GENERAL OVERVIEW

This paper will focus on the reasons affirmative action in higher education is necessary. Because affirmative action will be referenced often in this paper, it is important to formally define it. Webster’s dictionary defines affirmative action as the practice of improving the educational and job opportunities of members of minority groups and promoting the rights and progress of disadvantaged groups who have not been treated fairly in the past.\(^1\) In analyzing the reasons why affirmative action is necessary in higher education I will first provide a brief overview of the end of segregation in Brown v. Board of Education of Topeka. Then, through case law, I will explain courts’ limitations and challenges to de-segregating primary and secondary schools in the 21st century. Finally, I will summarize the paper by explaining why affirmative action is still necessary.

I. INTRODUCTION

In 1954, the Court in Brown v. Board of Education of Topeka held that “state-imposed racial segregation in public schools denies equal protection of the laws”\(^2\) and that separate educational facilities are inherently unequal.\(^3\) The court reasoned that equality in schools could not be measured merely by tangible factors such as buildings, curricula, qualifications and salaries of teachers, but by intangible factors.\(^4\) The Court cited intangible factors like the ability to study and discuss ideas with students of other

\(^{1}\) [Website](http://www.merriam-webster.com/dictionary/affirmative%20action)
\(^{3}\) Brown, 347 U.S. at 492
\(^{4}\) Id.
cultures. The Brown Court further reasoned that, “separating students of similar age and qualifications solely because of race generates a feeling of inferiority unlikely to be undone.” While this case set precedent in which schools could no longer segregate along racial lines, the Court did not issue a remedy and left it to the lower courts to fashion one “with all deliberate speed.” Since Brown, the Court has addressed several cases of school segregation but has not established a definitive plan to eliminate racial school segregation that could be enforced in schools across the nation.

In the 21st Century we are still facing problems despite the Court’s 1970s efforts to de-segregate schools. These problems include white flight to the suburbs that threatened school integration efforts, northern school systems, and inequitable funding between city and suburban schools. The first issue of white flight occurs when Caucasians move out of predominantly white communities as minorities incrementally move in. Typically, as a result of white flight, separate schools are created in which affluent white students are educated in a distinct district separate and apart from schools in districts where majority minority students of lower socio-economic statuses’ are educated. The second issue is northern systems of which there is virtually no history of legally mandated segregation. Because northern systems lack such history, it is more difficult for an individual or group to bring a cause of action, where segregation is apparent, and succeed against a school or district that has policies with a discriminatory purpose. Additionally it is more difficult for a court to determine that a school or district

---

5 Id. at 493  
6 Id. at 494  
8 Id. at 1604-05
has committed a constitutional violation and enforce a remedy against a school or district that engages in discrimination. The third issue is inequitable funding between suburban and city schools in which minority students often attend schools in the city and white students often attend schools in affluent suburbs. Disparities in school funding across the nation can be traced to the 1970s. Two examples of such disparity have occurred in Chicago Public Schools’ and New Jersey public schools. In 1972,

Chicago public schools spent $5,265 for each student’s education; but the Niles school system spent $9,371 on each student’s schooling.\(^9\) The disparity also corresponded to race: in Chicago, 45.4% of the students were white and 39.1% were African-American; in Niles, the schools were 91.6% white and 0.4% African American.\(^10\) Camden, New Jersey spent $2,538 on each pupil; but Princeton spent $7,725.\(^11\)

Because inequitable funding has been found in the 1970s and continues to be found in schools across the nation and because there has been little to no action on the part of the Court or school authorities to change this reality, affirmative action is necessary to provide higher education access to those of lower socio-economic statuses. Additionally, because the Court cannot prohibit white flight and because it is increasingly difficult to establish discriminatory policies that promote segregation, affirmative action is necessary to help students of color and of lower-socio-economic status gain access to higher education.

---

\(^9\) Jonathan Kozol, Savage Inequalities: Children in America’s Schools 236 tbl.1 (1991)
\(^10\) Id.
II. LIMITS TO COURT INTERVENTION

The United States Supreme Court has often intervened in educational affairs but typically only to set limitations on federal district court intervention. For example, the Court has held that district court intervention is limited to remedying dual systems. Dual systems are those promulgated to keep races separate and encompass schools segregated by race across the nation (typically by white and non-white). Dual systems are also associated with de jure segregation and that type of segregation occurs through constitutional or statutory laws put in place to keep races separate. In addition, the Court has limited district court intervention to cases of de facto segregation. Federal district courts are only allowed to intervene in that type of segregation when schools or districts have participated in constitutional violations. De facto segregation occurs in fact and though the private choices of individuals. It is not a result of laws.

The difficulty of district courts’ ability to remedy de facto segregation is elicited from a case called Keyes v. School District No. 1, Denver, Colorado. That case concerned a dual system in the district of Denver that was not historically operated by de jure segregation—legally mandated segregation. Rather the district’s make up appeared to be a product of de facto segregation. Because of this, Denver parents brought suit alleging that the School Board of Park Hill schools “used various techniques such as manipulation of student attendance zones, school site selection and a neighborhood school policy, and created or maintained racially or ethnically segregated schools throughout the school district.” While the Court held that there was a prima facie case

---

of intentional segregation in the core city schools\textsuperscript{13} it allowed the Board to disprove it. The Board was allowed to show that its policies and practices were not done to maintain or further advance efforts to segregate schools in Denver.\textsuperscript{14} Additionally, the Board claimed that it practiced racially neutral school policies.\textsuperscript{15} As one could imagine, the Board could easily rebut the contention that it used discriminatory policies by simply pointing to the racial composition of the neighborhood. It could then conclude that the racial composition of its schools is a result of the community and that their policies take no account of race. In looking at that anecdotal example, one can see how difficult it can be persuade the Court otherwise and effectively eliminate de facto segregation.

Another example of the Court limiting its role in de-segregating schools comes from a case called \textit{Swann v. Charlotte-Meckleburg Board of Education}. In \textit{Swann}, the Court condoned the district court’s intervention in de-segregating schools in which the district court set a framework for schools to progress to a unitary system of fully integrated schools. In that case, the Court supported the district court’s discretion and action of implementing race ratios to reflect a given district, transferring students from a majority racial group of a particular school to other schools where they would be minorities, grouping schools with attendance assignments, and busing students from one area to another.\textsuperscript{16} However, the Court cautioned that the district court could only go so far. It held that the federal court could not intervene unless there was a constitutional

\textsuperscript{14} Id. at 469
\textsuperscript{15} Id. at 467
\textsuperscript{16} Id. at 462
violation.17 The Court reasoned that “school authorities traditionally form and implement educational policies and have the power to decide how to prepare students to live in a pluralistic society.”18 Further, it reasoned that, if school authorities decided that each school should be prescribed a ratio of black to white students reflecting the district as a whole, it could do so.19 However, because communities are racially and economically segregated, school districts are often segregated and integration of schools has yet to come to fruition by school authority action alone. Erwin Chemerinsky, author of The Segregation and Resegregation of American Public Schools: The Court’s Role, states that, “when a school system is compromised predominantly of minority students, there is a limit on how much desegregation can be achieved without an interdistrict remedy.”20

In assessing limitations set by the Court, it is important to discuss the difficulty in establishing an interdistrict remedy. To date, an interdistrict remedy is difficult to attain because of Milliken v. Bradley, in which the Court “precluded an interdistrict remedy unless plaintiffs offered proof of an interdistrict violation.”21 Such proof would be difficult to find especially when, “Negro children had been intentionally confined to an expanding core of virtually all negro schools immediately surrounded by a receding herd of white schools.”22 Essentially, a plaintiff would have to demonstrate that a given district encouraged discrimination. However, it is unlikely that such a showing would

18 Id.
19 Id.
20 Chemerinsky, The Segregation and Resegregation of American Public Education: The Court’s Role, at 1606
21 Id. at 1607
turn up often, especially since communities are segregated and have become increasingly segregated over time and that reality could reasonably be the cause of a district’s racial demographics. Additionally, it is also unlikely that a remedy will be fashioned to fix this type of de facto segregation, since the Court is only required to intervene when there is a constitutional violation. Ultimately, segregation can be attributed to a multitude of factors including affluent community resistance to integration and the desire of community members to assure that property taxes are used in local schools exclusively for students in the community. Because there is definitive way to compel an interdistrict remedy in which schools must integrate along racial and socio-economic lines, affirmative action is necessary in order for youth of lower socio-economic statuses to have a chance at attaining higher education.

Additionally Freeman v. Pitts is another illustration of the Court’s apparent limitation in intervening in local school district affairs. In Freeman, the Court addressed the issue of whether a district court could relinquish control over a school system in compliance with a desegregation decree even though other parts of the system were not in compliance. The Court held that “the federal courts could relinquish supervision of school districts in incremental stages before full compliance had been achieved in all areas of school operations.” The Court reasoned that it is not the Court’s duty or the federal court’s goal to achieve racial balance. Rather “it is to be pursued when racial imbalance has been caused by a constitutional violation but when de jure segregation

\[23\] Kaufman and Kaufman, Education Law, Policy, and Practice: Cases and Materials, at 471
\[24\] Id. at 474
\[25\] Id. at 475
has been remedied the school district has no duty to remedy imbalance caused by demographic factors.” It can be inferred from that case that when communities are stratified along racial lines, and by no fault of schools authorities, that the district has no responsibility to continue to integrate schools. As a result, and so long as the Court and school districts do not work to integrate schools, America will continue to be a nation where districts are stratified along racial and socio-economic lines. Therefore, since there may well continue to be little to no change at the primary and secondary public school level, affirmative action is necessary to help students from lower socio-economic statuses’ gain access to higher education.

Ultimately, it should be clear from the case law cited above, that the Court chooses to have little to no authority to fully eliminate segregation in schools and defaults to an explanation that local school authorities are responsible for fashioning a remedy. The Court limits its intervention to situation where de jure segregation exists. Additionally, and as Freeman illustrates, the Court can incrementally withdraw federal district court supervision as progress toward desegregation is made. This means that full integration does not need to occur for federal courts to withdraw supervision. What should also be clear from the above case law is that the Court has done essentially little more than speak about remedies and comment on what needs to be done rather than effectively integrating schools. Some of the rhetoric can be found in Swann where the Court held that:

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority.

---

26 Id.
from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Based on the Court’s holding, the question remains: How do you integrate schools if there is little evidence to show that school authorities are or are not excluding pupils based on race but there is much evidence that de facto segregation is occurring? The answer often appears non-existent. Thus, affirmative action to help students of lower socio-economic status gain access to higher education is necessary until an answer comes to the forefront.

III. THE TREND OF RE-SEGREGATION

The task of integrating schools has been frustrated because of the Court’s contention that, “neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies when desegregation is accomplished.”27 Contrastingly, re-segregation is a present reality. According to Chemerinsky, “wealthy suburban school districts are almost exclusively white; poor inner city schools are often exclusively compromised of African-American and Hispanic students.”28 Furthermore, evidence elicits time and again that when communities are segregated along racial lines, schools are too. Additionally, Chemerinsky states that, “predominantly minority schools are not equal in their resources or their quality.”29 Based on the aforementioned trend it can be inferred that

27 Id. at 464
29 Id.
as a result of inequitable resources and quality, students from lower-socio-economic statuses are not often able to attain similar education like students in more affluent communities. Despite this reality, the Court has concluded that it needs to take no action to address this issue. In fact, the Court contended in *San Antonio Independent School District v. Rodriguez* that inequalities in funding do not deny equal protection and debate on inequitable funding essentially ended there. Since the Court does not seem to effectively redress inequality between poor and affluent schools, the reality of inequitable funding should be considered and be used as a proxy to allow some students from lower socio-economic statuses’ opportunities to access higher education. The reality that students from lower socio-economic statuses’ often suffer from limited funding in which their facilities, teachers, and educational resources are inadequate to compete against schools with more resources should be considered in helping some of those students get admitted to higher education institutions.

In assessing the trend of re-segregation, evidence allows an inference that race is correlated with socio-economic status and racially homogenous school demographics. Overall, when communities are segregated along racial lines, there is a pattern that results in which poorer minority communities are on one side town and affluent Caucasian communities reside in another part of town, figuratively and literally speaking. Because of that present reality and because of the fact that little has been done to fully integrate schools since the 1954 decision in *Brown*, affirmative action is necessary in higher education to propel those from lower socio-economic statuses into

---

30 *Education Law, Policy, and Practice: Cases and Materials*, at 77
academic environments where they can acquire the knowledge necessary to compete in
the work force and possibly raise themselves out of poverty.

In stating all of the above, I do not intend to incite hatred for wealthy Caucasians
or invoke complacency in others due to the depressing steps the Court has made to
remedy segregation. Rather my intention is to further advance the idea that if, the Court
cannot compel full integration and if local school authorities decide that its primary
objective is not to fully integrate schools, then affirmative action is necessary. Also, if
local school authorities continue to have autonomy in implementing or not
implementing policies that integrate schools along socio-economic and racial lines after
de jure segregation is eliminated, then affirmative action is necessary in higher
education to give students from lower socio-economic statuses opportunities to obtain
higher education and ultimately compete in the job market.

IV. THE NECESSITY OF AFFIRMATIVE ACTION

It can be inferred from the article, The Segregation and Resegregation of
American Public Education: The Court’s Role, that even if a school authority prescribed a
school policy in which mathematical ratios were used to reflect the local community—
such as a ratio of black to white students or a ratio of white to Asian students or a ratio
of Latino to white students—that school would more likely than not produce a racially
homogenous school because generally, most communities are racially homogenous.
Additionally, it can be inferred from the aforementioned case law, that the Court will
effectively remain hands-off as long as de jure segregation is eliminated.
The Court’s involvement in school segregation has not been sufficient. In fact, since the end of the 20th century, schools have reflected racial re-segregation. As of the 1998-1999 school year, 70.2% of African-American students attended majority African-American schools. Additionally, there is evidence that “the percentage of Latino students attending schools where the majority of students consist of all or almost all minorities increased steadily over the 1990s.” It is likely that because local property taxes fund a great portion of local schools, affluent parents and education board members will want youth in their communities to attend schools in their communities. Furthermore, it is likely that convenience will and often does compel the typical poor and affluent parent or guardian to send his or her child to a local school. In light of current trends as well as potential and reasonable parental and community sentiment, Courts have continually held that, absent a constitutional violation, local schools can sort out school segregation remedies itself. Based on this, affirmative action in higher education is necessary. Furthermore, because of the many limitations to lawfully integrating primary and secondary schools, affirmative action is necessary to allow students from lower socio-economic statuses an opportunity to access higher education.

32 Id. at 1599