental explanations exist, unrelated to Supreme Court decisions interpreting the Equal Protection Clause, or whatever disproportionate African-American, Hispanic-American, and Native American representation exists in positions of power.

If the Court interpreted the Equal Protection Clause to apply an effects test rather than a purpose test, the result would be that government would be required to sacrifice other important values in an ongoing effort to comply with this test. In the public school context, this could mean ongoing federal court supervision of educational decisions and massive busing of school children, even when busing has a negative impact on the quality of education. In the personnel area, it could mean that less qualified people would be chosen in order to satisfy demographic requirements, thereby reducing the competence level of such employees.

The purpose test avoids these problems,\textsuperscript{62} while still addressing the fundamental problem reflected by the use of the language of the Equal Protection Clause, namely, preventing government discrimination against persons

\textsuperscript{62} This is not to imply a negative judgment about the use of the effects test either by the federal courts as a remedial device to undo the prior effects of a judicially determined violation of the Equal Protection Clause or by Congress under section 5 of the 14th Amendment. (This is not the same issue that is discussed in the text above, namely, which is the appropriate test to determine whether there has been a violation of the Equal Protection Clause in the first place).

The only way the federal courts can undo what they regard as a violation of the Equal Protection Clause is to examine the effect that any remedial effort is having on the situation created by the violation. Thus, for example, if a school board has been found guilty of violating the Equal Protection Clause in the purposeful manner in which it has assigned students based on race to its various public schools, then in order to insure that it has remedied this violation, the courts will have to be equally cognizant of the school board's current efforts to undo its prior action. The only way for the courts to ensure the success of the current school board's effort to remedy its prior violation is by examining the racial makeup of the various schools within the district so as to note that the desired effect has occurred.

There are two additional reasons for allowing Congress to apply the effects test to remedy what appropriately has been determined to be an Equal Protection Clause violation under section 5 of the Fourteenth Amendment. First, if Congress is not given authority to employ an effects test under section 5, then it is difficult to see what section 5 can add to the judicially applied understanding of how to remedy an Equal Protection Clause violation. If one assumes that both Congress and the federal courts are given authority to enforce the Equal Protection Clause, how can Congressional enforcement be effective unless, like the federal courts, it has authority to take race into consideration, that is, be cognizant of the effects of its legislative remedy? Otherwise, Congress becomes ineffective as an instrument to remedy an Equal Protection Clause violation and section 5 is rendered ineffective as an enforcement mechanism. If it is equally plausible to interpret a constitutional clause as either ineffective, precluding Congress from doing what federal courts are reasonably allowed to do, considering effect in an enforcement or remedial context, or adding something new (say, allowing Congress to use the effects test to remedy an Equal Protection Clause violation), then as a matter of constitutional interpretation, the preferable course would be
because of an irrelevant characteristic such as race. The writer hopes that this discussion persuades the reader that the Court applied the appropriate test.

But even so, one must also recognize that a downside exists in using the purpose test. The downside is that it perpetuates the status quo. It does not solve most of the substantive problems that existed at the time of Brown, specifically, the psychological damage done to minorities because of the separation of the races. The current situation continues the separation of the races with African-Americans usually confined to city public schools, poor housing, poor transportation, and fewer job opportunities, while whites often live in the surrounding suburbs with greater resources available for "the good life."

Assuming that one accepts the purpose test on its merits as the appropriate test to be applied in determining whether the Equal Protection Clause has been violated, then most of the Court's decisions seem reasonable even though they have created a very significant downside. This conclusion is proper for several additional reasons that constrain the Court which have not been discussed thus far. One reason is that, assuming the under-representation of African-Americans, Hispanic-Americans, and Native Americans in positions of power and influence in our society can be corrected through government action, the Court is ill-equipped to effectuate these changes. A second reason is that the white majority has not yet committed itself to the necessary expenditures and sacrifices required to correct the statistical imbalance in minority representation at the upper economic, political, and social levels of society. Without such a commitment by the majority in a democratic society, any remedial effort undertaken by government is bound to flounder. These two arguments tend to merge together to the degree that some Court members view the Court's own role as a limited one. 63 This limitation is premised on the assumption that the executive and

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63. See Allen v. Wright, 468 U.S. 737 (1984) (the Court limited standing of plaintiffs challenging Internal Revenue Service's grant of tax-exempt status to private school discriminating on basis of race). One basis for the limitation is that monitoring the executive branch is a role for Congress and not the courts.
legislative branches, rather than the courts, represent the popular will; therefore judicial activism would tend to undermine the majoritarian democratic process.\(^64\)

Whether or not these additional considerations motivated the Court to use the purpose rather than the effects test, they help to explain or justify why it was chosen. As one examines the post-\textit{Brown} decisions limiting the scope of that case to undoing purposeful governmental discrimination or differentiation based on race or ethnicity, one imagines that the same jurisprudential restraints that have animated many members of the Court generally have applied here as well. This means that the perception in a democratic society of the Court’s role must be a limited one, or else it will be viewed as an inappropriate, and ultimately futile undercutsing of the will of the majority. Perhaps Justice Stone in \textit{United States v. Carolene Products}\(^65\) best delineated the limits of this role. He argued that the Court should defer to the expressed will of the popularly elected branches of government, that is, the legislature and the executive, except when: (a) the popularly elected government entity violates the explicit language of the Constitution; (b) the electoral process has become blocked so that the premise underlying judicial restraint (the need to defer to the democratic will) does not apply; or (c) majoritarian prejudices operate within the political process against a discrete and insulated minority.\(^66\)

The value of judicial restraint as articulated above, with the exceptions also noted, is that it preserves the basic democratic theory of the state. Given the democratic theory and practice based on that theory, the Court’s role is necessarily reactive: dependent on an actual case or controversy before it,\(^67\) restricted by the briefs and arguments and issues presented to it, unable to ascertain the economic impact of any decision calling on another branch of government to expend funds, unable to tax and raise money so as to be assured that its orders will be effectively carried out\(^68\) and dependent upon other government entities to enforce its decisions and on the public to acquiesce in them. Given these pragmatic restraints on the Court’s activism, what is their relationship to the Court’s handling of issues involving

\(^{64}\) See Goldberg v. Kelly, 397 U.S. 254, 271-79 (1970) (Black, J., dissenting) (arguing that the question of whether or not to provide due process protection before a state administrative agency cuts off welfare benefits should be left to legislatures elected by the people).

\(^{65}\) 304 U.S. 144, 152 n.4 (1938).

\(^{66}\) Id.


\(^{68}\) See Missouri v. Jenkins, 495 U.S. 33 (1990) (holding that a local federal district court could not remedy segregation by ordering a local property tax levy, though it could order the local government body to raise its own taxes even in excess of limit set by state law).
alleged racial discrimination? If the central problems surrounding racial inequality in society were a result of executive and legislative governmental action, then it would be constitutionally required and pragmatically feasible for the Court to address and perhaps resolve these problems. Indeed, these issues are what the Court has attempted to deal with since Brown. But when the problems are largely societal rather than governmental in nature, they probably cannot be effectively resolved by the Court. How can the Court eradicate poverty in the cities without also taking over the roles of the legislative and executive branches? How could the Court repair the broken homes, solve the drug, crime, and gang problems, or remedy the health inadequacies of the inner cities without becoming an Orwellian Big Brother? And, assuming it sought to do so, in the long run, how can the Court impose its will on a white majority that sought nothing more than to escape to the suburbs and disengage itself from the problems of impoverished minorities living in urban areas? Is it not obvious from voting patterns in recent presidential elections that, absent a dictatorship, a majority of voters cannot be forced by the courts or legislators to continuously engage in the problems of the minority when they do not want to? Even assuming that the Court could impose its will on the larger society, it would have to use dictatorial means to remain effective. Otherwise, how could the Court, as an institution without the power to collect taxes or engage in a comparative assessment of where taxes should be spent, determine in the cases before it how to proceed to maximize racial and ethnic equality? The Court lacks the tools for such assessments and, short of a judicial dictatorship, the clout to impose its will on the general society.

If it is accepted that the Court's role must be limited, then for the most part, its post-Brown decisions seem justified. They are justified because they deal with what the Equal Protection Clause requires: that government cease to be involved in racial discrimination or differentiation unless government can justify such action as necessary to achieve a compelling governmental end. The cases are justified because they do not have the courts attempting to do what they are poorly equipped to do, which is, to determine how to eradicate social inequalities between the racial and ethnic groups in our society. They are also justified because the racial problems in our society largely result from the dynamics of society itself. Assuming that they can be undone at all, they cannot be undone by the Court, especially when the larger society does not support such actions.

If one accepts this justification for the Court's narrow interpretation of Brown in more recent cases, then one also acquiesces to the Court's role, however tangential, in reinforcing the migration of more affluent, largely white families out of urban areas into the suburbs and the resulting minor-
ity domination and impoverishment of inner cities. To the extent that the urban schools have declined because the stabilizing influence of middle class children has been reduced, and to the extent that urban unemployment has increased as employers have brought jobs nearer to their suburban homes and largely white employees, the Court has played a role in the decline of schools and rising unemployment.

What is suggested here is that the social engineering properly begun by the Court with such idealism and hope in Brown has largely and properly been channeled in a narrow way that has dissipated that early hope. In the end, the Court acted as though it had decided that it could not effectively undo the social maelstrom revolving around race. The Court probably acted wisely even if, as a result, it added to the problem it was ostensibly attempting to correct at an earlier stage. One feels saddened that our cities are so impoverished and that minority children raised in this environment are often so poorly equipped to fully participate in society. But one is also chastened by an awareness that the Supreme Court, in a democratic society, even if it had the tools and the expertise (which it does not), cannot long require a majority of the population to unwillingly sacrifice its perceived interest on behalf of a minority. Even assuming that these urban and racial problems of our society are solvable by a determined electorate, they are beyond the Court’s ability to solve when the electorate is determined to ignore them.

D. One Unwise Court Decision

Given these kinds of constraints, could and should the Court have done more around the margins of its limited role to help undo the negative impact of Plessy? One area in which the Court could and should have taken a more active role involves the Court’s treatment of state efforts to fund pub-

69. For example, two Illinois counties experienced this kind of flight: Manufacturers, many of them looking for skilled workers and lower taxes, fled Chicago and Cook County in record numbers last year, according to data compiled by the publishers of the 1992 Illinois Manufacturers Directory. . . . Over the last decade, Chicago lost 129,061 manufacturing jobs. So while it gained 83,518 service-sector jobs, the city suffered a net loss of 45,543 jobs for the decade. . . . ‘Manufacturers tell us there has been a steady decline in the skills of workers in Chicago and Cook County’ [Howard S. Dubin, president of the Evanston-based Manufacturers’ News, Inc.] said. ‘Manufacturers today don’t need brawn . . . they need a more sophisticated work force able to use today’s technology. They aren’t finding that in Chicago or Cook County. For example, most machine tools today are computer driven, so workers must know something about computers. Few do. We need new training programs for city and county workers.’ Ronald E. Yates, Factory Flight Hits Record Pace, CHI. TRIB., Feb. 14, 1992, § 1, at 1, 10.
lic schools. In *San Antonio Independent School District v. Rodriguez*, the Court allowed the state to use the local property tax in each school district as the primary mechanism for funding the state's public schools. The result of this decision was that the school districts with greater property wealth could afford to fund their schools more lavishly than the poorer school districts. If *Plessy*, in theory, but not in fact, required tangible equality in a state's funding of the separate black schools compared to the white schools, then *Rodriguez* allows for inequality in fact, in a state's funding mechanism for impoverished (largely minority) school districts compared with the wealthy (largely white) school districts. Now, because of *Rodriguez*, the de facto separate education of the minority child need not be equal to that of the majority child, even as to tangible factors.

Because *Rodriguez* returns the Court to a de facto *Plessy* situation, whether *Rodriguez* was wisely decided must be addressed. The Court majority held that because the state action dealt with school districts rather than race, no suspect racial classification was involved. And, even assuming that the property tax as a mechanism for funding public schools purposefully discriminated against poor people, which the Court denied, wealth alone (or impoverishment alone) did not constitute a suspect classification. Nor was there a fundamental right for each child in the state's public schools to be educated with the same financial expenditure as every other child. Because neither a suspect classification nor a fundamental right was involved, the Court applied a rational basis test rather than strict scrutiny. It was rational and, therefore, constitutional for a state to use the property tax mechanism as the primary source for funding a district's schools. This was a means of encouraging local participation in and control of each district's schools.

As indicated above, in *Rodriguez* the Court chose not to regard wealth (poverty) as a suspect classification and (equal) educational funding as a fundamental right. The Court then upheld the property tax base for funding the public schools under a rational basis test. Under the rational basis test (as distinct from heightened scrutiny), the Court has almost always sustained government action when challenged as violating the Equal Protection Clause. But the Court's decision to apply the rational basis test was not pre-ordained by the Constitution. It is probably more understandable as a result of the conservative Court's unwillingness to add to those catego-

70. 411 U.S. 1 (1973).
71. Id. at 26-27.
72. Id. at 28.
73. Id. at 35.
ries where heightened scrutiny would be applied (such as race, gender, and voting). The likelihood that the Court would end up striking down even more types of government action as violative of the Equal Protection Clause increases under a strict scrutiny analysis.

But textually, the Equal Protection Clause of the Fourteenth Amendment is not limited in its protection to only a few special categories where a heightened scrutiny analysis is applied. Rather, it provides persons with equal protection of the law across a spectrum of categories. To the extent that it is argued that the Equal Protection Clause ought to be limited by its historic context, namely, the emancipation of the African-American race and its members' integration into the larger society, then this would seem to be the very sort of case in which that clause would be vigorously applied. The government's involvement in the ongoing disparity of funding for education constitutes government acquiescence to the ongoing cycle of impoverishment of the already poor, often African-American, and other minorities.

If the general society's indifference to the plight of impoverished minorities is beyond the scope of the Court's writ and ability to undo, it is not beyond the Court's writ to undo government's indifference to funding public education in the urban areas. Indeed, the very premise of the post-

Brown cases dealing with education is that, while the Court has no role to play in preventing societal segregation, it does have a role in proscribing purposeful government involvement in such segregation. While the government's acquiescence in the use of the local property tax as the primary funding device for public schools does not constitute purposeful government segregation, it does constitute purposeful government funding of inequality among students. Those at the bottom end of the economic and social ladder continue to be treated unequally in the tangible funding of their schools. Not only have the post-

Brown decisions made de facto partial segregation easier for society to continue (a result that this writer accepts as appropriate, considering the Court's limited role and ability), but they also made it easier for society to continue manifesting its indifference toward the urban African-American and other minorities by purposefully allowing school funding per child to continue to be based on the wealth of the district in which they live.

The Court could have decided that government services to persons based on their personal wealth involves a quasi-suspect class entitled to heightened scrutiny. Alternatively, the Court could have held that education is a fundamental right or that the rational basis test will be employed with particular bite in cases where the impact on minorities is likely to reinforce pre-

Brown inequalities. The Court could have reasonably fashioned
an analysis that would require state governments to attempt to provide equal funding for every public school student in the state. This approach would have ended one of the last vestiges of government's acquiescence in promoting racial inequality.

Because it would have been addressed to another branch of government and not to society as a whole, this approach would have avoided some of the difficulties articulated above when broader Court activism in this area is contemplated. It does not attempt to engage in broad social engineering designed to break the poverty cycle. It does not attempt to force whites to change their attitudes towards minorities and the poor. It does not attempt to change the mind-set of many minority persons that may reinforce the poverty cycle. It does not tell state governments how they must spend their revenues, thereby insuring either higher taxes or less funded government services. Rather, it only does what the Court can do. Specifically, it requires that the state spend an equal amount on each public school child regardless of where the child goes to school.

Perhaps many whites would have less respect for the Court if Rodriguez had been decided differently. Given the public's seeming apathy toward the problems of minorities and the poor in our society, this result might lead some right-wing politicians to assert that, because of judicial activism in violation of the plain language of the Constitution, the intent of the framers, or both, the Court personnel ought to be replaced by members with a "more textually rooted" and modest understanding of the Court's role. Such politicians might be given a receptive hearing by the general public.

However, the Court cannot always be a mirror of public opinion. If the Court believes that the textual language and purpose supports one interpretation rather than another, then its role is to do what it perceives to be right, regardless of the possibility of a political fallout.

74. This would not eliminate all problems connected with state per-pupil funding of public schools. One problem that seems intractable is that when a metropolitan area transcends more than one state, such as Kansas City, Missouri and Kansas, the funding per pupil would depend on which side of the state line the pupil lived.

Other problems are more tractable. Presumably such equal funding per pupil would have to take into account disparities in the cost of living in different regions of the state. Presumably it also would allow for parents who so chose and could afford it to enrich their children's education by paying for supplemental educational tutoring that the school did not provide, such as, ballet lessons, German lessons or driver education classes. This differential in funding per child would not violate the equal protection principal enunciated in the text because it would not result from government action.

75. The suggestion here is not that the Rodriguez majority did not believe in the reasoning and the result that it reached. Rather, if (contrary to the apparent fact) the Court had not believed in its holding, it should have acted on its belief rather than doing what it might have regarded as politically expedient.
A serious objection to this analysis may be that it fails to resolve the post-Brown acquiescence to a return to Plessy, namely, de facto separate facilities for the races. Even if the separate but unequal result of Rodriguez in the context of public schooling were overturned, the post-Brown cases still allow for de facto separation of the races and inequality in other areas. A result the writer accepts. The tangible factors would remain unequal because the public transportation systems in the suburbs, on which poor persons depend to get to work, would remain undeveloped; because the poor probably would continue to be inadequately housed in the cities while housing in the suburbs would be mainly zoned for wealthier persons; because jobs would remain centered in the suburbs where the wealthier whites congregate; because the health care of those living in the inner cities would remain poorer than those living in the suburbs; and finally, because crime rates would remain higher in the inner cities than in the suburbs.

There are intangibles that would also remain unequal. They would be unequal to the extent that the ghetto, barrio, and Indian reservation cultures are different from those of the more affluent white suburbs. So, to the extent that the respective cultures formed the persons raised in them, the honing of those talents useful to the larger world by the impoverished minority persons, and their opportunities to use these talents through interaction with the white elite, would be thereby diminished. Changing the result in Rodriguez would do little to undo the lingering effects of that societal segregation that continues even after Brown.76

76. Suppose (contrary to fact) the executive and legislative branches, spurred on by a popular mandate, were to attempt to undo the cycle of poverty, unemployment, violence, crime, poor education, drugs and broken families that permeates so much of our urban minority life. How might these changes best be effectuated?

One possibility is to attempt to replicate the findings for African-Americans, Hispanics and American Indian children set forth in a Scientific American article studying recent (and "more ordinary") Indochinese refugees now living in the United States. All the children attended schools in low-income, metropolitan areas in Orange County, California, Seattle, Houston, Chicago, and Boston. The children excelled in math and had a mean grade point average of B. The reasons for the refugees' success include an emphasis on parental encouragement for the children's educational achievement and familial involvement in doing extensive homework. Nathan Caplan, et al., Indochinese Refugee Families and Academic Achievement, Sci. Am., Feb. 1992, at 36.

If these cultural values are the key to successful adjustment into the broader society, it seems obvious that a benevolent government cannot impose them. But what government could do, in addition to insuring adequate pre- and post-natal medical care and nourishment, is to attempt to give the children the values which are sometimes lacking at home. This would entail separating the children from their parents for long periods of the day (say, upwards of 10 hours per day for more mature children). During this time, education and homework would be emphasized and encouraged by qualified instructors.

This approach, however, is probably too utopian and statist for our society. Nor is there any necessary assurance that it would work. But this is the approach that the writer would attempt if he could.
The Court has acquiesced in a substantial separation of the races in public schools, corresponding more to the reality of Plessy than to the promise of Brown because the problem is a societal one, and the Court’s role in solving it is necessarily limited. In a democratic society, the will of the majority governs. The majority population would probably acquiesce if the Court engaged in a limited, (Equal Protection Clause) textually derived demand on state governments to fund each public school child on an equal basis, that is, a limited demand with strong textual support formally made on government rather than on society itself. But this majority almost certainly would not accept the radical social engineering effort that would be required for the Court to attempt to produce the societal equality that a broad reading of Brown might suggest. To produce such equality probably would require the Court to force open suburban housing zoning patterns, to require massive busing between city and suburbs, to force federal courts into continuous intrusion into specific educational decisions, to force government into much more strenuous interaction with our urban and rural pockets of poverty, and to force massive education of whites toward acceptance of non-whites and of non-whites into adopting the cultural values of whites. Short of imposing a very intrusive state, the Court would be unable to halt the current trend toward largely separate societies, between rich and poor, whites, African-Americans, Native Americans, and Hispanic-Americans. The Court has no textual mandate for imposing such an intrusive state. Even if a reading of the constitutional text could be found to provide a basis for such a mandate, in a democratic society such decisions ought to be left to the people.

When the general society is willing to help the poor, the minorities, and the cities, it will attempt to do so. Meanwhile, the Court cannot and should not attempt to devise its own solution.