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TWO SIDES OF THE SAME COIN: JUSTICE POWELL AND JUSTICE MARSHALL’S PERSPECTIVES ON EDUCATION AND THE LAW

ADREANNE STEPHENSON*

INTRODUCTION

The jurisprudence of a Supreme Court Justice is one of eclectic tides. Various experiences impact a justice’s interpretation and application of precedent. Even though the black robe symbolizes impartiality, experience colors judicial opinions. Experience shapes the lens from which we view the world and it also shapes how judges determine what the law is.1 Complex in its composition, jurisprudence embodies the obscurity of individual experience, review of precedent and interpretation of statutes.

This Note will examine how Justice Lewis F. Powell and Justice Thurgood Marshall’s individual experiences affected their jurisprudence concerning educational issues. Part I will provide a brief biography of each Justice, relaying the experiences that shed light on their education perspective. Even though they were both southerners who served simultaneously—Justice Powell was appointed in 1972, retired in 1987, and Justice Marshall was appointed in 1967, retired in 1991—their jurisprudential perspectives were much farther than their seats on the bench. Their different lives placed them on two sides of the societal coin, Justice Powell on the “white privilege” side and Marshall on the “Negro inferiority” side. Their vastly unique perspectives and the Brown v. Board of Education2 decision made the 1970s and 1980s an exciting time for education reform.

Part II will contrast the Justices’ views on mandated busing as a remedy for integration. Justice Powell believed court mandated busing was unconstitutional, significantly disrupted education, and imposed on local officials’ responsibility to integrate. Conversely, Justice Marshall felt that forced busing was a constitutional means to integrate a divided society maintained by local segregation. Part III will contrast the Justices’ views on educational funding schemes. Once again, the two Justices found themselves on different sides of the same coin and held opposing views on how the Equal Protection Clause should apply to Texas’s educational funding scheme. Justice Powell trusted school boards to make reasonable and fair funding schemes without the imposition of the court. Justice Marshall did not trust

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1 See generally, Angela Nicole Johnson, Note, Intersectionality, Life Experience & Judicial Decisionmaking: A New View of Gender at the Supreme Court, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 353 (2014).

2 37 U.S. 483 (1954).
local regimes because racism was still prevalent in American society.

Part IV will focus on the transition from racial integration to rectification as the Court grappled with defining ‘equality’ and the constitutionality of implementing affirmative action programs. Powell recognized the history of discrimination, however, the history could not justify racial preference programs in perpetuity, especially when it infringed on reasonable expectations of innocent individuals. Marshall believed integration should be accomplished by any means necessary because historical discrimination usurped many opportunities for blacks and integration would ameliorate America’s bleak history. Part V will discuss Powell and Marshall’s differing viewpoints on affirmative action admissions programs best illustrated in Regents of University of California v. Bakke. Taking a more textual approach, Powell believed race could be one consideration for admission, but racial preferential programs should be phased out in the near future to ensure equality for all. Taking a more historical and legislative intent approach, Marshall believed preferential racial programs were a necessity to ameliorate past and present discrimination that remains prevalent in our society. By applying the Justices’ arguments in Bakke and jurisprudential patterns to the affirmative action case currently under consideration by the Supreme Court, Fisher v. University of Texas at Austin, this Note will predict their decisions as if they were still on the bench.

I. TWO ROADS DIVERGED IN A YELLOW WOOD: THE JUSTICES’ BACKGROUNDS

Justice Lewis F. Powell Jr. was born in Suffolk, Virginia in 1907 and grew up in Richmond, Virginia. He received his bachelors and law degree from Washington and Lee University. As a product of the Old South, Powell attended all white schools, lived in a household with all black servants, and harbored the mentality that blacks were inferior. Like many Southern whites, he never questioned this way of life especially in Virginia where segregation was the status quo. In 1954, after Brown “condemned a way of life,” partners at Powell’s law firm, Hunton and Williams, represented Prince Edward County in Allen v. County School Board. Powell’s colleagues persuaded the district court to uphold “separate but equal” schools because it would not be practical to implement integration immediately. Interestingly, Justice Thurgood Marshall was opposing counsel in the case and persuaded the Fourth Circuit to reverse. The Fourth Circuit’s opinion forced the county to integrate with “deliberate speed” as the Supreme Court set out in Brown.

5. Id. at 139.
6. Id. at 131.
7. 249 F.2d 462, 463 (4th Cir. 1957).
8. JEFFRIES, supra note 2, at 139.
As a firm believer in precedent, Powell “thought the constitutionality of segregation was conclusively established by long acceptance.”

He even stated in a letter that the segregation cases in regards to “the school decisions were wrongly decided.”

As a man in his early fifties when Brown was decided, the mentality of black inferiority had permeated his psyche for a half-century. According to Powell, he would “never favor compulsory integration” because desegregation cases were contrary to constitutional precedent and social policy.

However, Powell’s discontent with the Brown decision reflected not only his segregated past but also his grassroots philosophy. Powell’s bottom-up belief in change differed from the top-down approach used by the Court to implement integration. Issuing such a pervasive precedent, that infiltrated school boards across the nation, from the aloof and disconnected Supreme Court, displeased Powell. He disapproved the Court’s overreaching decision to change social policy.

As a leader in his community, Powell spurred local education reform in Richmond, Virginia. Powell was appointed to the Richmond school board in 1950 and served as chairman for eight years beginning in 1952. After serving the local school board, he was appointed to the State Board of Education. Education reform was important to Powell because his Uncle Ned, a teacher, nurtured Powell’s deep affection for learning and scholarship. His father, Louis Sr., influenced Powell’s appreciation of education as the key to economic success.

In Richmond, Powell reformed education by improving the sciences, mathematics, foreign languages, and international politics programs in response to the Space Race. Moreover, he augmented teacher salaries and built new schools.

Despite the positive reform, Powell’s service on the school board was not perfect. Throughout Powell’s tenure, dual attendance zones for “white” and “Negro” schools were maintained despite the school board’s authority to assign black and white pupils to the same schools and help facilitate integration. Moreover, the obvious solution of rezoning children from overcrowded “Negro” schools to under-enrolled white schools was diverted and the school board opted to build additional black schools instead. The Court in Bradley v. School Board held the school board responsible for preserving a discriminatory scheme because it had not changed the dual attendance system or the feeder school system. Powell’s

References:

9. Id.
10. Id. at 140.
11. Id.
12. Id.
13. Id. at 160.
15. Id. at 141.
16. Id.
17. 382 U.S. 103 (1965).
18. JEFFRIES, supra note 4, at 141. Because of the dual attendance system, black children walked past white schools to attend designated “Negro Schools.” In the feeder school system, after a child was assigned to a particular school, the child progressed through a pattern from white elementary to white junior high to
reaction to Brown’s mandate to integrate with “all deliberate speed” was the issuance of a press release stating the Richmond school board’s decision to wait for Virginian law to reflect on integration.\(^\text{19}\) The press release was not Powell’s only successful dodge of integration, but he also acted similarly during his service on the State School Board. Within the first year of his appointment, the board issued regulations authorizing local school boards to resume control of pupil placement as directed by the General Assembly.\(^\text{20}\) The shift in responsibility allowed Powell to dodge the issue of segregation once again leaving the localities, counties, and city school boards with the issue of integration.\(^\text{21}\) From his silence, one would think Powell agreed with the status quo. However, Powell was a man of many layers.

Behind the muteness, Powell actually held a more positive view of integration. Despite the fact that Powell’s children attended all-white private schools and his firm fought to delay integration efforts, segregation was a point of contention for Powell.\(^\text{22}\) As an Officer of the Court who held the law at the utmost respect, he wanted Virginia to proceed in good faith to implement Brown, despite the lack of popularity.\(^\text{23}\) He disapproved—but hesitantly voted for—public tuition grants used to fund all white private education.\(^\text{24}\) The private school scheme sustained segregation since privately owned establishments were not required to integrate; therefore, public schools became designated “black schools” and private schools became designated “white schools.” The private tuition grants maintained the unconstitutional dual system banned by the Supreme Court. Even though Powell appeared to facilitate segregation while on the school board, he performed discrete acts that proved he was a proponent of integration.

In 1956, Virginia considered applying the doctrine of interposition, which asserted the right of states to declare federal actions unconstitutional, to the Brown decision.\(^\text{25}\) Powell vehemently opposed the lawless notion of interposition because Virginia did not have a right to find the Supreme Court’s decision “null, void and of no effect.”\(^\text{26}\) His four arguments against interposition included: 1) interposition was the unconstitutional doctrine of nullification; 2) chaos would amount if the states could decide for itself the constitutionality of federal actions; 3) nullification essentially began the Civil War and due to its historical background is invalid; 4) the radical position disrespected law and order and should be disregarded instead of damage the Supreme Court’s authority. Powell pronounced, “[i]t seems obvious that we cannot expect to preserve our cherished institutions and maintain their positions of public respect and confidence, if we praise them only when their

\(^{\text{19}}\) Id. at 143.

\(^{\text{20}}\) Id. at 169.

\(^{\text{21}}\) Id. at 169–170.

\(^{\text{22}}\) Id. at 160.

\(^{\text{23}}\) Id. at 145.

\(^{\text{24}}\) Id. at 174.

\(^{\text{25}}\) Id. at 145.

\(^{\text{26}}\) Id. at 147.
actions please us and defy and denounce them when their actions displease us."

Despite Powell’s campaign against interposition and Richmond school board’s open opposition to massive resistance, Virginia launched an entire campaign against the Brown decision by closing schools to prevent desegregation. However, Powell’s efforts were not futile because he continued to advocate against massive resistance in political spaces and eventually Virginians began to listen. Powell helped prepare a presentation at the Rotunda Club for the governor, attorney general, lieutenant governor and reporters. Through the presentation, Powell expressed the many cons of massive resistance and its effect on Virginia’s industry, reputation, and community. Powell emphasized the correlation between the school crisis, economic downfall, and lack of industrial development urging Virginia to integrate before it spurred into an economic depression. He argued that United States citizens would not move to a state that closed schools and acted unlawfully against the highest court of the nation. Support of massive resistance quickly dwindled after the Rotunda presentation, marking a key event in Virginia’s history.

Powell was not considered a leader in integration, but he fostered a more accepting political environment for integration in Virginia. His passion and dedication to public education in Richmond was insurmountable and every year after Brown, Powell began to accept, embrace, and advocate for integration.

Even though Justice Powell and Justice Thoroughgood lived only one hundred and fifty miles from one another, they led very different lives. Growing up in Baltimore, Maryland in the segregated South, Marshall only attended all black schools and constantly dealt with whites’ open hostility toward Negroes. Marshall attended Lincoln University, also known as the “Black Princeton,” for undergrad and Howard University, a historically black college, for law school. Thurgood Marshall was greatly influenced by the strength of his mother, Norma Marshall, and the bold inquisitiveness of his father, William Marshall. Interestingly, William Marshall became the first black man to serve on a

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27. Id. at 148.
29. JEFFRIES, supra note 4, at 152.
30. Interview with Virginius Dabney, supra note 28.
31. JEFFRIES, supra note 4, at 151–53.
32. Id. at 176.
33. Id. at 181–82.
34. RICHARD KLUGER, SIMPLE JUSTICE 176 (1994). As a young child, Marshall’s first name, “Thoroughgood” was shortened to ‘Thurgood,’ making it easier for second grade Marshall to spell.
35. Id. at 179 (explaining that Marshall attended Howard since the University of Maryland in Baltimore did not admit blacks).
grand jury in Baltimore and had the race question omitted from consideration by the grand jury. This strong sense of black pride and respect for the courts encouraged Thurgood Marshall to pursue a career in law. Through law, he could help bring blacks out of the somber predicament of racial inequality and inferiority. One principle iterated by his father was: “Anyone calls you nigger, you not only got my permission to fight him—you got my orders to fight him.” Even though Marshall did not take his father’s principle to heart literally, he did figuratively by working hard in law school, engaging in tireless litigation, and continuing the fight against Negro inferiority.

Post-law school and during the Great Depression, Thurgood Marshall opened a practice, which did not receive much business. The dearth of black lawyers, approximately twelve in Baltimore, did not receive support from the black community because black attorneys lacked societal influence. Even when work did come, it was usually pro bono. By representing poor clients, he eventually acquired a good reputation throughout the community. In 1934, Marshall became very involved with the National Association for the Advancement of Colored People (NAACP) by providing legal counsel to the Baltimore branch and arguing cases that moved toward equality for blacks in America. From arguing against segregated universities to suing school boards to increase black teachers’ salaries, Marshall began making his mark on education through litigation. Much of Marshall’s work in education involved chipping away at the “separate but equal” doctrine founded in Plessy v. Ferguson. Using constitutionally based arguments, Marshall constantly undermined the “equal” prong by exposing unequal differences between white and black institutions regarding curricula, faculty, equipment, and facilities. Thurgood Marshall, Charles H. Houston, and William I. Gosnell

36. Id. at 177.
37. Id. at 182 (Marshall would soon debunk the myth that black attorneys did not have societal influence).
38. Id. at 182.
39. Id. at 184.
40. 163 U.S. 537 (1896).
41. NAACP History: Charles Hamilton Houston, NAACP, http://www.naacp.org/pages/naacp-history-charles-hamilton-houston (last visited Apr. 15, 2013). Charles Hamilton Houston was a black lawyer who trained Thurgood Marshall, argued many civil rights cases between 1930 and 1956, and served as special counsel to the NAACP. He attended Harvard Law School and became the first African-American editor of the Harvard Law Review. His main goal through litigation was to demonstrate how the states failed in maintaining “separate but equal” facilities in that officials only held true to the separate prong not the equal requirement.
42. F. Michael Higginbotham & Jose F. Anderson, William I. Gosnell: Brown’s Unsung Hero, SOCIAL SCIENCE RESEARCH NETWORK (July 6, 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2048657. Gosnell attended the University of Chicago law school and received scholarship under the same program as Pearson to attend an out of state school. He served as the legal director of the NAACP in Pearson v. Murray and encouraged Murray—the plaintiff—to challenge the segregation policy by writing a letter to the president of the university, Raymond Pearson, and suing if he was not accepted. Though Gosnell specialized in commercial litigation such as real-estate and probate, he continued to fight for civil rights by arguing Durkee v. Murphy, 29 A.2d 253 (1942), where the plaintiff sued Baltimore City for its limitations of black players on certain courses and inferior facilities of black golf courses as compared to white courses. This case spurred litigation about integrating golf courses throughout the country. See also MARVIN P. DAWKINS & GRAHAM C.
argued that the Fourteenth Amendment required the state to provide equal treatment in public funded facilities and refrain from denying one race a right possessed by another race.  

In the beginning, Marshall used the cost analysis to advocate for desegregation emphasizing that, “the best overall strategy seemed to be an attack against the segregation system by law suits . . . on the theory that the extreme cost of maintaining two ‘equal’ school systems would eventually destroy segregation.” Even under the “separate but equal” principle, providing separate medical schools, law schools, and graduate school programs for blacks that offered the same benefits as state schools for whites placed exorbitant costs on state governments. Moreover, creating separate entities for the small number of Negro citizens in the country was a waste of resources. Marshall successfully used the economic theory in Pearson v. Murray, where a highly qualified black man was denied admission to the University of Maryland’s law school solely because of his race. Since there was not an alternative law school in Maryland for blacks, the state gave blacks a $200 scholarship to attend an out-of-state black law school. This case in particular was dear to Marshall because he had considered attending the University of Maryland’s law school in Baltimore. He decided not to apply because of Maryland’s Jim Crow laws, took the scholarship given by the state, and commuted an hour to Howard University, which proved very expensive. In Pearson, the court held that equal treatment could only be furnished in the one Maryland law school provided by the state and granted the black petitioner admission. The opinion discussed the cost of attending Howard compared to the University of Maryland even though Howard’s tuition was sixty-eight dollars cheaper than the University of Maryland. Commuting costs, the cost of living in Washington D.C., and moving expenses augmented the cost associated with out-of-state attendance at a black private school; the exorbitant costs were evidence of unequal treatment. It was unconstitutional for Maryland to essentially use other states’ schools to educate its citizens. Other states were expending their financial resources building Negro schools while the state of Maryland relinquished its responsibility to furnish a “separate but equal” law school for black citizens.

Though the economic argument was successful in Pearson, it did not prove very successful in litigating segregation cases generally. In response to the NAACP’s cases against University of Missouri, Tennessee, North Carolina, and Kentucky, states continued to create Jim Crow law schools and graduate programs

45. KLUGER, supra note 34, at 179 (commuting was so expensive that Marshall worked numerous jobs to pay for school expenses and his mother even sold her engagement ring and wedding band to help with costs).
46. Pearson, 182 A. at 593.
47. Id.
with the promise of striving for equality.\footnote{Marshall, supra note 44, at 318–19 (referencing the Gaines and Bluford case where two African Americans were not admitted to the University of Missouri).} After bleak success in invalidating discriminatory graduate programs, Marshall’s strategy began to transform as he moved from the graduate school arena to the elementary school arena to attack segregation. Using an amalgamation of sociology, anthropology, psychology, and constitutional law, he persuaded the Court that separate could never be equal.

The transformation from the economic argument to the social science argument is best viewed in \textit{Sweatt v. Painter}.\footnote{339 U.S. 629 (1950).} Marshall mentioned that the facts in \textit{Sweatt v. Painter}, would have supported the economic argument because the University of Texas assumed the plaintiff would challenge the equality of the Jim Crow law school compared to the white law school. Therefore, Texas appropriated $2,600,000 to build a new Negro university and allotted $500,000 per year for the new school’s upkeep. Even though the reaction of the Texas legislature supported the theory that segregation was more expensive than integration, Marshall did not use the economic argument to win the case. Instead, he tackled desegregation head on.\footnote{Marshall, supra note 44, at 319.} Marshall convinced the Supreme Court of the United States to hold that the Equal Protection Clause required the petitioner’s admission into the white university. Marshall used anthropology and legal experts, who testified that race did not impact a child’s ability to learn and that equal facilities did not presume equal educational opportunities. Here, in \textit{Painter}, his use of social science that would ultimately win \textit{Brown} began to surface. Marshall argued that the University of Texas Law School had certain subjective qualities, such as faculty reputation, administrative experience, alumni position and influence, community, and prestige that made it a better institution than the Jim Crow school. In addition to subjective qualities, the Court noted that law is a profession that requires interactive learning. “[T]he interplay of ideas and the exchange of views with which the law is concerned”\footnote{Sweatt v. Painter, 339 U.S. 629, 634 (1950).} was nonexistent in the Jim Crow law school since the petitioner would not have the opportunity to engage with Texan lawyers—most of which attend the University of Texas. Without intellectual stimulation and discussion with students of varying backgrounds, the petitioner would not receive an equal education.\footnote{Essentially, the Court argued that diversity is a compelling interest for exposing the black petitioner to the diverse thought found in the all-white law school. Ironically, this argument would be used seventy-three years later, at the same university to argue that exposing white students to the diverse thought of minority students is a compelling interest in having affirmative action admissions programs. Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 227 (5th Cir. 2011).} Though the Court did not overturn \textit{Plessy v. Ferguson}, this case was another step toward its inevitable overturn by \textit{Brown}.

Justice Marshall’s reaction to \textit{Brown} was very different from Justice Powell’s. As a target of racial discrimination and a passionate advocate for black people, Marshall saw how the adversarial system improved college and graduate program acceptance rates of black students. Marshall “demanded that the Court fix a date
for the end of segregation in the schools” after the *Brown* decision. Though impractical since segregation plagued the American lifestyle for over three hundred years, a fixed date would quickly initiate desegregation efforts and incentivize state governments to enforce the Supreme Court’s mandate. The Court’s decision was a hard pill to swallow, but Marshall believed the top-down approach was the best way to spur integration. Conversely, Powell waited for the Virginia legislature to address the issue even though his influence on the school board could have quickly facilitated change. As a grassroots proponent, Powell advocated for a more gradual change where local governments developed innovative integration plans without creating massive upheaval. According to Powell, the decision applied pressure to integrate and the depth of its mandate would automatically spur education reform. Fixing a date would be difficult and quite unnecessary.

Even though both men viewed *Brown* differently, the combination of their ideals propelled integration efforts. Years after the *Brown* decision, both Justices’ perspectives seemed to evolve. In 1960, Marshall had a staggering confession, which juxtaposed his militant idea to fix a date for desegregation. He began to favor a more practical approach realizing that “old habits die hard.” Integration did not move as swiftly as Marshall hoped, but the courtroom served as a venue to place racial issues on the forefront of America’s political agenda. Marshall believed that *Brown* and other desegregation cases would not ultimately integrate school systems, but they acted as a “holding action,” opening the door to address the disconnect between education reform and race relations. The ultimate solution to integration “would only happen when the Negro took his part in the community, voting and otherwise.” Here, during Marshall’s epiphany, Powell’s school of thought and Marshall’s practical sensibilities met at a crossroad. Powell and Marshall agreed that efforts within the local communities were essential to implementing desegregation. Marshall realized that the final solution did not solely lie within the black community, but in blacks’ participation in the greater community on a grassroots level.

As a proponent for changing social policy through litigation, Justice Marshall recognized that *Brown*’s urgency initiated education reform around the nation. Though a grassroots man at heart, Justice Powell realized that the judiciary’s power was focused in its ability to flag important issues in the community, place them on the public agenda, and spur robust conversation and debate in the media, classrooms, workplaces, and social settings. Here Marshall’s school of thought and Powell’s realizations about *Brown* met at another crossroad. The ritualistic confines of litigation initiated change and increased awareness. The less formal interactions in the community mobilized individuals, forced action, and

54. *Id.* at 118.
55. *Id.*
implemented change as well. Powell was correct in that community leaders were not reading the Supreme Court’s one hundred and fifty page opinions, but they discussed the topics considered by the Court and helped create solutions that progressed towards greater equality for all.

Even though their thoughts met at a crossroad throughout their time on the bench, the nuances that made their jurisprudences different often placed them on opposite sides of an opinion. Powell trusted community efforts more than Marshall and their opposing views on education reform were evident from many opinions.

II. THE CONSTITUTIONALITY OF BUSING

“[T]his Court should not require school boards to engage in the unnecessary transportation away from their neighborhoods . . . It is at [the elementary] age level that neighborhood education performs its most vital role.”


“To suggest, as does the majority, that a Detroit-only [busing] plan somehow remedies the effects of de jure segregation of the races is, in my view, to make a solemn mockery of Brown I’s holding that separate educational facilities are inherently unequal . . . .”


Eight months before Powell was sworn in on January 7, 1972, the Supreme Court of the United States unanimously held in Swann v. Charlotte-Mecklenburg Board of Education57 that district courts have the authority to override school board integration plans and create remedies to insure racially mixed schools. Based on the school board’s statutory history of upholding a dual enrollment system and Brown’s demand to desegregate “with all deliberate speed,” grouping non-contiguous school zones and busing students to different parts of the city were appropriate tools for integrating public schools. As long as the time or distance of travel was not so great as to cause a health risk or impinge on the educational process, the remedial measures were deemed constitutional.58

Powell was not pleased with the Swann holding.59 He abhorred busing and his qualms with Swann were revealed in his part concurring and part dissenting opinion in Keyes v. School District No. 1.60 In Keyes, the plaintiffs claimed the school board engaged in racial segregation by manipulating school zoning and school site selection while enforcing neighborhood policies that kept schools racially separated. Since Denver’s school board did not have a statutory dual system, like

58. Id. at 30.
59. JEFFRIES, supra note 4, at 282–83.
60. 413 U.S. 189 (1973).
many Southern states post-\textit{Brown}, the petitioners had to prove that Denver engaged in systematic segregation creating a dual system or that Denver engaged in \textit{de jure} segregation by proving 1) the existence of segregated schools, and 2) the state’s intention to maintain segregation.\footnote{\textit{Id.} at 192 n.4, 198 (listing the core city schools).} Much of the majority’s argument was formulated around \textit{Swann}’s premise: the difference between \textit{de jure} segregation—the unconstitutional separation by law—and \textit{de facto} segregation—the constitutional separation without government responsibility—was intent. Under the Fourteenth Amendment, a school board could rebut the prima facie case of \textit{de jure} segregation with clear and convincing evidence that justified its actions.\footnote{\textit{Id.} at 208–10.}

The majority in \textit{Keyes}, which Marshall joined, remanded the case to the district court for several reasons. The Court believed evidence of “feeder” schools, segregated school zones, and student transfers of black children to black schools and white children to white schools could prove the existence of a dual system.\footnote{\textit{Id.} at 201–02.} It held that discovering intentionally segregative actions by the school board created a presumption that “other segregated schooling within the system [was] not adventitious.”\footnote{\textit{Id.} at 208.} Since the Court found intentional segregation in some of the schools at issue, segregative intent was proved and on remand, the school board had to rebut the prima facie case and show that the racially motivated policies were not created to preserve segregation. Though this case is not a busing case, Powell was very strategic in expressing his constitutional arguments about desegregation and voicing his opinions on busing.

In his concurring in part and dissenting in part opinion, Powell addressed the necessity of abandoning the \textit{de jure} and \textit{de facto} distinction emphasized in \textit{Swann} and the majority in \textit{Keyes}. The distinction only created different standards for Southern and Northern states. \textit{Swann} found that a state with “a long history” of statutorily imposed apartheid automatically engaged in \textit{de jure} segregation. Therefore, intent was not a requirement in the prima facie case against a Southern state. In essence, racial separation without a history of statutory segregation did not violate constitutional rights.\footnote{\textit{Id.} at 222 (Powell, J., concurring in part, dissenting in part).} Under this regime, Northern cities escaped chastisement by hiding in the shadows of \textit{de facto} segregation and public resistance of the segregated South.\footnote{JEFFRIES, supra note 4, at 291.} Powell found it unfair that Northern cities with heavy concentrations of minorities and segregated schools had to prove intent since they did not have a “history” of statutorily imposed segregation. In fact, many Northern states discarded their statutes before \textit{Brown}\footnote{\textit{Brown I}, 347 U.S. 483 (1954), held that state compelled or authorized segregation of public schools violates the Fourteenth Amendment and \textit{Brown II}, 349 U.S. 294 (1955) held that the state must take affirmative action to desegregate public schools.} was decided but continued to practice segregation. Therefore, Northern states did have a history of statutorily imposed
segregation.

Powell asserted that segregated schools in biracial metropolitan areas, whether Northern or Southern, “did not result from historic, state-imposed de jure segregation . . . [but from] segregated residential and migratory patterns . . . of which [were] . . . perpetuated and rarely ameliorated by action of public school authorities.”\(^68\) However, Powell’s statement is untrue. The generally accepted notion in many metropolitan areas during the 1970’s was that “school officials’ practices may have [had] a substantial impact upon housing patterns . . . .”\(^69\) The dictionary defines ‘perpetuate’ as “continuing without intermission or interruption.”\(^70\) Powell’s statement portrayed school officials as passive bystanders rather than active participants in school segregation. School segregation in metropolitan areas was a product of segregated housing while complacent school boards lurked in the shadows of racism. This cannot be true when school boards were key players in deterring black students from attending white schools in metropolitan areas even after Brown I. School boards could no longer rely on Jim Crow laws and racist state Constitutions because it was their duty to eliminate segregation “root and branch.”\(^71\) Many metropolitan school boards decided to act contradictory to the mandate and implemented covert segregation tactics instead of integration solutions.

For instance, in Kansas City (“KC”), a hyper-segregated metropolitan area, the school board shifted attendance zones to bus white students past black schools to white schools on the west side of the city.\(^72\) Through segregative practices, the school board flagged racially identifiable schools for whites which contributed to the maintenance of segregated neighborhoods.\(^73\) School board officials in KC did not merely perpetuate segregation, but actively refused to implement busing, equalize funding across districts, and change school boundaries to facilitate integration. In the 1960s, KC rejected a plan to build a series of integrated middle schools and implemented an “intact busing” program where black students were bused to white schools, but were segregated within the program. Therefore, black students learned in separate classrooms, had recess at a different time, and ate lunch on a different schedule from the white students.\(^74\) West side busing system, lack of corrective remedies, and “intact busing” arrangements were ways KC hid under the umbrella of de facto segregation. Metropolitan segregation methods “belie[d] any notion that the historical development of racial segregation in schools and housing was ‘natural,’ accidental, immutable, or caused by remote and uncontrollable

\(^{68}\) Keyes, 413 U.S. at 222–23 (emphasis added).


\(^{72}\) Kevin Fox Gotham, Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri, 43 AMER. STUDIES 5, 6, 18 (2002).

\(^{73}\) Id. at 5, 18, 20, 22.

\(^{74}\) Intact busing is basically the unconstitutional idea of “separate but equal.”
demographic forces or migration processes.” Local school board officials not only perpetuated but also explicitly created racially segregated school systems regardless of housing structure.

Similarly in Boston, Massachusetts, the figures showed starkly segregated schools due to the board’s implementation of feeder patterns and segregated enrollment programs. Boston’s use of open enrollment programs—where parents could opt out of their neighborhood school to choose a different—racially homogeneous—school, exacerbated racial segregation by contributing to the dual school system. In 1971, Boston adopted the controlled transfer policy to replace open enrollment. The controlled transfer policy allowed students to transfer to a school outside their neighborhood or zoning district only when there were open seats available. However, the controlled transfer policy had many exceptions, which essentially swallowed the rule. First, the grandfather clause allowed students who attended out of district schools to continue attending if a seat remained open. Second, it allowed those students, who applied the previous year but were not accepted to an out of district school, to transfer to an out of district school of their choice the next year. The third exception allowed brothers and sisters of transfer students to gain access to out of district schools. Fourth, transfers were granted within a multi-school district. Lastly, the catchall exception, or the hardship clause, ironically allowed transfers on the basis of racial grounds and without showing parental hardship. Boston’s school board even built small schools to serve classified racial groups and the neighborhood concept was only used in overwhelmingly segregated residential areas. In Morgan v. Hennigan, Boston’s schools argued that segregated housing and migration of the black population to the city was responsible for segregation. Similar to Powell’s support of the neighborhood system in Keyes, Boston argued that the neighborhood policy was constitutional despite segregative effects. However, Boston’s implementation of the controlled transfer system, extensive busing to racially segregated schools, and feeder patterns were anti-neighborhood policies since they intentionally placed students in schools outside their neighborhoods. Boston could not use the neighborhood concept to mask its segregative acts, especially since they were removing white children from their neighborhood schools and busing them across the city to white schools. In this instance, housing patterns did not cause school segregation; the school board’s active role in keeping schools segregated was the essential link.

75. Gotham, supra note 72, at 5, 29–30.
76. See also GERALD W. HEANEY & SUSAN UCHITELLE, UNENDING STRUGGLE: THE LONG ROAD TO AN EQUAL EDUCATION IN ST. LOUIS 71–82 (2004) (explaining the continued segregation of education after Brown in the metropolitan area of St. Louis, Missouri).
80. Id. at 454–55 (explaining all the exceptions of the controlled transfer policy).
81. Id. at 479.
Nashville, Tennessee, and Chicago, Illinois, were two other metropolitan areas with boards that actively segregated schools. In the late 1950s, Nashville contained overlapping districts of white and black schools in the city proper, but there remained segregated schools even though white and black families lived in close proximity. Since one third of the counties in Nashville did not offer public high schools for blacks, some black students had to pay tuition and commute to all-black facilities in another county. The Nashville school board was not eliminating segregation “root and branch” but rather opposed integration vehemently. The school board even denied a request of two white professors at Fisk University—the only unsegregated college in Nashville—who asked permission to enroll their children in black schools near the university. Even though community members tried to progress toward integration, Nashville’s board stood firm in hindering advancement. Chicago’s school board did more than just “perpetuate” school segregation by setting up mobile classrooms—called ‘Willis Wagons’—as a solution to overcrowded black schools. The school board could have facilitated integration by sending black students to nearby under-enrolled white schools, but they did not. Coined after Chicago’s school superintendent who served from 1953 to 1966, Willis Wagons hindered black children’s access to “good” schools and facilitated segregation via school board action.

Intentionally circumventing the holdings of Brown, metropolitan school boards played an active role in causing segregated schools and implementing segregative policies. Despite evidence on the contrary, Powell claimed school officials were mere bystanders, only perpetuating the difficult situation of segregated housing. Due to Powell’s past service on the school board, he was sympathetic to school officials, who were in the midst of racial unrest and school integration. While the Court gave orders from above, the infantry on the ground—school officials, legislators, and the American people—were engaged in a racial conundrum, trying to find the best way to desegregate the nation. Powell’s theory and evidence on the contrary raised the classic question: what came first, the racist school board or the segregated neighborhood? Segregated neighborhoods most likely affected segregated schooling, but Powell downplayed school boards’ roles in actively facilitating school segregation.

Despite Powell’s incorrect characterization of school board officials, his assertion that there should be one uniform standard of detecting segregation for all schools was correct. “[P]ublic school segregation exists to a substantial degree

83. Id.
84. Id.
86. Keyes, 413 U.S. at 232.
[when] there is prima facie evidence of a constitutional violation by the responsible school board. Figures were enough to show prima facie evidence, and the school board must prove it operated under an integrated system. Segregative intent should have been abandoned because it is impossible to discern, leads to unpredictable outcomes, and provides little relevance to the existence of a segregated school system. The effect of a system is significant; intent is irrelevant. Powell’s argument for standard equality between the North and the South revealed his pride in and loyalty to the South. Even though the South egregiously resisted integration and the North secretly upheld segregation, it was important for the Court to use equal standards and strike a balanced approach in determining whether a school board engaged in segregation.

Next, Powell addressed the majority’s criticism that the ‘neighborhood school’ concept adopted in Keyes was maintained to facilitate segregation. Powell believed the neighborhood school system offered many positive aspects to the community: it strengthened the neighborhood, provided easy access to public education, facilitated extracurricular activities, and fostered political support for community issues. Moreover, the neighborhood concept’s national use validated its constitutionality. After advocating the neighborhood concept, Powell addressed his qualms with extensive busing regimes validated by Swann. According to Powell, busing destroyed the traditional connectedness of the home, church and school life of children. He was not an advocate of busing, calling it “[t]he single most disruptive element in education . . .”. He feared the anonymity and rootlessness of city busing would destroy the sense of belonging found in the community. With meticulous care, Powell argued that busing interfered with a school board’s ultimate goal of producing quality education. Busing undermined the validity of the neighborhood by placing economic burdens on the community’s tax dollars and removing children from a familiar environment. Ordering a school board to discontinue segregative acts correctly punished the school board, but requiring the implementation of busing measures punished the students and parents. Though busing purported to aid integration efforts, it frustrated the purpose of Brown by augmenting the likelihood of segregation and exacerbating white flight. Whites would leave the public school system and flee to the suburbs,

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87. Id. at 235.
88. Id. at 228, 236
89. Id. at 233–34.
90. Id. at 214.
91. JEFFRIES, supra note 4 at 285.
92. Id.
93. Keyes, 413 U.S. at 248.
94. Id. at 246; see also JEFFRIES, supra note 4 at 285.
95. Keyes, 413 U.S. at 253.
96. Id. See also JEFFRIES, supra note 4 at 285.
97. JEFFRIES, supra note 4 at 285.
98. Keyes, 413 U.S. at 249–50.
99. Id. at 256–58; see also JEFFRIES, supra note 4 at 285–86.
leaving poor whites and blacks to attend rotting city schools.\footnote{JEFFRIES, supra note 4 at 286.} Underlying his opinion, Powell feared that busing would hurt the education system found in white middle-class neighborhoods, similar to the ones he preserved while on the school board. He was less concerned about the beneficial opportunities busing could provide for inner city black students.\footnote{Id. at 285.} According to Powell, the mixing of deprived and poor black children with middle-class whites would taint the integrity and compromise the educational environment of white schools.\footnote{Id.} Aligning with Powell’s grassroots theory and respect for states’ rights, he believed that school officials should bear the responsibility for instituting corrective measures of integration. The state legislatures should facilitate education reform and “communities deserve the freedom and the incentive to turn their attention and energies to [the] goal of quality education, free from protracted and debilitating battles over court-ordered student transportation.”\footnote{Keyes, 413 U.S. at 253.}

Powell was very careful in framing his argument against busing because he took a hands-off approach when faced with the dilemma of integrating Richmond schools and was the sole white southerner on the Supreme Court.\footnote{Id. at 253.} However, his careful framing did not hide the holes in his argument. Divided communities could not progress toward quality education in a time of racial turmoil and unrest, until school boards began to seriously consider desegregation. Placing integration back into the hands of a racially prejudiced school board that previously failed to implement corrective measures was not a practical remedy. Where communities have failed to take valid steps toward integration, the court provided solutions, such as busing, to encourage lackadaisical school boards to move with expediency. Moreover, Powell’s blind advocacy for the neighborhood system did not take into account the practical realities and the context of American schools. “Just as a good neighborhood tends to create and sustain a good school, a good school tends to create and sustain a good neighborhood.”\footnote{Kevin Fox Gotham, Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri, 43 AMER. STUDIES 5, 30 (2002).} Therefore, a bad neighborhood tends to create and sustain a bad school, and a bad school tends to create and sustain a bad neighborhood. Neighborhood systems only positively affected good school communities, and they negatively affected bad school communities.\footnote{Id.} Many school boards, including Boston’s, used the neighborhood concept to mask segregative policies. In essence, the neighborhood system was \textit{de facto} segregation by another name and created another way for metropolitan areas to hide behind the security of segregation.

In contrast with Justice Powell, Justice Marshall was a busing advocate, which
was made clear in his dissent in *Milliken v. Bradley.* In *Milliken*, a federal district court required Detroit, Michigan to implement a multidistrict busing remedy after finding *de jure* segregation in the Detroit city schools. The busing remedy would include fifty-three outlying districts that were not joined to the case. The plaintiffs had not proven a constitutional violation in one district produced a significant segregative effect in another, specifically the outlying districts. Due to the influx of blacks in the inner city and the influx of whites in the Detroit suburbs, enforcing a comprehensive desegregation plan solely for the city would not integrate the public schools. In a five to four decision, the Court decided to reverse the district court’s decision to enforce the multidistrict plan and remanded the case to discuss a remedy for only integrating Detroit city schools—not suburban schools.

Using the precedent set forth in *Swann*, Marshall believed the district court correctly required the State to implement the multi-district busing plan. It was significant to include outlying suburban school districts because the State had a duty to remedy the constitutional violation of segregated schools in any meaningful fashion. The only available means to a constitutional end was the busing of children in predominantly white suburbs to predominately black city schools and vice versa. Marshall reiterated the State’s duty to “eliminate root and branch” racial discrimination in public schools. Michigan could only accomplish integration of Detroit by involving suburban school districts, and the majority’s limitation on the remedy to city schools only would maintain a segregated system.

Marshall’s second argument was two pronged: 1) the state of Michigan was ultimately responsible for segregating public schools in Detroit; and 2) an intra-district busing plan was not sufficient to carry out the State’s constitutional duty. Marshall criticized the majority’s emphasis on the local school boards’ independence and its requirement to prove the domino effect of unconstitutionality from one district to another. According to Marshall, it was sufficient to implement a remedial plan since the State engaged in *de jure* segregation by passing laws prohibiting desegregation plans in 1970 and only disseminating transportation state funds to suburban schools, not city schools. Though the State claimed the lack of transportation funds for the city fostered the neighborhood concept, the State conveniently implemented the neighborhood concept in segregated neighborhood schools. These statewide actions were enough to show that the Fourteenth Amendment was violated in city schools and suburban schools in Detroit. Moreover, as agents of the State, local school boards were subject to State control,

108. *Id.* at 745.
109. *Id.* at 753.
110. *Id.* at 782 (Marshall, J., dissenting).
111. *Id.* at 787 (Marshall, J., dissenting) (explaining that all the Detroit inner city schools contained approximately seventy-five to ninety percent African American).
112. *Id.* at 791–92, 798–99.
113. *Id.* at 791–92.
and Michigan could have consolidated the school districts to implement the plan.\footnote{Id. at 796.} In regards to the second prong, the inclusion of outlying districts was not a ploy to impose racial balancing but a necessary means to achieve desegregation.\footnote{Id. at 788.} Moreover, the suburbs were very connected to the city proper. Therefore, it would not be overwhelmingly burdensome to transport children from the city to the suburbs, or vice versa.\footnote{Id. at 804.} Providing equitable relief via busing was within the court’s authority, since distance and time did not risk safety and health.\footnote{Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (1971).} Marshall also addressed the economic issues Powell raised about busing in Keyes. Based on the facts of Milliken, 1,800 buses were underutilized and could subsidize the nine hundred buses needed to implement the multidistrict plan. In Marshall’s opinions, he usually emphasized the significance of the facts of a particular case. Similarly, Marshall stressed that the economic costs would be ameliorated since Michigan owned unused buses.

Additionally, the majority misconstrued the principle that “the nature of the violation determine[d] the scope of the remedy” too narrowly when it held that including outlying districts exceeded the scope. Using his practical jurisprudence, Marshall concluded that the “nature of a violation determined the scope of the remedy simply because the function of any remedy is to cure the violation to which it is addressed.”\footnote{Milliken, 418 U.S. at 806 (Marshall, J., dissenting).} The remedy could not be narrowly construed at the risk of effectiveness, and the majority transformed “a simple commonsense rule into a cruel and meaningless paradox.”\footnote{Id. at 807 (Marshall, J., dissenting).} One statement in Marshall’s dissent highlighted his deep veneration for litigation and how it could be used to improve the racial divide:

> The Court, in my view, does a great disservice to the District Judge who labored long and hard with this complex litigation by accusing him of changing horses in midstream and shifting the focus of this case from the pursuit of a remedy for the condition of segregation within the Detroit school system to some unprincipled attempt to impose his own philosophy of racial balance on the entire Detroit metropolitan area.\footnote{Id. at 789–90 (Marshall, J., dissenting).}

The plan proposed by the District Court in Milliken would “help those children in the city of Detroit whose educations and very futures have been crippled by purposeful state segregation.”\footnote{Id. at 812 (Marshall, J., dissenting).} There was no reason to forfeit black students’ right to Equal Protection for integrated education due to malleable State procedures

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114. Id. at 796.
115. Id. at 788.
116. Id. at 804.
119. Id. at 807 (Marshall, J., dissenting).
120. Id. at 789–90 (Marshall, J., dissenting).
121. Id. at 812 (Marshall, J., dissenting).
\end{flushright}
and the nonexistent issue of school board independence. Desegregation was a difficult task, but the Court’s support of suburban white flight in Milliken was a step backwards in the race to integration. The majority decision encouraged complacent structuring of public schools in metropolitan areas and led to less aggressive means of integrating public schools. It is not surprising that Powell joined the majority in Milliken because he deferred to the actions of the school board. Powell would say that the creation of neighborhood schools is a positive aspect to foster community and belongingness, but Marshall would agree with Powell’s law clerk, Jay Harvie Wilkinson III, who wrote that for too many blacks, their neighborhood schools “meant confinement, a slow suffocation in the dankness of the ghetto. The school bus might mean hope, escape, the door to a new life of challenge and opportunity.”

III. THE CONSTITUTIONALITY OF EDUCATIONAL FUNDING PLANS

“It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unequally depending upon the relative wealth of the political subdivisions in which citizens live.”


“For on this record, it is apparent that the State’s purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.”


Justice Powell’s sympathy for school board officials and his deference to their actions was noticeable in San Antonio Independent School District v. Rodriguez. In Rodriguez, Texas adopted a dual system for financing public education by extracting funds from local property taxes, State funds, and federal allotments. Plaintiffs argued that disparities in funding between affluent school districts and poor districts were caused by stark differences in property taxes. For example, in Edgewood Independent School District, the poor district where the plaintiffs resided, there were 22,000 students, ninety percent who were of Mexican descent. Edgewood’s property taxes contributed $26 per pupil in 1967; once the state and federal funds were added, the district spent $356 per pupil. In Alamo Heights

122. Id. at 791 (Marshall, J., dissenting).
123. JEFFRIES, supra note 4 at 297.
125. Id. at 6.
126. Id. at 12.
School District, the most affluent district in the city, there were 5,000 students, most of which were Anglo-Saxon, with only eighteen percent Mexican residents. Alamo Heights’ property taxes contributed $333 per pupil in 1967; once the state and federal funds were added, the district spent $594 per pupil.\textsuperscript{127} The District Court held that the financial scheme was unconstitutional under the Equal Protection Clause, but the Supreme Court reversed.\textsuperscript{128}

According to the appellants, the financing system was unequal—the poor districts did not contain the same level of local control and fiscal flexibility as wealthy districts.\textsuperscript{129} Writing for the majority, Powell set up a two-part analysis under the Equal Protection Clause to determine the plan’s constitutionality: 1) whether the Texas financial system disadvantaged a suspect class or infringed upon a fundamental implicit or explicit constitutional right requiring judicial scrutiny or 2) whether the plan rationally furthered some legitimate, articulated state purpose and did not constitute invidious discrimination under the rationality standard of review.\textsuperscript{130} In regards to the first prong, Powell ultimately concluded that the system, based on relative wealth, was not enough to create a suspect class.\textsuperscript{131} Powell defined the “poor” as completely unable to pay for some desired benefit and unable to sustain absolute deprivation of a meaningful opportunity to enjoy that benefit.\textsuperscript{132} In \textit{Griffin v. Illinois},\textsuperscript{133} the Court held that a state law prohibiting indigent criminal defendants from obtaining an appeal transcript was unconstitutional because indigence revoked a fair opportunity to appeal.\textsuperscript{134} In \textit{Douglas v. California},\textsuperscript{135} the right to appointed counsel on direct appeal was granted to indigent defendants, who did not have resources to retrieve representation.\textsuperscript{136} Those burdened by attorney payments or relatively less-wealthy defendants were not classified as “poor” in \textit{Douglas}.\textsuperscript{137} The plaintiffs in \textit{Rodriguez} were not considered “poor” because not receiving public education was different from receiving a lower quality education, therefore absolute deprivation did not exist.\textsuperscript{138} “[T]he Equal Protection Clause [did] not require absolute equality or precisely equal advantages,” and the mere presence of inequality did not violate the

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\bibitem{127} \textit{Id.}
\bibitem{128} \textit{Id. at 6.}
\bibitem{129} \textit{Id. at 50.}
\bibitem{130} \textit{Id. at 17.}
\bibitem{131} \textit{Id. at 19.}
\bibitem{132} \textit{Id. at 20.}
\bibitem{133} 351 U.S. 12 (1956).
\bibitem{134} \textit{Rodriguez}, 411 U.S. at 21.
\bibitem{135} 372 U.S. 353 (1963).
\bibitem{136} \textit{Rodriguez}, 411 U.S. at 22.
\bibitem{137} \textit{Id. at 21–22.} Powell also used \textit{Williams v. Illinois}, 399 U.S. 235 (1970) (holding that criminal penalties cannot be given to indigents simply because they were totally unable to pay incarceration fines; indigents did not include those who make relatively less money or those in which the fines are a heavy burden) and \textit{Bullock v. Carter}, 405 U.S. 134 (1972) (invalidating Texas’ expensive filing fee for primary elections, which barred potential candidates unable to pay access to the ballot).
\bibitem{138} \textit{Rodriguez}, 411 U.S. at 23.
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Constitution.\textsuperscript{139} Moreover, the Court could not assume that poor people lived in poor districts, and Powell was unwilling to discuss the plaintiffs’ amorphous classes based on family income or district wealth discrimination.\textsuperscript{140} Since a suspect class did not exist and equal education based on relative wealth was not a guaranteed right under the Constitution, strict scrutiny did not apply.

Under the second prong, Powell found the Texas plan rationally furthered a legitimate, articulated state purpose and did not constitute invidious discrimination. As a past school board official, Powell was familiar with the technicalities and complex details that comprised funding schemes for school districts. The financial plan in Rodriguez, like the neighborhood concept in Keyes, was widely used across the country with “the Texas system [being] comparable to the systems employed in virtually every other State.”\textsuperscript{141} Powell’s hands-off approach was also prevalent in his discussion of the second prong, and he was vehemently against court imposition on states’ rights. Justice Powell proclaimed that “the ultimate solutions [concerning tax reform in school education] must come from the lawmakers and from the democratic pressures of those who elect them.”\textsuperscript{142} The Court’s limited function prohibited it from imposing “its judicial imprimatur on the status quo.”\textsuperscript{143} Through the lens of a grassroots advocate, the Court would exceed the scope of the Constitution if it struck down the financial plan. Supreme Court justices were not experts in school funding systems and did not have superior wisdom of legislators, scholars, and educational officials working diligently to better their communities.\textsuperscript{144}

Marshall had a different view of Rodriguez than his southern colleague; he found it unacceptable to submit the appellants to the “vagaries of the political process,” which was unfit to provide a non-discriminatory remedy.\textsuperscript{145} In his dissent, Marshall used the practical implications and historical context of the plan to prove Texas violated the Fourteenth Amendment. The mission of the Minimum Foundation School Program was to improve the finances of property poor districts in relation to affluent districts. However, the state program failed to subsidize despite the huge disparities in property taxes.\textsuperscript{146} Contrary to its mission, the program gave the most affluent district, Alamo Heights, more money per pupil than the poorer district, Edgewood. Alamo received three dollars more than Edgewood in 1967, and by 1970 it received one hundred and thirty-five dollars more than Edgewood. If variability in financing schemes were so significant as to affect educational opportunity and inequality between races, then the financing system reflected an intent to discriminate. Marshall defined the suspect class as disadvantaged school children in Texas’ poor districts that received unequal

\textsuperscript{139} Id. at 24.
\textsuperscript{140} Id. at 28.
\textsuperscript{141} Id. at 47–48.
\textsuperscript{142} Id. at 59.
\textsuperscript{143} Id. at 58.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 71 (Marshall, J., dissenting).
\textsuperscript{146} Id. at 78 (Marshall, J., dissenting).
educational opportunities based on affluence.\textsuperscript{147}

Marshall used the strict scrutiny standard instead of rationality review. Traditionally, rationality applied to state discrimination of economic and commercial instances because economic matters were usually far removed from constitutional guarantees.\textsuperscript{148} However, the standard of review used in analyzing state discrimination is higher “in light of the constitutional significance of the interests affected and the invidiousness of the particular classification.”\textsuperscript{149} Based on the historical background and marginalization of “discrete, powerless minorities” by the financial system, Rodriguez warranted judicial strict scrutiny.\textsuperscript{150} Moreover, wealth discrimination cases were mostly attributable to the private sector, but this case involved state economic discrimination, which was very unusual. Therefore, careful review was imperative.\textsuperscript{151}

The plaintiffs’ interest in Rodriguez was “fundamental” because education is a fundamental interest recognized by the Court that directly correlates with one’s ability to exercise their First Amendment rights and their right to vote.\textsuperscript{152} Many rights are implicitly fundamental even though they are not explicitly written in the Constitution. For instance, the rights to travel interstate and to vote in state elections are fundamental rights.\textsuperscript{153} If state action hindered a fundamental interest protected under the Constitution, then the state must show the action is “necessary to promote a compelling government interest.”\textsuperscript{154} Discerning “fundamental” interest is difficult, but the closer the interest is to a constitutional guarantee the more fundamental it becomes.\textsuperscript{155} The education of pupils in Texas was fundamental and closely related to constitutional guarantees of educational opportunity.

Next, Marshall criticized the majority’s two-pronged classification for wealth discrimination. He illustrated that in Harper, the Court struck down a $1.50 poll tax in Virginia because it directly hindered one’s fundamental interest of participating in state franchise. Moreover, the suspect class included those too poor to afford the $1.50 and those who failed to pay.\textsuperscript{156} Additionally, the political process was not a pertinent outlet for the disadvantaged because poor districts had little voice to influence legislative redress compared to rich districts that favored the status quo.\textsuperscript{157}

Texas’ state interest in maintaining the financial scheme was to preserve local

\textsuperscript{147} Bullock v. Carter, 405 U.S. 134 (1972).
\textsuperscript{148} Rodriguez, 411 U.S. at 98. \textit{Id.} at 78 (Marshall, J., dissenting).
\textsuperscript{149} \textit{Id.} at 109 (Marshall, J., dissenting).
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 123.
\textsuperscript{152} \textit{Id.} at 112–15.
\textsuperscript{153} \textit{Id.} at 99–100.
\textsuperscript{154} \textit{Id.} at 100.
\textsuperscript{155} \textit{Id.} at 102–103.
\textsuperscript{156} \textit{Id.} at 118.
\textsuperscript{157} \textit{Id.} at 123.
educational control; but it was not enough to meet the “compelling” standard according to Marshall. Describing it as “ephemeral character,” Marshall recognized that local control intended to engage the community in educating its children. The idea that it takes a Village to raise a child was fostered in the local education theme. However, when the financial plan created educational inequalities for minorities, the Equal Protection Clause trumped the communal end. Marshall most likely agreed with Powell in that the mere existence of inequality did not violate the Equal Protection Clause. However, Marshall believed the grave inequalities of the financial scheme towards the students in poor districts violated the Fourteenth Amendment. Powell’s commonality argument—that many states used similar plans—was not persuasive to Marshall because commonality did not prove constitutionality. According to history, though nearly every State engaged in segregation, it was still unconstitutional despite its normalness. Powell’s sympathy for school officials and Marshall’s sympathy for marginalized minorities placed the justices on opposite sides of Rodriguez due to their vastly different experiences.

IV. Transitioning from Integration to Equalization

Justice Marshall and Justice Powell wrote many opinions that affected the realm of education. As society moved from an era of desegregation to an era of rectification, the Court began to grapple with new legal issues. Using constitutional text and valid precedent, the Supreme Court justices sought out to define the meaning of “equality” considering the backdrop of past racial discrimination. In Wygant v. Jackson Board of Education, the definition of equality began to take shape. One could infer from its holding that legitimate expectations of seniority trump integration efforts made by the teachers’ union. In Wygant v. Jackson Board of Education, an affirmative action seniority system was implemented to protect African American teachers from layoffs. Due to the history of racial discrimination, the Collective Bargaining Agreement (“CBA”) between the Jackson Board of Education and the Union included a caveat in Article XII which retained less-senior minority individuals over more-senior white individuals to ensure “at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.”

Each year, the employees reconsidered, voted, and approved the CBA.

Justice Powell, who wrote the majority, rejected the school board’s “role model” theory, which claimed racial preferences were justified as a means of remedying societal discrimination and providing African American children with

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158. Id. at 133.
159. Rodriguez, 411 U.S. at 134.
161. Id. at 270.
162. Id. (quoting Art. XII of the Collective Bargaining Agreement).
role models.\textsuperscript{163} The “role model” theory would justify the use of racial preferences for eternity and remedies needed to discern a clear stopping point for preferential treatment.\textsuperscript{164} Reliance on historical discrimination was outmoded and the country was “long past the point required by any legitimate remedial purpose” to justify racially preferential layoff practices.\textsuperscript{165} While quoting Swann, “[a]t some point these school authorities and others like them should have achieved full compliance with this Court’s decision in Brown I,” Powell seemed to suggest that the country had completed its mission of integration, an overly optimistic and ill-judged conclusion.\textsuperscript{166} He accused the district court and the school board of engaging in the unconstitutional act of racial balancing, since “the affirmative duty to desegregate had been accomplished and racial discrimination through official action [was] eliminated from the system.”\textsuperscript{167}

Under strict scrutiny, the majority held that the provision violated the Fourteenth Amendment because it was not narrowly tailored to accomplish the State’s goal of remedying societal discrimination.\textsuperscript{168} The financial and psychological effects of layoff were more burdensome than the effects of not being hired.\textsuperscript{169} The timely investment to ensure job security, the legitimate expectations that followed from a seniority system, and the dependence on certain wages were aspects relied on by union workers. Powell’s use of psychologically based public policy strayed from his usual style and resembled more of Marshall’s style of opinion writing revealing Marshall’s influence on Powell’s jurisprudence.

Marshall’s dissent stressed the importance of viewing race-conscious provisions within the context and the facts of the case. The issue was whether the Constitution prohibited a union and school board from laying off minority teachers to preserve the effects of the affirmative hiring policy put into place as an “affirmative step[ ] to recruit, hire and promote minority group teachers . . . .”\textsuperscript{170} Since layoffs were necessary after two years of implementing the diversity hiring policy, enforcing a strict seniority system would lay off all the African American teachers and would essentially undo the integration of the teachers’ union.\textsuperscript{171} While the union advocated for the strict seniority system and the school board proposed freezing minority layoffs and placing the burden completely on white teachers, the two entities compromised by forming Article XII.\textsuperscript{172}

Using the reasonableness standard to analyze the provision, Marshall felt the state’s legitimate goal to “eliminat[e] the pernicious vestiges of past discrimination”

\textsuperscript{163} Wygant, 476 U.S. at 275–76.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 275.
\textsuperscript{166} Id. at 275–76.
\textsuperscript{167} Id. at 276.
\textsuperscript{168} Wygant, 476 U.S. at 280.
\textsuperscript{169} Id. at 283–84.
\textsuperscript{170} Id. at 297.
\textsuperscript{171} Id. at 298.
\textsuperscript{172} Id. at 298–99.
was constitutional.\textsuperscript{173} Strict scrutiny only applied to cases involving fundamental rights or suspect classifications and this case did not encompass either aspect.\textsuperscript{174} In addition, the Court gives a considerable amount of deference to unions in creating inventive seniority systems. In most union cases, the Court exudes “minimal supervision” over substantive portions of collective bargaining agreements due to the complicated structure of union contracts.\textsuperscript{175} Addressing Powell’s use of psychological effects, Marshall noted that the unfairness associated with layoffs should not be confused with the constitutionality of them.\textsuperscript{176} If a legitimate state purpose existed and eighty percent of the white union members reconsidered and signed the agreement six times, then the provision is constitutional.\textsuperscript{177} Lastly, Marshall criticized the majority for not providing an alternative solution to Article XII. The provision was the narrowest and most equitable because it enforced a seniority system and preserved minority representation simultaneously.\textsuperscript{178}

In \textit{Wygant}, Powell adopted certain aspects of Marshall’s jurisprudence and Marshall adopted specific characteristics of Powell’s jurisprudence. Usually, Marshall used social science to expand his constitutional arguments. However, Powell used social science to enhance his argument that an employee’s reliance on a seniority system trumped the racial preference regime implemented by the teachers’ union. On the other hand, Powell usually advocated for the freedom of school officials to act autonomous without court intervention. However, Marshall used the theory of autonomy to justify the union’s actions in \textit{Wygant}. Powell imposed Court intervention despite the usual deference given to unions and the employees’ actively contracting for the inclusion of Article XII. Each Justice’s perspective depended on the interests he sought to protect. Powell empathized the rights “innocent” white tenured workers who relied on job security despite their benefit from a historically exclusionary system. Conversely, Marshall sympathized with the black marginalized worker who was hired last due to past discriminatory policies and could not obtain the job security given to the white tenured workers because the opportunity to join the teachers’ union was not an option for black teachers pre-1980.

The legal issues surrounding affirmative action programs have caused much contention in the American courts and continue to be at the forefront of policy discussions. After the fifty-ninth anniversary of \textit{Brown}, affirmative action programs in college admissions have received considerable attention by the courts, media, and policy makers. Unsurprisingly, Justice Powell’s and Justice Marshall’s differing opinions on affirmative action as shown in \textit{Regents of University of California v. Bakke}, revealed interesting insights about their jurisprudence and

\begin{thebibliography}{1}
\bibitem{173} 476 U.S. at 301.
\bibitem{174} \textit{Id.} at 301–302.
\bibitem{176} \textit{Wygant}, 476 U.S. at 296.
\bibitem{177} \textit{Id.} at 299.
\bibitem{178} \textit{Id.} at 301.
\end{thebibliography}
experiences. If the two Justices were still on the bench, what would they say about affirmative action in today’s world? How would they decide Fisher v. University of Texas at Austin?

V. Bakke and its Implications on the Modern Affirmative Action

“It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”


“In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order.”


Regents of University of California v Bakke,\(^\text{179}\) a pivotal case in American constitutional history, set the precedent for affirmative action college admissions programs and shaped the constitutional arguments that would influence the holding of many future cases. In Bakke, the University of California Davis Medical School implemented a special admissions program to increase the number of disadvantaged students.\(^\text{180}\) The special admissions program worked concurrently with the regular admissions process to determine the students of the incoming class.\(^\text{181}\) All minority applications—African American, Asian American, American Indian, and Mexican American—as well as applications marked as economically or educationally disadvantaged were sent to the special admissions program.\(^\text{182}\) Special admissions interviewed one out of five applicants and did not require a minimum grade point average (“GPA”) or compare the top candidates to the general admissions applicants.\(^\text{183}\) There were no disadvantaged whites admitted under the special admissions program but there were significant increases in the admission rates for blacks and Mexican Americans as compared to minorities accepted through general admissions.\(^\text{184}\) As a screening mechanism in the regular admissions program, a 2.5


\(^{180}\) Id. at 272.

\(^{181}\) Id. at 274–75.

\(^{182}\) Id. at 274.

\(^{183}\) Id. at 275.

\(^{184}\) Bakke, 438 U.S. at 275 (The special admissions program accepted twenty one black students, thirty Mexican Americans, and twelve Asian Americans; the general admissions program accepted one black student, six Mexican American, and thirty-seven Asian American. Note the acceptance of Asian Americans were mostly under the general admission. The amount of minority general acceptances may have been skewed based on the number of minority applicants who applied to the general admissions and those who
GPA was required and one out of six applicants were interviewed. Bakke was denied admission twice through the general admissions program though he received a high interview score and there were seats open in the special admissions program when he was rejected. Some applicants admitted through the special program had lower GPAs, interview scores, and Medical College Admission Test ("MCAT") scores than the plaintiff.\(^ {185} \)

The plaintiff challenged the special admissions program because it functioned as a racial quota and guaranteed disadvantaged minorities sixteen seats in the incoming class.\(^ {186} \) Using the strict scrutiny standard, the Court held that the special admissions program was unconstitutional because it functioned as an unlawful quota system and directed the medical school to admit Bakke.\(^ {187} \) Powell recognized that the Equal Protection Clause was founded during historically troubling times. However, he expressed that in 1978, a more textual approach should be taken to ensure that all persons regardless of race received equal protection under the law.\(^ {188} \) Therefore, Powell discarded the two-class theory on the basis that the country had moved past racial discriminatory times and that it was unfair to offer racial preferences to minorities when whites did not receive special treatment.\(^ {189} \)

To justify the use of a suspect class, the State had to show the purpose was constitutional, substantial, and necessary to accomplish the goal.\(^ {190} \) The special admissions program had four main goals: 1) to reduce the underrepresentation of minorities in the medical profession, 2) to counter societal discrimination, 3) to increase physicians serving in underserved areas, and 4) to foster ethnic diversity in the student body.\(^ {191} \) Powell undermined each goal and concluded that it was not necessary for a suspect class to receive special treatment at the expense of others. The first goal of ameliorating underrepresentation of minorities as imposing a quota based solely on race, which was per se unconstitutional.\(^ {192} \) The medical school’s second goal of countering societal discrimination was nebulous and too broad to justify class.\(^ {193} \) According to Powell, it “impose[d] disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of

\(^ {185} \)Id. at 277 (The record did not reflect how many students admitted through general admissions had lower scores.).
\(^ {186} \)Id. at 279.
\(^ {187} \)Id.
\(^ {188} \)Id. at 289.
\(^ {189} \)Bakke, 438 U.S. at 296-98.
\(^ {190} \)Id. at 305.
\(^ {191} \)Id. at 306.
\(^ {192} \)Id. at 307.
\(^ {193} \)Id.
the special admissions program are thought to have suffered.”  The third goal, based on the university’s assumption that minority students will practice medicine in underserved, predominately minority communities, was not properly supported because the medical school did not provide information showing that minority students had this goal in mind. The lack of evidence and the broad assumption was insufficient to justify the suspect class. Ethnic diversity, the last goal of the university, was constitutionally acceptable; however Powell noted that race could only be one factor in the admissions process, not the sole deciding factor for admitting a student. Even though Powell and Marshall agreed that diversity could be a factor in the admissions process, Marshall did not completely agree with the majority and wrote a separate dissent expressing his arguments for upholding the constitutionality of the special admissions program.

While Powell used a textualist approach to interpret the Equal Protection Clause, Marshall used a historical contextual approach. Racial discrimination against blacks ensued for more than three hundred years in America and the state’s interest in rectifying such wrongs and improving the underrepresentation of minorities in the medical field was constitutionally valid. In the beginning of his dissent, Marshall laid out Negro history beginning with slavery. The proclamation that “all men are created equal” only applied to white men. Just as the British oppressively reigned over the thirteen colonies, whites in America repeated history by oppressively reigning over blacks. Justice Marshall emphasized the many cases that enhanced the unfortunate theme of Negro inferiority, especially the Civil Rights cases and . He quoted Justice Harlan, the sole dissenter in , stating that “separate but equal” really meant “colored citizens [were] so inferior and degraded that they [could not] be allowed to sit in public coaches occupied by white citizens.” Even in 1978, African Americans were not equal to their white peers mainly because centuries of unequal treatment were ingrained in the American way of life. The unemployment rate for blacks was twice that of whites despite their small population. Moreover, was decided a mere twenty-four years after held that integration of all schools was necessary. Twenty-four years was not enough to overturn three hundred and fifty years of segregation, so the medical school’s interest of ensuring diversity made the special admissions program constitutional.

Based on legislative intent, Marshall argued that the Fourteenth Amendment

194. Id. at 310.
195. Id. at 310–11.
196. Id. at 311–12.
198. Id. at 388–90.
199. Id. at 388.
200. The Civil Rights cases held that Congress lacked authority under the Equal Protection Clause to outlaw racial discrimination by private entities.
was enacted to grant Negroes a chance to succeed and to remedy the effects of discrimination.\textsuperscript{203} It logically followed that the implementation of race-conscious measures may be necessary to ensure equality especially since white resistance was still prevalent in society.\textsuperscript{204} The intent of the Framers was to promote equality based on the context of reality, not on an abstract equality grounded in the untrue premise that racial divide no longer existed in educational institutions. In \textit{Plessy}, the Court upheld many race conscious state actions. \textit{Swann} held that school boards could consider race in assigning school zones and \textit{United Jewish Organizations v. Carey}.\textsuperscript{205} held that New York’s reapportionment plan, which gave more power to Negros and Puerto Ricans in the district, therefore precedent supported the constitutionality of the special admissions program based on race.\textsuperscript{206} These cases supported remedial measures for groups who were victims to past discrimination despite that effect on “innocent” individuals.

According to Powell, if the two-class theory prevailed, the Court would have to evaluate prejudicial experience of various minorities, but Marshall disagreed.\textsuperscript{207} Blacks should not have to prove their suffering because racism’s enduring effects still pervaded blacks’ lives. Even though Marshall sat on the highest court of the land, he knew many blacks still attended racially divided schools and received less educational opportunities than their white peers. As a man who personally experienced racial discrimination, he knew that community practice did not dictate the racial equality granted by law. Justice Powell iterated that many disadvantaged whites in the world did not receive preferential treatment in the same way as minorities. Marshall articulated that the difference between disadvantaged whites and minorities was discriminatory history.\textsuperscript{208} The plight of poor whites was detrimental and difficult, however the plight of the poor black or Hispanic individual was more detrimental because the minority received even fewer opportunities than the disadvantaged white person. The legacy of unequal treatment closed the door to Negro opportunities to hold positions of influence, affluence, and prestige. In conclusion, Marshall found that the Court had come full circle: from the detriment of \textit{Plessy} and the Civil Rights cases to the triumph of \textit{Brown} and affirmative action cases and back to hindering programs implemented to ensure the equality of educational opportunities for minorities.\textsuperscript{209}

\textit{Bakke}’s influence continues to resonate in modern cases. It was extensively cited in \textit{Grutter v. Bollinger},\textsuperscript{210} where the Court in a five to four decision held that the University of Michigan Law School’s race conscious admission policy was constitutional. Diversity was a compelling state interest improving diverse
perspectives, enhanced professionalism in preparing students to interact with individuals with different views and fostered civic engagement. Currently, the Supreme Court is reviewing an affirmative action case, *Fisher v. University of Texas at Austin*, which has sparked a plethora of interest and warranted much media attention. Affirmative action cases tend to be very close decisions and *Fisher* will likely follow the trend. Reflecting on Powell’s and Marshall’s jurisprudences, this analysis will predict their opinions in *Fisher*.

In *Fisher*, two white women were denied admissions to the university and they challenged the constitutionality of the admissions policy. The two women alleged that they were discriminated based on race and should have been admitted because they were more qualified than admitted diverse candidates. The Western District of Texas granted summary judgment to the university and the Fifth Circuit Court of Appeals affirmed. Under strict scrutiny, the Fifth Circuit held that the race conscious admissions policy was constitutional and aided the university’s compelling interest to achieve diversity.

The Texas legislature enacted the race neutral “Top 10% Law,” where the University of Texas (“UT”) automatically granted admission to all students in the top ten percent of their high school class. After the enactment of the statute, the 2004 freshman class admitted 4.5% African Americans, 16.9% Hispanics, and 17.9% Asian Americans. Even though there was an increase in minority representation, ninety percent of small classes—ranging from five to twenty-four students—contained only one or zero African Americans, forty-three percent had one or zero Hispanic students and forty-six percent had one or zero Asian American students. In response to this underrepresentation, UT adopted the Personal Achievement Index (“PAI”) which took a holistic approach to admissions by rewarding students based on scores on two essays, leadership extracurricular activities, work experience, community service, socioeconomic status, race, and ethnicity.

Since the Top 10% Law increased minority enrollment, the appellants argued that it created a critical mass and the adoption of the PAI unnecessarily and unconstitutionally pursued racial balancing. According to *Grutter*, percentage plans that happen to increase diversity cannot replace race-conscious programs because the percentage does not assess applicants on an individual basis. Even

211. *Id.* at 307.
212. 631 F.3d 213 (5th Cir. 2011).
213. *Id.* at 217.
214. *Id.* at 227.
216. Amicus Brief for the United States at 6, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).
217. Amicus Brief for the United States at 4–7, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).
219. *Id.* at 239.
though the legislature thought this rule would increase minority admissions, the percentage plan does not embody the holistic view adopted in Grutter. Therefore, the “Top 10% Law” cannot replace a race conscious program implemented to achieve diversity and select people with unique perspectives, different experiences, and dynamic backgrounds.

Appellants also argued that the Top 10% Law reached a critical mass. Comparing enrollment numbers of Michigan Law School in Grutter, which ranged from 13.5 to 20.1 percent to UT’s admission of forty percent of African Americans, Hispanics, and Asian Americans, the appellants claimed that UT exceeded the necessity of critical mass.220 The Court rejected this because the appellants used the percentage range as a quota in determining critical mass.221 Grutter did not tie critical mass to a specific number. Just as affirmative action programs cannot implement quotas that reserve a specified number of minority seats, those challenging the programs cannot cap the number of minority seats at a specific number. Moreover, the Court would not allow the plaintiffs to lump together minority groups because lumping was held unconstitutional in Parents Involved.222 Each minority must be analyzed separately to discern whether the university’s diversity goals have been achieved. The Fifth Circuit found that the aggregate percentage skewed the existence of diversity because minorities were grouped in specific departments, and did not represent a critical mass for the university as a whole.223 Appellants claimed the PAI was not narrowly tailored and had a minimal effect on diversity substantially reached by the Top 10% Law. However, the Grutter-like system was not impermissible after the exhaustion of race neutral alternatives. Small gains in diversity were not reason enough to ban a race-conscious program.

Additionally, the mere fact that appellants had higher grades than diverse candidates admitted in the top ten percent of their high school was not cogent. Competition was much more intense for those who were not in the top ten percent. In 2008, ninety-two percent of Texas residents were admitted under the Top 10% Law, therefore non-top ten percent applicants filled the remaining eight percent.224 Often times, non-top ten applicants have higher SAT scores than automatically granted students, regardless of race, to help set them apart from a very large applicant pool.225 Consequently, the heavy emphasis placed on the academic qualifications of non-top ten applicants adversely affected minority applicants.

220. Brief for Petitioner at 5, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011) (No. 11-345).
221. Fisher, 631 F.3d at 243.
223. Fisher, 631 F.3d at 245.
because nationally, they have lower SAT scores than whites.\textsuperscript{226} Even though the Fifth Circuit affirmed the District Court, it did so with caution, saying that the PAI should not be implemented in perpetuity. Since the Top 10\% Law augmented the number of Texans admitted—in 1998, the law accounted for forty-one percent of Texas admits and in 2008, eighty-one percent of admits—the necessity of using race in admission policies may deteriorate based on racial demographics.\textsuperscript{227} In \textit{Grutter}, Justice O’Connor also addressed the perpetuity issue stating that the race conscious admissions program at Michigan’s Law School would be phased out within twenty-five years.\textsuperscript{228}

To predict Powell’s \textit{Fisher} opinion, the analysis will apply the framework in \textit{Bakke} and apply it to the facts of this case. Similar to the lower courts, Powell would use strict scrutiny to analyze UT’s use of race in its admissions process. To justify the use of a suspect class, the State must show the purpose is constitutional, substantial, and necessary to accomplish the goal. PAI had four main goals: 1) to foster ethnic diversity in the student body, 2) to promote cross racial understanding, 3) to prepare students for the workforce, and 4) to break down stereotypes.\textsuperscript{229} Powell would find the first goal of ethnic diversity constitutionally acceptable. However, Powell may be skeptical of the second goal of promoting cross-racial understanding and the fourth goal of breaking down stereotypes because they are nebulous concepts, similar to the goals in \textit{Bakke}, which purported to counteract societal discrimination. Unlike the university in \textit{Bakke}, UT does not ground its goals in assumptions and on its face, the program seems constitutional because race is amongst many factors in making admissions decisions and because there were not a specific number of seats set aside for minority students. In the analysis, Powell would have to discern if diverse Texas applicants received special treatment at the expense of the plaintiffs in \textit{Fisher} or if the plaintiffs were mere applicants that fell prey to fierce competition. Since the PAI resembles \textit{Grutter}’s holistic approach, Powell’s deep respect for precedent may lead him to affirm the Fifth Circuit. However, Powell had an overly optimistic view of the progress of race relations and by 2013, he may assume that race-conscious programs are no longer necessary. Based on a textual approach, he may reverse the Fifth Circuit because the top ten percent is sufficient in admitting minority students. He would agree with O’Connor that the Court must draw a line when considering the constitutionality of racial preference.

The Ghost of Marshall Past would analyze \textit{Fisher} using the historical context and practical realities of modern day racial relations and would hold UT’s program constitutional. If the Court decided the affirmative action program at UT was unconstitutional, Marshall would find that the Court had come full circle once again: from the detriment of \textit{Bakke}, to the triumph of \textit{Grutter}, and back to hindering

\begin{itemize}
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 246–47.
\item \textsuperscript{228} Id. at 222.
\item \textsuperscript{229} Amicus Brief for the United States at 7, Fisher v. Univ. of Tex at Austin, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).
\end{itemize}
affirmative action programs still necessary in providing educational opportunities to minorities. If Marshall were still living, he would view practical realities of today and conclude that the nation is far from achieving racial equality. Hate crimes remain commonplace in Southern states like Mississippi, and Alabama recently in 2000 updated its state law to allow interracial marriages. In 2011, a church in Kentucky would not wed an interracial couple and in 2010, a justice of the peace denied a marriage license to an interracial couple. It is clear that our society has not transitioned completely into racial equality and the idea of black inferiority continues to plague the minds of the American people. The discriminatory history of minorities is a driving source of grave race relations and therefore, diversity and ensuring education benefits for minorities are still compelling interests that deserve protection.

Marshall would find the perpetuity argument unpersuasive and reject O'Connor's overly optimistic dicta that affirmative action programs will not be needed in twenty-five years. Unfortunately, the modern day African American is still viewed as inferior by many Americans. To reverse nearly three hundred and fifty years of racial divide in such a small amount of time is impractical. Grutter occurred forty-nine years after the Brown decision and twenty-five years from the Grutter decision is 2028—nearly seventy-five years after the Brown decision and merely fifteen years from now. Marshall would not believe that seventy-five years of slow-moving progress could reverse nearly so many years of racial segregation. "Old habits die hard" and it will take centuries to improve racial relations in America.

CONCLUSION

Both Justice Powell and Justice Marshall expressed deep veneration for education. They recognized its ability to unlock the doors of success and expand one’s horizons beyond the boundaries of apathy. Though the Justices influenced education in different ways and often had opposing views, their unique jurisprudences were essential in moving the ball forward to educational reform. According to Powell, American politics relied too much on judges' ability to decide great social issues. On a grassroots level, community leaders should determine solutions for the problems that plague society, not nine robed judges.


Marshall believed the Court was a stimulant in motivating communities to act. Litigation was used as a tool to challenge social wrongs when the marginalized became complacent with the status quo and when local authorities inadequately addressed social ills. Even though defining equality resembled a game of tug of war, the justices presented both sides of the argument diligently and laudably. To much avail, their jurisprudence reflected their background experiences. Their two worlds merged while on the bench and each learned something from the other: the Southern white gentleman learned to appreciate the positive change brought by judicial decisions and the Southern black gentleman learned to recognize the community’s significance in transforming law into action.