FIFTY YEARS LATER, IT'S TIME TO MEND *BROWN*'S BROKEN PROMISE

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In this article, Boyce F. Martin, Jr., Circuit Judge of the Sixth Circuit United States Court of Appeals, reflects upon the Supreme Court's decision in Brown v. Board of Education *and expresses his concern that despite the Court's message that students should learn in a racially integrated environment, little progress, in the last fifty years, has actually been made. Specifically, many schools are still segregated and those schools that have successfully initiated programs to integrate their classrooms are now beginning to resegregate. Despite this lack of progress, however, Judge Martin believes a ray of hope emerged with the issuance of the Supreme Court's recent decision in* Grutter v. Bollinger. *This decision not only reaffirmed* Brown*'s message that students should learn in an environment where racial integration exists, but also went further by stating that everyone, not just minorities, will benefit from racially integrated educational environments. Judge Martin has confidence that this decision, along with the creation of race-conscious admission programs, will advance and achieve the ultimate goal of* Brown.

INTRODUCTION

On May 17, 1954, the Supreme Court declared segregated schools inherently unequal in the landmark decision of *Brown v. Board of Education*.[1] As *Brown* celebrates its fiftieth anniversary and groups organize to commemorate the occasion,[2] I write to reflect upon *Brown*'s continued impact in education and, indeed, in our society as a whole.

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The author wishes to thank his law clerks, Melissa Toner Lozner and Jill Lynn Marr, whose invaluable assistance was integral to the completion of this article.

1. 347 U.S. 483 (1954).

2. For example, the National Association for the Advancement of Colored People established the Brown 50th Anniversary Education Equity Commission, NAACP, *Brown 50th Anniversary Education Equity Commission Mission, at* http://www.naacp.org/BvBE/commissionintro.shtml (last visited Sept. 9, 2004) and the United States Department of Education established the Brown v. Board of Education 50th Anniversary Commission, Press Release, U.S. Dep't of Educ., Secretary Paige and Attorney General Ashcroft Announce Commission to Celebrate 50th Anniversary of *Brown v. Board of*

As a judge on a circuit court whose division is a matter of public knowledge, I reflect admirably upon Chief Justice Warren's ability to produce a unanimous decision on such a controversial topic—unanimity that, unfortunately, I was unable to garner in the most controversial topic that I encountered in my tenure as Chief Judge of the Sixth Circuit Court of Appeals: affirmative action.[3] As a citizen, however, I am bewildered to compare the singular voice with which the *Brown* Court spoke with the racial disunity with which our nation continues to grapple. I regret that the tone of this article is not more positive, but—like many of my colleagues—I have reached the lamentable conclusion that in fifty years, we, as a society, have made very little progress in achieving *Brown*'s promise of meaningful educational integration. That is not for lack of effort. But despite the best efforts of some, schools are still segregated, and even those schools that have made progress in achieving an integrated student body are beginning to resegregate.[4]

Just as I began to fear that the promise of *Brown* had been broken, the Supreme Court issued its decision in *Grutter v. Bollinger*,[5] holding that educational diversity is a compelling governmental interest and that, to that end, an applicant's race may be considered as one of a number of factors in making admissions decisions.[6] That holding—although concerned with graduate and professional schools rather than elementary schools—reaffirmed the simple yet central message of *Brown* that students should learn in a racially integrated environment.[7] Moreover, *Grutter* laudably went one step further than *Brown* by grounding its holding upon the rationale that *everyone* in the student body and society generally, not just minorities, benefits from educational diversity.[8] While this is by no means a novel concept—in fact, the widespread and enduring benefits of such diversity have been well documented—the Court's recognition of this essential truth was much needed.

In part I of this article, I reflect upon the *Brown* decision itself and the context in which it was issued. Part II examines the emerging trend toward resegregation and the court decisions that have paved the way for this unfortunate phenomenon. Finally, Part III discusses *Grutter* and urges educational institutions and individuals to take advantage of the opportunity that this decision has provided for our society to achieve the educational integration and diversity that the *Brown* Court promised.

Education (Sept. 6, 2002), http://www.ed.gov/news/pressreleases/2002/09/09062002a.html (last visited Sept. 9, 2004).

3. *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

4. Michael Dobbs, *U.S. School Segregation Now at* '69 *Level*, WASH. POST, Jan. 18, 2004, at A10.

5. 539 U.S. 306 (2003).

6. *Id.* at 342.

7. *See id.* at 330 ("[W]e endorse Justice Powell's view that student body diversity is a compelling state interest . . . .").

8. *See id.* at 333–34.

I. *BROWN* IN CONTEXT

Roberts v. City of Boston[9] was the first documented school desegregation case. *Roberts* involved a state law challenge to Boston's public school segregation policies.[10] Over cries of unfairness and inequality, the Massachusetts Supreme Judicial Court upheld the segregationist policy.[11] In so doing, the court noted:

> It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.[12]

Although the conclusion of the Civil War and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments signaled an end to the treatment of blacks as property and something less than citizens,[13] Reconstruction did not eliminate the pernicious racial discrimination that plagued the nation. Rather, the abolition of slavery brought about a new method of racial separatism—segregation and Jim Crow laws.[14] With the Supreme Court's approval of the separate but equal doctrine in *Plessy v. Ferguson*,[15] blacks were forced to separate and segregate themselves

9. 59 Mass. (5 Cush.) 198 (1849).

10. *Id.* at 204–05.

11. Notably, Charles Sumner, who would become Senator Charles Sumner and the drafter of the Senate version of the Civil Rights Act of 1875, was the attorney appearing on behalf of Roberts. Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 383–84 (1954) (noting Sumner's efforts in overcoming racial discrimination).

12. *Roberts*, 59 Mass. at 209–10.

13. *See* Scott v. Sanford, 60 U.S. 393, 404 (1856) (holding that blacks were not citizens within the meaning of the Constitution).

14. *See* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 320–21 (1986). Professor Karst notes:

> Racial segregation in the American South was the successor to slavery and the Black Codes, both of which had been decisively made unlawful by congressional legislation and the Civil War amendments. In this historical context it is easy to see Jim Crow for what it was: a thoroughgoing program designed to maintain blacks as a group in the position of a subordinate racial caste by means of a systematic denial of belonging. Jim Crow laws extended from disenfranchisement to prohibitions on interracial marriage and imposed racial segregation everywhere: schools, courtrooms, buses, restaurants—indeed, all places where people of both races otherwise might interact in public. Private racial discrimination also played an important role in maintaining the caste system, producing segregation in housing, employment, and public accommodations, and leaving a legacy that, even today, remains only partially remedied.

Id. (footnote omitted).

15. 163 U.S. 537 (1896).

from whites in virtually every aspect of daily life. Although not a school segregation case, *Plessy*'s holding was derived from language in *Roberts*.[16] While it is doubtful that the Massachusetts Supreme Judicial Court could have foreseen the monumental impact that its language would have upon later desegregation cases,[17] the separate but equal doctrine that it announced persisted for a half century until it was finally invalidated in *Brown*.[18] With *Plessy*'s doctrine firmly entrenched when the Court granted certiorari in *Brown*, seventeen states and the District of Columbia constitutionally, or statutorily, required segregation[19] and four jurisdictions permitted, but did not require, segregation.[20]

In my view, one of the most fascinating aspects of *Brown* involves the manner in which internal and external factors combined to enable the Court to achieve its unexpected unanimous decision.[21] *Brown*, more than any other case that I can recall, demonstrates the powerful tool of "good timing." When the *Brown* case originally appeared on the Court's docket, the plaintiffs' challenge appeared doomed to fail.[22] Even though political pressure to overrule *Plessy* was mounting to some degree,[23] a majority of the Court appeared ready, under Chief Justice Vinson's leadership, to uphold *Plessy*'s separate but equal doctrine.[24] The Court was divided enough, however, to request that the parties brief additional issues, and the case was scheduled for reargument.[25]

Before reargument could take place, Chief Justice Vinson unexpectedly died of a heart attack and President Dwight D. Eisenhower filled his vacancy with Governor Earl Warren of California.[26] The fortuitousness of Chief Justice Vinson's death and his replacement by Chief

16. *Id.* at 544; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 491 & n.6 ("The doctrine apparently originated in *Roberts v. City of Boston* upholding school segregation against attack as being violative of a state constitutional guarantee of equality." (internal citation omitted)).

17. Notably, Boston eliminated public school segregation in 1855. *Brown*, 347 U.S. at 491 n.6.

18. *Id.* at 495.

19. Leflar & Davis, *supra* note 11, at 378 n.3 (collecting citations).

20. *Id.*

21. *See Federal Judges Share Memories of Historic Civil Rights Victory*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Feb. 2004 ("'I think the only thing we didn't expect was that the decision would be unanimous. That was a complete surprise . . . . We hoped for 5-4 at the very least, but unanimity was not what I expected.'") (quoting Constance Baker Motley, who was a member of the legal team representing the plaintiffs).

22. Bernard Schwartz, *Chief Justice Earl Warren: Super Chief In Action*, 33 TULSA L.J. 477, 482 (1997).

23. *See* Brief of Amicus Curiae United States at 17–18, Brown v. Bd. of Educ., 347 U.S. 483 (1954) ("In the briefs submitted by the United States in *Henderson v. United States*, 339 U.S. 816, and in *Sweatt v. Painter*, 339 U.S. 629, and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, the Government argued that racial segregation imposed or supported by law is *per se* unconstitutional. . . . The facts of every-day life confirm the finding of the district court in the Kansas case that segregation has a 'detrimental effect' on colored children; that it affects their motivation to learn; and that it has a tendency to retard their education and mental development and to deprive them of benefits they would receive in an integrated school system.").

24. Schwartz, *supra* note 22, at 482.

25. *See id.* at 482–83.

26. *Id.* at 483.

Justice Warren was immediately evident to those hoping to overturn *Plessy*'s discriminatory doctrine. Indeed, Justice Felix Frankfurter was quoted as saying that Chief Justice Vinson's death was "the first indication that I have ever had that there is a God."[27] From the Justices' first conference on the *Brown* case, Chief Justice Warren actively led the discussions of the Court.[28] With his activism and outspokenness on the issue, Chief Justice Warren led the Court to its unanimous decision to overrule *Plessy* and declare that the separate but equal doctrine had no place in the public education system.[29]

Brown, however, left open, for a later decision, the question of the appropriate method for the enforcement of the right it had pronounced.[30] A little over a year later, the Court resolved the question of enforcement in what is commonly referred to as "*Brown II*."[31] In his characteristically short and straightforward style, Chief Justice Warren, writing again for a unanimous Court, ordered that the desegregation of schools occur "with all deliberate speed."[32] Although intended to give the states flexibility to find the best method for achieving desegregation within its borders, the phrase "with all deliberate speed" was strategically used by opponents of segregation to stall the integration of public schools.[33] In fact, "[f]rom 1954 until 1964, the enforcement effort faced almost uniform local and state resistance in the South."[34] Not until the enactment of the Civil Rights Act of 1964[35] and the Court's issuance of a series of decisions[36] did the integration that *Brown* had promised truly begin to materialize. During this period "the South moved from almost total racial separation to become the nation's most integrated region."[37]

27. *Id.*

28. *Id.* at 483–84.

29. *Id.*; *Brown*, 347 U.S. at 495.

30. *Brown*, 347 U.S. at 495–96 (noting the complexity of relief issue and ordering more argument).

31. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

32. *Id.* at 301.

33. Schwartz, *supra* note 22, at 489–90.

34. GARY ORFIELD, THE CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 3 (2001).

35. 42 U.S.C. § 2000 (2000).

36. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–31 (1971) (ordering busing); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (requiring the challenged Mississippi schools to desegregate, "at once"); Green v. County School Bd., 391 U.S. 430, 438–41 (1968) (invalidating a freedom-of-choice plan and finding it to be an ineffective method for combating segregation, noting that [s]uch delays are no longer tolerable"). The Court in *Swann* aired its frustration with the slow progress that schools had made in achieving integration:

> Over the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance.

Swann, 402 U.S. at 13.

37. ORFIELD, *supra* note 34, at 3.

These victories, however, proved to be short-lived with the election of President Richard Nixon in 1968 and his appointment of four Justices to the Court.[38] Two major decisions—each written by Nixon appointees—that seriously undercut the ability of urban black children to receive an integrated and equally financed education, began the trend toward the deceleration, if not reversal, of the desegregation movement.[39] In the years that followed, integration among schools peaked nationwide around 1988, but with desegregation losing favor in the courts and public opinion, integration levels have since persistently decreased.[40]

II. A PROMISE BROKEN: THE DEMISE OF DESEGREGATION

> [W]e must face the tragic fact that we are far from the promised land in the struggle for a desegregated society. Segregation is still a glaring fact in America . . . . [H]istory has proven that social systems have a great last minute breathing power and the guardians of the status quo are always on hand with their oxygen tents to keep the old order alive.[41]

As I recalled Martin Luther King's words, I wondered whether he would be shocked by their prophetic nature. His words remain nearly as true today as when they were spoken almost fifty years ago. Perhaps the ultimate of ironies is that as our nation's diversity increases,[42] so does the trend toward resegregation of our schools.[43] Similarly, studies have shown that despite general declines in residential segregation made in the last twenty years, school segregation has increased.[44] Although the

38. *Id.* at 3–4.

39. *See* Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (rejecting metropolitan desegregation plan); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (upholding school district financing tied to local tax base that created unequal funding among school districts). Famed constitutional law professor, Erwin Chermerinsky writes: "The combined effect of *Milliken* and *Rodriguez* cannot be overstated. *Milliken* helped to ensure racially separate schools and *Rodriguez* ensured that the schools would be unequal." Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1614 (2003).

40. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 19 (2004) ("Since 1988, with strong opposition to desegregation from the courts and inaction or opposition by executive agencies, segregation has increased substantially in all regions on both measures, except in the Northeast where there was never significant desegregation efforts by comparison to other regions of the country.").

41. Martin Luther King, Jr., Desegregation and the Future, Speech Before the National Committee for Rural Schools, (Dec. 15, 1956), *in* THE PAPERS OF MARTIN LUTHER KING, JR.

42. U.S. CENSUS BUREAU PEOPLE: RACE AND ETHNICITY MINORITY, (2003) http://factfinder.census.gov/jsp/staff/SAFFInfo.jsp?_PageId=+p9_race_ethnicity (last visited June 28, 2004) (reporting minority populations are growing at rates faster than white population).

43. *See* Chemerinsky, *supra* note 39, at 1599 ("The year 2004 will be the fiftieth anniversary of *Brown v. Board of Education*, and American schools will mark that occasion with increasing racial segregation and gross inequality."); ORFIELD & LEE, *supra* note 40, at 2–4 ("We are celebrating a victory over segregation at a time when schools across the nation are becoming increasingly segregated . . . . Now black communities in every part of the country are experiencing increasing segregation, though nowhere near the level of the pre-civil rights South.").

44. John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1401–04 (2003)

problem certainly is not as great as before the Civil War and the passage of the Reconstruction amendments, the trend is undeniable.[45] Thus, in this part, I examine some of the Court cases and statistical evidence leading to my conclusion that fifty years after the *Brown* decision we are nowhere near achieving the meaningful integration that *Brown* had promised.

A. Legal Trends

Perhaps the demise of *Brown*'s lofty aspirations could have been foretold. Indeed, one immediate reaction to impending integration was simply to close the schools[46]—a result that some had hypothesized.[47] "White flight" was another reactionary phenomenon that occurred in cities under the threat of impending court-ordered desegregation.[48] As discussed, the dilatory tactics of the southern states, however, could last only so long once desegregation became favored among the courts. The blow to the desegregation movement delivered by the Court in *Milliken v. Bradley*,[49] which denied interdistrict desegregation remedies, initially went somewhat unnoticed as public schools, particularly southern school districts, "witnessed a pattern of broad compliance with federal judicial decrees."[50] However, "[f]rom the perspective of nearly thirty years, it is fair to say that the Supreme Court's 1974 decision in *Milliken v. Bradley* signaled the end of court-ordered school desegregation as a nationwide means of achieving racial justice, as begun in 1954 by *Brown v. Board of*

("Data drawn from the 2000 census indicate that residential segregation among African Americans is decreasing); ORFIELD & LEE, *supra* note 40, at 7 ("Housing actually became modestly less segregated for blacks during the 1980s and 1990s.").

45. ORFIELD, *supra* note 34, at 2 ("From 1988 to 1998, most of the progress of the previous two decades in increasing integration in the region was lost. The South is still much more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate.").

46. *See* ORFIELD & LEE, *supra* note 40, at 12 (noting that Prince Edward County—one of the school systems involved in *Brown*—choose to close their schools rather than comply with desegregation, and gave vouchers for private schools, which, of course, were only for white children).

47. Leflar & Davis, *supra* note 11, at 405 ("If the Supreme Court decides that segregation in schools by act of the states or their subdivisions violates the Fourteenth Amendment, it is possible that some of the Southern states will attempt to evade the new requirements by divorcing their school systems from the machinery of government as such."); *id.* at 407–09 (analogizing the potential reactionary closure of southern schools to South Carolina's reaction to *Smith v. Allwright*, 321 U.S. 649 (1944), which held that primaries conducted by a political party constituted state action and therefore, blacks could not be excluded from participating. In reaction to this holding, the South Carolina Democratic Party, alleging it was acting as a purely private party, adopted rules for excluding blacks from its primaries under the auspices of acting as a private organization.).

48. The white flight that took place in reaction to desegregation orders occurred in one of two ways. White parents would either send their children to private schools, which were not subject to the desegregation orders, or they would physically relocate their family to surrounding suburbs. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629–30 (1983) (noting that it is "widely agreed that school desegregation typically does accelerate white departures from the public school system").

49. 418 U.S. 717, 752 (1974).

50. Boger, *supra* note 44, at 1388.

Education."[51] That is, the denial of interdistrict remedies made it nearly impossible in many urban centers to achieve integration because, in part, white flight had left these areas with a majority population of blacks, while the majority of whites lived in the surrounding suburbs.[52]

With a Supreme Court packed with four Nixon appointees, it was only a matter of time before desegregation began losing favor in the courts.[53] Consequently, "[i]n a succession of sharply divided opinions issued in 1991, 1992, and 1995, Chief Justice Rehnquist invested 'local control' of schooling with a constitutional weight that counterbalanced the earlier Warren Court's concern for racial discrimination and educational injury."[54]

Specifically, in *Board of Education of Oklahoma City v. Dowell,*[55] the Court found that desegregation decrees must be dissolved when "a 'unitary' school system had been achieved,"[56] even if the dissolution of the decree would result in the resegregation of the schools.[57] In *Freeman v. Pitts*,[58] the Court held that desegregation orders can be eliminated even during their "incremental stages, before full compliance has been achieved in every area of school operations."[59] Finally, in *Missouri v. Jenkins*,[60] the Court made voluntary desegregation plans virtually impossible by holding "that the district court's order that attempted to attract nonminority students from outside the district was impermissible because the plaintiffs had not proved an interdistrict violation."[61] Additionally, the *Jenkins* Court held "that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order."[62]

Collectively, these decisions "send [the] unmistakable [message] that district courts should begin winding up the process of desegregation. In each opinion, the Court stressed the importance of returning schools

51. Paul Boudreaux, *Vouchers, Buses, and Flats: The Persistence of Social Segregation*, 49 VILL. L. REV. 55, 62 (2004) (footnote omitted).

52. Chemerinsky, *supra* note 39, at 1605–09. Professor Chemerinsky notes:

> White families moved to suburban areas to avoid being part of desegregation orders affecting cities. In virtually every urban area, the inner city was increasingly comprised of racial minorities. By contract, the surrounding suburbs were almost exclusively white . . . . Thus, by the 1970s, effective school desegregation required interdistrict remedies.

Id.

53. ORFIELD, *supra* note 34, at 16 n.57.

54. Boger, *supra* note 44, at 1389.

55. 498 U.S. 237 (1991).

56. Chemerinsky, *supra* note 39, at 1616.

57. *Dowell*, 498 U.S. at 247–51.

58. 503 U.S. 467 (1992).

59. *Id.* at 490.

60. 515 U.S. 70 (1995).

61. Chemerinsky, *supra* note 39, at 1617 (citing *Jenkins*, 515 U.S. at 90, 92).

62. *Id.* at 1618 (citing *Jenkins*, 515 U.S. at 100). Furthermore, the *Jenkins* Court ruled that the desegregation order's salary increases were "simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation." *Jenkins,* 515 U.S. at 100.

to local control, emphasizing that this is the ultimate objective of any desegregation suit."[63] Most commentators agree that the unfortunate, but predicted, effect of these decisions was the commencement of a significant trend toward resegregation.[64]

B. Statistical Trends

Although recent studies have demonstrated that residential racial segregation has declined,[65] they also demonstrate an increase in segregation among school districts.[66] This trend towards resegregation is most alarming and apparent in the south.[67] In 1968, when the southern courts realized that serious countermeasures were necessary to overcome the dilatory tactics used to avoid desegregating, seventy-seven percent of black students attended schools that were attended by ninety to one hundred percent black students.[68] By 1988, with twenty years of court oversight, this number had dropped to twenty-four percent.[69] In 2001, after the Court's not-so-subtle hint that the federal courts should discontinue their oversight of desegregation efforts, the number of black students attending schools that were attended by ninety to one hundred percent black students had increased to thirty-one percent.[70]

A similar study demonstrated that by 1990, the desegregation efforts in the south resulted in school systems that were forty percent less segregated than the levels of residential segregation.[71] Ten years later, "however, public schools were only twenty-seven percent less segregated than their local housing markets, a one-third reduction in the effectiveness of desegregation efforts."[72] Indeed, a study sampling the resegregation trends of school districts from 1986–2000 reported that of the 185 districts studied, the exposure of black students to white students increased in only four of the districts.[73] Another study has demonstrated that white students, although constituting only two-thirds of the entire student population, typically attend schools where four out of five children (seventy-nine percent) are white.[74]

63. James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1669 (2003).

64. Boudreaux, *supra* note 51, at 62–64; Chemerinsky, *supra* note 39, at 1615–19; ORFIELD & LEE, *supra* note 40, at 18.

65. *See* ORFIELD & LEE, *supra* note 40, at 7; Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563, 1571–73 (2003).

66. *See* ORFIELD & LEE, *supra* note 40, at 7; Reardon & Yun, *supra* note 65, at 1573–75.

67. ERICA FRANKENBERG & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 6 (2001).

68. ORFIELD & LEE, *supra* note 40, at 20.

69. *Id.*

70. *Id.*

71. Reardon and Yun, *supra* note 65, at 1585.

72. *Id.*

73. FRANKENBERG & LEE, *supra* note 67, at 6.

74. ORFIELD & LEE, *supra* note 40, at 16–17.

Particularly interesting are the trends in those districts that were subject to the Court decisions discussed above. Notably, each of these school districts is undergoing increasing resegregation. For example, in the Oklahoma City public schools, which were at issue in *Dowell*, the exposure of black students to white students fell from 33.7% in 1988, to 20.6% in 2000.[75] This means that the average black student attends a school that is nearly eighty percent black. Ultimately, "[i]n [t]his city that the Supreme Court found to have fulfilled all its desegregation obligations and eliminated the heritage of racial discrimination, the average black student was in a 79 percent minority school and the average Latino in a 70 percent minority school."[76] Similar trends are exhibited in the public schools located in DeKalb County, Georgia, which was involved in the *Pitts* decision, and Kansas City, Missouri, which was involved in the *Jenkins* decision. Specifically, in DeKalb County, the exposure rate of black students to white students fell from 23.4% in 1988, to 7.4% in 2000.[77] Additionally, in Kansas City, Missouri, the exposure rate of black students to white students fell from twenty-two percent in 1992, to nine percent in 2001.[78] Furthermore, since 1986, the Detroit, Michigan public schools, which were at issue in the *Milliken* decision, have exhibited one of the largest declines in white student exposure to black students.[79] Moreover, statewide statistics of Michigan demonstrate that it is one of the most segregated states for black students.[80] For example, "63 percent of black students were in intensely segregated schools and the typical black student was in a school with 80 percent nonwhite students."[81]

C. Jefferson County, Kentucky

Proudly, Kentucky, despite its initial resistance to segregation,[82] has been considered the most integrated state for black students.[83] One study reported that only 0.2% of blacks attend schools that are ninety to one hundred percent populated by minorities.[84] Louisville, my hometown—which is part of Jefferson County—has been recognized as one of "the most striking examples of this trend [of possessing] extremely high levels of white/black residential segregation in 1990, but low levels of

75. FRANKENBERG & LEE, *supra* note 67, at 13.
76. ORFIELD & LEE, *supra* note 40, at 37.
77. FRANKENBERG & LEE, *supra* note 67, at 13.
78. ORFIELD & LEE, *supra* note 40, at 37.
79. *Id.* at 8 (Table 3); s*ee also* U.S. CENSUS BUREAU, FACT SHEET, DETROIT, MICHIGAN (2000) (reporting that blacks constitute 81.6% of Detroit's population, while whites constitute only 12.3%).
80. ORFIELD & LEE, *supra* note 40, at 26 (noting "[t]he four most segregated states in 2001 for black students by two different measures (Black Exposure to White and Percent Black in Majority White Schools) were New York, Michigan, Illinois and California.").
81. *Id.* at 27.
82. *Id.* at 31.
83. *Id.* at 29.
84. *Id.*

public school segregation."[85] While Jefferson County's story is inspirational, I fear that the recent dissolution of a desegregation decree, which had been in effect since the 1970s, will cause Jefferson County schools to suffer the same fate that has plagued the school districts discussed above.

Jefferson County's quest to integrate its schools began in the early 1970s, when the Kentucky Civil Liberties Union, Legal Aid Society, and National Association for the Advancement of Colored People launched an effort to desegregate the Louisville and Jefferson County school systems by filing lawsuits in the district court.[86] The Kentucky Commission of Human Rights also filed suit seeking desegregation through the merger of the Louisville and Jefferson County school systems.[87] In 1974, the United States Court of Appeals for the Sixth Circuit ordered the Louisville and Jefferson County school systems to desegregate and adopted a plan to merge the two systems.[88] The Sixth Circuit's desegregation plan required cross-county busing of both black and white students, which was arranged by the students' last names and grade levels.[89] The goal was to attain a certain percentage of black students in each school.[90] In 1978, the Sixth Circuit ended its active supervision of the plan, but left some portions of the desegregation decree intact.[91]

For the next two decades, the School Board continued its efforts at integration, although the means by which it sought to achieve that goal evolved to some degree.[92] In 1984, the Board changed the original desegregation plan to a system of zones and satellites in order to allow most students to attend schools that were located closer to their homes.[93] In 1992, the Board replaced mandatory busing with a program that gave parents more choices of elementary schools, while at the same time maintaining racial percentage goals.[94] In 1996, the Board approved a new plan requiring that all schools in the county maintain student bodies comprised of fifteen to fifty percent black students.[95]

By 1998, one popular magnet school in Jefferson County had achieved such success with integration that black students comprised approximately fifty percent of the student body.[96] Thus, under the 1996 plan, no more black students could be admitted to that school. Several

85. Reardon & Yun, *supra* note 65, at 1577.

86. *The Desegregation of Jefferson County Schools*, COURIER-JOURNAL (Louisville, Ky.), June 11, 1999, *available at* http://www.courier-journal.com/localnews/1999/9906/11/990611integration_timeline.html.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*; *see also* Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d, 753, 769 (W.D. Ky. 1999).

black students who were denied admission to that school filed a complaint against the Board in the case of *Hampton v. Jefferson County Board of Education*,[97] seeking dissolution of the consent decree and alleging a violation of their equal protection rights.[98] The district court observed the unique posture of the case, noting that "[u]sually, it is the school board trying to shed its obligations under a desegregation order" and "[n]ever before have the plaintiffs been African-Americans, for whose supposed benefit such decrees were entered."[99]

In order to obtain dissolution of a desegregation decree, a plaintiff must establish that there has been good faith compliance with the decree and that, to the extent practicable, the vestiges of state-imposed segregation have been eliminated.[100] The district court determined that both elements were satisfied in *Hampton*.[101] First, the Board's good faith compliance with the decree was unquestionable, as evidenced by the fact that "Jefferson County is nationally acknowledged as one of the most thorough and successful desegregation plans in the nation"[102] and "is the most or one of the most desegregated major urban school systems."[103] Second, the court found that the Board had eliminated the vestiges of prior de jure segregation "to the extent practicable,"[104] and that even though some degree of racial imbalances remained, those imbalances were not "vestiges" of the old segregated educational systems of the past, but rather were the product of free choice.[105] Therefore, because both requirements had been satisfied, the district court ordered the dissolution of the desegregation decree.[106]

97. 72 F. Supp. 2d at 754.

98. The original lawsuit alleged an equal protection violation, but the district court held that some portions of the desegregation decree remained in effect and the Board's efforts to comply with the decree were immune from constitutional challenge until the decree was dissolved. *Id.* The issue of whether the desegregation decree should be dissolved was addressed in a subsequent lawsuit. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000).

99. *Hampton*, 102 F. Supp. at 359.

100. *See id.* at 360.

101. *Id.* at 363–70.

102. *Id.* at 369–70 (citing Brian L. Fife, *In Defense of Mandated School Desegregation Plans: An Analysis of Kentucky's Jefferson County Experience*, 25 EQUITY & EXCELLENCE 100, 100–05 (1992)).

103. *Id.* at 370 (citing Gary Orfield & John T. Yun, *Resegregation in American Schools* 15 (1999); Gary Orfield, *Public School Desegregation in the U.S., 1968–1980*, at 5, 40 (1983)). The *Hampton* court emphasized the "great practical value and legal significance" of the Board's accomplishments:

> The Board has extinguished "'root and branch'" those institutional attitudes which enabled the former dual systems and their accompanying policies and practices. This is the most important goal of desegregation, and its achievement is deeply meaningful. Because [the Board] has demonstrated good faith over such a long period of time, the Court, the students, the parents, and the community can be justifiably confident that the Board will never again condone segregation or any other form of discrimination against African-American students. Everyone associated with [the Board] over the past twenty-five years deserves this community's thanks and praise for their role in this success.

Hampton, 102 F. Supp. at 370.

104. *Id.* at 363–69, 373–76.

105. *Id.* at 368–69.

106. *Id.* at 382.

The *Hampton* court recognized, however, the likelihood that without the desegregation decree, Jefferson County schools would most likely begin to resegregate,[107] as countless other schools had done. While most would view this phenomenon as unfortunate, the district court reasoned that it would present no *constitutional* problem—and would have no bearing upon the decision of whether to dissolve the decree—because it would not be the result of any state action.[108] Rather, in the court's view, the reemergence of "majority-black schools" after the dissolution of the desegregation decree would be due primarily to the racially concentrated nature of Jefferson County housing and demographic patterns.[109] But, as the court was careful to point out, the desegregation decree was never intended to "change Jefferson County's racial demography to achieve permanent non-racial housing patterns," nor had anyone suggested that continuation of the decree would have "a realistic chance of achieving demographic integration."[110] The court noted, "Kentucky school boards may be powerful, but they cannot move people within the county,"[111] and "[e]ven if some schools would now have majority-black student bodies, it is difficult to see that [the Board] is sending any such message."[112] Thus, the court concluded that any resegregation that may result from the dissolution of the decree would be acceptable—or at least, would not be an impediment to dissolving the decree—because it would be the result of the exercise of free choice.[113]

The *Hampton* court was careful to clarify that its decision was not "a referendum on whether the federal courts should prefer integrated schools or neighborhood schools"; rather, the court's role was limited "to stak[ing] out the constitutional parameters within which the Board is free to exercise its discretion—wisely, foolishly, cautiously, bravely, astutely, as the case may be."[114] The Board took advantage of the court's invita-

107. *Id.* at 371. In the court's view:

> [T]he term "resegregation" is an improper and misleading description of this phenomenon. Segregation is the conscious, deliberate act of separating people by race. A return of some schools to an African-American majority because of a certain racial demography could be a vestige of the former segregation, but it is not an act of segregation itself.

Id. at 371 n.28.

108. *Id.* at 371.

109. *See id.* at 372–73.

110. *Id.* at 373–74. The court noted that the only possible impact that the decree could have on demographic integration was the speculation that "additional time with non-neighborhood schools might stimulate more residential integration." *Id.* at 374.

111. *Id.* Empirical evidence suggests that efforts at achieving educational integration have little effect on achieving residential integration. The School Board's expert, Dr. Gary Orfield, testified that "in a city like Louisville, where there have been no segregated schools for twenty-five years, the school system's residual effect on residential racial patterns is not substantial." *Id.*

112. *Id.* at 375.

113. The district court explained that "African-Americans may choose to attend a neighborhood school, a majority-black school, or any other school or program. By allowing these choices, [the Board] does not stigmatize those students at majority-black schools." *Id.* at 376.

114. *Id.*

tion and has since fashioned a new race-conscious desegregation plan that is currently the focus of a recent legal challenge.[115]

The *Hampton* case represents a microcosm of what is occurring throughout the country in the aftermath of the Supreme Court's effective abandonment of federal oversight of local desegregation initiatives. The lesson of *Hampton* is that in our current legal climate, school boards are essentially the only entities that have the power—indeed, the responsibility—to accomplish meaningful integration in public schools. As if this task were not onerous enough, school boards must accomplish this task, along with countless others, within the confines of severely limited budgets.

But the broader and more difficult question involves the soundness of this state of affairs. While accepting that resegregation is a likely result, the Court has essentially authorized a return to segregation by relaxing the standards for the dissolution of desegregation decrees and allowing for their dissolution. Lower courts have followed suit.[116] Given that resegregation is undoubtedly occurring, I fear that this trend may "revive the message of racial inferiority implicit in the former policy of state-enforced segregation"[117] that we have worked so hard to extinguish. It would be a shame to create a cycle of segregation because of our failure to learn the lessons of history.

III. A PROMISE RENEWED: *GRUTTER V. BOLLINGER*

Thus, as the fiftieth anniversary of *Brown* approached, I could not help but feel disheartened at how little progress we, as a nation, have made in achieving the promise of integration. It was against this backdrop that the cases of *Grutter v. Bollinger*[118] and *Gratz v. Bollinger*[119] reached the Sixth Circuit United States Court of Appeals during my tenure as Chief Judge. After much deliberation and debate, our court

115. *See* McFarland v. Jefferson County Bd. of Educ., No. 3:02-CV-620-H, 2004 WL 1810242 (W.D. Ky. June 29, 2004). As of the time this article was written, this legal challenge was awaiting resolution.

116. *See, e.g.,* Manning v. Sch. Bd., 244 F.3d 927, 929–31 (11th Cir. 2001) (reversing district court's refusal to dissolve an injunction that had subjected the school district to court supervision under a federal desegregation decree and ordering the lower court to grant dissolution); Lee v. Russell County Bd. of Educ., No. 70-T-848-E, 2002 U.S. Dist. LEXIS 4075, *21–24 (M.D. Ala. Feb. 25, 2002) (dissolving all outstanding orders and injunctions requiring school board to take actions to accomplish desegregation because the board "fully and satisfactorily complied" with the court's orders, "[t]he vestiges of the prior de jure segregated school system have been eliminated to the extent practicable" and the board "demonstrated a good-faith commitment" to the court's decrees); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359 (M.D. Ala. 2002) (same); Davis v. Sch. Dist., 95 F. Supp. 2d 688, 697 (E.D. Mich. 2000) (dissolving a permanent injunction, which had been entered by the court in 1974 to allow it to retain jurisdiction over the desegregation case to ensure its proper administration, because defendant school board had complied in good faith with desegregation decree and "the vestiges of past discrimination" in the school district "have been eliminated to the extent practicable").

117. Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237, 260 (1991) (Marshall, J., dissenting).

118. 288 F.3d 732 (2002).

119. 277 F.3d 803 (2001).

reached a decision in *Grutter*.[120] It was with a great sense of honor and responsibility that I authored the opinion for a majority of our court, holding that educational diversity is a compelling governmental interest and that the University of Michigan Law School's race-conscious admissions policy was narrowly tailored to achieve that interest.

When the Supreme Court affirmed our decision,[121] I felt a tremendous sense of cautious optimism. Timely issued just one year before the fiftieth anniversary of *Brown*, the Supreme Court's opinion in *Grutter*, among other things, served as a much needed reminder of a simple truth that the Court had recognized nearly fifty years earlier in *Brown*: that students of all racial and ethnic backgrounds should learn in an integrated educational environment.[122] More significantly, *Grutter* also went one step further than *Brown* by recognizing the countless and lasting benefits that a diverse student body confers not only upon minority students, but also upon the entire student body and society as a whole.[123]

Most striking to me is the clear, unambiguous voice with which the Court recognized and emphasized the importance of racial and ethnic diversity—among many other relevant and important measures of diversity—in academics. Whereas our majority opinion relied heavily upon Justice Powell's opinion in *Regents of University of California v. Bakke*[124] as binding precedent for the proposition that academic diversity was a compelling interest, Justice O'Connor took a braver route. She declined to resolve the technical issue of whether Justice Powell's opinion was binding precedent,[125] and instead held that, consistent with Justice Powell's view, "student body diversity is a compelling state interest that can justify the use of race in university admissions."[126]

Also noteworthy is the Court's unprecedented recognition of the benefits that racial and ethnic diversity confers upon the entire student body—and, indeed, society as a whole. This recognition stands in stark contrast with the rationale supporting the Court's decision in *Brown*,

120. We were in the process of deciding *Gratz* when the Supreme Court granted certiorari in both *Grutter v. Bollinger*, 537 U.S. 1043 (2002) and *Gratz v. Bollinger*, 537 U.S. 1044 (2002), thereby obviating the need for us to issue an opinion in *Gratz*. One reason for our delay in issuing an opinion in *Gratz* was the tremendous amount of upheaval and controversy within our court that was sparked by *Grutter*. I am referring primarily, of course, to the publication of a "Procedural Appendix," in which one of the dissenting judges accused me of manipulating the court's internal procedures so that an *en banc* rehearing of the panel's initial decision would occur after the retirement of two judges who were viewed as conservative. *Grutter*, 288 F.3d at 810–14 (Boggs, J., dissenting).

121. Grutter v. Bollinger, 539 U.S. 306 (2003).

122. *Id.* at 333.

123. *Id.* at 333–34.

124. 438 U.S. 265 (1978).

125. *Grutter*, 539 U.S. at 325 ("We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'") (citation omitted).

126. *Id.*

which was primarily concerned with ameliorating the negative effects that segregated schools had on black students:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[127]

In *Grutter*, by contrast, the Court recognized that all students—minority and nonminority alike—benefit from racial and ethnic diversity in academics because such diversity "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."[128] With increased diversity, the Court noted, "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[129] The Court emphasized that the benefits associated with academic diversity extend far beyond the classroom: "[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[130]

The numerous amicus curiae briefs filed on behalf of the law school by such diverse parties as General Motors Corporation and "high-ranking retired officers and civilian leaders of the United States military" confirmed to the Court that "[t]hese benefits are not theoretical but real . . . ."[131] For example, the Court credited "major American businesses" with making it "clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[132] It also recognized that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security."[133] The Court's focus upon the importance of diversity not only to minority students, but to *all* students—and the resulting benefits that such diversity bestows upon our society—is, laudably, the strongest endorsement for diversity in the history of the Court.[134]

127. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (citation omitted).
128. *Grutter*, 539 U.S. at 330 (citation and quotation marks omitted).
129. *Id.* (citations and quotation marks omitted).
130. *Id.* (citations and internal quotation marks omitted).
131. *Id.*
132. *Id.*
133. *Id.*
134. In *Bakke*, Justice Powell did state that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (quoting Keyishian v. Bd. of Regents,

Despite its approval of the University of Michigan Law School's race-conscious admissions program, the *Grutter* Court held that "race-conscious admissions policies must be limited in time."[135] While the Court declined to fix a precise date on which the permissibility of such programs would expire, the Justices in the majority "expect that 25 years from now, the use of racial preferences will no longer be necessary."[136] Given that the gap in standardized test scores between races is widening as a consequence of the resegregation that is occurring throughout the nation, we have a long way to go to achieve this goal.[137]

To obviate the need for race-conscious admissions policies will require broad-based commitment, coupled with a serious change in societal attitudes and customs. For example, other schools must take advantage of the opportunity that the *Grutter* Court has provided by implementing race-conscious admissions programs that are narrowly tailored to achieve a diverse student body. Notably, the University of Texas—whose race-conscious admissions program was struck down by the Fifth Circuit in 1996, in the case of *Hopwood v. Texas*[138]—responded to the *Grutter* decision with a sense of relief and opportunity, "proclaim[ing] itself freed from the *Hopwood* decision and ready to reinstitute affirmative action."[139] The extent to which other colleges and universities follow suit

385 U.S. 589, 603 (1967)). It has been argued, however, that Justice Powell's statement "does not necessarily contemplate the presence of both blacks and whites among the nation's leaders, only that the leaders, who might all be white, should be attuned to a diversity of ideas and mores." Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1618 (2003).

Interestingly, some scholars have viewed the Court's reliance upon the benefits of diversity to non-minorities through somewhat more skeptical lenses. Some point out the "irony" of arguing that "admitting blacks is good because it helps whites." *Id.* at 1615–16. Others suspect ulterior motives: "no matter how much harm blacks were suffering because of racial hostility and discrimination, [they] could not obtain meaningful relief until policymakers perceived that the relief [they] sought furthered interests or resolved issues of more primary concern." Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003). It has been posited that President Lincoln issued the Emancipation Proclamation only "after concluding that freeing the slaves would aid rather than detract from the war to preserve the Union" and that there is evidence that the Supreme Court's decision in *Brown* "was strongly influenced by the State Department's efforts to ease severe adverse criticism of racial violence and discrimination, as well as the need to counter subversive activities on the domestic front." *Id.* at 1624 n.10 (citing Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 104–07 (2000)).

135. *Grutter*, 539 U.S. at 342.

136. Some scholars view this "sunset provision" as inconsistent with the Court's characterization of the attainment of a diverse student body as an inherently compelling governmental interest. Sheryl G. Snyder, *A Comment on the Litigation Strategy*, *Judicial Politics and Political Context Which Produced* Grutter *and* Gratz, 92 KY. L.J. 241 (2003–04).

137. *See id.* at 260 (citing Steven A. Holmes & Greg Winter, *Ideas & Trends: Test of Time*, N.Y. TIMES, June 29, 2003, sec. 4, at 1; Arthur Levine, *American Education: Still Separate, Still Unequal*, L.A. TIMES, Feb. 2, 2003, at M1).

138. 78 F.3d 932 (5th Cir. 1996).

139. Anita Chang, *University of Texas Will Put Race Back in Admissions Policy*, COURIER-JOURNAL (Louisville, Ky.), June 28, 2003, at A12; *see also* Gerald Torres, Grutter v. Bollinger/Gratz v. Bollinger*: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1598 (2003).

For those of us in Austin, what was most striking was the repudiation of the Fifth Circuit's decision in *Hopwood*. We could now take a deep breath with the realization that colleges and univer-

remains to be seen, but is critical to our ability to rise to the challenge that the Supreme Court has issued.[140]

Even more significantly, individuals must take advantage of these programs and motivate future generations to do the same. "Observing the admission of other [minorities] into selective schools who then graduate into higher echelons of society can motivate otherwise unproductive, unresponsive, and resistant young people before they foreclose options that can prepare them for upward mobility."[141] As Professor Elijah Anderson writes, "[y]oung people must . . . be encouraged to adopt an outlook that allows them to invest their considerable personal resources in available opportunities. In such more positive circumstances, they can be expected to leave behind the attitudes, values, and behavior that work to block their advancement into the mainstream."[142]

In the end, the legacy of *Grutter* will depend upon what we, as a society, make of it. I sincerely hope that *Grutter* has the effect of increasing diversity not only in graduate and professional schools, but in all levels of education. Granted, much of *Grutter*'s rationale is specific to the context of graduate or professional schools, but the basic underpinning of the Court's holding—that a diverse student body confers extraordinary and enduring benefits upon every student and, indeed, society in general—applies with equal force to any level of education. It is my sincere hope that the Supreme Court's affirmation of this essential truth will motivate schools of all educational levels to institute programs that achieve meaningful integration and diversity in our nation's schools.

sities in Texas, Louisiana, and Mississippi would once again be permitted to use race-conscious admissions policies that are expressly designed to achieve the now constitutional goal of diversity. *Id.*

Prior to the Fifth Circuit's *Hopwood* decision, the University of Texas Law School was renowned for its legacy of enrolling and graduating more "African American and Mexican American lawyers than any non-minority law school in America." Torres, *supra* note 139, at 1597 (citing Interview with M. Michael Sharlot, former Dean, University of Texas School of Law, in Austin, Tex. (Sept. 15, 2003)); s*ee also id.* ("At one point, one out of every eleven Mexican American lawyers was a graduate of the University of Texas Law School."). The year after *Hopwood*, however, "African American enrollment dropped to 0.9% of the incoming class and Mexican American enrollment fell to 5.6%—the lowest levels for both groups since affirmative action started at the University in 1983." *Id.* (citing Minority Enrollment for Entering First Year Classes at the University of Texas School of Law, 1983–2002 (Oct. 30, 2002), *available at* http://www.law.utexas.edu/hopwood/minority.html).

140. A "Joint Statement of Constitutional Law Scholars" responding to the Court's decisions in *Grutter* and *Gratz* provides useful guidance to institutions of higher education in formulating race-conscious admissions policies that pass constitutional muster. *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, Cambridge, MA: The Civil Rights Project at Harvard University, at 19–22 (2003). It also discusses the impact of *Grutter* and *Gratz* upon the issue of race-conscious policies in the related areas of K–12 public education, government and employment. *Id.* at 23–25.

141. Greenberg, *supra* note 134, at 1620.

142. ELIJAH ANDERSON, CODE OF THE STREET 289 (1999), *cited in* Greenberg, *supra* note 134, at 1620.

CONCLUSION

Reflecting upon the fiftieth anniversary of *Brown*, I wish I could say that we, as a nation, have made fifty years worth of progress. Instead, I am afraid that *Brown*'s promise of meaningful integration in our schools has been broken. Our schools are rapidly resegregating and our society continues to suffer from deep racial and ethnic divides. Against this backdrop, the Court's decision in *Grutter* shines as a ray of hope. *Grutter* reaffirms *Brown*'s commitment to meaningful educational integration and goes one step further by recognizing the enduring benefits that educational diversity confers upon all students and society as a whole. But *Grutter* alone can do nothing to improve educational integration and diversity; that is up to us. I can only hope that we, as a society, take advantage of the opportunity that *Grutter* has provided, so that the next fifty years will see more progress than the last in achieving meaningful educational integration and diversity.