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## Has the Roberts Court Plurality's Colorblind Rhetoric Finally Broken Brown's Promise

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## Has the Roberts Court Plurality's Colorblind Rhetoric Finally Broken Brown's Promise

# HAS THE ROBERTS COURT PLURALITY'S COLORBLIND RHETORIC FINALLY BROKEN *BROWN*'S PROMISE?

PHOEBE A. HADDON<sup>†</sup>

## ABSTRACT

This Essay examines the continuing significance of the *Keyes* decision to the judicial vision of equality and racial isolation in public education. By comparing efforts to promote educational equality from the *Keyes* era through today, this Essay asserts that the judiciary has wrongly embraced a colorblind interpretation of the Equal Protection Clause. In so doing, courts have impeded the progress of children in Denver and around the country, ignored highly instructive social science studies on the benefits of desegregation, and broken the constitutional promise of equal citizenship. For future policy makers and lawyers to address these persistent problems, legal educators must equip students with tools to reclaim legal conversations about freedom and equality. The author, Dean Phoebe A. Haddon of the University of Maryland Francis King Carey School of Law, concludes with recollections of her late aunt, Rachel B. Noel, who played an instrumental part in the evolution of the *Keyes* case.

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<sup>†</sup> Dean and Professor of Law, University of Maryland Francis King Carey School of Law; B.A., Smith College; J.D., Duquesne University School of Law; L.L.M., Yale Law School. This Essay is dedicated to the memory of my aunt, Rachel B. Noel, a member of the Denver Public Schools Board of Education in 1965. As a school board member, she advocated for integration with great courage and dignity, believing that all children were entitled to a quality of education. Thanks to my research assistant, Hillary Edwards, and Max Siegel, Fellow of the University of Maryland Francis King Carey School of Law Thurgood Marshall Law Library, for their work on this Essay, and to Jane Wilson and Max Siegel for their assistance on a previous piece that laid the foundation for parts of this Essay.

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## INTRODUCTION

It is a pleasure to join this symposium, which includes so many old friends as well as new colleagues gathered to explore the continuing significance of *Keyes v. School District No. 1*.<sup>1</sup> During the first panel last evening,<sup>2</sup> men and women shared stories of their own diverse experiences and those of their families in the days leading up to and following the decision to litigate *Keyes*. These accounts were deeply moving, and they set the stage for our exploration forty years later. Both the constitutional jurisprudence about equality as well as the tools for relief that are available to courts have changed dramatically in the past forty years.

Although I knew firsthand some of the stories that were shared last evening from my interviews with my aunt, Rachel Noel, and her dear friend and ally, Ed Benton, I learned from the panelists that the actors not only were intent on keeping the promise of *Brown v. Board of Education*<sup>3</sup> but also were motivated by their dedication to the memory and work of Dr. Martin Luther King Jr. It was news of his senseless slaying that galvanized integration advocates and led them to formulate the Noel desegregation resolution that eventually brought about the *Keyes* suit.<sup>4</sup> This kind of rededication to deliver on *Brown*'s promise—to address continuing racial disparities in access to education and opportunities to learn—is necessary today. Colorblind doctrine<sup>5</sup> has made it more diffi-

1. 413 U.S. 189 (1973).

2. See Panel 1: *Remembering Keyes from Those Who Lived It* (Jan. 31, 2013), <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (presenting a retrospective roundtable on *Keyes* by those who experienced, lived, and litigated the case in the Denver metropolitan area).

3. 347 U.S. 483 (1954).

4. Craig Barnes, *A Personal Memoir of Plaintiffs' Co-counsel in Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1059, 1061–64 (2013).

5. "Colorblind doctrine" refers to the intent-based application of strict scrutiny to all express uses of race. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1826 (2012). See generally *id.* at 1826–28 (charting the emergence of colorblind doctrine from Justice Powell's colorblind logic in *Bakke* to its dominance in the Court following *Croson*). For an explanation of the implications of colorblind doctrine on broader society, see STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 170 (1996) (explaining that the colorblind doctrine is a manifestation of legal liberalism that says race plays no part in society, resulting in the continuation of an "invisible system of white privilege"). For an incisive and seminal challenge to this notion that the Constitution compels colorblind doctrine, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 *passim* (1991). For a challenge to the application of colorblindness as a governing principle in the context of mass incarceration, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 227–31 (2010). For more on efforts to integrate schools, see Margalynne J. Armstrong & Stephanie Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008).

cult to deliver on that promise, but I believe at this symposium, we can lay the framework for the future.

The promise of *Brown* to which I refer was reiterated in a dissent by Justice Marshall in *Milliken v. Bradley*,<sup>6</sup> another Supreme Court case decided around the time of *Keyes*. Justice Marshall challenged the Court majority's rejection of a cross-district remedy for segregation found to exist in Detroit, Michigan.<sup>7</sup> White flight into the suburbs and official conduct of the city and neighboring communities had left the city racially isolated, but the Court majority denied the remedy that could have addressed racial imbalance in the schools.<sup>8</sup> Justice Marshall observed in dissent that primary and secondary schools are foundational not only in providing educational opportunities for the children but also in shaping their identity formation, openness to living in a community, and ability to get along with others.<sup>9</sup> In his view, an appropriate remedy could take account of the vital role of public schools to impart those civic and other important values we carry with us to the end of our days.<sup>10</sup> He said, "[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together."<sup>11</sup>

This vision of public education and support for broad judicial power has been diminished, perhaps most dramatically in *San Antonio Independent School District v. Rodriguez*.<sup>12</sup> There, the Court refused to find a constitutional right to education and solidified the states and local government as principal decision makers responsible for funding policies.<sup>13</sup> With the *Rodriguez* Court's deference to political resolution of the question of equality in public education, federal courts were disabled from redressing equality claims.

The disparity of resources in school districts has widened<sup>14</sup> even as racial isolation of public schools has increased.<sup>15</sup> Yet the *Brown* prophecy about the importance of learning and getting along is more accurate today than ever before, even though it is not often linked to judicial conceptions of equality and respect.<sup>16</sup> The Kerner report's warning of two nations divided by race and wealth is hard to challenge.<sup>17</sup> A root of the

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6. 418 U.S. 717 (1974).

7. *Id.* at 782–83 (Marshall, J., dissenting).

8. *Id.* at 782.

9. *Id.* at 783.

10. *Id.* at 807.

11. *Id.* at 783.

12. 411 U.S. 1 (1973).

13. *Id.* at 37.

14. For statistics on disparities of school resources, see *Civil Rights Data Collection*, U.S. DEP'T EDUC., <http://ocrdata.ed.gov> (last visited Apr. 16, 2013).

15. See GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 3 (2007).

16. David L. Kirp, Op-Ed., *Making Schools Work*, N.Y. TIMES, May 20, 2012, at SR1.

17. See SUMMARY OF REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

problem lies in unaddressed educational disparities. Generations of public schoolchildren trapped in poverty have been denied the promise of *Brown*<sup>18</sup> in urban and rural communities across the country and where Jim Crow was never formalized in law. For many black and brown children caught in neighborhoods of poverty and often a cycle of violence, their very survival is at stake.<sup>19</sup>

In *The New Jim Crow*, Michelle Alexander makes a compelling argument that public policies have supported mass incarceration rather than other alternatives for addressing the complex social problem of drugs in these poor communities.<sup>20</sup> Moreover, such policies mask this choice to criminalize conduct with colorblind rhetoric.<sup>21</sup> This shortsighted approach in neighborhoods compromised by drugs, lack of quality education, and scarcity of jobs reinforces stereotypes about the "other" by limiting corrective options to address disparities.<sup>22</sup> It also has robbed our country of the prosperity and competitive strength of thousands of overwhelmingly black and brown youth despite the long-recognized necessity for state and federal courts alike to intervene when local and national political processes fail the constitutional guarantee of equal protection.<sup>23</sup>

#### I. THE KEYES CASE

Soon after Martin Luther King Jr.'s death, the Denver Public Schools (DPS) adopted the Noel Resolution, a vehicle used by the school board and other leaders to charge Denver Public Schools' superintendent, Robert Gilberts, to implement an integration plan.<sup>24</sup> Despite evidence that district officials were aware of disparities in education and had themselves undertaken actions that led to racial isolation of student and teacher school assignments, DPS had not responded with a plan.<sup>25</sup> The resolution mandated busing and other measures to address the unequal student performance and tangible evidence of discrimination.<sup>26</sup> Less than a year after the Noel Resolution passed, Denver voters, however, defeat-

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18. Bob Herbert, Op-Ed., *Separate and Unequal*, N.Y. TIMES, Mar. 22, 2011, at A27.

19. See Julie A. Phillips, *White, Black, and Latino Homicide Rates: Why the Difference?*, 48 SOCIAL PROBLEMS 349, 349 (2002) (asserting that structural characteristics such as living in "poor, crime-ridden neighborhoods" contribute to higher numbers of deaths among minorities).

20. See generally ALEXANDER, *supra* note 5.

21. *Id.*

22. Edward Said famously described "othering" as "the act of emphasizing the perceived weakness of marginalized groups as a way of stressing the alleged strength of those in positions of power." EDWARD W. SAID, *ORIENTALISM* 5 (1978).

23. Justice Harlan Stone's discussion of representative defects in the democratic process in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), popularized this understanding that some groups cannot participate as effectively in the political process as others and that politics cannot be trusted with their protection. See Lewis F. Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088-89 (1982).

24. *Keyes v. Sch. Dist. No. 1*, 303 F. Supp. 279, 283 (D. Colo. 1969).

25. *Id.*

26. *Id.* at 283-84.

ed two pro-integration school board members (Edgar Benton and Monte Pascoe) and elected two strident anti-busing candidates (Frank Southworth and James Perrill).<sup>27</sup> Two months later, in a suit filed by Latino, black, and white parents alleging that DPS was maintaining a policy of intentional segregation, the district court granted the plaintiffs' motion for preliminary injunction.<sup>28</sup>

#### *A. Grappling with Questions of Segregative Intent*

On July 31, 1969, Judge William Doyle granted the preliminary injunction restoring the integration plans that had been rescinded by the newly constituted school board.<sup>29</sup> He concluded that DPS repealing the integration resolutions and replacing them with open enrollment was *de jure* segregation, not merely *de facto* segregation.<sup>30</sup> After wending its way through the federal appeals courts and challenging the district court's mandate to desegregate,<sup>31</sup> on October 12, 1972, the *Keyes* case was argued by the plaintiffs before the Supreme Court,<sup>32</sup> which rendered its decision on June 21, 1973.

The *Keyes* Court answered the first impression question of what is necessary to prove an equal protection violation where no statute had segregated schools but where plaintiffs "prove that the school authorities have carried out a systemic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the schools system."<sup>33</sup> It concluded that proof that a meaningful portion of the school system was affected by the intentional segregative decision making establishes a *prima facie* case, creating "a presumption that other segregated schooling within the system is not adventitious."<sup>34</sup> The majority indicated that the burden was left to the school system to prove that other segregated schools within the system were "not [also] the result of intentionally segregative actions."<sup>35</sup> The Court majority did not join Justice Powell in urging in his concurrence that the Court abandon the *de jure*–*de facto* segregation distinction and require that all school systems

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27. *Id.* at 284.

28. *Id.* at 289.

29. *Id.* at 288.

30. *Id.* at 287.

31. The original injunctive order was vacated and remanded by the Tenth Circuit on August 7, 1969 because it was seeking more specificity from the order. *Keyes v. Sch. Dist. No. 1*, 303 F. Supp. 289, 289–90 (D. Colo. 1969). Judge William Doyle of the district court added supplemental findings and reinstated the preliminary injunction. *Id.* The case was tried on its merits in February 1970, and on March 21, 1970 the Court ordered a permanent injunction and an integration plan as a remedy after concluding certain schools were segregated. *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 63 (D. Colo. 1970). This ruling was affirmed in part and reversed in part by the Tenth Circuit. *Keyes v. Sch. Dist. No. 1*, 445 F.2d 990, 1007 (10th Cir. 1971).

32. For a recording of the *Keyes* oral argument, see *Keyes v. School District No. 1*, OYEZ PROJECT IIT CHI.-KENT C.L., [http://www.oyez.org/cases/1970-1979/1972/1972\\_71\\_507](http://www.oyez.org/cases/1970-1979/1972/1972_71_507) (last visited Apr. 16, 2013).

33. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201 (1973).

34. *Id.* at 208.

35. *Id.*

end school segregation.<sup>36</sup> The case was remanded to the district court, which held later that year that the school system had in fact operated a dual system.<sup>37</sup>

For more than twenty years, the district court set about trying to provide relief and return—or perhaps create for the first time—a unitary system of education to Denver’s children.<sup>38</sup> This work was against the backdrop of an increasingly hostile white population that was set against the integration resolution that spawned the litigation, had no appetite for busing, and had fled neighborhoods that did integrate.<sup>39</sup>

*B. Confronting the “Tri-ethnic Dilemma” of Appropriate Relief from Racial Discrimination and Inequality*

Eight Denver children and their parents—Latinos, whites, and blacks—sued the school district for employing a pattern of intentional conduct leading to widespread racial discrimination and inequality of educational opportunity.<sup>40</sup> However, the dominant theory of the case rested on the claims of black children.<sup>41</sup> Based on evidence that both blacks and Latinos attended schools isolated from whites, the Supreme Court concluded, among other things, that black and Latino students should be treated as minorities suffering similar inequities, and thus their presence in one school could not be considered desegregation.<sup>42</sup> The *Keyes* Court also made clear that Latinos—like blacks in earlier desegregation cases in the South—were entitled to remedies for intentional sepa-

36. *Id.* at 223–36 (Powell, J., concurring).

37. *Keyes v. Sch. Dist. No. 1*, 368 F. Supp. 207, 210 (D. Colo. 1973). Part of the evidence of the case included the fact-gathering of University of Denver statistician Professor George Bardwell, a mathematician, and Dr. Paul Klite, a research physician, who used U.S. Census Bureau data and school district boundaries to trace movements of the black population and changes in school boundaries. *See Barnes, supra* note 4, at 1064. Decisions about where to build college preparatory schools as compared to manual training schools, where new schools were built, and where students were bussed reflected racial concentrations. *Id.* It was clear that

[a]s the black population of north Denver had gradually moved east across the northern tier of the city, school boundaries for elementary schools had regularly shifted eastward. The effect was that black children who had moved across boundary lines into white districts could be recaptured by the new lines and brought back into redrawn black districts. . . . These boundary changes were effectively segregating Denver’s schools, and the practice had been going on since the 1920s.

*Id.* at 1065.

38. *See* Tom I. Romero, II, *Foreword: How I Rode the Bus to Become a Professor at the University of Denver Sturm College of Law; Reflections on Keyes’s Legacy for the Metropolitan, Post-racial, and Multiracial Twenty-first Century*, 90 DENV. U. L. REV. 1023, 1056–57 (2013).

39. *See infra* text accompanying note 48. *See generally* TIMOTHY J. MINCHIN & JOHN A. SALMOND, *AFTER THE DREAM: BLACK AND WHITE SOUTHERNERS SINCE 1965*, at 6, 179 (2011) (explaining that racial factors arising from busing and desegregation were a significant cause of white flight and that progress in the South was eroded in the late 1970s due to white flight, forcing federal courts after 1980 to continue to engage with complex issues of racial balancing in schools).

40. *Keyes v. Sch. Dist. No. 1*, 445 F.2d 990, 994 (10th Cir. 1971).

41. *See Barnes, supra* note 4, at 1067 (noting exhibits, graphs, and charts of census and other data showing trends over the years for racial attendance at all of Denver’s northeast sector schools and flows of population across the northern tier of the city).

42. *Keyes*, 413 U.S. at 195–98.



ration from whites, and that desegregation was mandated in the North for whole districts, not just for individual schools that could prove segregated intent.<sup>43</sup> This was a substantial legal victory for the plaintiffs, but the black and Latino communities were not unified around the relief they sought. This conflict made visible an issue we continue to grapple with as we try to define the goals of achieving equality and to mesh competing interests of groups in a multiracial and ethnic community.<sup>44</sup> Thus, the *Keyes* case brought to the forefront the need for political coalition building—not just for tolerance—if we desire to accord equality and respect for diverse group-based objectives.<sup>45</sup>

Because the trial court in Denver, like others across the country, faced the task of dismantling the city's dual systems of education without a clear political mandate supporting this work, its undertaking proved exceedingly difficult. Moreover, the groups seeking an end to inequality were not of one view about how best to level the playing field—black and Latino aspirations and goals for their children dramatically diverged.<sup>46</sup>

Busing had been used in Denver to carry students from one neighborhood to others across the city prior to the desegregation mandate of the court. But often this tool was used “flexibly,”<sup>47</sup> and most often to

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43. *Id.* at 200.

44. See Rachel Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 *LA RAZA* L.J. 1 *passim* (1995) (asserting that tensions have resulted due to an increase in racial and ethnic diversity within the U.S. population). Some of these competing interests include the black interest in integration and the Latino interest in the preservation of their respective languages, histories, and communities. *Id.* at 2, 4; James J. Fishman & Lawrence Strauss, Note, *Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver's Public Schools: A Study of Keyes v. School District No. 1*, 32 *HOW. L.J.* 627, 634 (1989).

45. Fishman & Strauss, *supra* note 44, at 718 (discussing the inclusion of the Hispanic population as an important part of the political process of creating “a more democratic society”).

46. Chicanos generally looked to the decision makers to provide their children with opportunities to learn in their own neighborhood, seeking additional Latino teachers and principals to teach their children and to support their cultural and language interests. See *id.* at 634 (asserting that Hispanics opposed integration as a form of cultural hegemony). On the other hand, black community leaders and parents, wanting their children to attend quality schools with teachers giving the same kind of attention that white children received, sought the elimination of racially isolated schools that had resulted in their children being bussed as much as forty-five minutes from north to south Denver, while whites' resistance to any busing had been acceded to by the district officials. *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 63, 66 (D. Colo. 1970). There was evidence that the school district had moved school boundaries east across the northern tier of the city, tracking black migration as it moved across the city and consistently having the effect of returning black children to predominately segregated schools while taking them out of white schools. *Id.* at 65. Furthermore, school district records explicitly indicated that there were low expectations for black achievement by white teachers and school leaders; black achievement was considered not likely to be more than the eighteenth percentile of overall student performance, whereas whites were expected to perform in the seventieth or eightieth percentile. Low expectations translated into self-fulfilling poor performance that black parents urged could be eliminated through integration and quality schools in all communities. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (examining how separating students based on race leads to feelings of inferiority that derail the educational process).

47. See Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1061 n.60 (1984) (“Under so-called ‘freedom-of-choice’ plans, . . . school

bring willing black students who chose to attend better schools outside of their racially isolated neighborhoods—or to deliver whites to predominantly white schools. By the time of the district court's mandate, emotions aroused by the issue of busing were deep, especially among whites. A decade ago, Derrick Bell observed that "[b]using arouse[d] such resentment because it deprive[d] white[] . . . parents of their 'freedom' to choose their children's schools," and that courts ultimately acceded to these personal preferences of whites in the face of escalating white flight that was also aided by local government decision makers.<sup>48</sup>

In his *Keyes* concurrence, Justice Powell expressed grave concern about school desegregation plans that require extensive transportation solely to achieve integration; he, like others, emphasized the value of neighborhood schools and the traditional community-based fabric of public schools.<sup>49</sup> Justice Powell predicted that the imposition of busing for the sake of integration would hasten the dismantling of neighborhood education with parents leaving the public school system for the suburbs or private schools. Debate over who is to be transported would also divert attention from the goal of equality. True to this prediction, white parents in Denver (like elsewhere) manifested their continued opposition to busing and racial balance by leaving the school district.<sup>50</sup>

Ordered by Judge Doyle, the so-called Cardenas Plan—which included bilingual education and an ethnic studies program, and was ruled unconstitutional by the Tenth Circuit<sup>51</sup>—started a round of plans circulated from 1976 to 1995, until Judge Richard Matsch granted a motion to terminate the district court's jurisdiction and return full governance to the school board.<sup>52</sup>

Given the contentious nature of its work, it is likely that any court would seek ways to tailor relief that would eliminate some disparities in the quality of schools available to blacks and Latinos but with minimal disruption to the rest of the community. Professor Tom Romero has written persuasively about the "tri-ethnic dilemma," offering additional in-

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boards purported to comply with *Brown II* simply by permitting those minority students who chose to transfer to move from all-black schools to majority-white schools—an option that often led to little integration.").

48. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 110 (2004).

49. *Id.* at 108. Recent school closures in Philadelphia, Chicago, and other cities have sparked political uproar as children have lost out on public education within their communities, resulting in the filing of civil rights complaints with the United States Department of Education. See Monica Davey, *As Chicago Strikes Goes on, the Mayor Digs in*, N.Y. TIMES, Sept. 18, 2012, at A1; Jon Hurdle, *Philadelphia Officials Vote to Close 23 Schools*, N.Y. TIMES, Mar. 8, 2013, at A16.

50. BELL, *supra* note 48, at 109.

51. The Tenth Circuit found that the lower court exceeded its remedial powers when it adopted the Cardenas Plan and further explained: "We believe that the district court's adoption of the Cardenas Plan would unjustifiably interfere with such state and local attempts to deal with the myriad economic, social, and philosophical problems connected with the education of minority students." *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465, 482 (10th Cir. 1975).

52. See Fishman & Strauss, *supra* note 44, at 682–83 (detailing the history of Cardenas Plan).

sights on the complex and conflicting starting points for discussing equality in this metropolitan community in the West.<sup>53</sup>

*C. Shortcomings of Lifting Mandate once Past Discrimination Is Eliminated "to Extent Practicable"*

In 1995, the district court found that DPS had complied in good faith by removing segregation "to the extent practicable"<sup>54</sup>—terminology that came from *Missouri v. Jenkins* and that all but admitted that racial isolation continued—but that remaining inequality was not the vestige of unlawful segregation.<sup>55</sup> Tracing resegregation to permissible, de facto explanations as distinguished from the continuing vestiges of segregative intentional bias is nearly impossible and, given our current understanding of implicit bias today, not a well-founded basis of distinction. In Denver, like many urban cities, much of the isolation was a consequence of population growth and neighborhood concentration that could not indisputably be attributed to the old boundary-drawing practices.<sup>56</sup> Many Latinos in the west of the city, as well as blacks who continued to live in impoverished neighborhoods in the east, were not bused after the mandate lifted.<sup>57</sup> The racial isolation was also due to flight out to the edges and then beyond the city lines by middle-class whites who feared race mixing or simply did not support the racial integration efforts and mightily resisted "forced" busing.<sup>58</sup>

There is another complicating factor that I argue reflects the shortcomings of trying to make the de jure and de facto distinction in determining whether court relief was warranted in the case of Denver: the twenty-year desegregation options offered by the federal court to address racial isolation and develop an effective plan to unite the public school system were hampered by the anti-busing clause of the 1974 Poundstone Amendment to the Colorado state constitution.<sup>59</sup> This amendment effectively precluded a citywide solution to segregation even as it prohibited growth by annexation of lands surrounding the city.<sup>60</sup> The amendment not only severely curtailed lasting desegregation of DPS, it stunted the growth of the city itself and adversely affected economic development of

53. See Tom I. Romero, II, *The "Tri-ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 TEMP. POL. & CIV. RTS. L. REV. 817, 818, 855 (2004) (asserting that cases like *Keyes* pose challenges when "set in the context of the multiracial and multiethnic American West").

54. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995).

55. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1281 (D. Colo. 1995) (holding that "vestiges of past discrimination [by the district] had been eliminated to extent practicable").

56. Fishman & Strauss, *supra* note 44, at 635.

57. See CATHERINE L. HORN & MICHAEL KURLAENDER, CIVIL RIGHTS PROJECT, *THE END OF KEYES—RESEGREGATION TRENDS AND ACHIEVEMENTS IN DENVER PUBLIC SCHOOLS* 7 (2006) (asserting that when the "School Board voted for a return to neighborhood schools," that policy sent "students to the school nearest their home").

58. Fishman & Strauss, *supra* note 44, at 657.

59. COLO. CONST. art. XX, § 1.

60. HORN & KURLAENDER, *supra* note 57.

the suburbs.<sup>61</sup> Supporters of the Poundstone Amendment were open about their resistance to busing and school integration and spoke in terms that exposed their bias and support of retrenchment.<sup>62</sup> The amendment remains in effect.

Similar to what was happening in other desegregation cases in the North and West, as well as in the South *after* 1995, once the district court granted the motion to terminate jurisdiction over desegregation of DPS, the schools in that district rapidly resegregated.<sup>63</sup> As the Harvard Civil Rights Project has noted, although there were bases for linking improvements in skills and other qualitative benefits to integration, conclusions about their lasting nature were difficult given the rapid return to substantial racial isolation after the mandate was lifted.<sup>64</sup>

*D. Emerging Political Landscape Suggesting "Mission Accomplished"*

Notably, the district court's decision to end its supervision was based in part on its view that a new day had come to Denver. The court pointed to tangible evidence of a change in the political landscape that included elected black and Latino leaders in Denver and elsewhere in the state.<sup>65</sup> The court noted the change in racial composition of the political decision makers made Denver

very different from what it was when this lawsuit began. . . . Black and Hispanic men and women are in the city council, the school board, the state legislature, and other political positions. . . . People of color are not bystanders. They are active players in the political, economic, social and cultural life of the community.<sup>66</sup>

There are other explanations for the court's decision. By this time, federal policy shifts that began in the '80s (particularly during President Reagan's first Administration) contributed to the ebbing of popular support for integration policies across the country.<sup>67</sup> A sense of "mission

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61. Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. FOR SOC. JUST. 73, 121 (2004).

62. See *id.* at 119 (describing various ways in which Denver parents voiced their opposition to integration).

63. HORN & KURLAENDER, *supra* note 57.

64. *Id.* at 23.

65. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1307 (D. Colo. 1995).

66. *Id.*

67. For example, the Reagan Administration helped repeal funding for training, interventions, research initiatives, and other programs designed to improve race relations in schools. Gary Orfield, *Prologue: Lessons Forgotten*, in LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 1, 3 (Erica Frankenberg & Gary Orfield eds., 2007). In addition, President Reagan agreed to repeal the Gifted and Talented Children's Education Act of 1978. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2175, 95 Stat. 357, 809 (codified as amended at 42 U.S.C. § 1396n (2012)). The Gifted and Talented Children's Education Act had provided funding for gifted students that helped to meet the greater need for increased participation in gifted programs among black and Latino schoolchildren. The Gifted and Talented Children's Education Act of 1978, Pub. L. No. 95-561, Title IX-A, 92 Stat. 2143, 2292 (codified at 20 U.S.C.

accomplished" pervaded. Government retrenchment from ambitious integration mandates in Denver—as in other districts across the country—was quick.<sup>68</sup> In the first years of the Reagan Administration, the President pushed strict limits on the use of busing, and Congress debated measures to limit the scope of busing plans in many school districts. In addition to courts' willingness to honor the private choices of whites about busing, they manifested a lack of interest in considering housing discrimination as relevant to school desegregation. A confluence of these factors created "an inescapable cycle of racial separation,"<sup>69</sup> denying real integration for urban centers like Denver and insulating the suburbs.

### *E. Assessing Social Science Evidence of Effects of Desegregation and Resegregation*

The *Keyes* case offered opportunities, though short-lived, for social scientists to study the effects of social interaction and diverse learning environments experienced by children while the court enforced the desegregation mandate. As Professor Lisa Martinez and others pointed out at this symposium,<sup>70</sup> there continues to be promising data about the effects of integration; but challenges remain relating to poverty and continuing gaps in achievement with the rest of the population.

The Harvard Civil Rights Project and other scholars continue to collect and publish social science studies on the effects of segregation, integration, and other actions undertaken in districts like Denver.<sup>71</sup> Their conclusions are not definitive but are instructive. First, these studies have assessment problems because the rapid reconstitution of racially isolated neighborhoods makes it hard to identify the benefits of more racial balance. Second, socioeconomic background may drive some findings of studies in highly concentrated areas of poverty for blacks and Latinos. But Denver-specific studies have found statistically significant improvement in learning and other well-being-related outcomes for both

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§§ 3311–3318 (1978) (repealed 1982)); Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 731–32 (2001) (explaining that even though data is not tracked consistently, racial minority families are in greater need of programming for gifted students than are their middle-income peers).

68. See Orfield, *supra* note 67, at 4–5 (describing how "[t]he country turned in a different direction when the standards movement emerged in the aftermath of the Reagan administration's *A Nation at Risk* report in 1983," and it began overlooking the social contexts of schools such as "problems of racial and economic inequality and the positive possibilities of racial diversity").

69. BELL, *supra* note 48, at 114.

70. See, e.g., Lisa Martinez, Assoc. Professor, Dep't of Sociology & Criminology, Univ. of Denver, Remarks on Panel 3: De Facto Segregation and the Neighborhoods and Communities in Which Children Are Raised at Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*: Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm>.

71. See, e.g., HORN & KURLAENDER, *supra* note 57, at 7–9.

blacks and Latinos. These studies show little if any evidence that whites benefit from what are once again predominantly white environments.<sup>72</sup>

In 2006, the Harvard Civil Rights Project studied the legal and demographic shifts that took place in DPS over the decade following the court's decision that a unitary system had been achieved.<sup>73</sup> Some studies found significant differences in academic achievement as measured by test scores for black students as compared with earlier studies when these students moved from segregated to desegregated settings with white students.<sup>74</sup> However, the magnitude, persistence, and conditions under which the benefits exist are debated in the research.<sup>75</sup> Moreover, desegregation may affect higher achieving blacks differently than lower performers because studies also suggest that desegregated schooling is associated with attainment of modestly higher educational and occupational aspirations for black students.<sup>76</sup> The conditions that seem to matter are educational and career options available in racially mixed environments where there are likely more developed social networks that reflect middle-class norms of success. Also, for a host of reasons, including disparate school financing, segregated schools often have comparatively fewer resources such as quality teachers, counselors, and other educational advantages available to them, leading to fewer opportunities to achieve in racially isolated communities.<sup>77</sup>

Importantly, some studies also recognize "attitudinal and civic outcomes that can occur [in students] as a result of attending diverse schools," including a higher comfort level with other racial groups, an increased sense of civic engagement, and a greater desire to live and work in multiracial settings as compared with students in segregated environments.<sup>78</sup> White students in desegregated schools also exhibit more racial tolerance and less apprehension about interacting with black peers over time than do those attending schools in segregated environments.<sup>79</sup> There is also a greater likelihood of cross-racial interactions and friendships beyond school borders.<sup>80</sup> Similar findings have been reported for Latinos, though there are fewer studies that document the benefits for this group.<sup>81</sup> Because Latinos are frequently segregated in some of the

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72. See *id.* at 23.

73. See generally *id.*

74. See *id.* at 4.

75. See *id.* at 23.

76. See *id.* at 4.

77. Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS. C. REC. 1052, 1061 (2003) ("Given the system of public school financing, which depends largely on property taxes, and in view of the racial segregation in public and private housing markets, it is not surprising to find racial (and class) differences in school financial resources and in the opportunities to learn that they purchase." (citations omitted)).

78. HORN & KURLAENDER, *supra* note 57, at 5.

79. *Id.*

80. *Id.*

81. *Id.*

poorest schools with sparse resources, the potential increase in achievements may be a consequence of better educational resources and exposure to diverse socioeconomic and career aspirations.

Despite these findings, some of the participants of this symposium have questioned the role of courts in addressing the deeply dividing social and legal issues that confronted the Denver community. But the problems that were the focus of litigation in *Keyes* remain with us; and if anything, the complexities of the controversies have deepened. Even as we differ about whether and when courts have a role in resolving such socially important and complex disputes, it is critical for each of us to remind ourselves of the moral courage and commitment that these community leaders displayed in their efforts to integrate schools. Their objective was to offer brown and black children equal respect and better opportunities to prosper in life with a sound education. The factors that contribute to better outcomes and civic engagement should not be discounted, and I argue that there remain opportunities for courts—state and federal—to be part of the discourse about how better to address persistent inequality. Case accounts of the complex problem of race relations can lay the framework for challenging the status quo. They also can provide historical context for considering new equality-promoting alternatives. Re-examining cases like *Keyes* does expose the intractability of the social problem of race relations, but our new reading can also invite us to search for better solutions informed by the past and looking to the future.

*F. Confronting the Damaging Effects of Colorblind Rhetoric in Public Education Cases*

In public education cases addressing racial isolation—most recently *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>82</sup>—and in affirmative action cases on higher education admissions from *Regents of the University of California v. Bakke*<sup>83</sup> to *Fisher v. University of Texas at Austin*,<sup>84</sup> a plurality of Supreme Court Justices has fine-tuned colorblind rhetoric into a constitutional requirement that deprives both lower courts and political decision makers of the tools necessary to address racial and ethnic isolation in schools. Rather than expanding opportunities for student racial engagement and other integration policies, colorblindness now more often erects constitutional *barriers* to corrective action if race is used as a factor in decision making, thereby designating legitimate efforts to address segregation as unlawful. Because some integration policies have shown promise in increasing learning opportunities and creating socially important identity formation, the use of colorblind rhetoric to change these policies deprives children of equal opportunity. Their rejection leaves our society hobbled and our

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82. 551 U.S. 701 (2007).

83. 438 U.S. 265 (1978).

84. 133 S. Ct. 2411 (2013), *vacating and remanding* 631 F.3d 213 (5th Cir. 2011).

communities less capable of understanding cultural and other differences.

Increasingly the norm in public education experienced by children is that of one race or racially imbalanced classroom settings.<sup>85</sup> Also, white students lack diversity as to race but as contrasted with the experiences of black and brown children, their education is often very different in terms of opportunity because of wealth differentials. However, our cities, neighborhoods, churches, and recreational places are also segregated and thus, there are few opportunities for young people to interact across racial and socioeconomic lines.

Some of the panelists at this retrospective suggest that the lesson of *Keyes* is that courts are ill-equipped to address these substantial social problems of racial isolation and institutional inequality. However, it can be argued to the contrary. I find meaning in the dissents of cases like *Parents Involved* that challenge the conflation of colorblindness and equality and seek opportunities where we can rethink the policies promoting integration if not today, then in the future. We can draw more heavily on social science literature, which more accurately today than in the past informs us of the benefits of pluralistic communities and the value of social interaction among diverse community members. Research findings also now document that unconscious or implicit bias shapes our thinking and colors our decision making about others<sup>86</sup> that gets shaped by racial isolation. These are important tools available for informing our understanding of persistent racial discrimination and providing opportunities for change as we reframe the discussion about the role of courts in the future.

One could argue that social science findings and conclusions about the effects of segregation on individuals—including injuries that might flow from de facto segregations—should lead to the conclusion that addressing effects of racial isolation is a compelling interest that justifies

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85. See BELL, *supra* note 48, at 109–10; GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2001); GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 274–75 (1996). Cf. HORN & KURLAENDER, *supra* note 57, at 9 (examining the effect of the end of court-mandated desegregation and concluding that “while it is apparent that Whites were becoming more segregated from their peers [in] other racial groups,” many black and Latino students were attending more segregated schools than their white counterparts).

86. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–93 (2005) (citing John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996); Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002); Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563–67 (2000); Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80–81 (1999)) (discussing studies elaborating on “the ways in which race alters intrapersonal, interpersonal, and intergroup interactions” and involving unconscious bias and subliminal messaging).



broad and flexible action.<sup>87</sup> This would certainly lead us to include consideration of race in strategic decisions for improving education. The importance of addressing racial separation and remaining inequality in education drove at least some of the Court to permit race as a factor in law school admissions decisions in *Grutter v. Bollinger*.<sup>88</sup> Ironically, however, even as social scientific studies offer more convincing evidence of the need to examine the impact of racial and ethnic isolation, the Supreme Court's rhetoric of colorblindness has become more pronounced.<sup>89</sup> This has led critics like Stephanie Wildman to call for a renewed consciousness of the impact of race that she terms "color insight" to acknowledge the role of implicit bias or privilege.<sup>90</sup>

A clear, colorblind-based objection to race-conscious efforts to address inequality was put forth by the *Parents Involved* plurality. In this 5–4 decision from 2006, the Supreme Court struck down two districts' efforts to create diverse public schools using race in narrowly confined circumstances.<sup>91</sup> The plurality view cast in constitutional question race-based desegregation decisions.<sup>92</sup> The decision prompted vigorous dissents, including one offered by Justice Breyer. In a passionate and well-documented account of the school district's efforts to achieve balance, Justice Breyer characterized the Court plurality's adherence to colorblindness as formalistic and not faithful to *Brown*: "real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are 'conscious' of the race of individuals."<sup>93</sup> The plurality's vision of the Fourteenth Amendment's Equal Protection Clause seems shrunken and at odds with important and challenging issues that school desegregation cases like *Keyes* were intended to address. Another observation from Justice Breyer in *Parents Involved* evokes a passage in *Brown* as Justice

87. See James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1688, 1702 (2003) (asserting that social science research "is directly relevant to the issue of whether student-body diversity or overcoming de facto segregation is a compelling interest" and concluding that "[b]y working together to present sound legal theories and a strong political case for racial and socioeconomic integration, lawyers and social scientists may yet be able to prevent our schools from becoming even more racially and socioeconomically segregated than they are today").

88. 539 U.S. 306, 325 (2003).

89. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 *passim* (2009); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 *passim* (2009).

90. *Armstrong & Wildman*, *supra* note 5, at 649 ("Color insight would encourage noticing race in each context in which it arises, including the operation of white privilege and any other advantaging or disadvantaging function of race.").

91. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–11 (2007).

92. See *id.* at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 285 (2009) ("*Parents Involved* virtually closes the door on the use of the race of individual students to make student assignments to schools.").

93. *Parents Involved*, 551 U.S. at 806 (Breyer, J., dissenting).

Breyer laments the unwillingness of the plurality to support efforts to address the reality of demonstrative imbalance in the district<sup>94</sup>: "To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."<sup>95</sup>

For three decades after *Brown*, the Supreme Court conferred lower courts with broad enforcement powers and discretion in the choice of tools to integrate previously segregated schools.<sup>96</sup> This happened first in the South and later in the North and West in cases like *Keyes*, where discriminatory intent could be inferred from the previous and continuing conduct of local school boards and other public officials.<sup>97</sup> During this time, in the face of recalcitrance, white flight, resegregation, and general malaise, school districts were required by court decree—but also often encouraged and permitted by courts through their continuing mandate to desegregate—to use broad tools to achieve the equality promised by *Brown*.<sup>98</sup>

But the climate has changed, and the pursuit of equality for people of color has become less urgent to others. Perhaps the growing size and visibility of a black and brown educated middle class has been a factor.<sup>99</sup>

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94. *Id.* at 803 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

95. *Brown*, 347 U.S. at 494.

96. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.").

97. Joel B. Teitelbaum, Comment, *Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate*, 79 MARQ. L. REV. 347, 356 (1995) ("*Keyes v. School District 1* was the first in a line of northern-based cases in which the Court attempted to lay down rules dealing with the de jure/de facto distinction. The Court in *Keyes* emphasized that the differentiating factor between the two is the 'purpose or intent to segregate.' . . . In *Milliken v. Bradley*, the Court addressed the question of whether a federally-ordered desegregation remedy could include suburban school districts when a city's school district is shown to be officially segregated. The Court held that such a remedy is impermissible." (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973))).

98. *See generally* Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 889-90 (1993) (characterizing *Brown* as crucial to advancing the goal of equal opportunity while still leaving room for discretion, leading to subsequent judicial intervention in the decades to follow).

99. *See supra* text accompanying note 66; *see also* EBONI M. ZAMANI-GALLAHER ET AL., THE CASE FOR AFFIRMATIVE ACTION ON CAMPUS: CONCEPTS OF EQUITY, CONSIDERATIONS FOR PRACTICE 27 (2009) (explaining that "African Americans who score well on high-stakes tests may have become acculturated to mainstream values and culture," generating apathy toward "Black ideological issues"); Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 1003-04 (2010) (stating that evidence of a substantial improvement in the economic condition of some African Americans has been used to buttress claims that "[i]n this so-called post-race era, . . . those who have not achieved the American dream have failed, not because of racism, but because of a lack

It is clear that in the last twenty years (and certainly under the Roberts Court), the Fourteenth Amendment has more frequently been invoked successfully in support of the interests of whites.<sup>100</sup> African Americans and other historically subordinated groups have often lost their claims involving school desegregation, affirmative action in secondary education, and bias in employment, criminal law, and housing.<sup>101</sup> Consistent with this observation, less than a decade after *Grutter*, the Court this Term appeared poised to reject the University of Texas's effort to create a diverse class in *Fisher*.<sup>102</sup> The University of Texas at Austin used race as one factor in creating its student body composition.<sup>103</sup> It also automatically admitted students in the top ten percent of state high schools, many of which are highly segregated.<sup>104</sup> The petitioner claimed that the Texas program was at odds with *Grutter* but at oral argument backed away from urging the Court to overrule that case.<sup>105</sup>

The Supreme Court vacated the decision by the U.S. Court of Appeals for the Fifth Circuit that upheld summary judgment favoring the

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of skill, inadequate motivation, and intergenerational pathologies within parts of the African-American community"); Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 759 (2010) ("Even among those who may be sympathetic to the cause, these days there seems to be an acknowledgement that traditional school desegregation litigation is passé.").

100. Erwin Chemerinsky previously underscored the historical and jurisprudential incongruity of this shift:

There is an irony in seeing the conservative majority interpret the equal protection clause as requiring colorblind government decision-making. These are the Justices who profess the need to follow the original intent behind constitutional provisions. But if anything is clear about the Congress that ratified the Fourteenth Amendment it is that it did not believe in colorblindness as a constitutional principle. It created numerous programs, such as the Freedmen's Bureau, to provide benefits based on race and it voted to segregate the District of Columbia public schools.

Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 429 (2007) (footnote omitted); see also Barnes et al., *supra* note 99, at 996 ("[O]ne need look no further than Chief Justice Roberts's opinion in *Parents Involved* to imagine the day when the Court will reject race-based remedies in all but the most egregious intentional discrimination cases . . . . Because the Court appears hostile to expanding the use of the diversity rationale outside of higher education and because several sitting Justices seem to believe that almost any consideration of race by the state is harmful, the diversity rationale may be in serious jeopardy." (footnote omitted)).

101. See Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL'Y 381 *passim* (2000).

102. Lyle Denniston, *Argument Recap: Will Grutter Be Reshaped?*, SCOTUSBLOG (Oct. 10, 2012, 3:15 PM), <http://www.scotusblog.com/?p=153589> ("At the center of the discussion was the Court's last major ruling on affirmative action in college admissions—*Grutter v. Bollinger*, in 2003. There was almost no one at the hearing thinking that *Grutter* would be flatly overruled, but Justice Sonia Sotomayor wondered what was on almost everybody's mind: would it be 'gutted'? At a minimum, it seemed, it would have to be rewritten, and its central point—that a university can make some limited use of race until it achieves a 'critical mass' in a diverse student body—may well be cast aside. Chief Justice John G. Roberts, Jr., led a determined assault on the concept, finding it far too indefinite, and the idea had no fervent champions.").

103. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013), *vacating and remanding* 631 F.3d 213 (5th Cir. 2011).

104. *Id.* at 2416.

105. Reply Brief for Petitioner at 21, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3875237, at \*21; Amy Howe, *The Fisher Argument in Plain English*, SCOTUSBLOG (Oct. 10, 2012, 4:43 PM), <http://www.scotusblog.com/?p=153659>.

university's admissions policy.<sup>106</sup> It remanded the case for the Fifth Circuit to determine "whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."<sup>107</sup> In the majority decision joined by Justice Sotomayor, among others, and with which Justices Scalia and Thomas concurred, the Court held that the appellate court had failed to apply strict scrutiny in a sufficiently demanding fashion.<sup>108</sup>

Justice Kennedy wrote that to properly apply the narrow-tailoring prong of strict scrutiny, a court must verify that it is "necessary" for the university to use race to achieve the educational benefits of diversity and must satisfy itself "that no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>109</sup> Leaving for later consideration a challenge to *Grutter's* deference to a university's judgment whether diversity is essential to its educational mission, *Fisher* places a more restrictive, heavier burden on the university to prove that its use of race is justified. The Roberts Court majority's deep skepticism of diversity as a constitutional objective and distaste for racial balancing as a tool for building equality is clearly reflected in this demanding analysis. It seems accurate to say that *Brown's* promise has not merely remained unkept but has been broken as a consequence of the Court's devotion to colorblindness.

Despite rapid resegregation and the return of racial isolation in many neighborhood schools, there are positive and long-lasting contributions of the *Keyes* case that may more fully be appreciated in the future when litigants may once again offer socio-legal arguments to courts willing to hear these claims and propose new remedies and strategies to eradicate the subordinating effects of racial isolation, inequality of opportunities, and concentrated poverty in our nation. If local, state, and federal governments are deprived of the critical tools to enable students to learn from, live with, and work alongside other students from different backgrounds, the chances that we can effectively address the salience of race and attack other forms of bias are sorely diminished. I believe this can have grave consequences for our economy, security, and society. The desegregation and integration policies and programs employed by the school districts that were challenged in *Parents Involved*—like the policies of using race as one factor in admissions decision making in *Grutter* and those that were at issue in *Keyes*—are designed to provide opportunities for students to come together and learn in social environments that challenge racial stereotypes. Such integrated educational communities can advance common understanding of people, including racial minorities; they can show us the value of living in a pluralistic society.

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106. *Fisher*, 133 S. Ct. at 2421.

107. *Id.*

108. *Id.* at 2414, 2421.

109. *Id.* at 2421.

This kind of flexibility is not the path taken in affirmative action cases today because a Roberts Court plurality increasingly views such relief not as corrective, but rather as “racial entitlement.”<sup>110</sup> I believe this construction of Fourteenth Amendment equality, favoring the white norm as “colorblind,”<sup>111</sup> must be challenged. District courts should be left with broader discretion to use race-based tactics and strategies to address continued racial isolation and inequality. In light of the Supreme Court’s recent cases, we will need to find new constitutional and other strategies to enable courts to entertain claims and allow other governmental decision makers like school boards to address these issues.

Rejecting these propositions, the Roberts Court has placed a premium on colorblind decision making that seems shortsighted and abstract, obstructing rather than building opportunities to create a civically engaged community of educated citizens. It is divorced from the reality of living in a multicultural world and far removed from the message of inclusion—and humanity—in *Brown* and *Keyes*. A view of “mission accomplished” or of a post-racial educational system is belied by the harsh reality of other facts. Armed with data, scholars like those at the *Keyes* symposium and authors like Michelle Alexander in *The New Jim Crow* have marshaled these facts. They paint dramatic pictures of structural inequality in criminal law enforcement and education linked to the misguided policy choices of the government that continue to privilege whites and subordinate Latinos and blacks.<sup>112</sup>

A 2011 supplement to the American Council on Education’s twenty-fourth *Minorities in Higher Education* report showed that, among racial groups, Caucasians and Asian Americans are the only ones to earn more degrees than in previous generations; there has been no increase among African Americans or Latinos.<sup>113</sup> Undoubtedly, this is due in part to the educational disparities that Latinos and African Americans continue to encounter long before they even contemplate higher education.<sup>114</sup>

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110. Jess Bravin, *Scalia Calls Voting Act a ‘Racial Preferment,’* WALL ST. J., Apr. 17, 2013, at A3; Spencer Overton, *Justice Scalia’s Latest ‘Racial Entitlement’ Remark*, HUFFINGTON POST (Apr. 4, 2013, 6:11 PM), [http://www.huffingtonpost.com/spencer-overton/justice-scalias-latest-ra\\_b\\_3103845.html](http://www.huffingtonpost.com/spencer-overton/justice-scalias-latest-ra_b_3103845.html).

111. See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 535 (2012) (describing “a larger contradiction in America: the desire for an anti-essentialist, colorblind society without the will to tangibly address the rampant racial inequalities that exist in this country”).

112. ALEXANDER, *supra* note 5, at 11–12 (“Mass incarceration—not attacks on affirmative action or lax civil rights enforcement—is the most damaging manifestation of the backlash against the Civil Rights Movement. The popular narrative that emphasizes the death of slavery and Jim Crow and celebrates the nation’s ‘triumph over race’ with the election of Barack Obama, is dangerously misguided. The colorblind public consensus that prevails in America today—i.e., the widespread belief that race no longer matters—has blinded us to the realities of race in our society and facilitated the emergence of a new caste system.”).

113. YOUNG M. KIM, 2011 SUPPLEMENT TO MINORITIES IN HIGHER EDUCATION: TWENTY-FOURTH STATUS REPORT 1 (2011).

114. See generally Daniel Kiel, *An Ounce of Prevention Is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action*, 88 DENV. U. L. REV. 791, 796 (2011) (“[Law

And this lack of progress reinforces stereotypes that cannot be easily challenged because of racial isolation and adoption of a colorblind rhetoric that masks bias.

This reality is also confirmed by our experiences in our law schools. A collaboration between the Society of American Law Teachers and one of Columbia University School of Law's clinics revealed an especially concerning trend in law school admissions from 1993 to 2010: though the undergraduate grade point averages and Law School Admission Test scores of African American and Mexican American applicants have risen steadily, and even though 3,000 new 1L seats have opened during this period, the percentages and real numbers of both groups within law schools have decreased dramatically.<sup>115</sup> In fact, none of the 3,000 new seats were filled by African American or Mexican American students.<sup>116</sup> Furthermore, the shutout rates for African American and Mexican American applicants were higher than those for whites and Asians.<sup>117</sup>

It is undeniable that *Keyes*, along with *Rodriguez* and *Milliken*, marked "the beginning of the end of an era of robust federal judicial involvement to ensure that all students had access to equality of educational opportunity."<sup>118</sup> The choices that were made—including the retreat from identifying the roots of racial discrimination in residential decisions that could have been linked to governmental policies, and abandonment of integration as a means to address racial segregation—have consequences that we must assess.

Colorblind doctrine disables us from confronting the complex social problems that perpetuate the inequalities resulting from racial isolation. It uncouples the relationship between disparities in social and cultural capital available to children and this racial isolation. It leaves unexamined how implicit bias produces stereotypes about racial inequalities, and influences our behavior because race is a proxy for undesirable traits and can operate as stereotype threat. It leaves public education and other social institutions unaccountable for producing a trained elite as well as

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schools' affirmative action] interventions are significant because they come at the highest level of education within a society where there are educational disparities nearly every step of the way from birth to law school admission." (footnotes omitted)).

115. *A Disturbing Trend in Law School Diversity*, LAWYERING DIGITAL AGE, <http://blogs.law.columbia.edu/salt/> (last visited Apr. 18, 2013).

116. *Id.*

117. *Id.* But see Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 81–82 (2007) ("The model minority myth has shifted considerably into something much uglier. Asian Americans have now become stigmatized for the very things for which they were praised. A new species of yellow peril has emerged. Asian Americans are still despised for occupying spots that supposedly belong to 'real' Americans, but the focus has shifted from the employment to the educational context. Because Asian Americans are still viewed as a threat to the invisible yet pervasive status of white privilege, the concept of yellow peril, while ever-present, has changed to include their perceived successes. Still perceived as incapable of blending in with the white majority, Asian Americans are singled out for working to achieve what is supposed to be the American dream." (footnote omitted)).

118. Romero, *supra* note 38, at 1028.

institutional structures that are responsive to the diverse voices and needs of a multicultural society. Rather than promoting colorblindness as a constitutional imperative, I believe there are grounds for characterizing as fundamentally anti-democratic the consequences of this doctrine because they perpetuate racial disparities and leave unexamined continuing effects of racial privilege. It is inconceivable to me that such legal strategies will dismantle persistent and devastating racial inequalities if they are built on a conception of "blindness."

## II. IS THERE OPTIMISM FOR THE FUTURE?

I believe in the power of lawyers to strategize and develop new arguments to serve justice. As legal educators, we can look to examples from the past. Charles Hamilton Houston's Howard University advocacy project that supported the civil rights strategies and litigation efforts leading to *Brown* is a great example.<sup>119</sup> This strategy began at the time of Jim Crow, when the meaning of the Fourteenth Amendment equality had also been reduced to formalisms. During the fifty years following the Civil War, like the '80s and '90s of this last century, the collective memory about the meaning of equality changed.<sup>120</sup> As law professors, we can provide our students with the tools to reclaim the conversation about freedom and equality and instill confidence in their ability to address rather than tolerate persistent racial inequality. This is why I allude to dissents that can often make powerful cases for marginalized interests. There is also inspiring work being done by social scientists who have joined us at this symposium focused on *Keyes*. Students will be the lawyers and policy makers addressing the persistent problems revealed in *Keyes* that have been the subject of discussions today. They will have the opportunity to rethink old strategies (armed with dissents) and create new solutions.

There is already new thinking about education as a fundamental human right that is recognized by other nations and that can be both provocative and instructive of our construction of equality. International scholars are developing interesting ways to think about integration of multi-interest groups in other multicultural communities, ways that are

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119. See generally Genna Rae McNeil, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2167, 2070-71 (1998) ("[Charles] Houston led, advised, and collaborated with scores of African-American lawyers in private practice as well as those African-American attorneys who were affiliated with the NAACP, the Legal Defense Fund, and Howard Law School. Charles Hamilton Houston—as the successful advocate of the duty of fair representation in *Steele v. Louisville & Nashville Railroad Co.*, as the bold opponent of restrictive covenants in *Hurd v. Hodge*, as the architect of the litigation campaign that led from *Missouri ex rel. Gaines v. Canada* to *Brown v. Board of Education*—played a principal role in defining and pacing the legal phase of the African-American struggle against racial oppression until his death in April 1950. In large part, this is his legacy." (footnotes omitted)).

120. See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 97 (2001).

linked to human rights. This work can also be connected to *Brown's* democracy-based equality notions.<sup>121</sup>

In our country, new ideas about constitutional connections, such as dignity rooted in liberty, transcends narrower liberty and equality meanings and can prove fruitful for constructing a civil rights or human rights agenda. Equality can also be rooted in the Due Process Clause. Group-based claims of the Equal Protection Clause, that Professor Laurence Tribe has termed “a legal double helix,”<sup>122</sup> can also be used by courts to address issues using a conception of dignity that gives new meaning to liberty and equality in support of civil or human rights agendas in the future.<sup>123</sup> The Thirteenth Amendment is another consideration because it is linked to *Brown's* democracy focus and could support its integration goals. It seems obvious that the opportunity to acquire knowledge through higher education—and legal education, in particular—is an important part of the Constitution's promise of citizenship.<sup>124</sup>

In this symposium, Professor Myron Orfield has talked about the need for vocal integration advocates to make the case for new claims using available data and other evidence of inequality<sup>125</sup>; other panelists have commented on the continuing importance of building coalitions in multicultural communities.<sup>126</sup> Universities are the ideal sites for interdis-

121. European Union courts have considered claims by Roma children who have been excluded from school and have found a violation of the right to be integrated into society. In an example of transplanted claims, Jack Greenberg writes in Bulgaria about the integration of multicultural groups. See Jack Greenberg, *Remarks of Jack Greenberg*, 78 ST. JOHN'S L. REV. 259, 259–60 (2004).

122. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004) (asserting that a careful attendance to courts' rulings under substantive due process reveal a narrative “in which due process and equal protection, far from having separate missions entailing different inquiries, are profoundly interlocked in a legal double helix”).

123. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (arguing that “dignity” is a long overdue term linking liberty, and equality and that the Court has not abided by the distinction between liberty and equality).

124. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 101–02 (2007) (claiming that a review of the last century's due process jurisprudence reveals that anti-subordination is the driving force of the Fourteenth Amendment and that “the Fourteenth Amendment's core principle [is] equal citizenship, which gives every citizen a right to be treated as a respected and responsible participant in community public life”).

125. See Myron Orfield, Dir., Inst. on Metro. Opportunity and Professor of Law, Univ. of Minn. Law Sch., Remarks on Panel 3: De Facto Segregation and the Neighborhoods and Communities in Which Children Are Raised at Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*: Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/special/events/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm>.

126. See Rachel F. Moran, *Untoward Consequences: The Ironic Legacy of Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1209, 1215 (2013) (noting how “blacks and Latinos had not forged political coalitions in support of an integrationist agenda, school reform, or municipal reform” as part of the *Keyes* litigation in Denver); Michael A. Olivas, *From a “Legal Organization of Militants” into a “Law Firm for the Latino Community”*: MALDEF and the Purposive Cases of *Keyes*, *Rodriguez*, and *Plyler*, 90 DENV. U. L. REV. 1151, 1152–53 (2013) (noting how “a more comprehensive litigation strategy, one where the different racial and language interests could have been coordinated with the various parties,” might have positively influenced the outcome of *Keyes*



ciplinary discussions—like those we have undertaken at this symposium—where students can become better informed, and we can continue to explore new policy strategies and doctrinal opportunities for addressing inequality that is the consequence of racial isolation. These explorations must not be divorced from opportunities to hear from the communities that are affected by our thinking. We must continue to make education accessible and achievable to students of color and students who come from less privileged backgrounds.

### III. THE IMPACT OF MRS. RACHEL B. NOEL

I have also been asked to share recollections of my aunt, Rachel Noel, who was a principal architect of Resolution 1490, the “Noel Resolution,” which required the superintendent of DPS to prepare a comprehensive integration plan for the school district.<sup>127</sup> Long before the district court’s first disposition of *Keyes* in 1969, Rachel Noel—Aunt Rachel—played an instrumental part in the evolution of the case. Like many others in the community, she saw inequality in a public education system and was determined to engage in collective action to effectuate change. But it was her dogged persistence, enlightened perspective, and methodology as a social scientist that made her an especially important leader. As an active parent volunteer in community associations in the neighborhood where her family lived, she used her training as a sociologist to document the disparities in the quality of education offered to her children along with other blacks and Latinos in the city. Rachel Noel later worked as a consultant with the Denver Commission on Human Relations. The Commission undertook a special study of the city’s schools, and its report concluded that the school board’s decisions about where to draw attendance boundaries, new school building locations, assignment of minority teachers, and the use of mobile classrooms to address overcrowding in northeast Denver contributed to racial isolation, although there was no official policy of segregation.

Elected to the school board in 1965, Rachel Noel, along with other pro-integration allies, continuously sought board support for integration resolutions. She helped bring to the public’s attention a record of school board proceedings and inaction that obstructed integration efforts. These actions and decisions of the board resulted in increasing racial isolation of black and Latino children. For many of the Latino activists, the community goals were better education in their neighborhood schools, the teaching of Chicano history, and the availability of language classes. For blacks, the predominant interest was in attaining quality education and eliminating racial isolation in the schools. Rachel Noel and her allies—

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and other desegregation cases); Romero, *supra* note 38, at 1051 (noting how “*Keyes* demonstrates the power of pursuing a multiracial litigation strategy where the interests of various racial groups are pursued along different legal paths”).

127. Barnes, *supra* note 4, at 1059.

Ed Benton and Monte Pascoe—listened and responded with the suit for the integration of schools.

Kenneth Mack, the author of a new biography of famous black advocates, including Pauli Murray, writes about this black feminist's leadership in the first wave of the women's movement.<sup>128</sup> She coined the phrase "Jane Crow" to describe the discrimination that women faced as they struggled for equal rights in the twentieth-century workplace.<sup>129</sup> Though Rachel Noel evolved into an extraordinary leader in the Denver community, in another era she might have gone to law school and went on to practice or teach the law. Her brother was a lawyer, as was their father. And "Gra'pa"—Aunt Rachel's grandfather and my great grandfather—also studied law by reading legal books, like others during that time. Rachel Noel's son (Buddy) and niece (me) went to law school in the decade following the *Keyes* Supreme Court disposition. Instead of going to law school, Rachel went to Fisk University (one of the historically black colleges and universities) and studied sociology under the well-respected Charles Johnson, a sociologist who also mentored and encouraged Howard University-trained sociologist Kenneth Clark.

Clark's doll study was instrumental in documenting young black schoolchildren's preferences for white over colored dolls. The study was offered as evidence in *Brown* of the subordinating influence of segregation, which the *Brown* Court movingly described as "generat[ing] a feeling of inferiority as to their status in the community that may affect the hearts and minds in a way that would unlikely be undone."<sup>130</sup> Although Clark's study has been criticized in more recent times, the words generated in *Brown* about segregation affecting the hearts and minds of children still resonate in the passionate dissent written by Justice Breyer in *Parents Involved*.<sup>131</sup>

In another day, Rachel Noel might have been lead litigator in the *Keyes* litigation, as could have a host of other women volunteers in this extraordinary and socially important press for equality. But instead, she is the proud progenitor of social scientists who are engaged in sophisticated and important work that supports the case for promoting integration and community building today. They have begun to help uncover and offer persuasive evidence of bias in so-called neutral decision making in law and public policies and to demonstrate how race and gender

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128. KENNETH MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 207–33 (2012) (describing the trials of Pauli Murray).

129. Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 188 n.3 (2006) (citing Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965)) (explaining that the term "Jane Crow" originated in the writings of lawyer and feminist Pauli Murray).

130. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

131. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 775 n.22 (2007).

privilege affects our ability to succeed, which challenges the de facto—de jure distinction built upon intentionality.

The leadership and courage of Rachel Noel, like that of others in this battle for equality and dignity, inspired lawyers, educators, and other citizens who knew her and of her work to press onward. Perhaps most important, knowing her and interacting with her profoundly affected more than a generation of college students who attended Metropolitan State University of Denver and schoolchildren at the Noel Middle School who interacted with her personally after she left the school board and became a professor. It was clear at the Noel school dedication that she had captured the imagination of the middle school students with the mantra "Excellence is the Standard," which she attributed to "Gra'pa." All of these children and young adults—and I daresay, an extraordinarily large number of adults in the Denver community, the State of Colorado, and beyond—have benefitted from being exposed to her leadership, generosity of spirit, and belief in human dignity. She has certainly been an important role model to many whites and people of color—and to me.

#### CONCLUSION

Ironically, since *Bakke*, the only compelling interest the Court has recognized for race-conscious affirmative action in school admissions has been diversity. The importance of having role models was explicitly set aside in that case and rejected as a compelling governmental interest in affirmative action cases.<sup>132</sup>

But those of us who have had the privilege to interact with female and male role models like Rachel Noel know the value of models for all children. Everyone deserves the experience of interacting with someone who can help her to envision a stronger, future self. Even as we ponder how better to address the theoretical and doctrinal bases for promoting racial equality, there are ways we can make a tangible difference in the lives of youth who live in communities profoundly affected by the inequalities that we have been addressing at this symposium. For example, we can volunteer at schools or other organizations in our local communities and provide opportunities for youths to see paths to their own success. In this way, we can also rededicate ourselves to the promise of

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132. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) ("Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (holding that a school board could not extend protections against layoffs for employees based on race or national origin in order for employees to serve as role models for minority schoolchildren).

*Brown.* And we can learn as much as we give from the role modeling we offer.