BLACK LAWYERS AND CIVIL RIGHTS: THE NAACP'S LEGAL CAMPAIGN AGAINST SEGREGATION

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ABSTRACT

While many remember the 1950s and '60s Civil Rights Movement as a grass-roots series of events consisting of mass marches, boycotts, and other protest activities, less is known about the carefully orchestrated series of lawsuits that occurred decades earlier. This Essay discusses the legal campaign against segregation by the NAACP working with national and local Black lawyers' organizations. The Essay traces the development of the law from Plessy v. Ferguson*'s establishment of the "separate-but-equal" doctrine to the execution of the "equalization" strategy that culminated with* Brown v. Board of Education*. Ware analyzes the impacts of these legal developments and the southern states' "massive resistance" to school integration that remained post-*Brown*. The Essay concludes by discussing the lasting effects of discriminatory policies using the example of continuing segregation in neighborhoods and schools in many urban communities.*

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INTRODUCTION

The Civil Rights Movement is remembered as a broad-based, grass-roots series of events consisting of mass marches, boycotts, and other protest activities of the 1950s and '60s. Actually, that was the second phase. The first phase commenced in 1935 with a long-range, carefully orchestrated series of lawsuits that culminated with the 1954 decision in *Brown v. Board of Education*. This Essay is an overview of the legal campaign, including the organization, development, and execution of legal challenges to segregation, by the NAACP working with national and local Black lawyers' organizations such as the Mound City Bar Association.

The Essay begins with a discussion of *Plessy v. Ferguson*'s establishment of the "separate-but-equal" doctrine. It describes the development in the 1930s of the NAACP's analysis and recommendations for legal challenges to segregation. It also explains the execution of the "equalization" strategy that culminated with *Brown v. Board of Education*. The following section analyzes the southern states' "massive resistance" to school integration in the 1950s and '60s. The concluding sections explain how the federal subsidies that made the development of suburban communities possible intentionally excluded African American families. The legacy of government's discriminatory housing policies is reflected in high levels of continuing segregation in neighborhoods and schools in many urban communities.[1]

1. This Essay is based on the author's research and publications about NAACP's litigation campaign against segregation. Earlier publications include: Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 MERCER L. REV. 631 (2001) [hereinafter Ware, *Setting the Stage*]; ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION (2003); LELAND WARE, A CENTURY OF SEGREGATION: RACE, CLASS, AND DISADVANTAGE **(**2018) [hereinafter WARE, A CENTURY OF SEGREGATION]; Leland Ware, *The Story of* Brown v. Board of Education*: The Long Road Racial Equality*, *in* EDUCATION LAW STORIES: LAW AND SOCIETY IN THE CLASSROOM (Michael A. Olivas & Ronna Greff Schneider eds., 2007); Leland Ware, Brown *at 50: School Desegregation from Reconstruction to Resegregation*, 16 U. FLA. J. L. & PUB. POL'Y 267 (2005); Leland Ware, *Brown v. Board of Education*, ENCYCLOPEDIA OF RACE AND RACISM, https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/brown-v-board-education [https://perma.cc/DMX3-DZNF]; Leland Ware, Plessy*'s Legacy Revisited: The Government's Role in the Development, Institutionalization and Perpetuation of Residential Segregation*, 7 J. SOC. SCI. 92 (2021). Some of the discussions in this Essay are derived from those publications.

I. SEGREGATION

In 1896, the Supreme Court ruled in *Plessy v. Ferguson*[2] that "the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of this property without due process of law nor denies him equal protection of the law within the meaning of the Fourteenth Amendment." The Court endorsed segregation and established the "separate-but-equal" doctrine. It held New Orleans's segregation ordinance did not violate the Constitution if the facilities provided for blacks were equal to those reserved for whites. The Court observed "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[3] The vision of segregation was a two-tiered society. Blacks could work as domestic servants, janitors, laborers, and other menial occupations. They were not allowed to vote in the South. They were confined to crowded, substandard housing in segregated neighborhoods.[4]

In 1909, the National Association for the Advancement of Colored People (NAACP) was established to fight segregation. After years of unsuccessful lobbying, public education, and protest activities, the NAACP shifted its focus. In 1922, Charles Garland, the son of a Boston millionaire, donated $800,000 to establish a fund to support radical causes. A committee was established that included James Weldon Johnson, the executive secretary of the NAACP; Roger Baldwin, the founder of the American Civil Liberties Union; and other progressives. Garland turned the money over with the request it be given away as quickly as possible, even to unpopular causes. The committee proposed that the fund award a grant to the NAACP to carry out large-scale legal campaigns to advance the constitutional rights of African Americans.[5]

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2. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

3. *Id.* at 552.

4. Jennifer Ritterhouse, *Daily Life in the Jim Crow South, 1900–1945*, *in* OXFORD RSCH. ENCYCLOPEDIA OF AM. HIST. (May 2018); Leon F. Litwak, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 326–404 (1998).

5. For more depth and detail on the NAACP's legal campaign see generally, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004); COTTROL, DIAMOND & WARE, *supra* note 1; JACK GREENBERG, CRUSADERS IN THE COURTS*:* HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); MARK V. TUSHNET, BROWN V. BOARD OF EDUCATION: THE BATTLE FOR INTEGRATION (1995); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S

II. BLACK LAWYERS' NETWORKS AND THE EQUALIZATION STRATEGY

In 1936, the NAACP hired Charles H. Houston to lead a campaign that would challenge segregation in the courts. At that time Houston was the dean of Howard University's law school, where he inspired the generation of African American lawyers waging the legal battle against segregation. Houston's strategy anticipated that cases would be filed arguing states operating segregated schools were in violation of the Fourteenth Amendment based on the substandard and unequal facilities they maintained for black students.

By the early 1930s, the "separate-but-equal" doctrine was firmly entrenched. Given the conservative legal climate, Houston did not want to risk an affirmation of *Plessy*. He devised an indirect approach instead: the "equalization strategy." When the plan was implemented, cases would be filed arguing that states operating segregated schools were in violation of the Fourteenth Amendment based on the substandard and demonstrably unequal facilities maintained for black students. Houston calculated if the equality aspect of the "separate-but-equal" doctrine was enforced, states would be compelled to make black schools physically and otherwise equal to the white institutions. States would not be able to bear the resulting economic burden. Segregation would eventually collapse under its own weight.[6]

African American attorneys were at the forefront the NAACP's litigation campaign.[7] The Mound City Bar Association was founded in 1922.[8] It became a chapter of the National Bar Association (NBA) which

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STRUGGLE FOR FREEDOM (2001); WALDO E. MARTIN JR., BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS (Katherine E. Kurzman et al. eds., 1998); GENNA RAE MCNEIL, GROUNDWORK, CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); Juan Williams, *Thurgood Marshall: American Revolutionary*, 25 UNIV. ARK. LITTLE ROCK L. REV. 443 (2003); Ware, *Setting the Stage*, *supra* note 1; ROBERT CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS (2005).

6. Ware, ENCYCLOPEDIA OF RACE AND RACISM, *supra* note 1.

7. Robert L. Carter et al., *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2149 (1998).

8. *The History and Legacy of Mound City Bar Association*, MOUND CITY BAR ASS'N, https://www.moundcitybar.com/about.html [https://perma.cc/9EXJ-SYHR].

was established in August 1925, in Des Moines, Iowa.[9] One of the organization's purposes was to form a nationwide organization of practicing attorneys of the Negro race. After its founding, the NBA grew rapidly by adding as affiliate chapters existing or newly formed black bar associations across the country.[10] The organization was critical to black lawyers during this period because they were excluded from the American Bar Association and local bar associations.

These exclusions meant black lawyers were denied the contacts and interactions that are important to succeeding in a profession. Local black bar associations and the NBA provided a critical link to organizations within the profession. Beginning in 1926, the NBA held yearly conventions at which black lawyers from across the nation gathered. This gave them an opportunity to meet, compare notes, and discuss issues of importance to practicing lawyers.

Many of these lawyers were graduates of Howard Law School and were acquainted with each other based on that old school tie. They were members of the NBA and met at least once a year at NBA conventions. The same lawyers were usually active in and leaders of the local branches of the NAACP. Yearly meetings were convened at which local NAACP Branches gathered. These associations formed a vast network in which the NAACP, Howard Law school, and the NBA provided critical links. As Raymond Pace Alexander explained in 1941:

> The Negro bar, most of whom are members of the National Association of the Advancement of Colored People, many of the officers, directors, and most active of the membership being either members of the legal committee of the N.A.A.C.P. or officers in their respective city branches, have since the formation of the Bar Association, given active support to many important cases involving the

9. *History of the NBA*, NAT'L BAR ASS'N, https://www.nationalbar.org/NBAR/about/history/NBAR/content/history.aspx?hkey=dc876c1f-5004-418b-a8c9-25cee1c69668 (last visited Nov. 3, 2021).

10. J. Clay Smith Jr., *The Black Bar Association and Civil Rights*, 15 CREIGHTON L. REV. 651 (1981) (An appendix delineates local black bar groups across the nation.); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 556–60 (1993).

> civil and political rights of the Negro which have been brought in various courts throughout the country.[11]

The litigation campaign focused initially on graduate and professional schools where the southern states were most vulnerable. Several publicly funded black colleges had been established in the South, but virtually none of them provided graduate or professional training. The first "equalization" case, *Pearson v. Murray*,[12] involved a black student's efforts to be admitted to the University of Maryland Law School. Houston and his former student, Thurgood Marshall, represented the plaintiff. They argued that Maryland violated the Fourteenth Amendment as it had failed to establish a law school for black students. Maryland's defense that it had established an out-of-state scholarship fund for black students was rejected. At the trial's conclusion, the judge ordered the University to admit Murray to the entering class the following semester. A similar case, *Missouri ex. rel. Gaines v. Canada*,[13] was filed in Missouri in which the same arguments were made. The Supreme Court held Missouri's out-of-state fund did not satisfy its obligation under *Plessy* and ordered the black student's admission to the University of Missouri's Law School.[14]

Murray and *Gaines* were decided in the late 1930s. With the outbreak of World War II in 1941, the NAACP's attention was diverted to other matters, including a campaign to equalize black and white teachers' salaries.[15] When the war ended in 1945, the organization's focus returned to education. In 1946, the NAACP filed a suit against the University of Oklahoma. The Supreme Court held, in *Sipuel v. Board of Regents*,[16] that Oklahoma was obligated to provide legal instruction to black students. A similar case, *Sweatt v. Painter*,[17] was filed in Texas and another case, *McLaurin v. Board of Regents*,[18] was brought in Oklahoma. The Supreme Court issued decisions in both cases on the same day in 1950. In opinions

11. Raymond Pace Alexander, *The National Bar Association—Its Aims and Purposes*, 1 NAT'L BAR J. 1, 4–5 (1941).
12. Pearson v. Murray, 182 A. 590 (Md. 1936).
13. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
14. Ware, *Setting the Stage for Brown*, *supra* note 1.
15. John A. Kirk, *The NAACP's Campaign for Teachers Salary Equalization: African American Women Educators and the Early Civil Rights Struggle*, 94 J. AFRICAN AM. HIST. 529, 535 (2009).
16. Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948).
17. Sweatt v. Painter, 339 U.S. 629 (1950).
18. McLaurin v. Okla. St. Regents, 339 U.S. 637 (1950).

acknowledging the stigmatic and other intangible injuries that segregation caused, the Court ruled in the NAACP's favor, but stopped short of reversing *Plessy*.

After the rulings in *Sweatt* and *McLaurin*, the NAACP lawyers decided an adequate foundation for a direct challenge to *Plessy* had been established. Eventually, six cases were filed in five jurisdictions by Thurgood Marshall and other NAACP lawyers. *Brown v. Topeka Board of Education* arose in Kansas. *Briggs v. Elliott* involved schools in South Carolina. There was also a Virginia case, *Davis v. County School Board of Prince Edward County*, and a District of Columbia proceeding, *Bolling v. Sharpe*. The two Delaware cases were *Belton v. Gebhart* and *Bulah v. Gebhart*.[19]

The cases were consolidated and argued in front of the Supreme Court in December of 1952. They were held over and re-argued in December of 1953. The decision in *Brown v. Board of Education* was announced on May 17, 1954. Chief Justice Earl Warren read the unanimous opinion to a packed courtroom. It concluded that under the Equal Protection Clause of the Fourteenth Amendment, "[s]eparate educational facilities are inherently unequal." The decision represented the beginning of the end of state-sponsored segregation. [20]

III. SEGREGATED NEIGHBORHOODS AND RACIALLY ISOLATED SCHOOLS

The Supreme Court's 1954 decision did not address the remedy. The cases were held over and re-argued again. In the 1955 decision in *Brown II*, the Supreme Court remanded the cases and ordered the school boards to develop plans in which desegregation would proceed with "all deliberate speed" under the supervision of the local federal courts.[21] The southern states reacted to *Brown* with open hostility.[22] For nearly twenty years,

19. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

20. Apart from Jack Greenberg, the lawyers who argued the *Brown* cases in the Supreme Court were African Americans. *Attorneys – Brown v. Board of Education National Historic Site*, NAT'L PARK SERV. (Feb. 13, 2020), https://www.nps.gov/brvb/learn/historyculture/attorneys.htm [https://perma.cc/KJ4Y-WCGS]; LEON FRIEDMAN, ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 5 (1969).

21. Brown v. Bd. of Educ. of Topeka (Brown II), 349 U.S. 294, 300–01 (1955).

22. Tony Badger, *Southerners Who Refused to Sign the Southern Manifesto*, 42 HIST. J. 517, 517–34 (1999).

southern officials actively defied *Brown* or engaged in prolonged delaying tactics.

Brown sparked the era of Civil Rights activism. Mass marches, "sit-ins" boycotts and other forms of protest activities were organized in localities across the south. Martin Luther King and others emerged as leaders of the movement.[23] Despite the unprecedented levels of demonstrations and other protest activities during the 1950s and 1960s, very little progress was made toward school desegregation. In 1961, in Alabama, Mississippi, South Carolina, Florida and Georgia, there were no black students attending white schools.[24]

In the late 1960s, the Supreme Court finally took steps to end to the South's massive resistance. *Griffin v. County School Board of Prince Edward County*[25] was a case in which a school district involved in the original *Brown* cases had closed all of its public schools to avoid integration. In 1964, Prince Edward County was ordered to reopen its schools. In *Alexander v. Holmes County Board of Education*, the Supreme Court ruled in 1969 that the "continued operation of segregated schools under a standard allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible . . . the obligation of every school district is to terminate dual school systems at once and operate now and hereafter only unitary schools."[26]

In *Green v. County Board of New Kent County*,[27] the Court held in 1968 that states that operated segregated schools had an affirmative duty to eradicate all vestiges of the segregated system "root and branch." In *Swann v. Charlotte-Mecklenburg Board of Education*,[28] decided in 1971, the Court endorsed busing as a means of achieving racial balance in individual schools.

In the early decades of the twentieth century, working class whites lived in ethnic enclaves in cities. Extended families often occupied the same residence. The 1944 G.I. Bill provided returning veterans with financial

23. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 112–36 (1989).

24. *Massive Resistance*, SEGREGATION IN AMERICA, EQUAL JUST. INITIATIVE, https://segregationinamerica.eji.org/report/massive-resistance.html [https://perma.cc/AN79-7CEV].

25. Griffin v. Sch. Bd., 377 U.S. 218 (1964).

26. Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19 (1969).

27. Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430 (1968).

28. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

assistance for college and home mortgages. Millions of servicemen were able to afford homes for the first time. In 1947, real estate developer William Levitt purchased 4,000 acres of Long Island, New York, farmland and converted it into the largest privately planned community in American history.[29] Communities like Levittown were constructed in metropolitan regions across the nation. Residential construction rose from 114,000 new homes in 1944 to 1.7 million by 1950.[30]

All of this was facilitated by the introduction of fixed-rate, thirty-year mortgages insured by the Veterans Administration (VA) and Federal Housing Authority (FHA).[31] Mortgage interest and local property taxes could be deducted from federal income taxes. Working class families could achieve the American dream: a single family, detached home on a quarter acre lot.

The working class was elevated to the American middle class through home ownership. During the post-War era, a distinct image of American family life was promoted. The family unit consisted of a husband, wife, and two or three children. Prior to the War, intergenerational families frequently lived in a single household. They resided in ethnic enclaves established during the first decades of the twentieth century.[32] They maintained many of the customs, languages, and religious traditions of the countries from which they migrated. The exodus to suburban communities promoted conformity and assimilation.

A 1954 *Saturday Evening Post* article described Levittown this way, "[e]verybody lives on the same side of the tracks. They have no slums to fret about, no families of conspicuous wealth to envy, no traditional upper crust to whet and thwart their social aspirations."[33] A generation of children

29. HERBERT GANS, THE LEVITTOWNERS: WAYS OF LIFE AND POLITICS IN A SUBURBAN COMMUNITY 17 (1967).

30. Claire Suddath, *Brief History of The Middle Class*, TIME MAG. (Feb. 27, 2009), http://content.time.com/time/nation/article/0,8599,1882147,00.html [https://perma.cc/8AB4-CDAN].

31. DOUGLAS MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 17–59 (1998); Ware, *A Century of Segregation*, *supra* note 1, at 115–16; KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 204–05 (1985); DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 129–31 (2010).

32. Herbert Gans, *Symbolic Ethnicity: The Future of Ethnic Groups and Cultures in America*, 2 ETHNIC & RACIAL STUD. 1 (2010).

33. *Becoming a Levittowner: Community Life*, ST. MUSEUM OF PENN., http://statemuseumpa.org/levittown/two/i.html [https://perma.cc/J6EN-27CM].

learned to read in books that depicted Dick and Jane and their dog Spot. The characters resided in a suburban home surrounded by a white picket fence.[34]

IV. REDLINING

School desegregation efforts took place against a backdrop of residential segregation. In the 1940s and 1950s, white families were rapidly moving to suburban communities. Housing segregation was mandated by the federal government. The Home Owners' Loan Corporation (HOLC), a federal agency established during the 1930s depression, fostered residential segregation through "redlining."[35] Economists believed that property values were closely linked to the racial composition of neighborhoods. The HOLC rated every neighborhood in America "A," "B," "C," or "D" using color coded maps. The lowest quality rating, "D," was colored red.

Neighborhoods rated "A" had to be homogenous and occupied by the families of business and professional men who were white and usually native-born. Neighborhoods in which blacks resided were rated "D" and coded red. Lenders were discouraged from making loans in neighborhoods that were redlined.[36] The HOLC neighborhood risk maps institutionalized discrimination based on race and geography.[37]

The FHA used HOLC's system to develop criteria for selecting the mortgages it would insure. The FHA's underwriting standards reflected the model of neighborhood change developed by economist Homer Hoyt. In his influential 1939 book, *The Structure and Growth of Residential Neighborhoods in American Cities,* Hoyt described the patterns of development of residential neighborhoods according to his "sector theory" of neighborhood change. In Hoyt's invasion-succession model, newly constructed neighborhoods were occupied by white families.[38] Over time,

34. Adalaide Morris, *Dick, Jane, and American Literature: Fighting with Canons*, 47 C. ENG. 467 (1985).

35. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1997); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 39–67 (2017).

36. Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101 (2006).

37. WARE, A CENTURY OF SEGREGATION, *supra* note 1, at 115–16.

38. Gordon Adam, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 94 YALE L.J. 101 (2006).

the neighborhoods transitioned from white Protestants to Jewish families and finally to African Americans as the housing stock grew older and began to deteriorate.[39]

The FHA developed Residential Security Maps that assigned every neighborhood a place somewhere along this continuum.[40] The FHA's 1935 underwriting manual stated, "[i]f a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in value."[41]

After the decision in *Shelley v. Kraemer*[42] outlawed restrictive covenants, the FHA made some largely cosmetic changes to its *Underwriting Manual*. However, the *Manual* continued to warn against the introduction of adverse influences that would diminish the desirability of the neighborhood. Real estate publications used in college and university courses and by practicing realtors continued to urge separating "inharmonious" populations.[43]

Revised editions of *Hoyt's Principles of Urban Real Estate* toned down some of its racial references but did not abandon its message that white neighborhoods needed protection from inharmonious groups.[44] The federal government's discriminatory policies excluded African Americans from the largest wealth-producing programs in the nation's history: single-family homes in suburban communities purchased with VA and FHA insured mortgages.[45]

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39. HOMER HOYT, THE STRUCTURE AND GROWTH OF RESIDENTIAL NEIGHBORHOODS IN AMERICAN CITIES 15–29 (1939).

40. Robert K. Nelson et al., *Mapping Inequality: Redlining in New Deal America*, AM. PANORAMA (2017), https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8 [https://perma.cc/J2ML-AFBZ].

41. Blake MacKenzie, *Race and Housing Series: Government's Role in Housing Segregation*, TWIN CITIES HABITAT FOR HUMANITY (Oct. 16, 2019, 4:18 PM), https://www.tchabitat.org/blog/housing-segregation-how-it-was-created-or-reinforced [https://perma.cc/DX4M-384L].

42. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding racially restrictive covenants are not per se illegal as they do not involve state action, but courts cannot enforce them).

43. John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 L. & SOC. INQUIRY 399 (2007).

44. ARTHUR M. WEIMER & HOMER HOYT, PRINCIPLES OF URBAN REAL ESTATE (2d ed. 1948); ARTHUR M. WEIMER & HOMER HOYT, PRINCIPLES OF URBAN REAL ESTATE (3d ed. 1954).

45. OLIVER & SHAPIRO, *supra* note 34, at 97.

V. THE LIMITS OF INTEGRATION

The effect of racially segregated housing patterns on school desegregation efforts was the focus of *Milliken v. Bradley*,[46] a case involving schools in Detroit, Michigan. As a consequence of white flight to suburban communities, the schools in Detroit were rapidly shifting to predominately black enrollments. The lawyers in *Milliken* argued that desegregation could not be achieved without including the suburban districts in the desegregation plan.[47]

The Supreme Court held that suburban districts could not be required to participate in court-ordered desegregation plans unless it could be proven that their actions contributed to segregation in the jurisdiction in which the case arose. This meant that there could be no court-ordered busing across district lines without a showing of an inter-district violation. In most localities, suburban districts were effectively insulated from the desegregation process.[48]

Court supervised school desegregation proceeded slowly for several years after *Milliken*, relying heavily on busing to achieve racial balance in schools. In the early 1990s, the Supreme Court's revised its approach with the "resegregation" decisions: *Board of Education of Oklahoma City v. Dowell*,[49] *Freeman v. Pitts*,[50] and *Missouri v. Jenkins*.[51] In *Dowell*, the Supreme Court modified the standard for determining "unitary status": the point at which the desegregation obligation has been satisfied and court supervision is no longer necessary.

The Court ruled in *Dowell* that the test for determining unitary status was whether the school board "had complied in good faith with the [original] desegregation decree," and whether all "vestiges of past discrimination had been eliminated to the extent practicable."[52] In *Freeman v. Pitts*, a case involving a school district adjacent to Atlanta, Georgia, the

46. Milliken v. Bradley, 418 U.S. 717 (1974).
47. *Id.*
48. MASSEY & DENTON, *supra* note 30, at 17–59; ROTHSTEIN, *supra* note 34, at 30–67; KENNETH FOX, METROPOLITAN AMERICA: URBAN LIFE AND URBAN POLICY IN THE UNITED STATES, 1940-1980 (1990)
49. Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991).
50. Freeman v. Pitts, 503 U.S. 467 (1992).
51. Missouri v. Jenkins, 515 U.S. 70 (1995).
52. *Dowell*, 498 U.S. at 249–50.

Court found that when segregated schools persist because of changes in the racial composition of neighborhoods or other "external" factors, school districts would not be held responsible unless those conditions were caused by actions taken by school officials.

Dowell, Freeman, and *Pitts* eviscerated the *Green* standard, which established an obligation to eliminate all vestiges of segregation "root and branch." Under the Court's modified formula, school districts are obligated to eradicate vestiges of segregation only to "the extent practicable."[53] This was affirmed in *Jenkins* where the majority ruled that the test for determining unitary status was not a determination that all vestiges of the formerly segregated system had been eliminated "root and branch," but whether school districts complied in good faith with the desegregation decrees, and whether the remnants of past discrimination had been eliminated to the "extent practicable."[54] The Court also found that segregated housing patterns, which affected the racial composition of individual schools, would not preclude a unitary status finding unless those conditions were directly attributed to the actions of school officials.

The Supreme Court's redefinition of unitary status requires courts to hold that the desegregation obligation has been satisfied even when school enrollments reflect the segregated housing patterns of the neighborhoods in which they were located. This has led to unitary status findings in school districts across the nation. As high levels of residential segregation persist in many urban neighborhoods, public schools in those communities have been resegregating since the 1980s.[55]

53. *Id.* at 249.

54. *Jenkins*, 515 U.S. at 90.

55. Jason M. Breslow, Evan Wexler & Robert Collins, *The Return of School Segregation in Eight Charts*, FRONTLINE (July 15, 2014), https://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts/ [https://perma.cc/2PGW-BEW3]; Michael Maciag, *School Segregation Data for U.S. Metro Areas: Measures of School Segregation Between Black and White Students*, GOVERNING (Jan. 9, 2019), https://www.governing.com/archive/school-segregation-dissimilarity-index-for-metro-areas.html [https://perma.cc/7TED-BZVZ].

CONCLUSION

In the 1950s and '60s, Civil Rights advocates hoped that placing black and white students in the same schools would create equal educational opportunities for the entire student body. That did not always work out. In many schools, African Americans and Latinos are still treated differently and less favorably than similarly situated white students. One of the factors driving the current phenomenon is implicit bias. Researchers have shown that many white teachers make negative assumptions about students' capacity to learn based on their backgrounds and ethnicity. This is an unconscious attitude that occurs automatically without the perpetrator's knowledge. Negative stereotypes about black students are communicated by, among other things, body language, affect, and speech. When black students perceive a teacher's negative attitudes, it can adversely affect their interactions with teachers.[56]

Educational success entails a range of cultural behaviors, extending to such non-academic attributes as decorum, mannerisms, and accents. White students from affluent backgrounds have learned the expected behavior. In many cases, children from low-income and minority backgrounds have not. Affluent students fit the pattern of their teachers' expectations. Underprivileged and minority students are frequently seen as "difficult" and presenting "challenges."

An example of this phenomenon is reflected in research on discipline disparities. In March of 2014, the U.S. Department of Education released data containing information on approximately 16,500 school districts, 97,000 schools, and 49 million students. The data showed that racial disparities in out-of-school suspensions start at the earliest stages of the educational process. African American children represent 18% of preschool enrollment but 42% of the preschool children who are suspended once, and 48% of the preschool children suspended more than once.[57]

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56. Bruce Douglas et al., *The Impact of White Teachers on the Academic Achievement of Black Students: An Exploratory Qualitative Analysis*, 22 EDUC. FOUND. 47 (2008); TRACEY A. BENSON & SARAH E. FIARMAN, UNCONSCIOUS BIAS IN SCHOOLS: A DEVELOPMENTAL APPROACH TO RACISM 117–33 (rev. ed. 2020).

57. U.S. DEP'T OF EDUC. FOR C.R., C.R. DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE (Mar. 21, 2014), https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf (last visited Nov. 3, 2021).

Overall, black students are suspended and expelled at a rate three times greater than white students. On average, 5% of white students are suspended, compared to 16% of black students. Black students represent 16% of the student population, but 32%–42% of students suspended or expelled.[58] Numerous studies show that the higher rates of discipline received by African American students are not attributable to more serious or more disruptive behavior.[59]

Social capital is transmitted by the parents of affluent students. They are inculcated with speech patterns, styles of dress, and comportment that equip them with the attributes needed to reproduce their parents' social position. These class-based advantages can be erroneously interpreted as a reflection of a student's "hard work" or "innate" ability. Unconscious assumptions can create formidable barriers to their success. The nation still has a long way to go to achieve equality in educational settings.

58. *Id.*; Leland Ware & Kendra Brumfield, *Discriminatory Discipline: The Racial Crisis in America's Public Schools*, 85 UMKC L. REV. 739 (2017).

59. AJMEL QUERESHI & JASON OKONOFUA, NAACP LEGAL DEF. & EDUC. FUND, INC., LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE (2017), https://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf [https://perma.cc/GM9S-XWZK]; Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617 (2015).