Do African-Americans Need Immersion Schools? The Paradoxes Created by Legal Conceptualization of Race and Public Education

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Kevin Brown*

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*Associate Professor of Law, Indiana University School of Law. B.S., 1978, Indiana University; J.D., 1982, Yale University. I would like to acknowledge and express my appreciation to many colleagues and other friends whose support and suggestions have been so valuable to this Article. Special thanks to Professors Alexander Aleinikoff, Craig Bradley, Dan Conkle, Anthony Cook, John Dayton, Don Gjerdingen, Dwight Greene, Linda Greene, Carol Greenhouse, Lynne Henderson, Douglas Laycock, David Rabbain, Lauren Robel, John Scanlan, Leland Ware, and David Williams. In addition, I would like to thank John Pratter. An earlier draft of this Article was delivered at the Law and Society Workshop at Indiana University in December 1991 and at the Midwestern People of Color Legal Research Conference in March 1992. I would like to thank the participants of both conferences for their helpful suggestions. I would also like to thank Krystie Herndon for her exceptional secretarial assistance. I would like to thank Scott Gilchrist, Olivia Phillips, Alex Sharma, and Glenda Alexander for their exceptional research assistance, and the Indiana University School of Law and the University of Texas School of Law for the financial support they provided for this Article. I want to also thank my extraordinary wife, Danielle Brown, for the tireless support, love, and care she provided.

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Every time I think about public education, my own experience during the 1960s and the early 1970s is never far from my mind. I attended integrated public schools in a northern suburb of Indianapolis, Indiana from fifth grade through high school. During the early 1970s, I was one of the so-called “lucky blacks” (although many of us still considered ourselves Negroes at the time) who attended the prestigious North Central High School. Blacks comprised approximately ten percent of the four thousand students enrolled at North Central. With the exception of the tracked courses—English literature, math, and science—my classes reflected the overall racial composition of the student body.

Even though I was unaware of it at the time, many aspects of my education embodied cultural conflicts between dominant American culture and African-American culture. As a child, I accepted and believed in the underlying desegregation era assumption that only skin color differentiated blacks and whites. I recount the following incident for the purpose of highlighting the existence of a cultural conflict between dominant American culture—which the traditional educational program incorporates—and

1. The scope of this Article is limited to elementary and secondary education. Unless otherwise noted, the terms “public school” and “public education” refer only to public elementary and secondary schools or public elementary and secondary education, respectively.
African-American culture. The incident occurred shortly after my sixteenth birthday, approximately eight weeks into the fall semester of the 1972-1973 academic year.

My junior year literature class was a tracked course. The purpose of the class was to expose students to a portion of the canon of sacred literary classics that someone like Alan Bloom or E.D. Hirsch\(^2\) thought all red-blooded Americans, regardless of hue, should read. We read many of the classic literary works including Charles Dickens's Great Expectations, William Shakespeare's Julius Caesar, and Nathaniel Hawthorne's The Scarlet Letter. I was one of two black students in a class of approximately thirty students. The teacher was a venerable lady. She was much like one would imagine a female literature instructor. Tall and slender like a willow, she had a kind countenance that confirmed genuine concern for her students.

The class was about to commence reading The Adventures of Huckleberry Finn by Mark Twain. Although my parents\(^3\) were avid readers, I was not familiar with the name Mark Twain at the time. The teacher announced that the class would read portions of Huck Finn out loud. She said something to the effect that, "Mark Twain wrote this book almost 120 years ago and used a unique writing style. I realize that some of you may be offended by the use of certain terminology in the book. I believe, however, that we must read the book the way it was written in order to get the true flavor of Mark Twain's literary style."

The way she said "some of you" captured my attention. I knew through my studies in American history that my ancestors had once been held as slaves by good intentioned, albeit misguided, whites who lived in the Antebellum South. However, compassionate whites residing in the North rectified their hapless condition a century ago. The Yankees, so incensed over this flagrant breach of morality, took up arms against their own brothers to liberate my ancestors. I wondered, "If this Mark Twain wrote his book 120 years ago, what did he think of my ancestors? And, if he were alive, what would he think of me?"

I quickly flipped through some of the pages of the book and my worst fears were realized. This man, this Mark Twain, had used the unforgivable insult "nigger," and his book was deemed a literary classic. Twain used the term so flippantly that it was obvious he did not consider the term an insult to me, my parents, my ancestors, or my race. At that moment, the full realization of my predicament in this classroom struck me like a left hook.


\(^3\) My parents were both public school teachers in the Indianapolis, Indiana public school system during the time I attended desegregated suburban schools. A desegregation lawsuit, commenced with the filing of a complaint on May 31, 1968, embroiled the Indianapolis Public School District in a bitter battle. See United States v. Board of Sch. Comm'rs of Indianapolis, 332 F. Supp. 655 (S.D. Ind. 1971) (holding that the school board operated a segregated school system between 1954 and 1968), aff'd, 474 F.2d 81 (7th Cir. 1973) (declaring last minute policies insufficient to eliminate the consequences of years of discrimination), cert. denied, 413 U.S. 420 (1973).
from George Foreman. I had to sit in this classroom and listen to my white classmates read this book (with this unforgivable insult) out loud!

I raised my hand and my teacher immediately acknowledged me. I broached the subject with what I hoped would appear to be detached objectivity. "I do not think that it would detract from Mark Twain's book if certain terminology were excluded from our reading out loud." My attempt at detached objectivity obviously failed as a bewildered look crossed my teacher's face. I then said with candidness: "I consider it an insult to have this book read out loud with the word 'nigger' in it."

At that moment, the teacher's kind and caring countenance melted into a dispassionate scowl. "Kevin, I'm sorry you feel that way. But this is one of the great literary classics of all time. We will read the book aloud; the way it was written. I'm not going to treat you special just because you happen to be a Negro. Let's begin ... Laura will you read from page fourteen?"

Jim said the witches bewitched him and put him in a trance, and rode him all over the world and tired him most to death. Jim was monstrous proud about it, and he got so he wouldn't hardly notice the other niggers. Niggers would come miles to hear Jim tell about it, and he was more looked up to than any nigger in that country. Strange niggers would stand with mouths open and look him all over.

The irony of Mark Twain's novel lies in his portrayal of Huck Finn as an enlightened boy who rises above the cultural values dominant in the slaveholding society of the Antebellum South. Even today, many teachers use Huckleberry Finn as a lesson to white Americans in understanding black Americans. Such an understanding of Huck Finn was obviously lost on me as a sixteen-year-old high school junior. If my experience was typical, many African-American school children saw Mark Twain's The Adventures of Huckleberry Finn as the epitome of a racist novel.

INTRODUCTION

Since 1954, America has waged a war against racial segregation in its public schools. The legal system remains one of the primary forces behind...
attempts to desegregate the public schools. In the last forty years, over five hundred school districts have been under some form of court-ordered desegregation plan. Driven by both legal and political considerations, an aspiration to fully integrate racial and ethnic minorities with whites in public schools has dominated educational policy. Yet despite the desires, intentions, and efforts of millions of Americans, the war to integrate public schools has not accomplished this objective. New reports indicate that public schools were just as segregated in 1990 as they were in the early 1970s.

In the cases of Board of Education of Oklahoma City v. Dowell and Freeman v. Pitts, the Supreme Court has set the stage for the termination of school desegregation decrees. Termination of these decrees will return student school assignment decisions to the control of local and state education officials. Education officials will be able to re-adopt race-neutral student placement methods, such as neighborhood school assignments and freedom of choice plans. Since the goal of maintaining a desegregated student body will no longer motivate student assignments, the termination of a large number of existing desegregation decrees during the 1990s will result in an increase in racial separation in public schools.

9. This does not deny the existence of significant advances in the reduction of segregation in America's public schools. Much progress occurred in the South. Gary Orfield, Public School Desegregation in the U.S. 1968-80 5 (1983). A 1980 U.S. Department of Education study found that nearly half (48.7%) of the black students living in the Northeast attended schools that were at least 90% minority and that 63% of black students around the U.S. attended schools that had a majority of minority students. Id. at 4.

A recent report on segregation in public schools noted that although no change in desegregation for blacks has occurred since the mid-1970s, there has been an increase in racial isolation elsewhere. Gary Orfield & Franklin Monfort, Racial Change and Desegregation in Large School Districts: Trends through the 1986-1987 School Year 1 (1988). Segregation for Hispanics has increased since the mid-1970s. Id. The report stated that for African-Americans desegregation appears to be related to the existence of court-ordered, as well as voluntary, desegregation plans. Id. at 19. Additionally, only 3.3% of white students now attend schools in central city school districts. Id. at 3; see Gary Orfield, School Desegregation in the 1980's, Equity and Choice, Feb. 1988, at 25 (presenting data showing that desegregation plans adopted by cities are successful, areas that did not adopt school desegregation plans grew "increasingly segregated along racial lines," and segregation among Hispanics remains high and has been increasing).

13. The Supreme Court in Dowell held that school districts that have eliminated the vestiges of their prior discriminatory conduct no longer require court authorization for the promulgation of school policies, including those related to school assignments. Dowell, 498 U.S. at 239. The traditional mandate of the Equal Protection Clause determines the constitutionality of such policies. Id. at 237.
14. Residential segregation of African-Americans in the United States has changed only slightly since 1960. Studies of the 29 metropolitan areas with populations of blacks in excess of 150,000 (representing just over half of the total black population) show residential segregation improved only slightly between 1960 and 1980. Commission on Behavioral and
the times suggests that America's public schools have entered a period where, in the foreseeable future, racial separation will likely become an acceptable result of race-neutral student assignments.

On the heels of the Supreme Court's school desegregation termination opinions are new efforts which, if allowed to proceed, could fundamentally redesign public education for many African-Americans.15 A number of public school systems have considered various educational initiatives specifically designed for African-Americans. The attempt to establish separate educational academies for African-American males was one of the most publicized initiatives. While no public school system currently operates African-American male academies, proposals in both Detroit and Milwaukee resulted in the formal establishment of immersion schools open to any student who wishes to enroll, regardless of race and gender. Another coeducational immersion school, the Ujamaa Institute, opened in New York City in September 1992.16 Immersion schools by design take into account the cultural and social environment of African-Americans. Thus, these schools pursue alternative teaching techniques and strategies to achieve their educational mission.17

As the federal courts abandon school desegregation, this country heads towards more racial and ethnic segregation in public schools. In the absence of significant forces pushing in the direction of integration, the desire to establish immersion schools will increase. I have, therefore, chosen not to focus on either the sagacity of immersion schools or the importance of a cross-cultural education for a racially and ethnically diverse student body preparing to live in a pluralistic society. That emphasis ignores the Hobson's choice presented and implies that a significant increase in the amount of racially integrated public education is a viable alternative to pursue.


15. Throughout this Article, I primarily use the terms "African-American" and "black" to refer to people of African descent who are in America. One of the major points of this Article is that part of what it means to be a black person in this society is to live a part of your life cast in the role of our society's socially constructed meaning for a black person. Others (including other blacks) will treat individual blacks as part of our dominant society's view of black persons. To me, therefore, persons of African descent in America will have their personal identity in many social situations constructed consistent with the dominant social construction of the concept of a black person in this country. My use of the term "African-American" attempts to make the dual connection between people of African descent and American society.

16. In addition to the three public school systems currently operating immersion schools, there are about 350 private Afrocentric academies operating nationwide which educate over 50,000 students. Afrocentric Schools: Fighting a Racist Legacy, U.S. News & World Rep., Dec. 9, 1991, at 74, 74-75. These private schools seem to be having some academic success. In a recent study of 82 black private schools nationwide, over 60% of the schools' students were scoring above national averages in reading and math. Id.

17. This Article limits its scope to situations where school officials propose educational initiatives for African-Americans. Attacks on the traditional educational program by African-Americans, such as the lawsuit filed in New York City charging that its educational program systematically discriminates against African-Americans, are related situations but lie beyond the scope of this Article. See Grimes v. Cavazos, No. 90-4599 (S.D.N.Y. filed July 10, 1990).
The benefit of any education is measured by how well it prepares students to deal with the situations that they will encounter throughout their lives. Given this consideration, immersion schools are attractive because they can account for two aspects that uniquely influence the social and educational environment of African-Americans. First, African-Americans live in a society where common “knowledge” about blacks plays a central role in the dominant American socio-historical experience. In the dominant American culture, this history produces a socially constructed category for African-Americans with particularly negative connotations. Black people occupy a social category where its inhabitants are perceived as poor, lazy, lustful, ignorant, and prone to criminal behavior. African-Americans do not choose, nor can they escape from, this omnipresent social category. Assumptions made about the personality traits of African-Americans attached to their racial-social category often form the hidden backdrop for many of their social interactions in this society. These dominant societal perceptions of African-Americans exert a major influence on many of their experiences. This is simply a matter beyond the control of black individuals.

Second, because of the historical interaction between blacks and whites in America, African-Americans have developed an alternative culture that provides them with a different understanding of their racial group and, hence, their own experiences in this society. As with the influence of dominant American culture, blacks do not choose to be enculturated into African-American culture. African-American individuals generally possess knowledge consisting of ideas, attitudes, opinions, and beliefs that flow from the African-American culture. This culture influences their understanding of their educational experiences.

Immersion schools provide educators with the opportunity to develop teaching strategies, techniques, and materials that take into account the influence of the dominant American and the African-American cultures on the social environment and understandings of African-Americans. Educators can formulate strategies and teach techniques to African-American students to help them successfully overcome racial obstacles. Immersion schools also provide educators with an opportunity to reduce the cultural conflict between the dominant American culture, which is enshrined in the traditional public education program, and African-American culture. This conflict is a primary reason for the poor performance of African-Americans in public schools.

Since education is an acculturating institution, concern about the influence of culture in determining the appropriate educational techniques and strategies is understandable. Educators are necessarily drawn to the influence of culture on the attitudes, opinions, and experiences of individuals. In contrast, the Supreme Court’s interpretation of the Equal Protection Clause argues that government should make decisions by abstracting people from the social conditions which influence them. While education requires that culture—as a molder of people—be taken into account, law
views individuals as self-made. While our legal system may not be blind to the influence of culture on individuals, it tends to assume that individuals choose to be influenced by their culture. For education, cultural influences are important. For law, conversely, they are not.

Because of the interplay between the differing cognitive frameworks of law and education, there is no good solution to the legal problem posed by the establishment of immersion schools. Any legal resolution will lead to a striking paradox. There are three conceivable methods of resolving the legal conflict involving the establishment of immersion schools. The first is to justify immersion schools by viewing them as racially neutral because they are open to all, while ignoring the fact that they are structured to appeal to African-Americans. This conceptualization produces two paradoxes. First, it calls for labeling schools designed for African-Americans as race-neutral. Second, it implies that the impact of culture on individual African-Americans is chosen. The justification for immersion schools, however, rests on the fact that African-Americans are not free to choose the influence which cultural ideology—both dominant and African-American—exerts on their lives.

Second, courts can invalidate immersion schools as violating the Equal Protection Clause. This amounts to a declaration that African-American students experience equal treatment in schools which are not immersion schools. However, education in schools that are not immersion schools remains inadequate because it does not address influences of culture on the social environment created by the dominant culture and the educational experience of African-Americans.

The third resolution would be for courts to uphold the decisions of educators to establish immersion schools because they survive strict scrutiny. In order for immersion schools to survive strict scrutiny, proponents of the schools must provide compelling justifications for their racially motivated decisions. This will force courts to conclude that the deplorable social and educational conditions of African-Americans in traditional school systems constitute those compelling justifications. However, the use of statistics to support this proposition rationalizes derogatory beliefs about African-Americans. One motivation for establishing immersion schools is to provide black students with strategies to overcome society's presumption that blacks are incompetent. Yet in order to provide the compelling interest for this kind of education, proponents of immersion schools must attempt to provide a factual basis that works to justify the presumption of black incompetence. This resolution, therefore, reinforces one of the very problems that makes immersion schools necessary.

Part I of this Article describes why African-Americans need some form of alternative education. The need for alternative education is embodied

19. The opinions in United States v. Fordice show the potential difficulty that our legal system will have resolving this issue. 112 S. Ct. 2727 (1992) (examining a Mississippi higher education de jure segregation scheme). Justices Scalia and Thomas separately addressed the legality of the continued existence of historically black colleges. Id. at 2741-56. For a discussion of the Fordice opinions, see infra notes 276-86 and accompanying text.

20. See infra notes 23-128 and accompanying text.
in the concept of immersion schools. Part II discusses the origin and establishment of immersion schools. Part III addresses how these schools will be conceptualized and discussed for purposes of legal analysis. Finally, the Conclusion focuses on the paradoxes resulting from the legal conceptions of immersion schools.

I. THE NEED FOR ALTERNATIVE EDUCATION

The essential issue raised by immersion schools is whether African-Americans need some form of alternative education that takes into account the social environment created by their African-American culture and the dominant American culture of their racial-social category. Blacks find themselves socially embedded in two different cultures in the central component of race. The ideas about race and blacks present in these cultures conflict and pull in opposite directions. Immersion schools provide educators with the opportunity to develop educational programs for African-American students that are responsive to the contradictory influences of the African-American and dominant American cultures.

Nothing requires this type of education to be conducted by public as opposed to private institutions. However, this country is heading towards more racial and ethnic segregation in its public schools as federal courts abandon school desegregation efforts. The growing realization that there are no longer significant forces pushing integration will incite efforts to use public schools to provide immersion schools. If America was still engaged in efforts to successfully integrate public schools, I would strongly advocate that such education only take place in private institutions such as churches and community centers located within the African-American community. I would counsel against public schools revising their educational programs and policies to meet the needs and interests of African-Americans. Rather, I would urge judges, politicians, and educators to focus on true multicultural education, with the goal of instilling cross-cultural competency of various ethnic cultures in an ethnically diverse student body. Unfortunately in the 1990s, this position fails to consider the current situation and future direction of the racial composition of student enrollments in American public schools.

21. See infra notes 129-80 and accompanying text.
22. See infra notes 181-286 and accompanying text.
A. The Social Construction of African-Americans in Dominant American Culture

In our dominant culture, African-Americans are involuntary inhabitants of a racial-social category constructed with particularly negative connotations. Race is not merely an immutable characteristic, it is also present when the person is present. As a consequence, our society's negative construction of African-Americans threatens to assert itself in many social situations encountered by blacks.

1. Enculturation of Individuals in our Society

What passes as our individual consciousness does not develop in a vacuum. We are not free agents bound only by our own individual choices and understanding of the world. Rather, our consciousness is influenced and conditioned within the context of various historically created cultural systems of meaning. As a result, becoming an individual in American society occurs under the guidance of historically developed cultural systems of meaning. Through a process of acculturation these cultural systems of meaning, including those attached to racial-social categories, are absorbed by the individual.

Culture consists of much more than artifacts or physical objects such as clothing, food, music, or art of a given community. Culture includes a patterned system of knowledge and conceptions that for any given group has evolved from its past and is progressively modified and augmented to account for situations affecting its existence. Culture is an entire way of life shared by members of a given community. It provides various groups with knowledge patterns which they use to interpret reality. It allows individuals in a given community to form, order, and direct their lives. In short, culture is the invisible medium through which all human understanding occurs.

In America, as in any society, a dominant culture prevails. Dominant ideas, attitudes, and beliefs are constantly changing and adjusting to new


situations.30 For example, at one time we believed that cigarette smoking was sophisticated, the Soviet Union would always be our enemy, and drunk drivers were merely a nuisance. Some of our ideas result from a long socio-historical process and run deep in the repertoire of the dominant American belief system. Democracy, pursuit of wealth by the individual, meritocracy, and freedom for individuals are ideas deeply ingrained in our dominant culture.

Our dominant culture also includes common knowledge related to the competence in routine matters and personality traits and characteristics of individuals falling into various social categories.31 Social categories that have a significant influence on our view of individuals in our society include occupation, academic credentials, marital status, race, gender, sexual orientation, socio-economic status, and religion, for example. Our dominant culture tells us to seek the advice of a doctor if we need medical treatment, not a medicine man or a herbalist. It tells us that people with law degrees—when compared to most people in our society—tend to be intelligent, articulate, and highly motivated individuals. Our dominant culture also tells us that people who drop out of high school are more likely to engage in criminal behavior than college graduates.

We rely upon this pragmatic knowledge to interpret our interactions with others. We generally do not view ourselves as drawing upon preexisting ideas derived from cultural ideology to interpret the statements, appearance, and behaviors of others. Rather we often experience such meanings as a reflection of rational deduction from our own objective observations.32 As a result, the human mind will often ascribe to individuals personality traits and other characteristics consistent with those believed to be possessed by people in their particular social category.33 We do this regardless of whether the individuals actually possess these given personality traits.34 Thus, the common knowledge of various social categories in our dominant culture often form this unseen backdrop for our interactions with each other.

30. Thomas Bender, Community and Social Change in America 43 (1978).
31. Id. at 42.
32. "She will believe that her actions are motivated not by racial prejudice but by her attraction or aversion to the attributes she has 'observed' in the groups she has favored or disfavored." Lawrence, supra note 26, at 339. Professor Lawrence illustrates the above point well when he recounts Howard Cosell's famous "little monkey" description of a quick Washington Redskins football player in 1985. Id. Cosell claimed he was making an impartial description of the player. Id. at 339-40; see also Stephen Frosh, The Politics of Psychoanalysis: An Introduction to Freudian and Post-Freudian Theory 46-47 (1987) (presenting an essentially Freudian view of acculturation).
33. Our social relations are therefore in part a function of the ideological structures that dominate our society. Frosh, supra note 32, at 46-47; see also George Lukacs, Reification and the Consciousness of the Proletariat, in History and Class Consciousness: Studies in Marxist Dialectics 83 (Rodney Livingstone trans., 1971).
34. The human mind must think with the aid of generalizations. Once formed, those generalizations become the basis for normal judgments and may operate at a level below their conscious perception. Gordon Allport, The Nature of Prejudice 20 (1954).
Socially constructed categories in the dominant culture are an important part of an individual's identity. This does not mean that individuals are automatically determined by the dominant norms and expectations that flow from the various social categories they inhabit. In fact, individual actors may understand themselves and others within an ideological framework that rejects the notions contained within our dominant culture. Nevertheless, in many social situations people will interpret their statements, appearances, and actions within our dominant cultural understanding. As a result, the dominant social norms and expectations will often form the most important invisible background for interpreting the actions of individuals. Thus, dominant cultural constructions of social categories exert a tremendous influence on the consciousness and experiences that individuals in our society have with others.

We must remember that our dominant cultural ideas are a product of our society's socio-historical experience. As such, these ideas provide an understanding for those enculturated into them regardless of the individual's hue. The culture will continue to exist regardless of the number of individuals operating within the dominant culture.

2. The Connotations Attached to African-Americans

One of the most important social classifications in our society is an individual's race. Our dominant racial attitudes and beliefs are the product of America's particular socio-historical experience. Racial attitudes have played a central role in the American socio-historical experience, the genesis of which predates the founding of the political union itself.

35. Michael J. Sandel, Liberalism and the Limits of Justice 147-54 (1982). In his book, Sandel articulates three conceptions of community. One is what he calls an "instrumental conception" based upon the conventional individualist assumptions which take for granted the self-interested motivations of agents. This account conceives of community wholly in instrumental terms and evokes images of a private society where individuals regard social arrangements as a necessary burden. The second conception is one where the participants have certain shared ends and regard the scheme of cooperation as a good in itself. Their interests are not uniformly antagonistic but in some cases complementary and overlapping. This "sentimental conception" of community is also individualistic since it assumes the antecedent individuation of subjects of cooperation whose actual motivations may include benevolent aims as well as selfish ones. And finally, Sandel notes a third conception of community which he calls "constitutive conception." This occurs when members of a society conceive that their identity is defined to some extent by the community of which they are a part. For them, "community describes not just what they have as fellow citizens but also what they are, not a relationship they chose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity." Id. at 150. It is the notion of a constitutive conception of community that I refer to when I talk about African-Americans being members of a socially constructed category within dominant American culture. That designation in some real way becomes part of who they are.


38. Rutledge M. Dennis, Socialization and Racism: The White Experience, in Impacts of Racism on White Americans 71, 72 (Benjamin Bowser & Raymond Hunt eds., 1981) ("[Racist attitudes] occupy[y] a place in the American value pantheon alongside such concepts as
Throughout history, religious, biological, and culturally deficient explanations have provided the justification for racial attitudes and beliefs. While the dominant social meaning of being black has changed over time, the derogatory terms have always been a part of the black connotation.\(^{39}\) Traditionally, being poor, lazy, lustful, ignorant, and prone to aggressive behavior are traits commonly associated with being black.\(^{40}\)

Today, recognition of the meanings attached to blacks in dominant American culture is not as straightforward as it has been throughout much of American history. Although individuals (of all races and ethnicities) act upon the negative connotations attached to blacks, open expression of such prejudices by individuals is improper.\(^{41}\) Social science data verifies this assertion. This data, for example, indicates a shift in the expressed norm for racial attitudes of whites—from a sanctioned negative attitude to an
obligatory neutral or positive attitude towards blacks. While surveys show that whites overwhelmingly reject blatant forms of discrimination, they fail to show an association with more positive behavior toward African-Americans. Caucasians continue to show opposition to racial change for ostensibly nonracial reasons. As a result, whites accept the goals of integration and equal treatment at an abstract level, but are reluctant to accept the implementation of policies that would bring about those goals.

The political arena also demonstrates the continued viability of negative connotations attached to African-Americans in dominant American culture. Even though the number of African-American elected officials has increased tremendously, these officials rarely win outside of predominantly black voting districts. In districts with a significantly white elector-

42. James M. Jones, The Concept of Racism and its Changing Reality, in Impacts of Racism on White Americans 27, 30 (Benjamin P. Bowser & Raymond G. Hunt eds., 1981); see also Thomas F. Pettigrew, New Patterns of Racism: Different Worlds of 1984 and 1964, 37 Rutgers L. Rev. 673, 690-91 (1985). But see Lynn Duke, Whites' Racial Stereotypes Persist; Most Retain Negative Beliefs About Minorities, Survey Finds, Wash. Post, Jan. 9, 1991, at A4. In a nationwide survey conducted by the National Opinion Research Center at the University of Chicago 62% responded that African-Americans “are more likely to be lazy” and 53% responded that African-Americans are “less intelligent.” Id. A 1990 survey by the National Opinion Research Center found that 62% of whites rated blacks as lazier than whites, and 78% thought blacks were more likely to prefer welfare to being self-supporting. Id. Yet, for most of this century, blacks were actually more likely to work than whites. A greater percentage of African-American men than white men were in the work force from 1890 until World War II. Current statistics indicate 69.5% of African-American men are in the work force compared to 76.4% of white men, and black women outpaced white women until 1990. See Jeannye Thornton et al., White Myths About Blacks, U.S. News & World Rep., Nov. 9, 1992, at 43.

43. Jones, supra note 42, at 30; Pettigrew, supra note 42, at 688-89. An example of subtle racism is the remarkable experience that light-skinned blacks have when they converse with whites who are not cognizant of their color. Even if the conversation did not involve blatantly racist topics, light-skinned blacks found that the whole tenor of the conversation changed once their race was known to one more akin to a superior-subordinate relationship. Neil Gotanda, A Critique of “Our Constitution is Color-Blind,” 44 Stan. L. Rev. 1, 27 (1991) (“The moment of racial recognition is thus characterized by an unconscious assertion of the racial hierarchy. . . .”)

The characterization of the Fourteenth Amendment as one that potentially aids blacks and serves “special interests” (and all the stigmas attached to that concept) is another example of a non-overt negative attitude. In the liberal-integrationist framework any regulation that allows for disparate treatment is disfavored, hence the devaluation of the Fourteenth Amendment by characterizing it as a “special interest” amendment (as opposed to the First Amendment which is presumed to be more important because it is “universal”). See Lawrence, supra note 39, at 475.

44. Pettigrew, supra note 42, at 690-91.


African-American candidates often receive fewer votes in elections than polls conducted prior to the election indicated. This suggests that the aversion to an African-American candidate runs deeper than openly expressed by voters. Professor Edsall has noted how these negative attitudes toward African-Americans provide the primary explanation for the success of Republicans in presidential elections from 1968 to 1988. According to Professor Edsall, presidential politics refer to African-Americans in the form of a debate about certain core issues, such as crime (propensity for aggressive behavior), welfare (poor, lazy, and lustful), and affirmative action (lack of intelligence). These issues, although neutral on their face, contain deep racial meaning.

Confusion regarding dominant beliefs about African-Americans today may relate to the following: On one hand, "negative stereotypes" about African-Americans are irrational and are, therefore, discouraged; while on the other hand, objective social statistics can verify such stereotypes. Our society views abstract racism as irrational. Personality characteristics and traits actually possessed by individuals should form the criteria for judgments. Since internal personality traits and characteristics are not ascertainable from appearance, a person's appearance is irrelevant. Skin color should be an apolitical description of a person. When people attach undue significance to skin color or any trait based upon physical appearance, they do not judge the person upon his or her personal characteristics and traits.

Judgments based on racial stereotyping have roots in the irrationality of stereotypes. The attachment of undue significance to race impairs the
It acts to distort the cognitive process of adjudicators. People have a more difficult time perceiving the actual qualities of an individual whom they have stereotyped. Condemnation of abstract racism also contains a moral aspect. Society views race-based decisions as particularized wrongs because they violate the societal goal of fair and individualized decisionmaking. Judging people based on the color of their skin rather than on the content of their character ignores their individuality.

This abstract version of racism does not, nor is it intended to, reflect the complex social reality of discrimination in our society. We live in a country where racial inequality is the norm. African-Americans, as a social group, are worse off than their Caucasian counterparts in almost every observable aspect of their existence. Statistics show African-Americans at the bottom of numerous classifications valued by society including income, wealth, education, home ownership, and life expectancy. At the same time, African-Americans are at the top of statistics in categories despised by our society, such as unemployment, crime, poverty, school dropout rates, and

51. Jones, supra note 42, at 27.


53. T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1063 (1991) ("Race-consciousness ... is disfavored because it assigns a value to what should be a meaningless variable.").

54. Indeed, the assimilationist-integrationist philosophy generally "sees Negro ghettos as products of racial segregation that should not even exist. Hence, nothing in the traditions of ghettos are worth preserving even when ghettos do exist in actuality." Harold Cruse, The Crisis of the Negro Intellectual 234 (1967) (emphasis in original); see also Gary Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1151, 1154 (1985). For a criticism of this theory, see Michael W. Apple, Ideology and Curriculum 57-60 (1979).

55. Martin L. King, Jr., I Have a Dream Speech (Aug. 28, 1963), in A Testament of Hope: The Essential Writings of Martin Luther King, Jr. 217, 219 (James M. Washington ed., 1986) ("I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by content of their character.").

56. Kristin Bumiller, The Civil Rights Society: The Social Construction of Victims 10 (1988); see also Shelby Steele, The Content of Our Character 5 (1990) ("Race is a separate reality in American society, an entity that carries its own potential for power . . . ").

57. The argument can and has been made that statistics apply to the group and not to the individual. As early as the 1840s, Jakob Friedrich Fries argued that "statistical laws apply only to the mass, and are without significance for individuals." Henry L. Gates, Statistical Stigmata, 11 Cardozo L. Rev. 1275, 1279 (1990) (quoting from Theodore M. Porter, The Lawless Society: Social Science and the Reinterpretation of Statistics in Germany, 1850-1880, in 1 The Probabilistic Revolution 351, 359 (Lorenz Kruger et al. eds., 1987)). The Supreme Court also adopted this reasoning in McCleskey v. Kemp. 481 U.S. 279 (1987) (holding that statistical evidence suggesting that the victim's race is a significant factor in determining who gets the death penalty is irrelevant as to the question of whether or not an individual defendant's sentence of death was impermissibly influenced by race). While I can agree in part with that proposition, it simply leads to the conclusion that individual African-Americans can overcome, in many instances, the negative connotations attached to being African-American. It does not refute, however, that those connotations will influence many of their social relationships.
PARADOXES OF LEGAL CONCEPTUALIZATION

the number of prison inmates.\textsuperscript{58} While abstract racism is irrational, this socially verifiable racism is not. Racism gets its support through observable evidence found in the social conditions of African-Americans.

One can believe that the current socio-economic condition of African-Americans is the result of socio-historical factors. Therefore, it is not necessary to believe that the current condition of African-Americans is attributable to some inherent flaw in their biology, their culture, or God's intention. Nevertheless, statistics do reveal that African-Americans score lower on standardized tests (proxies for intelligence).\textsuperscript{59} African-Americans have a higher conviction rate for violent crimes and constitute a much larger percentage of the prison population than the general population (proxies for tendencies toward violence and criminal behavior). African-Americans earn less money and are more likely than whites to be unemployed or live below the poverty line (proxies for indolence). Therefore, people who make value judgments about African-Americans as a group justify their negative judgments by referring to these statistics. Hence, in many social contexts, negative stereotypes of African-Americans appear to be rational judgments based upon objective evidence detailing their social conditions. To avoid these negative inferences, individuals must ignore otherwise legitimate evidence regarding people who inhabit a given social category. Obviously, if these statistics were tied to high school dropouts, for example, there would be little social disapprobation in using them to judge personality characteristics.

People often fail to ignore this evidence in favor of an abstract form of reasoning regarding African-Americans. Asking individuals to ignore race in determining the personality characteristics of people is asking them to be irrational. I do not attempt to rationalize or justify racism. Rather, I attempt to demonstrate, as Professor Lawrence has argued, that negative judgments about African-Americans often carry the perception of rational judgments.\textsuperscript{60}

Eliminating this form of rationalized racism requires fundamental changes in our underlying economic, educational, and political institutions. Both massive affirmative action programs and redistributions of wealth are necessary changes. A short perusal of the debates regarding the Civil Rights Act of 1991 reveals there is little desire in American society to engage in any fundamental socio-economic restructuring. Proponents of the bill were

\textsuperscript{58} In 1986, 45.3\% of those behind bars in America were African-Americans. Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 197 (1992). The unemployment rate among African-Americans in 1990 was 11.3\% compared to 4.1\% for whites. In fact, the unemployment rate for blacks has exceeded 10\% in every year since 1975. Id. at 103. The life expectancy at birth for white females in 1989 was 79.2 years, black females 73.5 years, white males 72.7 years, and black males 64.8 years. U.S. Bureau of the Census Statistical Abstract of the United States: 1992, at 77 (112th ed. 1992). In 1991, the median family income of African-Americans was $21,423 while that of whites was $36,915. Id. at 451. Moreover, while only 10.7\% of whites lived below the poverty line, 31.9\% of African-Americans lived below that line. Id. at 457.

\textsuperscript{59} The average African-American SAT score is 737; for whites it is 933. Hacker, supra note 58, at 142.

\textsuperscript{60} Lawrence, supra note 26, at 386-39.
quick to note it was not a “quota bill” despite President Bush’s suggestions to the contrary. Undoubtedly, the political realities that would emanate from such a characterization concerned proponents of the Civil Rights Act of 1991.61


It is possible for individuals to maintain a discrete distance from some social categories they inhabit in our dominant culture. However, other social categories are important determinants of an individual’s identity or an individual’s perceived identity by others. Therefore, they exert a tremendous influence on an individual’s experiences in society regardless of the individual’s efforts to resist.62 Two important factors allow individuals to personally influence what categories they inhabit in our dominant culture. First, individuals in our society control, to some extent, a number of choices which place them in various social categories. For instance, individuals can choose certain occupations and are able to change those occupational choices. Individuals can influence their academic credentials. Arguably, individuals in our society can change their religious affiliations.63 Second, the most significant social categories in the dominant culture to which the individual belongs, such as those flowing from job occupations, academic credentials, sexual orientation, most religious affiliations, and economic status, are not readily apparent. Individuals often have control over the introduction of the meaning associated with these social categories in our dominant culture. People do not interject their occupation, religious affiliation, educational credentials, economic status, or sexual orientation into every social context that they encounter.

In contrast, race is not a social category in our dominant culture over which an individual possesses control. Since it is generally a visible characteristic, race is present when we are present. Even though everyone belongs to a race of people, African-Americans are set apart from other races by the negative connotations attached to their blackness. The conno-

61. See, e.g., On Civil Rights: No Steps Back, N.Y. Times, Aug. 6, 1990, at A12 (“The bill is a no quota bill.”); Steven A. Holmes, On Job Rights Bill, A Vow to Try Again in January, N.Y. Times, Oct. 26, 1990, at A25 (“The bill’s proponents argued at first that their bill did not go beyond Griggs, and that because there had not been a pervasive use of quotas since Griggs, the measure would not foster quotas.”); Steven A. Holmes, Rights Leaders Reject Bush Proposal, N.Y. Times, Oct. 22, 1990, at A15 (“Congressional Democrats and civil rights figures today denied that their bill would lead to quotas as the Administration has contended.”); Neil A. Lewis, President’s Veto of Rights Measure Survives by One Vote, N.Y. Times, Oct. 25, 1990, at A1 (“The measure’s supporters insist that it was not a quota bill . . . ”).


63. Some religious adherents argue that their pursuit of religious affiliation arises because God directed them in this path. Their affiliation is therefore not a product of their choice. See Michael J. Sandel, Religious Liberty—Freedom of Conscience or Freedom of Choice? 1989 Utah L. Rev. 597, 608-14.
tations attached to dark skin in this society are generally negative. Therefore, being classified as an African-American in our dominant culture results in persistent inequality in many social interactions. African-Americans constantly confront a set of socially constructed meanings regarding their suitability for a particular job, motivation level, intellectual and physical abilities, morality, sexuality, bargaining skills, desirability as neighbors, and financial status. Our dominant culture says that African-Americans are less intelligent. This knowledge affects blacks in social contexts where intelligence is important. Our dominant culture says that African-Americans have less money than their Caucasian counterparts. This knowledge affects blacks in business settings and social contexts where financial status is an important factor. Our dominant culture says that African-Americans are prone to crime and violence. This knowledge affects blacks in social contexts where others fear for the loss of their property or sense a threat of physical danger.

As a consequence, no other individual factor so thoroughly influences the social experiences of African-Americans as their skin color. It does not

64. Aleinikoff, supra note 53, at 1062. Professor Steele has written that “in America to know that one is not black is to feel an extra grace, a little boost of impunity.” Steele, supra note 56, at 4.

65. In a recent study, the Urban Institute intended to determine the amount of discrimination that exists in the employment market. They sent out one white and one black applicant whose experience, education, age, physical appearance, demeanor, articulateness, and energy level were as similar as possible. The study also created personal biographies for the applicants that were identical with respect to the jobs sought. While the study found that two-thirds of the job applicants were treated equally, it also found that in 20% of the cases the white applicant advanced further than the black applicant, and in 7% of the cases the black applicant advanced further than the white applicant. The research appears to contradict the claim that hiring practices favor blacks with equal qualifications. Margery A. Turner et al., Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring 5-6 (Urban Inst. ed., 1991).

A 1991 listing by Business Week of the chief executives of America’s 1,000 largest corporations showed only one black: Erroll B. Davis, chairman of a Wisconsin utility holding company. Hacker, supra note 58, at 108.

66. Feagin, supra note 45, at 110.

67. See, e.g., Ian Ayers, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817 (1991) (discussing a study which revealed that African-Americans paid more than twice the markup for a new car than white males paid and more than white women paid).

68. Common Destiny, supra note 14, at 49-51 (estimating that in many metropolitan areas one-quarter to one-half of all rental inquiries by blacks are met with clearly discriminatory responses); Margery A. Turner et al., Housing Discrimination Study: Synthesis VI (Dept’ of Hous. Urban Dev. ed., 1991) (reporting that a study of 25 metropolitan areas disclosed that 59% of black home buyers experienced some form of discriminatory treatment); see also Reynolds Farley & Walter R. Allen, The Color Line and the Quality of Life in America 103 (1987); Peter J. Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am. J. Econ. & Soc’y 185 (1985).

69. See, e.g., Feagin, supra note 45, at 105-08 (noting that blacks regularly report poorer service at restaurants and hotels, and harassment and surveillance while shopping); Lena Williams, When Blacks Shop, Bias Often Accompanies Sale, N.Y. Times, Apr. 30, 1991, at A1.

70. For the difficulties faced by light-skinned blacks who can pass for whites, see Judy Scales-Trent, Commonalities: On Being Black and White, Different and the Same, 2 Yale J.L. & Feminism 305, 305 (1990). See also Gotanda, supra note 43, at 61 n.247 (stating that whites
matter how hard individual African-Americans resist; notions of racial inferiority continue to exert a tremendous influence on their lives. They are under a constant reminder that part of their life is a function of what it means to be a black American as defined by our dominant culture. The

71. See, e.g., Kimberle W. Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1358 (1988) ("The most significant aspect of Black oppression seems to be what is believed about Black Americans, not what Black Americans believe."). Psychological studies have found that overhearing a racial slur in a group context will cause the individual listeners to evaluate members of the slurred group more harshly in the future. Jeff Greenberg & Tom Pyszczynski, The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease, 21 J. Experimental Soc. Psychol. 61, 69-70 (1985). Interestingly enough, this group-thought only occurs when the black's slur-inducing action serves to confirm racist stereotypes. Id. "Atypical" positive performances by blacks do not trigger reciprocal, positive occurrences of group-thought among whites. Id.

72. For more in-depth discussions of this meaning, see Aleinikoff, supra note 53, at 1069-72. Kenneth Clark noted long ago that children's attitudes toward blacks are determined chiefly by "contacts with the prevailing attitudes towards negroes. It is not the negro child, but the idea of the negro child, that influences children." Clark, supra note 26, at 25-26. In The Fact of Blackness, Frantz Fanon describes what it is like when a black person attempts to ignore being cast in the socially constructed role of a black person.

I came into the world imbued with the will to find a meaning in things, my spirit filled with the desire to attain the source of the world, and then I found that I was an object in the midst of other objects. Sealed into that crushing objecthood, I turned beseechingly to others. Their attention was a liberation, running over my body suddenly abraded into non-being, endowing me once more with the agility that I had thought lost, and by taking me out of the world, restoring me to it. But just as I reached the other side, I stumbled, and the movements, the attitudes, the glances of the others fixed me there, in the sense in which a chemical solution is fixed by a dye. . . . I wanted to be a man, nothing but a man. Some identified me with ancestors of mine who had been enslaved or lynched . . . "Understand, my dear boy, colour prejudice is something I find utterly foreign . . . But of course, come in, sir, there is no colour prejudice among us . . . Quite, the Negro is a man like ourselves . . . It is not because he is black that he is less intelligent than we are . . . I had a Senegalese buddy in the army who was really clever . . . "Look at the nigger! . . . Mama, a Negro! . . . Hell, he's getting mad . . . Take no notice, sir, he does not know that you are as civilized as we . . ." My body was given back to me sprawled out, distorted, recoloured, clad in mourning in that white winter day. The Negro is an animal, the Negro is bad, the Negro is mean, the Negro is ugly; look, a nigger, it's cold, the nigger is shivering, the nigger is shivering because he is cold, the little boy is trembling because he is afraid of the nigger, the nigger is shivering with cold, that cold that goes through your bones, the handsome little boy is trembling because he thinks that the nigger is quivering with rage, the little white boy throws himself into his mother's arms: Mama, the nigger's going to eat me up.

Frantz Fanon, The Fact of Blackness, in Anatomy of Racism 108-11 (David T. Goldberg ed., 1990); see also id. at 112-26 (discussing an African person's view of this phenomena). As is so in the above piece, when African-Americans attempt to live with the concept of the knowing individual who is self-determining and self-generating, they are constantly reminded of the social construction attached to their existence in the dominant culture of many countries, including America. This point was also made during the black power movement of the 1960's by Stokely Carmichael and Charles Hamilton. "[W]e must realize that race is an overwhelming fact of life in this historical period. There is no black man in this country who can live 'simply as a man.' His blackness is an ever-present fact of this racist society, whether he recognizes it or not . . . ." Stokely Carmichael & Charles V. Hamilton, Black Power: The Politics of Liberation in America 54 (1967).
background conditions attached to racial-social categories by the dominant American culture are not transitory. Rather, these conditions will form the unseen backdrop for many important social encounters of African-Americans throughout their lives.\(^7\)

It is a common statement that being white means not having to contemplate one's race.\(^7\) Even though Caucasians also have a race, the perception of whiteness does not convey any important information about the individual in dominant American culture. Within dominant American culture, whites act against a neutral racial background. In comparison to blacks, whites have the advantage of not being assigned to a social category where people will presume they are inferior, incompetent, and unworthy of respect. Dominant group members generally do not experience the reality of having their racial identity scripted by our dominant culture.\(^7\)

Blacks

\(^{73}\) As Professor Delgado has stated, there is one structural feature of human experience [that] separates people of color from our white friends, accounting in large part for our differing perceptions in matters of race. This structural feature which dwarfs almost everything else is simply stated: white people rarely see acts of subtle racism, while minority people experience them all the time.


\(^{74}\) Some scholars have noted that to be white is to be free from confronting the importance of race on a daily, personal, interaction-by-interaction basis. See, e.g., Alan Freeman, Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay, 23 Harv. C.R.-C.L. L. Rev. 295, 357-58 (1988) (contrasting the experiences of whites in experimental situations where they are the minority). Being white, one may be unaware of the importance of race in daily, personal interaction; however, race is still an important concept for whites. The importance may simply be the assumption that it is unimportant.

Professor Aleinikoff, paraphrasing Professor Rich’s comment about white feminists, stated:

I believe that [whites] today, raised white in a racist society, are often ridden with white solipsism—not the consciously held belief that one race is inherently superior to all others, but a tunnel-vision which simply does not see nonwhite experience or existence as precious or significant, unless in spasmodic, impotent guilt-reflexes, which have little or no long term, continuing momentum or political usefulness.


This simply results from what Kenneth Karst notes as defining the community in such a way as to exclude subordinated groups. Kenneth L. Karst, Belonging to America 3 (1989). If you are a member of the community, you may not be aware of the effect of the community’s label on you individually. Robert Blauner argues that the only whites who are race conscious in the modern era are the conservatives—especially the Southern conservatives and white supremacists. Robert Blauner, Racial Oppression in America 267 (1972).

\(^{75}\) Aleinikoff, supra note 53, at 1084. As Fredrickson has noted, racist assumptions “are rarely subjected to careful scrutiny because they seem so natural, so much a part of us.” Fredrickson, supra note 39, at 331-32. Rutledge M. Dennis, in a 1981 article, noted that there was little information on the consequences of racism for whites. Dennis, supra note 38, at 72-73 (noting (1) the scarcity of information on the consequences of racism for whites, and (2) the disinterest of whites in critically analyzing their assumptions about blacks). He also noted that whites felt little need to critically analyze their assumptions about blacks, because they
and whites, therefore, occupy different social worlds in our dominant culture even when they physically coexist.

B. The History of Public Education

In order to understand the appeal of immersion schools, it is necessary to understand the nature of the traditional public education program in our society. Since public education is one of our social institutions, it is a product of a history. My purpose is not to criticize the traditional model of public education or the motives of those who advanced it. Rather, my purpose is to provide an understanding of public education in order to demonstrate why immersion schools may solve the educational problems of African-Americans.

1. The History of the Traditional (Assimilationist) Model of Public Education

Since the arrival of the English colonists in America, public education has functioned as a tool to promote Anglo-American cultural values. The basic concept of public elementary education has its origins in the nineteenth century. It emphasized the need to inculcate cultural values and basic social skills. Horace Mann, the first Secretary of Education of Massachusetts, did more than anyone to influence the American conception of public education. He instilled in the minds of Americans the idea that education should be universal and free, with its primary aims being advancement of social efficiency, civic virtue, and character. Mann was a passionate believer in the primacy of the socializing function of public schools. Education was a means to make future workers more productive, by increasing their knowledge. However, the primary virtue of education was to inculcate the proper values and behavior patterns needed for a

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already had the answers. Id. at 73.

The same point has been made with respect to religion. Some argue that one cannot understand the experience of the Holy, in a religious sense, unless one has had it. See Rudolf Otto, The Idea of the Holy (Oxford Univ. Press 1950) (1925) (inquiring into the non-rational nature of the divine and relationships to the rational); see also Ninian Smart, The Philosophy of Religion 9 (1970).


compliant work force.\(^7\) Mann saw public schools as institutions of social control, believing that public schools would assuage the poor of their hostility towards the rich.\(^8\) Henry Barnard, another influential public school architect of the nineteenth century, also championed public schools as places to inculcate proper values.\(^9\)

The rapid industrialization of American urban areas in the latter part of the nineteenth century and early part of the twentieth century created an economic need for labor from immigrating white ethnics. However, the Anglo-American ruling class feared the dilution of the "superior" dominant Anglo-American culture.\(^10\) The expressed desire of educators to "Americanize" the immigrants proved to be a potent force in augmenting support for public and compulsory education.\(^11\) Public schools and compulsory attendance laws spread most rapidly in states having the greatest influx of non-Anglo immigrants. During this time, several changes in the educational program of public schools reflected this "Americanizing" agenda. Fifteen states banned the teaching of foreign languages in public schools.\(^12\) Many state legislatures enacted statutes mandating courses in United States history and citizenship and requiring all instruction in public schools to be conducted in English.\(^13\)

Schools became the celebrated arsenal of the moral crusade to make the children of immigrating cultural minorities tolerable. For example, a

\(^{79}\) See generally Horace Mann, Report for 1848, in Annual Reports on Education 640, 701-09 (1868).

\(^{80}\) Mann also believed the French Revolution would not have occurred with free public schools. Horace Mann, Lectures on Education, in Life and Works (Mary Mann ed., 1891).

\(^{81}\) Barnard frequently expressed his disdain for the immigrant poor:

No one at all familiar with the deficient household arrangements and deranged machinery of domestic life, of the extreme poor and ignorant, to say nothing of the intemperate—of the examples of rude manners, impure and profane language, and all the vicious habits of low bred idleness, which abound in certain sections of populous districts—can doubt, that it is better for children to be removed as early and as long as possible from such scenes and examples.


\(^{82}\) The formative members of the curriculum field and most early leaders in education were of Anglo-Saxon descent. Apple, supra note 54, at 70.

\(^{83}\) Collins, supra note 77, at 102.

\(^{84}\) See Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 314 (1986).

\(^{85}\) See generally David Tyack et al., Law and the Shaping of Public Education 1785-1954 (1987). The number and percent of states proscribing patriotic instruction or rituals in 1903 and 1923 were:

<table>
<thead>
<tr>
<th>Category</th>
<th>1903</th>
<th>1923</th>
</tr>
</thead>
<tbody>
<tr>
<td>History of U.S.</td>
<td>30 (67%)</td>
<td>49 (90%)</td>
</tr>
<tr>
<td>Citizenship</td>
<td>1 (2%)</td>
<td>39 (81%)</td>
</tr>
<tr>
<td>Flag Displays</td>
<td>17 (38%)</td>
<td>39 (81%)</td>
</tr>
<tr>
<td>All Instruction in English</td>
<td>14 (31%)</td>
<td>35 (73%)</td>
</tr>
</tbody>
</table>

Id. at 171.

In 1885, only 11 states mandated American History by law and only 9 states required instruction be conducted in English. Id. at 170. The campaign to mandate patriotism by law gained momentum in the 1890's and accelerated after World War I. Id.
New York State Assembly report addressing the need for universal schooling stated, "[L]ike the vast Atlantic, we must decompose and cleanse the impurities which rush into our midst, or like the inland lake, we shall receive their poison into our whole national system."86 Elwood Cubberley, one of the most influential educators of his time, also clearly stated the major goals of common public schools:

Our task is to break up these [immigrant] groups . . . to assimilate and amalgamate these people as part of our American race, and to implant in their children, as far as can be done, the Anglo-Saxon conception of righteousness, law and order, and popular government, and to awaken in them a reverence for our democratic institutions and for those things in our national life which we as a people hold to be of abiding worth.87

"Assimilation" was the term given to the incorporation of immigrants into American society.88 The term served to describe public and private programs aimed at forcing the immigrants and their children to accept the Anglo-American culture.89 What lay behind the beneficent promise of public education was an attenuation of the immigrants' cultures.90 Thus, the ethnic immigrants' cultural heritage, values, and perspectives were not the subject of genuine concern in public schools, rather, they were the object of antipathy.91

86. Carl Kaestle, The Evolution of an Urban School System 141 (1973); see also Apple, supra note 54, at 66.
87. Ellwood P. Cubberley, Changing Conceptions of Education 15-16 (1909). Cubberley also described the Southern and Eastern European immigrants who arrived after 1880 as "[i]literate, docile, lacking in self-reliance and initiative, and not possessing the Anglo-Teutonic conceptions of law, order, and government, their coming has served to dilute tremendously our national stock, and to corrupt our civic life." Id. at 15.
88. Assimilation describes both a process and an ideology. It describes the process by which an ethnic group acquires and accepts the culture of the mainstream society, including its cultural values, heritage, and perspective. As an ideology, assimilation suggests that the ethnic group should acquire and accept the dominant culture. The assimilation model of public education advances both the ideology and the process of assimilation. Assimilation also has two different aspects. One aspect of assimilation focuses upon the "structural assimilation" of the assimilating group into America's dominant lifestyle. This is exemplified by integrated neighborhoods, integrated work environments, interracial marriages, integrated churches, and desegregated schools. The second aspect of assimilation is "cultural assimilation," whereby the assimilating ethnic group adopts a shared language, similar behavior patterns, and a core set of attitudes, beliefs, and opinions of the dominant American society, including its cultural heritage and perspective. Hence, one of the elements necessary to belonging to American society is, in the extreme sense, the abandonment of one culture in favor of another. Karst, supra note 74, at 2. Traditional public education, in general, advances cultural assimilation, because it attempts to transmit dominant American cultural values and heritage to all school children from the dominant American cultural perspective. Id.
89. See, e.g., Gleason, supra note 76, at 80-96; see also Karst, supra note 74, at 84.
90. Apple, supra note 54, at 63-64 ("Schools do not only control people; they also help control meaning. Since they preserve and distribute what is perceived to be 'legitimate knowledge' . . . "). "Anglo conformity" came to dominate the idea of assimilation. Karst, supra note 84, at 312.
91. Robert Stevens notes how the notions of ethnic superiority of native Anglo-Americans played into the expansion of educational requirements for the practice of law. Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 92-111 (1983).
However, the assimilation of voluntary ethnic immigrants advanced by public schools need not be viewed as negative. Learning the language and culture of the dominant group certainly increased the ability of voluntary immigrants to obtain the economic and political rewards for which they came to America. Moreover, many of these voluntary immigrants were eager to learn the dominant culture of America. After all, it was the promise of the benefits that existed in America which brought them to America in the first place.

2. Application of the Traditional Model of Public Education to African-Americans

The Supreme Court's opinion in *Brown v. Board of Education*\(^9\) ignited an educational reform movement for African-Americans. However, the logic animating that reform movement was a replication of the same educational logic used two generations earlier in response to the non-Anglo European immigrants. Just as schools were supposed to repress the native culture of the immigrants, they were to do the same with African-Americans. As a result, the assimilating educational logic became sound educational theory to be applied to African-Americans in schools.\(^9\)\(^3\) These premises and structures of public education remained intact.\(^9\)\(^4\)

Educational reforms also incorporated many of the assumptions about African-Americans that formed the basis of the Supreme Court's *Brown* opinion. The Court asserted that racial isolation stifled the intellectual and psychological development of African-Americans.\(^9\)\(^5\) Accepting the Court's view as gospel, educational reforms for African-Americans—like those for non-Anglo European immigrants—were dominated by a "cultural deprivation paradigm."\(^9\)\(^6\) The popular notion of "cultural deprivation" viewed

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Increasing educational requirements for admission to the bar to reduce the number of poor and immigrants becoming lawyers was among the arguments made by legal educational reformers during the period from 1880 to 1930. Id. at 99-100. Entry into the legal profession could also be limited to those who shared the proper moral values and ideology. Id. at 100.

\(^9\)\(^2\) 347 U.S. 483 (1954).


\(^9\)\(^4\) Banks, supra note 24, at 31.

\(^9\)\(^5\) 347 U.S. at 494.

\(^9\)\(^6\) See, e.g., Banks, supra note 24, at 46. See generally Carl Brereiter & Seigfried Engelmann, *Teaching Disadvantaged Children in the Preschool* (1966). One review of studies on the need to make changes to address the educational problems of the disadvantaged and minority children found that 82% of the studies stressed the need to make changes in the children, and only 8% saw a need to change the school. Joe Frost & Glenn Hawkes, *The Disadvantaged Child* 278 (1966).

During the late 1960s, two African-American psychiatrists, William Grier and Price Cobbs, pointed to the existence of this inferiority consciousness in Americans. They argued that the culture of slavery still infected the American consciousness. Our country simply dropped its slaveholding cloak, but the inner feelings remained the same. William H. Grier & Price M. Cobbs, *Black Rage* 34 (1968).
black children as imprisoned in a deficient culture.97 The school's mission was to help African-American children repudiate their culture and associated ideas.

As Professor Banks has pointed out, the two major goals of educators during this movement were to raise the self-concepts of ethnic minority youths and to increase their racial pride.98 Educators assumed that students with healthy self-concepts were better learners and thus would fare better in school.99 However, the movement embodied the notion that the self-concept of ethnic minorities would improve by a portrayal of blacks as essentially colored whites.100 For example, the changes made by commercial textbook publishers were not substantive but biological. Dick and Jane retained all of their usual middle-class social and behavioral traits, but were given black and brown faces.101 Traditional instructional programs underwent revision to recognize previously neglected contributions of individual ethnic minorities. However, to be acknowledged, the individuals had to satisfy the Anglocentric norms of acceptability and excellence.102 Thus, attempts to include African-Americans resulted in ethnic content grafted onto the white instruction typified by traditional educational programs.103

The establishment of a number of cultural enrichment programs followed these changes in the curriculum. Trips to concerts, art galleries, scientific laboratories, and museums became part of the educational system.104 The purpose of these programs was to expose minority children to the artifacts and traditions of America's mainstream.105 However, no
corresponding programs exposed white children to important social institutions in the African-American community. The underlying message of this one-way exposure was that racial minorities would improve by simply dropping their deviant cultural traits and attitudes and adopting the requisite mainstream characteristics.\textsuperscript{106}

3. Why the Assimilationist Model of Public Education Does Not Work

Since public educators treated African-American culture the same way they treated the culture of voluntary immigrants, they could not address the educational implications of the differences between the cultures of African-Americans and voluntary immigrants. Those differences may very well be important for restructuring education for African-Americans. Rectifying the failure to take account of those differences is one of the primary goals of immersion schools.

Parents, teachers, and personal characteristics of students, as well as the material resources, educational practices, and school policies (including tracking and disciplinary practices), are significant factors influencing the public education experience of individual ethnic minority students. The degree of cultural conflict existing between a school’s traditional Anglocentric culture\textsuperscript{107} and a student’s ethnic culture is another significant factor.\textsuperscript{108}

Generally, the assimilationist model of public education has succeeded when applied to voluntary immigrants from non-Anglo Europe,\textsuperscript{109} Central America,\textsuperscript{110} and Asia. However, this success has not occurred with those ethnic groups who did not voluntarily choose incorporation into American society, such as American Indians, African-Americans, and certain Latino

\begin{footnotes}
\item[106] Mildred Dickeman, Teaching Cultural Pluralism, in Teaching Ethnic Studies: Concepts and Strategies 5, 19 (James A. Banks ed., 1975); see also Jones, supra note 42, at 40-45.
\item[107] One commentator sees traditional university education in America as “a bastion of racism... striving desperately to maintain the status quo.” Houston A. Baker, Jr., The Journey Back: Issues in Black Literature and Criticism 130 (1980).
\item[108] Irvine, supra note 28, at xvii-xxi.
\item[109] There is little doubt that certain non-Anglo European ethnic groups are more assimilated than others. Ethnicity is stronger among Eastern, Southern, and Central European descendants than it is among Northern and Western European descendants. All of these groups, however, are far more culturally and structurally assimilated in the United States than African-Americans. Traditionally, educational historians have maintained that the schools played a major role in Americanizing the Southern, Central, and Eastern European immigrants and helping them to attain upward social mobility. Banks, supra note 24, at 30-31 (contending, as a revisionist historian, that the school’s role in assimilating immigrants and helping them to attain social mobility has been greatly exaggerated). See generally Samuel Bowles & Herbert Gintis, Schooling in Capitalist America: Educational Reform and the Contradictions of Economic Life (1976); Colin Greer, The Great School Legend (1972) (discussing revisionist history).
\item[110] For a comparative analysis of the educational experiences of Hispanics from Central America and those of Mexican descent, see Marcelo M. Suarez-Orozco, Immigrant Adaptation to Schooling: A Hispanic Case, in Minority Status and Schooling: A Comparative Study of Immigrant and Involuntary Minorities 37, 37-61 (Margaret A. Gibson & John Ogbu eds., 1991) [hereinafter Minority Status and Schooling].
\end{footnotes}
The success or failure of the assimilationist approach to public education, when applied to various ethnic minorities, may depend on the respective cultures of the ethnic groups. Ethnic groups tend to have their own cultural understanding of how American society works and their place in that order. Their view of public education is a part of this overall culture.

African-American culture stands in a position different from that of immigrants who have come to this country voluntarily. Voluntary immigration does not compare with either emancipation from slavery or the elimination of segregation. Recent comparative work by educational anthropologists documents how involuntary minorities respond to their educational experience differently from voluntary immigrants. Around the world, other involuntary minorities have replicated the poor performance of African-Americans in the public schools: Koreans and Burakumins in Japan, Maoris in New Zealand, Aborigines in Australia, and

111. Primarily, the American melting pot notion was developed to explain European ethnic incorporation into dominant American society, not racial incorporation. Price M. Cobbs, Valuing Diversity: The Myth and the Challenge, in The State of Black America 1989 151, 157 (1989). While Israel Zangwill is generally credited with coining the phrase "melting pot," the assimilationist notion as an explanation for the American cultural phenomenon has been around for centuries. Even in the 1770s, Michel-Guillaume-Jean de Crevecoeur, a French commentator on American life, discussed the assimilationist ideology. See generally Lee C. Cain, Toward Black Cultural Understanding: Integrating Black Literature and American History, 66 Ill. Sch. J. 27 (1987). He noted that "Americans are people of European stock who leave behind their prejudices and manners of the Old World...[and] make a transition to new ones...in a new land." Id. at 27. In 1782, Hector St. John de Crevecoeur, an immigrant from Normandy, published a series of commentaries on life in the United States. On the subject of assimilation, he noted "What, then, is the American, this new man?...I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations....Here individuals of all nations are melted into a new race of men." J. Hector St. John de Crevecoeur, Letters from an American Farmer and Sketches of Eighteenth-Century America 69-70 (Albert E. Stone ed., Penguin Books 1981).

112. As Justice Marshall noted, the experience of African-Americans in America has been different in kind, not just in degree, from that of other ethnic groups. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting); see also Geoffrey C. Hazard, Jr., Permissive Affirmative Action for the Benefit of Blacks, 1987 U. Ill. L. Rev. 379, 387 (discussing ways that the institution of slavery cut off the cultural roots of many generations, causing blacks to be isolated by society with no hope of advancement). Overt racism against blacks helped contribute to the ascendancy of white immigrants. White immigrants replaced blacks who were driven out of occupations in railroads, streetcars, construction, and shipbuilding. See, e.g., Blauner, supra note 74, at 64; Gertrude Ezorsky, Racism and Justice: The Case for Affirmative Action 57-60 (1991); Herbert Hill, Race, Ethnicity, and Organized Labor: The Opposition to Affirmative Action, 1 New Pol. 45-52 (1987).

113. John U. Ogbu, Immigrant and Involuntary Minorities in Comparative Perspectives, in Minority Status and Schooling, supra note 110, at 3, 5-6; John U. Ogbu, Minority Status and Literacy in Comparative Perspective, Daedalus, Spring 1990, at 141 (examining why some minority groups do better in the education system than others). See generally Richard K. Harker & Keith McConnochie, Education as Cultural Artifact: Studies in Maori and Aboriginal Education (1985); Marion M. de Lemos, Conceptual Development in Aboriginal Children: Implications for Aboriginal Education in Aboriginals and Education 244, 247-60 (Sydney S. Dunn & Colin M. Tatz eds., 1989) (discussing this phenomena and how it affected Maoris, indigenous people of New Zealand, and Aborigines).
American Indians and certain Latino groups in the United States. As with blacks in this country, individual failure, inferiority, or inadequacies in the home environment are the reasons cited by dominant social groups for the minorities' poor performance in their respective countries.

a. Comparison of voluntary immigrants and involuntary minorities

This subsection summarizes Professor John Ogbu's arguments regarding the distinction between the orientation of involuntary minority cultures and voluntary immigrant cultures and the effect on their understanding of public education. A group's cultural understanding of public education influences both the students' and the communities' attitudes and strategies regarding education. Two historical forces helped shape the cultures of ethnic minority groups in their dominant host society: their initial terms of incorporation into society and their pattern of adaptive responses to discriminatory treatment by members of the dominant group after their incorporation.

Voluntary immigration to a country with the purpose of searching for a better life provides an ethnic group with a reference point for understanding their economic, social, political, and educational experiences in that country. Voluntary immigrants generally move to their host country hoping for greater economic opportunities and more political freedom than was probable at home. Therefore, they tend to compare their economic, social, political, and educational situations in their host country to what they left behind. Generally, this comparison allows them to develop a positive comparative framework for interpreting their conditions in their host country. Many voluntary immigrants who do not believe they are better off exercise the option of returning to their native land.

Voluntary immigrants also come with their native culture intact. Their cultures have not evolved in response to discrimination experienced in America. As a result, cultural and language differences between voluntary immigrants' native culture and the dominant American culture, as enshrined in public schools, are not oppositional. Voluntary immigrants see the cultural differences between themselves and dominant group members as something they must overcome to achieve their goals for a better life. This goal of finding a better life, after all, brought them to their host country originally.

Both voluntary immigrants and involuntary minorities frequently face prejudice and discrimination in American society and public education. When confronted with this discrimination, voluntary immigrants tend to interpret the economic, political, and social barriers they face as temporary.


116. John U. Ogbu, Immigrant and Involuntary Minorities in Comparative Perspectives, in Minority Status and Schooling, supra note 110, at 3, 3-33.
They believe they can overcome these problems in time, with hard work, and more education. Voluntary immigrants also tend to interpret prejudice and discrimination in their host country as a result of being foreigners. They view prejudice and discrimination as the price they must pay for the benefits they enjoy. Therefore, they have a greater degree of trust of, or at least acquiescence towards, members of the dominant group and the institutions they control.

This cultural story also influences the view voluntary immigrants have toward public education. By viewing the obstacles they face as flowing from their lack of knowledge about their host country, education becomes an important element in the strategy of getting ahead. Even though voluntary immigrants know that their children may suffer from prejudice and discrimination in public schools, voluntary immigrants tend to view this as a price of the benefit derived from being in the new country. Opportunities for education in the United States also aid this positive educational comparison as opportunities far exceed those available in their native land.

Voluntary immigrants come to their host country to improve their economic, political, and social conditions. This starkly contrasts the situation of involuntary minorities who were brought into their present society through slavery, conquest, or colonization. Without the voluntary aspect of their original incorporation, involuntary minorities differ from voluntary immigrants in their perceptions, interpretations, and responses to their situation. Unlike voluntary immigrants, involuntary minorities cannot refer to a native homeland to generate a positive comparative framework for their condition. Instead, they compare themselves to the dominant group. Since the dominant group is generally better off, the comparative framework of involuntary minorities produces a negative interpretation of their condition. Their cultural interpretation leads to resentment. Minorities perceive themselves as victims of institutionalized discrimination perpetuated against them by dominant group members. As a result, involuntary minorities distrust members of the dominant group and the institutions they control.

Involuntary minorities respond to prejudice and discrimination differently than voluntary immigrants. Involuntary minorities are not in the position of being able to understand prejudice or discrimination as a result of their status as foreigners. In their view, the prejudice and discrimination they experience in society and school relates to their history as members of a victimized group. Unlike immigrants, involuntary minorities do not view their current condition as temporary.

Cultural differences between involuntary minorities and the dominant group also arise after the former becomes an involuntary minority. Recall that the Africans brought to America came from a collection of diverse cultural groups. These culturally-diverse groups forged much of their unifying culture within America itself. In order to live with subordina-

117. As Professor Genovese has noted, however, African-Americans retained more of their African heritage than people have appreciated. However, it is widely recognized that African-American culture is a new culture influenced by African origins and shaped by American experiences. Eugene D. Genovese, Blacks in the United States—From Slavery to the
tion, involuntary minorities developed coping mechanisms. These responses are often perceived as oppositional to those of the dominant group. The historical interactions of blacks and whites in this country have led to an oppositional character in the cultures of the two races. Many elements of the African-American culture started out as responses to conditions of oppression and subordination. The African-American culture is more at odds with the dominant American culture enshrined in public schools than the native culture brought to this country by voluntary immigrants.

Cultural differences also function as boundary-maintaining mechanisms which differentiate involuntary minorities from their oppressors, namely, dominant group members. These cultural differences give involuntary minorities a sense of a social identity and self-worth. Utilizing the cultural frame of reference of the dominant group can be threatening to the involuntary minority's identity and security, as well as the group's solidarity. As a result, involuntary minorities are less likely to interpret differences between them and dominant group members as differences to overcome; rather, they are differences of identity to be maintained.

Thus, involuntary minority students often face the dilemma of choosing between academic success and maintaining their minority cultural identity. Furthermore, there is a fear that even if they did act like members of the dominant group, involuntary minority students still might not gain acceptance. This could result in the worst of all possible situations: losing the support of the minority group and not gaining acceptance by the dominant group.

b. Cultural conflict between African-American culture and public school culture

This reference to African-American culture does not presuppose that African-American culture is somehow better or worse than dominant American culture, only that it is different. Nor does this reference to culture rest upon the claim that all African-American school children share an undifferentiated black culture. Certainly there are geographic, religion, class, color, and gender variations that affect the attitudes and behaviors of individual blacks. Some social scientists argue that the academic problems of African-Americans are attributable to the fact that more are from the lower class or under class. For these social scientists, a racial-cultural conflict no longer exists. However, research generally shows that at any given


118. Due to the conflicts between the dominant American cultural heritage and perspective and Afrocentric cultural heritage and perspective, the two cultures cannot be integrated without some personality dislocation. Robert Staples, Introduction to Black Sociology 68 (1976).

119. The conflicts are not unexpected. Professor Karst notes that in the South, which is the American ancestral home for the overwhelming majority of African-Americans, to identify oneself as white meant, above all, to identify oneself as not black. Karst, supra note 74, at 17; see also Amuzie Chimezie, Black Bi-Culturality, 9 W. J. Black Stud. 224 (1985) (defining and discussing black bi-culturality).

socio-economic class level, black students, on average, do poorer than their white counterparts. Race appears to exert its own unique influence on the school experiences and outcomes of black children unexplainable by other socio-economic factors.

Even though individual minority members may react very differently to their individual educational situation, ethnic groups are able to develop a cultural response that influences the collective interpretation of the group's educational experience. This cultural interpretation influences the overall success of members of their community in public schools. A number of educational researchers have examined how cultural misunderstandings between teachers and students result in unnecessary conflict, distrust, hostility, and school failure for many African-American students. Cultural misunderstandings negatively affect the educational experiences of both teachers and students. These misunderstandings come from black students' perceptions that certain behaviors and understandings are characteristic of white Americans, and hence inappropriate for them. Further, teachers and administrators generally are reluctant to discuss race and race-related issues. The color-blind philosophy of educators is, in part, linked to uneasiness in discussing race, lack of knowledge of the African-American culture, and fears that open consideration of differences might incite racial discord.

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121. John U. Ogbu, Immigrant and Involuntary Minorities in Comparative Perspectives, in Minority Status and Schooling, supra note 110, at 3, 5-6; see also Hacker, supra note 58, at 143 (showing a significant disparity between the SAT scores of blacks and whites even when adjusted for family income). Furthermore, Hacker noted that blacks from families with incomes in excess of $50,000 scored lower on the SAT than whites from families with incomes of less than $20,000. Id.


123. See, e.g., Reuben M. Baron et al., Social Class, Race and Teacher Expectations, in Teacher Expectancies 251-69 (Jerome B. Dusek ed., 1985); The Comm. on Policy for Racial Justice, Visions of a Better Way: A Black Appraisal of Public Schooling 16-17 (1989) (discussing research revealing that teachers' gross stereotyping as well as their inaccurate, negative, and rigid expectations of black and low-income children form the groundwork for self-fulfilling prophecies of academic failure); Irvine, supra note 28, at 26; see also Shael Polakow-Suransky & Neda Ulaby, Students Take Action to Combat Racism, Phi Delta Kappan, Apr. 1990, at 601-05 (reporting results of a survey involving over 2,000 students in the Ann Arbor, Michigan school system that revealed the existence of racially-polarized attitudes by blacks and whites).

124. John U. Ogbu, Immigrant and Involuntary Minorities in Comparative Perspectives, in Minority Status and Schooling, supra note 110, at 3, 27.

125. See generally Michelle Fine, De-Institutionalizing Educational Inequity, in School Success for Students at Risk 89 (Council of Chief State Sch. Officers ed., 1988); Janet W. Schofield, Black and White in School: Trust, Tension and Tolerance 48-52, 63-64 (1982). One principal in Schofield's study stated, "I really don't address myself to group differences when I am dealing with youngsters... I try to treat youngsters as youngsters and not as black, white, green, or yellow... Children are children..." Id. at 50. The problem with this approach is that it blocks any consideration of how cultural differences might affect attitudes and behaviors of black students. The result will lead to the misinterpretation of the behavior of the black students by judging it based upon white cultural norms.
The story in the prelude about my reaction to reading Huck Finn in my junior literature class was intended to illustrate the racial cultural conflict. It was not intended to be interpreted as the experience of one child. As a middle class black child, whose parents both possessed masters degrees in education from Indiana University, I shared much in common with my white teachers and classmates. Nevertheless a racial cultural conflict existed between my interpretation of our class reading Huck Finn and the interpretation of my English literature teacher. My teacher and I were both interpreting Huckleberry Finn, but we were interpreting it from the understanding of radically different cultures. Use of the word "nigger" by whites is offensive to African-Americans, even if written in a so-called "literary classic." Understanding The Adventures of Huckleberry Finn from an African-American cultural perspective lead me to believe that it was not a literary classic, but rather an offensive and racist book. Consequently, the interpretation of my teacher's requirement that the class read the book, especially out loud, was that the exercise was insulting and degrading to all African-Americans, including me. My objecting to the reading of Huckleberry Finn was, therefore, a rebellion against an act of racial subordination. My teacher, however, was perceiving my actions from a completely different set of cultural ideas. Rather than viewing her actions as insulting, she saw my actions as both biased and asking for "special treatment" because I was interjecting race into what she understood as a racially neutral situation (i.e., reading a classic literary book).

The cultural experience and the interpretation of traditional education in public schools by involuntary minorities is different from that of voluntary immigrants. Ignoring or undervaluing the culture of involuntary minorities is likely to have far more negative consequences for their education than for voluntary immigrant groups. One researcher, for example, examined the performance of high achieving African-American students. She noted that they were forced to develop a raceless persona to succeed in the public schools.

126. Law school academics also can experience cultural conflict in their legal academies similar to what I refer to in the prelude. See, e.g., Pierre Schlag, The Problem of the Subject, 69 Tex. L. Rev. 1627, 1679-83 (1991) (describing the experience of young liberal thinkers in American law schools whose political and cultural maturation was influenced by the Civil Rights movement and the Vietnam War, as well as the counter culture). These individuals found themselves as members of law faculty and were being groomed to think and act like the very people against whom they were fighting. Id.

127. In my high school, students received grades in their classes every six weeks. For the six week period that preceded reading Huck Finn, my grade in English was a "B." For the six week period that we read Huckleberry Finn, it was a "D." During the time the class read Huckleberry Finn, an antagonistic relationship developed between my English teacher and me that continued during the remainder of the time I was in her class. Even though my English grade improved to an "A" for the six week grading period after reading Huck Finn, the antagonism in our relationship did not lessen. At the end of the third grading period, my English teacher was given the opportunity to send six of her students to another English class with a different teacher. Needless to say, I was one of those transferred.

II. PROPOSALS FOR IMMERSION SCHOOLS

Proponents of immersion schools reject the assumption that the traditional assimilationist education is either value-neutral or embodies the appropriate education for African-Americans.129 Traditional education programs fail to take into account the unique social environment of African-Americans created by the dominant culture and the influence of African-American culture on the educational experience of blacks. As a result, traditional educational programs, even when formally denominated multicultural, incorporate the Anglo-American cultural bias of our society.130

Proponents of immersion schools recognize that blacks need to understand dominant American culture and, despite the obstacles placed in their path, must be able to excel in that culture.131 As a result, while immersion schools may appear outwardly separatist, they could prove to be an important strategy for incorporating African-Americans into the mainstream.

individuals). See generally Ray C. Rist, The Invisible Children: School Integration in American Society (1978). Rist followed a group of young black children bused to an upper-class mainly white school. The principal, who applied a policy of treating all kids alike, expected the black kids to perform and behave no differently than the white children from the comfortable suburbs. The result was disastrous for the black children. This is a problem that will affect African-Americans in other areas as well. For example, Stanley Garn and Diane Clark have pointed out that black babies at birth are smaller than white babies; however, between the ages of 2 and 14, they are taller than their white counterparts. Yet if the physical dimensions of blacks are measured based upon white standardized norms, black babies will be judged undernourished when they are not and black children who may be nutritionally deficient, will nevertheless pass for normal. Diane Garn & Stanley Clark, Problems in the Nutritional Assessment of Black Individuals, 66 Am. J. Pub. Health 262, 262-67 (1976).


The assimilationist ideal has proven to be controversial. Gotanda mentions the ruckus caused by historian Kenneth Stampp's book, The Peculiar Institution, in which he stated that slaves were "white men with black skins." Gotanda, supra note 43, at 59 n.238. Gotanda made two points about Stampp's beliefs. First, the assimilationist theory made it easy for blacks to see how this ideology robs them of their cultural identity. Id. at 59-60. Further, Stampp implicitly regarded white as the norm, whites were not "black men with white skins." Id. at 59.

130. See James A. Banks, Multietnic Education: Theory and Practice 12 (2d ed. 1988). Anglocentric bias refers to a hegemonic or dominant world view that exclusively values Anglocentric culture and justifies past and present denigration and subordination of the cultures of people from all other lands and origins. Anglocentrism is a sorting and selection process used to screen out information and accounts that do not support the superiority of Anglo-American and Western cultures' societal, political, economic, and spiritual manifestations.

131. All subjects in public education are not equally infested with dominant American cultural ideology that incorporates a belief in African-American inferiority. The issue is far less important in subjects of scientific exactitude such as math, chemistry, physics, geometry and calculus. But see Nobles, supra note 28, at 9-16 (arguing that Afrocentric materials must be infused throughout the curriculum including subjects like science and math).
A. The Arguments Made by Proponents of Immersion Schools

Proponents of immersion schools often cite the negative educational statistics of African-Americans. The Detroit School Board, for example, argued that the need for male academies was due, in part, to the failure of the traditional coeducational program. The school board pointed to statistics which show the poor academic performance of African-American males and their high dropout rates. These statistics documented the failure of the traditional educational program. Many of those who objected to the exclusion of females from these academies did so because they felt that the condition of African-American females within educational institutions was just as deplorable as that of the males.

Poor educational performance among African-Americans results from an improperly designed structure of education. Proponents cite statistics to demonstrate the educational crisis of African-Americans, not to demonstrate the inabilities of African-Americans. These statistics focus on the flawed nature of the traditional educational approach as it is applied to African-Americans. That flawed approach results in African-Americans shaping themselves to fit within the negative expectations that flow from the dominant social construction of African-Americans. As a result, traditional public education is not the solution to the racial obstacles African-Americans encounter. Rather, it is one of those obstacles.

B. Genesis of Immersion Schools

In a sense, immersion schools represent a traditional approach by African-Americans to make education in racially separate schools more responsive to the needs and interests of African-American students. Immersion schools have their roots in the long standing debate regarding separate versus integrated education for African-Americans. This debate has a history that is two centuries old. It is part of a much larger debate about the general social, political, and economic condition of blacks in this country. The issue of whether the educational interests of black children are better served in separate institutions, as opposed to racially-mixed
schools, was first addressed by the black community of Boston, Massa-
setts in the 1780s and 1790s. This debate also flared up in some of the
state constitutional conventions after the Civil War and during the

137. Shortly after the American Revolutionary War, Boston organized the first urban
Schools, 1789-1850, at 172 (1973). The early Boston school law did not exclude blacks from
attendance at the community schools. Id. at 161. In 1787, however, two years before the
establishment of the public school system in Boston, Prince Hall delivered a petition from
Boston's black community to the legislature of the Commonwealth of Massachusetts. Herbert
The petition requested that the legislature order the Boston school committee to establish a
school for Boston's black community. Id. By 1790, vex and insult had driven all but three or
four blacks from Boston's community schools. Arthur O. White, The Black Leadership Class
and Education in Antebellum Boston, 42 J. Negro Educ. 504, 505 (1973). Hosea Easton, a
black who had been enrolled in Boston community schools, recalled his former teachers
sending bad youngsters, white and black, to the so called "nigger seat", berating them by
saying they would be as poor or ignorant as a nigger or have no more credit than a nigger.
Hosea Easton, A Treatise on the Intellectual Character and Civil and Political Condition of the
Colored People of the United States and the Prejudice Exercised Towards Them 40-43 (Issac
Knapp ed., 1837); see also Schultz, supra, at 160 (pointing to the fact that the lack of attendance
at Boston schools by blacks was also a result of the deplorable economic condition of the black
community in Boston).

The Boston School Committee rejected the original request to fund separate schools for
blacks. But in 1812, the School Committee recanted its earlier position and took over funding
and control of a private school started by blacks. By 1830, a completely segregated school
system for the black children had developed. Id. at 167.

Even as Boston moved towards its segregated school system, the seeds of discord regarding
the sagacity of separate education had been sowed. The desire of black parents to eliminate
segregation in the Boston schools eventually led to the case of Roberts v. Boston, 59 Mass. (5
Cush.) 198 (1850) (upholding the Boston School Committee's authority to segregate the
schools). Success, however, came to the proponents of integrated schools when the Massachu-
setts General Legislature passed a law in 1855 that made segregation illegal. White, supra, at
513.

138. The debate concerning separate versus integrated education also arose during some
of the state constitutional conventions of 1868 and 1869. Meyer Weinberg, A Chance to Learn:
The History of Race and Education in the United States 51 (1977). The freedmen who voiced
their opinion about education generally supported desegregated schooling. Id. One comment-
tator noted that these individuals cared less for the higher principles involved with respect to
desegregation. Id. Their concerns centered on practical considerations. Id. Separate schools
would mean inferior schools in the sense of a lack of funding. Horace M. Bond, Education of
the Negro in the American Social Order 56 (1934). As long as the education was on a
nonsegregated basis, the black students were not vulnerable to the systematic underfunding of
their schools. See id. (noting that "'unreconstructed' legislators either made no provision for
the education of Negroses or placed the responsibility for support upon taxes levied upon
Negroses and not upon general tax funds"). Professor John Hope Franklin notes that many
white southern legislators were not adverse to reducing educational expenditures across the
board. John H. Franklin, Jim Crow Goes to School: The Genesis of Legal Segregation in
Southern Schools, S. Atlantic Q., Spring 1959, at 234-35. Even so, they went as far as possible
in cutting the funds for the black schools before trimming the budgets of the white schools. Id.

The segregation versus desegregation debate was also touched off in 1863 when Chicago
passed the Black School Law mandating segregation for children attending school. The refusal
of black parents to comply with the law helped lead to its repeal two years later. See Paul E.
Peterson, The Politics of School Reform 1870-1940, at 111 (1985). See generally Peter Shane,
School Desegregation Remedies and the Fair Governance of Schools, 152 U. Pa. L. Rev. 1041
(1984) (arguing that segregation harmed African-Americans because they were powerless to
partake in an educational program that was not hostile to them).
discussions of the Blair Education Bill in the 1880s. 139

While the threads of the debate about immersion schools are traceable to earlier times, the place in which to begin this most recent chapter is a special issue of Ebony magazine, published in August 1983. The issue introduced the African-American community to Walter Leavy's provocative question: Is the black male an endangered species? 140 To emphasize the deteriorating condition of the African-American male, Leavy pointed to the homicide rates, 141 the high rates of imprisonment, 142 an increase in the rate of suicide, 143 the infant mortality rate, 144 and a decrease in life expectancy. 145 The crisis of the African-American male was brought to the attention of mainstream America with proposals by a few public school systems to establish African-American male classrooms or academies. These proposals have raised one of the most controversial educational issues of the 1990s. Proposals for such education surfaced in a number of cities, including Miami, Baltimore, Detroit, Milwaukee, and New York.

The legality of race and gender segregated schools limited to African-American males, however, is open to serious questions. 146 The Ujamaa Institute, an immersion school in New York City that opened in September 1992, is coeducational. The Milwaukee School System, on advice of counsel, abandoned its original proposal to establish an all-black male school and


140. Walter Leavy, Is the Black Male an Endangered Species?, Ebony, Aug. 1983, at 41. There have been debates and discussions about the survivability and viability of the African-American male. See generally Black Men (Lawrence E. Gary ed., 1981); Young, Black, and Male in America: An Endangered Species (Jewelle Gibbs et al. eds., 1988).

141. Leavy, supra note 140, at 42 ("[T]he overall homicide rate for Black males is 60 per 100,000, a rate higher than that of White males, White females and Black females combined. In addition, homicide is the leading cause of death of Black males between the ages of 15 and 24.").

142. Of the 345,960 people in state prisons around the country, black men represent almost half. Id.

143. "Due to a number of societal stresses, experts say, the suicide rate among Black males has more than doubled in the past ten years." Id.

144. The black male infant mortality rate is double that of white males. Id.

145. The life expectancy of black males is 5 years less than that of white males, 9 years less than that of black females, and 13 years less than that of white females. Id.

146. The Supreme Court has addressed the issue of gender segregation in both public education and public university education. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). In Hogan, the Court struck down the state's single sex admission policy for its school of nursing at the Mississippi University for Women. Id. at 730. The Court noted that the proffered justification for the exclusion, providing a remedial haven for women from the hierarchy of domination in the man's world of higher education, was unpersuasive. Id. at 791. They viewed excluding men from a school of nursing as perpetuating the stereotyped view of nursing as exclusively a woman's job. Id. at 729-30.

The issue of gender-segregated education in public schools was addressed by the Court in Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977) (per curiam). An evenly-divided Court upheld an otherwise coeducational school system's maintenance of sexually segregated high schools for high academic achievers. Id. at 703.
instead established immersion schools that include females. Instead, in Garrett v. Board of Education, a federal district court in August 1991 granted a preliminary injunction against the Detroit School Board’s proposal for male academies. The American Civil Liberties Union of Michigan and the National Organization of Women Legal Defense and Education Fund represented the plaintiffs. The plaintiffs ignored the race-based decision making that motivated the adoption of proposals for those schools. They only challenged the gender-based exclusion. The district court enjoined the implementation of the male academies, concluding that the Detroit plan would violate state law as well as Title IX, the Equal Educational Opportunities Act, and the Fourteenth Amendment.

New York, Detroit, and Milwaukee have, however, gone forward and now operate schools with a focus on the culture and heritage of African-Americans. Enrollment at these schools is formally open to anyone in the respective school system who wishes to apply.

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149. Id. at 1005.


152. The district court specifically noted it “[was] not presented with the question of whether the Board can provide separate but equal public school institutions for boys and girls.” Garrett, 775 F. Supp. at 1006 n.4.

153. Miami abandoned its plan to establish experimental separate schools for African-American males after receiving a letter from the Department of Education indicating that it was the Department’s position that such schools were illegal. Letter from Jesse L High, Regional Civil Rights Director, Office of Civil Rights, U.S. Department of Education, to Dr. Joseph A. Fernandez, Superintendent of Schools, Dade County Public Schools (Aug. 31, 1988) (on file in the University of Iowa College of Law Library). These subsequent developments have prevented the operation of separate schools for African-American males. Baltimore, however, operates three separate classrooms for African-American male students in otherwise coeducational schools. Worthington, supra note 147, at C25.

154. Regardless of the legal issues involved, the logic supporting black male academies also supports separate schools for African-American females. Many supporters and opponents of proposals for African-American male academies have argued that a similar crisis faces African-American females. In Milwaukee, for example, it was noted that the dropout rate of African-American females was 45%, only slightly better than the 55% rate for African-American males. Worthington, supra note 147, at C25. In the brief filed by the National Organization for Women and the ACLU Fund of Michigan attacking Detroit’s male-only academies, the plaintiffs argued that urban girls (African-American females) suffer loss of self-esteem, become parents at an early age, and get involved in criminal activity just like the males. Garrett, Motion for Restraining Order, supra note 132, at 14. In Garrett, the court pointed to a resolution by the Board of Education of Detroit which noted that in addition to the crisis facing African-American male students in public schools, there is an “equally urgent and unique crisis facing . . . female students.” Garrett, 775 F. Supp. at 1007 n.5. The district court noted that “[u]rban girls drop out of school, suffer loss of self-esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system.” Id. at 1007.
schools experiment with creative teaching techniques directed toward the learning and socialization styles of African-Americans.155 These schools also provide special mentoring and tutoring programs for students and faculty development programs for teachers.156

Educators may be in the process of reshaping and redefining public education to fit the specific social environmental needs of African-American children. In the past, a number of African-American scholars have argued that black children are systematically miseducated in the traditional educational program.157 Educational initiatives in immersion schools may represent the beginning of an effort to address the inappropriateness of the traditional education program when applied to African-Americans. This deficiency flows from an improper conceptualization of the educational needs of African-Americans.158 The traditional educational program that purports to be value-neutral may actually be detrimental to

155. See, e.g., African-American Focus Schools, The Milwaukee Public Schools: Questions and Answers 3 (Jan. 4, 1991) (on file in the University of Iowa College of Law Library). A number of researchers have described the nature of African-American culture and its implications, particularly in an educational context. See generally A. Wade Boykin, The Triple Quandary and the Schooling of Afro-American Children, in The School Achievement of Minority Children: New Perspectives 57, 57-92 (Ulrif Neisser ed., 1986); Janice E. Hale-Benson, Black Children: Their Roots, Culture, and Learning Styles (2d ed. 1986); Thomas Kochman, Black and White Styles in Conflict (1981); Asa G. Hillard III, Psychological Factors Associated with Language in the Education of the African-American Child, 52 J. Negro Educ. 24, 24-54 (1983); Infusion of African and African American Content, supra note 129. Pasteur and Toldson, for example, noted the aversion of black children to formality, their frankness of manner, and contempt for artificiality. Alfred B. Pasteur & Ivory L. Toldson, The Roots of Soul: The Psychology of Black Expressiveness 62 (1982). They also pointed to their depth of feeling as evidenced by their highly-charged, noisy, and emotional expressions. Id. There are obviously a number of differences contained in the language codes used by many African-Americans and those who use standard English. In addition, blacks tend to be more racially group-oriented. This leads African-Americans to be far more conscious of racial issues than their white counterparts.

156. Immersion schools do not necessarily require African-American educators to be the personnel who train African-American children. Black teachers, however, having experienced the existence and impact of the two cultures on the social environment of blacks, may be in a better position to recognize and respond to issues that concern the students. Nevertheless, it is obvious that teachers in immersion schools will certainly need some special training in African-American culture in order to be effective. The issue of the extent to which a school system could structure the selection process to lead to a racial concentration of black teachers in immersion schools is beyond the scope of this Article.

157. Carter G. Woodson made this point in his provocative book. Carter G. Woodson, The Mis-Education of the Negro 17-25 (1933) (arguing that black students were taught to admire the Hebrew, the Greek, the Latin and the Teuton cultures, but to despise the African); see also W. E. B. DuBois, A Social Program for Black and White Americans (May 31, 1943), in Against Racism: Unpublished Essays, Papers, Addresses 1887-1961, at 206, 215 (Herbert Aptheker ed., 1985) ("[I]f the rights ... for each race are substantially equal, ... separation of education facilities can only be objected to because of its social waste; and on the other hand can be agreed to because of the right which persons have to follow their tastes and preferences in association."); W. E. B. DuBois, Does the Negro Need Separate Schools, 4 J. Negro Educ. 328 (1935) ("Theoretically, the negro needs neither segregated nor mixed schools. What he needs is education.").

158. See Richard L. Roe, Valuing Student Speech: The Work of Schools as Conceptual Development, 79 Cal. L. Rev. 1271, 1295 (1991) ("Research has shown ... that socio-cultural value differences between ... students and mainstream school officials, have a negative impact on the learning process.").
the educational interest of many African-Americans.\textsuperscript{159}

The experimental programs that immersion schools employ are attempts to reduce the cultural conflicts existing between their African-American students and the dominant American culture enshrined in the traditional educational program. If successful, immersion schools could redefine the African-American cultural interpretation of the educational experience. Additionally, immersion schools allow educators the opportunity to teach strategies to help African-Americans deal with the simple reality that they must live with the ever present hassle of being black.\textsuperscript{160}

\textbf{C. The Significance of Immersion Schools}

The dominating logic which motivated educational reform for African-Americans in the 1960s, 1970s, and early 1980s originated during a time when both legal and political forces in America were attempting to desegregate public education.\textsuperscript{161} With the termination of school desegregation decrees, the pro-integrationist policies of the school desegregation era will likely become relics of an increasingly distant past. Many educators will begin to approach African-American educational issues with the realization that racial separation in public schools and American society is here to stay. For education officials, the reform logic behind the desegregation era could become \textit{passe}. The acceptance of long-term segregation in public schools may exert a tremendous influence on educational reform for African-Americans. The desire to develop standardized educational programs across racial and ethnic lines, including multicultural programs, could become anachronistic. This will inexorably lead to more attempts to redesign the education of African-American youth.

\textbf{D. Purpose of Afrocentric Curriculum}

The incorporation of Afrocentric curricular materials into the educational process is one of the primary strategies immersion schools employ to

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\item \textsuperscript{159} See, e.g., Banks, supra note 130, at 35; Carleton R. Bryant, All-Black School Plan Gets Praise, Wash. Times, Aug. 23, 1991, at A6.
\item \textsuperscript{160} The psychodynamic work on "nigrescence" may give some hint of the benefits immersion schools give to African-American students. For example, in his book, Shades of Black, William Cross discusses the process individual blacks go through in changing from a non-Afrocentric identity into an Afrocentric identity. He labels this process "nigrescence," a French term for becoming black. In the advance stages of internalizing the new black identity, Cross notes that the new identity provides the African-American with a psychological buffer performing a number of protective functions:
\begin{itemize}
\item The structure of the protective function seems to involve (1) an awareness that racism is part of the American experiences; (2) an anticipatory set—regardless of one's station in American society, one can well be the target of racism; (3) well-developed ego defenses that can be employed when confronted with racism; (4) a system blame and personal efficacy orientation in which one is predisposed to find fault in the circumstances, not the self; and (5) a religious orientation that prevents the development of a sense of bitterness or the need to demonize whites.
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Cross, supra note 96, at 215.

\begin{itemize}
\item \textsuperscript{161} See Kevin Brown, Has The Supreme Court Allowed the Cure for De Jure Segregation To Replicate the Disease?, 78 Cornell L. Rev. 1, 75 (1992) (noting that "an educational reform movement arose in the wake of the Supreme Court's decisions to desegregate public schools").
\end{itemize}
accomplish their goals. The use of Afrocentric curricular materials in urban school systems is on the rise. School systems in Atlanta, Detroit, Indianapolis, New Orleans, Portland, and Washington, D.C., have approved their use.\textsuperscript{162}

An Afrocentric curriculum is an emerging educational concept and educators will determine what passes as truly Afrocentric over the course of time. In a vague sense, an Afrocentric curriculum teaches basic courses by using Africa and the socio-historical experience of Africans and African-Americans as its reference points.\textsuperscript{163} An Afrocentric story places Africans and African-Americans at the center of the analysis. It treats them as the subject rather than the object of the discussion.\textsuperscript{164} However, this perspective is not a celebration of black pigmentation. An Afrocentric perspective does not glorify everything blacks have done. It evaluates, explains, and analyzes the actions of individuals and groups with a common yardstick, the liberation and enhancement of the lives of Africans and African-Americans.\textsuperscript{165}

An Afrocentric curriculum provides black students with an opportunity to study concepts, history, and the world from a perspective that places them at the center. Such a curriculum infuses these materials into the relevant content of various subjects, including language arts, mathematics,
science, social studies, art, and music.\textsuperscript{166} Students are provided with both instruction in the relevant subject and a holistic and thematic awareness of the history, culture, and contributions of people of African descent. For example, from an Afrocentric perspective the focal point of civilization is the ancient Egyptian civilization (known as "Kemet" or "Sais") as opposed to Ancient Greece.\textsuperscript{167} Therefore, Egypt, not Greece is the origin of basic concepts of math and science. This is done to show African-American students that they can maintain their cultural identity and still succeed in their studies.

Nowhere is the implication of Afrocentric education more profound and more controversial than in the context of American history.\textsuperscript{168} From an Afrocentric perspective, American history is a tale about the historic struggle of blacks against the racial oppression and subjugation of Africans and their descendants. The presentation of American history from an Afrocentric, rather than an Anglocentric perspective, leads to different conclusions about the heritage of African-Americans within the United States. A brief look at the slavery experiences of African-Americans illustrates the difference and illuminates the educational strategies behind such a presentation.

From the Afrocentric perspective, the focus on slavery centers around what African-Americans and their ancestors did to resist the institution of slavery. What is important about captivity (slavery) was the struggle by the captives (slaves) against their oppressors. It is important to note that the captives did not sink into helplessness, apathy, and demoralization, rather, they struggled to survive, both spiritually and physically. Thus, while

\textsuperscript{166} Portland, Oregon, for example, began using African-American baseline essays which were first developed in 1982 as part of a multicultural program. Portland has developed similar materials on the history, culture, and contributions of five other geo-cultural groups: Asian-Americans, European-Americans, Hispanic-Americans, Indian-Americans and Pacific Island-Americans. Id. at vi. For example, the mathematics section begins by pointing out that many programs avoid the African basis for mathematics. Egyptian mathematics began in 580 B.C., almost 2,000 years before history acknowledges the start of mathematics in Greece. This section also argues that geometry and trigonometry began in ancient Egypt. The Pythagorean Theorem may have been formulated by the ancient Egyptians 1,000 years before it was discovered by Pythagoras. Euclid, one of the greatest mathematicians of his era, though pictured as a fair European Greek, was actually an Egyptian. Id. at M5.


\textsuperscript{168} \textit{See, e.g.,} Warren Crichlow et al., Multicultural Ways of Knowing: Implications For Practice, 172 J. Educ. 101, 107-15 (1990) (including an exercise addressing a lesson in American history discussing the right to vote and what it means to be a self-made man).
PARADOXES OF LEGAL CONCEPTUALIZATION

unable to successfully challenge the system of captivity frontally by battles of liberation, the captives waged a many-sided struggle against their captors.\footnote{169}{The events that represent this struggle are infinite. There were uncounted rebellions and personal acts of defiance (including suicides) by Africans on ships of captivity during the "Middle Passage." Some of these courageous individuals showed that they would rather die than to submit to captivity. There were countless insurgency actions by freedom fighters led by known revolutionary figures such as Jemmy,\footnote{171}{In September 1739, Jemmy led a revolt in Saint Paul's Parish which is near the western branch of the Stono River, approximately twenty miles from Charleston. \textit{Id.} at 34. His revolt eventually included some 70 to 80 Africans. \textit{Id.} Jemmy's group "successfully raided a store for arms and ammunition and executed the two storekeepers . . . ." \textit{Id.} It is said that after this raid, they marched, calling out "liberty." \textit{Id.} By the time his revolt was subdued, he had executed twenty of the white captors. \textit{Id.} at 35.} Nat Turner, Toussaint L'Overture,\footnote{172}{Toussaint L'Overture led a successful revolt in San Domingo against the French. The revolt began in 1791 and led to the founding of Haiti on January 1, 1804. The implacable resistance of the black revolutionaries utterly destroyed some of France's finest military forces. According to Harding, the effectiveness of the revolt led by L'Overture in San Domingo helped convince Napoleon to abandon his dream of a French empire in the new world. As a result, Napoleon sold the entire Louisiana Territory to the United States in 1803. \textit{Id.} at 46-47.} Gabriel Prosser, and Denmark Vessey, along with unknown revolutionary figures. There were countless assassinations and poisonings of the captors by the captives. Major fires set in many American cities, such as Charleston, Albany, Newark, New York, Savannah, and Baltimore, were suspected of being set by blacks intent upon overthrowing the yoke of captivity.\footnote{173}{Elijah Anderson and John Mason were both fugitives who rescued more than 2,000 blacks from slavery in the 1850s. \textit{Id.} at 190.} There was the work of blacks, such as Harriet Tubman, Elijah Anderson, and John Mason,\footnote{174}{Derrick Bell, Race, Racism and American Law 6 (1980).} who assisted others out of the most severe form of captivity—slavery. There were also countless individual acts of self-liberation and protest by the captives including their refusal to submit to work or performing the work in a haphazard fashion.

An Afrocentric perspective would conceptualize the genesis of the Civil War as an effort to hold the Union together as opposed to movement to free the black captives. The massive movement of individual captives to free themselves by heading toward Union army camps when the war broke out forced the Union government to address the issue of their freedom. This perspective would also emphasize the fact that Lincoln's Emancipation Proclamation was more of a military document than a humanitarian one.\footnote{175}{Harding, supra note 170, at 232.} It excluded from its provisions the "loyal" slave states of Missouri, Kentucky, Delaware, and Maryland, the anti-Confederate West Virginia Territory, and loyal areas in certain other Confederate states.\footnote{176}{Genovese, supra note 117, at 6.} As a consequence, nearly one million black people whose masters were considered loyal to the Union were, theoretically, unaffected by the Proclamation. Their freedom was not legally secured until the Thirteenth Amendment.
was ratified almost three years later. From an Afrocentric perspective, Lincoln is not the great emancipator of the black captives. Rather, the great emancipators are those African-American ancestors who made freedom their personal responsibility.177

The Anglocentric focus on slavery, however, presents the struggle against racial oppression as primarily one orchestrated and waged by abolitionist whites, such as the Quakers, William Garrison, and John Brown with occasional assistance from blacks like Frederick Douglass and Harriet Tubman. This perspective emphasizes twin goals of the Civil War as holding the union together and eradicating slavery. President Lincoln is seen as leading the charge to reverse years of racial bigotry. The Anglocentric perspective treats the Emancipation Proclamation as both a humanitarian and military necessity. An Anglocentric perspective of slavery converts slaveholders, such as George Washington and Thomas Jefferson, into saviors because of their personal concern with the institution of slavery and their private acts of manumission.178 In fact, many whites who opposed slavery did so not for what slavery did to blacks but because of its negative impact on the work ethic and morality of whites.179 Nevertheless, these individuals are considered champions of the interest of slaves.

The object lesson (teaching strategy) of presenting the story of slavery from an Afrocentric point of view shows African-Americans that they are descendants of over seventeen generations of people who struggled against racial subordination in America. The value inculcated to African-Americans by this perspective is that they must take charge of their own liberation. It is only when blacks commit themselves to this task that their condition will improve.

The Anglocentric perspective, however, portrays whites as active parties in the abolition of slavery. Their efforts in overcoming the racial bigotry of other whites is praised. The Anglocentric perspective intends to foster feelings of loyalty for the country by showing how America overcame its own atrocities. This perspective portrays blacks as passive and submissive to the racial domination of slavery. Presenting only this view to African-American school children may lead to a sense of disempowerment. This perspective projects the view that, as in the time of slavery, improvements in the conditions of African-Americans must await the beneficence or enlightenment of whites.180

177. Lincoln, in his annual address to Congress on December 1, 1862, proposed three constitutional amendments just one month before the Proclamation was to go into effect. Id. at 235. The amendments Lincoln proposed provided for "gradual emancipation (with a deadline as late as 1900), financial compensation to [slave] owners, and colonization for the freed people." Id. at 235.


179. Alexis de Tocqueville, Democracy in America 344 (George Lawrence trans., 1966).

180. Professor Derrick Bell, for example, argues that the Supreme Court's school desegregation cases can be understood as the Supreme Court balancing the interests of black rights against white interests and choosing the latter. See Derrick Bell, Brown and the Interest-Convergence Dilemma, in Shades of Brown: New Perspectives on School Desegregational 91, 91-106 (Derrick Bell ed., 1980). See generally Derrick Bell, And We Are Not Saved
The concept of racially separate education implied by immersion schools is not without its critics. They argue that these plans are throwbacks of "separate but equal" concepts. The comments of Dr. Kenneth Clark, the leading psychologist for the NAACP in Brown v. Board of Education, illustrate this sentiment. "For adults to impose this nonsense on children is academic child abuse. . . . It's outrageous. It's absurd. It's a continuation of the whole segregation nonsense. . . . [It does not make sense] unless this society wants to regress."182

In addition to the racial separation of students, education which emphasizes the history and culture of black people has drawn its own criticism. Such studies are often seen as peripheral, and many believe schools utilizing an Afrocentric curriculum are employing a weakened educational program. One commentator, while lauding attempts to address the problems of "underclass" children, stated that the inclusion of an Afrocentric curriculum in schools indicates that the schools are mired in a dubious pedagogy. The former U.S. Secretary of Education, William Bennett, criticizes Afrocentric education by saying that the children are not Africans; they are Americans.

Given the school systems that have established immersion schools or adopted some form of Afrocentric curriculum, it is likely that the primary, if not exclusive, push for the establishment of immersion schools will be in school systems or neighborhoods that are predominantly black. Therefore, African-Americans could initiate a legal challenge to the establishment of an immersion school. African-Americans are never unified on racial issues due to their enculturation in both African-American culture and American culture. While many will support the concept of immersion schools, others will vigorously oppose it. African-Americans are not oblivious to the criticisms of immersion schools. The education of their children is of utmost concern to African-American parents. They know that access to the best education possible will best prepare their children for the future. The possibility that black children educated in immersion schools will be unable to compete with children with a traditional education will be an issue many


182. Clark's statement focused on separate schools for African-American males, but the tenor of his comments suggests that he would also raise the same concerns about immersion schools. Sam Roberts, Separate Schools for Male Blacks Igniting Debate, N.Y. Times, Nov. 12, 1990, at B1.


African-American parents address. The political implications of racial separation and race consciousness also concern African-Americans.

Any school system establishing immersion schools must do so with an eye on the potential for litigation regarding the legality and constitutionality of these schools. State statutory and constitutional provisions, along with other federal statutes may be applicable in a legal analysis of immersion schools. However, I have limited my analysis to the Equal Protection Clause. As I analyze the constitutionality of immersion schools, I will assume that such schools are established along the lines of those in New York, Detroit, and Milwaukee. Immersion schools in these school districts are formally open to anyone who wishes to attend on a racially neutral basis. The school structure takes into account the culture and social environment of African-Americans. Therefore, the schools involve conscious racial decision making in establishing the schools and organizing their educational program. However, the school systems determine student assignments on a racially neutral basis.

I will begin by showing the implicit model of education built into legal analysis. For constitutional purposes, proponents of immersion schools must justify deviations from this model with arguments that are persuasive within legal institutions. The explanations for immersion schools offered in Part I presuppose that the social environment created by both the dominant American culture and African-American culture is chosen. Since our legal system downplays the involuntary influence of culture on the individual, arguments derived from those explanations will not provide a persuasive defense for the constitutionality of immersion schools. Proponents must offer other “legal” justifications.

A. The Model of Education Implied by the Law

Law is a powerful mechanism through which our society implements its normative choices. The legal system consists of rules structured around a certain conception of social reality. Law validates its own conception of social reality by dictating the kinds of arguments that are persuasive within legal institutions. Since the legal arena is the final

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186. Standing is an important issue that must be resolved before any legal challenge can be made.

187. The relevant federal statutes involved in the legality of immersion schools include Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act. In Regents of the Univ. of Cal. v. Bakke, a majority of the Court concluded that Title VI of the 1964 Civil Rights Act goes no further in prohibiting the use of race than does the Equal Protection Clause of the Fourteenth Amendment. 438 U.S. 265, 287 (1978).

188. Legal thought can be viewed as a language for communicating about the circumstances of the social world. Peller, supra note 54, at 1154. Law is also knowledge in the sense that it is "vernacular characterizations of what happens connected to vernacular imaginings of what can." Geertz, supra note 25, at 215.


190. The core of America's liberal legal system has been described as the conviction that law is fundamentally separate from other types of social control. Gerald Torres, Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations, 25 San Diego L. Rev. 1043,
arena for resolving disputes in American society, legal culture will influence the conceptions and discussions about issues which take place outside of legal institutions.\footnote{191}

Immersion schools implicate the Equal Protection Clause because of the racially motivated decision making. To the extent that our liberal legal system recognizes the influence of culture as the molder of the individual, it sees that influence as chosen. Our legal system, and specifically the Supreme Court’s interpretations of the Equal Protection Clause, grounds its social vision in a conception of a society that is a collection of knowing individuals.\footnote{192}

The legal system views “knowing individuals” as autonomous, independent, self-directed, coherent, self-defining, and free-willed.\footnote{193} The social action of these knowing individuals is presumed to be controlled by their intent or preferences. Our legal system sees individuals as choosing both the broader culture with which they identify, and the socially constructed categories they inhabit in that culture.\footnote{194}

The conceptual structure of society as a collection of knowing individuals has its own rules for organizing social events and, particularly, the role of government. The role of government within this conception of society is

\footnote{191. Bumiller, supra note 56, at 23. Law, therefore, helps to construct popular consciousness and perception. \textit{See generally} Peter Gabel, \textit{Reification in Legal Reasoning}, in 3 Research in Law and Sociology 25 (Steven Spitzer ed., 1980); Duncan Kennedy, \textit{Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940}, in 3 Research in Law and Sociology 3 (Steven Spitzer ed., 1980). Law operates as a vali- dator of particular conceptions of society because it legitimizes certain social arrangements outside of our legal institutions. Torres, supra note 190, at 1043, 1050.}


\footnote{193. This view of the individual in society can be attributed to the demise of the medieval unitary world view. Karl Manheim, \textit{Ideology and Utopia: An Introduction to the Sociology of Knowledge} 13 (1936); \textit{see also} Pierre Schlag, \textit{Normative and Nowhere to Go}, 43 Stan. L. Rev. 167, 181 (1990) [hereinafter Schlag, \textit{Normative and Nowhere to Go}]. \textit{See generally} Seyla Benhabib, \textit{Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory}, 11 Cardozo L. Rev. 1435 (1990). Knowing individuals know few, if any, limits on their ability to understand the world. Pierre Schlag, \textit{Missing Pieces: A Cognitive Approach to Law}, 67 Tex. L. Rev. 1195, 1211 (1989). Understanding and reasoning, therefore, occur between individuals who can operate in a universal intellectual dimension. Id. The notion of the individual as unbounded in his or her ability to perceive ideas provides a conception of the individual as one who is able to adjudicate the validity of arguments being made because the individual stands outside of the boundaries of the inquiry and experience. Id. at 1215.}

\footnote{194. \textit{See infra} notes 195-205 and accompanying text.}
to mediate the conduct of knowing individuals and allow them to pursue their own desires. Simultaneously, the government must prevent them from unjustly interfering with the rights of their fellow persons. The government must, therefore, strive to achieve a sort of neutrality, respecting the pursuit of an individual's various objectives equally.

The Supreme Court's interpretations of the Equal Protection Clause recognizes that some social categories that individuals inhabit, such as race, ethnicity, and gender, are not the result of choice. When issues arise regarding these categories, the Supreme Court generally considers governmental transcendence as the proper resolution. This means that rather than acknowledging differences, the government should ignore them in favor of treating people as individuals, absent important or compelling justifications.

The model of knowing individuals requires special tailoring for children. According to the Supreme Court, children are persons within the meaning of the Constitution. However, the Court notes that the constitutional rights of children differ from those of adults. The distinction between the minor and the adult is fundamental and inescapable.

Children are not born with developed cognitive faculties. They lack the experience, maturity, and judgment of adults, and, therefore, cannot critically evaluate what is presented to them. As a result, the fundamental ontological premise of the knowing individual is inapplicable for determining all of the rights accorded to children. Since children do not enter situations as knowing individuals, their goals, preferences, and interests do

195. For a fascinating case dealing with attempts by religious adherents to attack the law's vision of social reality as merely one of many competing world views, see Smith v. Board of Sch. Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987). In Smith, the plaintiffs attempted to have 44 textbooks that were used in Mobile County Public Schools banned because the books advanced the religion of secular humanism. Id. at 688.

196. Torres, supra note 190, at 1049.

197. Professor Gotanda, arguing against color-blind decision making, convincingly points out that even when people strive to be racially color-blind, they cannot attain this goal because they immediately notice race, and then try to ignore it. Gotanda, supra note 43, at 16. A truly color-blind person would fail to notice color in the first instance. Id. at 18-19.

198. See Belotti v. Baird, 443 U.S. 622, 634 (1979) (concluding that a child's right to protection against deprivation of liberty or property is virtually coextensive with that of an adult).

199. The Supreme Court has recognized "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Id. at 634, 637; see also Ginsberg v. New York, 390 U.S. 629, 640 (1968) (upholding a statute according minors a more restricted right to buy pornography than that assured to adults).

200. See John H. Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321, 323 (1979) (noting that we think of children as inferior due to their physical, mental, and emotional immaturity); Stanley Ingber, Socialization, Indoctrination, or the "Pall of Orthodoxy," 1987 U. Ill. L. Rev. 15, 18 (stating that society perceives children as "lacking the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); Roe, supra note 158, at 1277 ("Furthermore, the immaturity of children is thought to make them more vulnerable to perceived negative influences that the state as well as parents may want to control through the curricular authority vested in the state as educator.").
not receive the same weight as those of adults. While adults—as knowing individuals—are seen as choosers, children are seen as learners.201

Though children do not fit the ontological premise of knowing individuals, this conception does suggest an implicit model of public education that finds support in many of the Court's more recent opinions addressing constitutional issues in public education.202 Since the requirement of governmental neutrality is implicit in the concept of the social world composed of knowing individuals, that concept will form the basis of the implicit model of education. This implicit model functions as the unstated norm for the role of public education from which deviations must be justified.

The implicit model views the function of public education as converting learners into knowing individuals. Public education, like other governmental functions, must maintain the neutrality that flows from the conception of society as a collection of knowing individuals. The governmental process of converting learners into knowing individuals performs two conflicting functions.203 Education performs a uniquely individualistic function geared towards promoting the capacity of individuals to decide for themselves. This academic function is value neutral. It views education as increasing the capacity of individuals to choose, not toward limiting their choices.204

Education also performs a limiting function for society. This limiting function inculcates values that restrict the desirability of certain choices individuals might make. The societal function is also value neutral, but in a different way.205 Social functions predicate value neutrality on instilling

202. In his concurring opinion in Board of Educ. v. Pico, Justice Blackmun noted that "[t]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated in the structure of our government." 457 U.S. 853, 876 (1982).
204. Courts, legal commentators, and educators agree that one of the functions of schools is to impart to students school-determined and school-endorsed knowledge, skills, and values. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (describing the school's role as a mechanism for introducing children to cultural values); Pico, 457 U.S. at 864 (acknowledging that schools are vehicles for instilling fundamental social values). See generally John G. Saylor & William M. Alexander, Curriculum Planning for Modern Schools (1966); Mark Yudof et al., Kirp & Yudof's Educational Policy and the Law 145 (2d ed. 1984); Stephen R. Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293, 1343 (1976); Roe, supra note 158, at 1293.
205. Professor Roe criticizes the Court for employing what he calls an inculcation-of-values model to its educational jurisprudence rather than a conceptual development model. Roe, supra note 158, at 1274-75. The conceptual development model flows from principles and insights gleaned from a substantial body of literature in the fields of psychology, education, and cognitive science. See Taxonomy of Educational Objectives, Handbook I: Cognitive Domain 7 (Benjamin S. Bloom ed., 1956). See generally David R. Krathwohl, Cognitive and Affective Outcomes of Learning, in 2 The Encyclopedia of Education 196 (Lee C. Deighton ed., 1971). I agree that a conceptual development model may be more appropriate for the
fundamental values into children that make it possible for their fellow knowing individuals to pursue their desires without undue influence. These fundamental values are implicit in our democratic form of government.

1. Public Schools as Academic Institutions

Schools disseminate useful information and teach basic academic skills, such as reading, writing, and math. They also assist in the cognitive development of children. Schools seek to broaden the sensibilities of children, kindle their imagination, and foster a spirit of free inquiry. Schools also foster cognitive development by providing children the opportunity to equip themselves with the vocational skills necessary for them to become self-sufficient and self-reliant adults.

Decisions regarding teaching techniques and curriculum fall within the academic functions of public schools. Moreover, a school's educational officials must make choices among which subjects to offer because of the finite resources and limited instructional hours. Judicial review often fails to reexamine reasonable academic decisions because they necessarily involve the academic expertise of educators.

educational interest of children than the value-inculcating model employed by the Court. My disagreement with Professor Roe stems from the fact that I believe that educators, not courts, should employ a conceptual development model. By providing deference to the decisions that educators make, courts allow educators to apply an educational model which they believe is most appropriate for the students under their charge.


208. William B. Senhauser, Education and the Courts: The Supreme Court's Educational Ideology, 40 Vand. L. Rev. 959, 942 (1987). Vocational skills functions follow the academic function in importance. People view the basic academic skills, namely reading, writing, and math as making students more employable. Because of public policy concerns, courts are reluctant to allow lawsuits alleging educational malpractice. See, e.g., Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 856 (Ct. App. 1976) (holding plaintiff's suit for loss of earning capacity failed despite limited employment opportunities because of plaintiff's inability to read and write); see also Hunter v. Board of Educ., 439 A.2d 582, 585 (Md. 1982) (holding monetary damages based on an educational malpractice claim must fail because these complaints make courts the overseers of the day-to-day operation of the educational system); Hoffman v. Board of Educ., 400 N.E.2d 317, 320 (N.Y. 1979) (holding that public policy precluded recovery for educational malpractice based on a negligent assessment of plaintiff's educational ability); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) (holding public policy prevented a claim for educational malpractice despite plaintiff's inability to comprehend English well enough to enable him to complete an employment application).

Educators also perform the academic function when they tailor education to the abilities, needs, and interests of individual students. Public schools regularly separate students for academic reasons. Generally, schools separate fifth graders from fourth graders in order to match each child's instruction with the individual's presumed level of maturity, experience, and intelligence. Grade levels do not provide the only line for separating students, many schools separate students in the same grade in core courses of English and mathematics.

In addition to separating students for instructional purposes within a given school, many school systems have also set up alternative schools for students with educational or social problems. For example, the Detroit School Board has operated three all-black female schools for pregnant teenagers since 1991. Moreover, the Board also operates two all-black male schools for students considered incorrigible disciplinary problems.

Schools also afford opportunities for students to pursue individual interests. In junior high and high school students routinely choose courses, studying subject areas of particular interest to them. Many school systems also operate schools of choice, "magnet schools," with a special emphasis on a number of academic or technical areas. Specialty areas include science, mathematics, foreign languages, and vocational programs. Parents (in consultation with their children) choose to send children to magnet programs due to their interest in the particular concentration offered. Providing students and their parents with choices about educational programs illustrates the individualistic orientation of the academic function.

Society presumes that schools engaged in the academic function are imparting the neutral commodity of knowledge and assisting individual students in developing reasoning and other cognitive abilities. This presumption contrasts with the reality that education involves the inculcation of values. Through the prescription of curriculum, selection of textbooks and reading material, employment of various teaching techniques and strategies, and enforcement of administrative rules and regulations governing student and teacher conduct, school officials bias the example, has indicated on a number of occasions that school officials must be able to make choices about the curriculum as part of the exercise of their educational expertise. Kuhlmeier, 484 U.S. at 270; Edwards v. Aguillard, 482 U.S. 578, 605 (1987) (Powell, J., concurring); Pico, 457 U.S. at 882 (Blackmun J., concurring); id. at 863-64 (plurality opinion). The Supreme Court's opinions have insulated decisions made in good faith by governmental officials that sought to advance educational objectives. Mark G. Yudof, A Battle for Students' Hearts and Minds, 126 N.J. L.J. 9, 20, (index page 1388) (Nov. 22, 1990).


211. Garrett, Motion for Restraining Order, supra note 132.

educational environment. Value choices determine the presentation of information. Nevertheless, in order to maintain the presumed neutrality of the implicit model of public education, the overwhelming majority of decisions by educators must be presumed to be value neutral.

When courts address the academic function of public schools, they attempt to ascertain whether the actions taken by educational officials are a reasonable exercise of their educational judgment. This standard does not mean that every exercise of educational judgment is permissible but it does entail deference to the judgment of educators. This judicial deference to educational expertise of school officials prevents courts from becoming actively involved in the day-to-day operation of public schools.


Elected representatives of the state designate the ideology and some of the content of public school teaching material. The elected representatives of the locality, the local school board, and their appointees designate the remainder of the content and much of the ideology. The board, the principals, and the teachers may select a textbook favoring their own views and ideologies, and they might not permit alternatives. The teacher may be required to submit in advance a series of lesson plans reviewed by the higher authorities in order to control the shape, content, and methodology of the teacher's classes. In the end, a sufficient compilation of proper responses to the controlled process produces a graduate.

214. Even though government-sponsored education may purport to be value neutral, no such education will exist. John Stuart Mill noted the problem with respect to government-sponsored education:

[State sponsored education] is a mere contrivance for moulding people to be exactly like one another; and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind.


217. A number of lawsuits filed in the 1970s and 1980s against various school districts alleged that the school systems failed to educate students attending schools in those districts. The central issue in these cases was whether there was a "duty" as that term is understood in an action for negligence, misrepresentation, or fraud. Courts consistently concluded that no legal duty existed to educate children, noting that recognition of such a duty would require courts to become involved in the day-to-day operation of public schools. See generally D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981) (holding actions for
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When educational decisions involve the reasonable exercise of educational expertise, they are consistent with the implicit model of education. No additional legal justification for these decisions is necessary.

2. Public Schools as Socializing Institutions

Children attend public schools during the most impressionable intellectual period of their lives. By awakening the child to dominant American cultural values, schools perform an important socializing function. The choice of which values shall be transmitted in public schools normally lies with the political majority or interest group in charge of the local school system. However, the Supreme Court's jurisprudence in this area indicates that it will override those choices when they violate what the Court has called "fundamental values necessary to the maintenance of a democratic political system."

The Court evaluates the socializing aspect of public education by closely examining the values instilled by the public schools and deemphasizing the pedagogical ramifications of educators. Regardless of any pedagogical benefits, no justification exists for academic decisions made by public policy. See Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rpt. 854 (.Ct. App. 1976) (holding that based on public policy, defendant school system owed no duty of care to provide adequate instruction); Torres v. Little Flower Children's Serv., 474 N.E.2d 223 (N.Y. 1984) (holding educational malpractice action by functionally-illiterate plaintiff against city agency, which assumed responsibility to provide plaintiff with education as needed, was barred for public policy reasons, just as it would be barred against the school itself); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979) (holding that a cause of action against a school district seeking monetary damages for educational malpractice is not cognizable in the courts as a matter of public policy). But see Gershon M. Ramer, A New Legal Duty for Urban Public Schools, 63 Tex. L. Rev. 777, 781 (1985) (contending that when existing sources of law are applied to the recent recognition of the ability of even urban public schools to educate their students effectively, "a new legal duty emerges to educate effectively").

Compulsory school attendance laws in most states require children to attend school from approximately ages 6 to 16. William D. Valente, 2 Education Law: Public and Private 466 (1985) (presenting appendix table showing the age range of each state during which children must attend school). In addition, over 90% of the students who attend schools in this country, attend public schools. Louis Althusser claims the educational institutions remain the dominant ideological state apparatus. Louis Althusser, Ideology and Ideological State Apparatuses: Notes towards an Investigation, in Essays on Ideology 3, 152-57 (1984).

To have a liberal democratic state, it is necessary to educate children in that manner. See Bruce Ackerman, Social Justice and the Liberal State 163 (1980) (discussing the place of education in liberal theory); see also Plyer v. Doe, 457 U.S. 202, 222 n.20 (1982) (noting that public schools perform an important socializing function by imparting shared values that maintain social order and stability); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (stating that education is probably the most important function of state and local governments).


educators that violate fundamental values. The public school's effectiveness in teaching children "proper" fundamental values, therefore, is the primary concern of the Supreme Court. Among the values the Court considers fundamental are tolerance for political and religious diversity, patriotism, belief in self-sufficiency, belief in racial equality, and a commitment to faithfully discharge the duties imposed by citizenship. The imposition of these values relates to learners in one of two ways. It either causes children to develop their own capacity to choose or it instills in them the values necessary to promote the rights of others to choose for themselves in our society. It follows that the conception of society as a collection of knowing individuals is at the heart of the fundamental values articulated by the Supreme Court.

One must interpret the actions of governmental officials to determine the values that a particular action inculcates. As with any other social phenomena, there will be multiple plausible interpretations for any given educational act. Courts must select the most appropriate interpretation for the meaning of a governmental act. Once the Court interprets a governmental act, it can identify the value socialized by that act.

Courts will often consider the motives of officials as the primary criteria in determining the most appropriate meaning for their actions. The Supreme Court has employed a motive test to determine the constitutionality of various governmental actions affecting public education in a number of disparate areas. The only cases where the Court struck down governmental action attributable solely to religious motivations are public education cases. The Court has also endorsed a motive test to determine

222. Fraser, 478 U.S. at 681 (stating that public schools must inculcate habits and manners of civility which are fundamental values necessary for the maintenance of a democratic political system). The Court noted that "[these] values of 'habits and manners of civility' essential to a democratic society must . . . include tolerance of divergent political and religious views, even when the views expressed may be unpopular." Id.

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), can also be thought of as a situation where the schools attempted to suppress nondisruptive political speech. As a result, the school officials sent the message that one need not tolerate even nondisruptive unpopular political speech.

The liberal construction of the phrase "tolerance for political diversity" conflicts with the inculcation of certain political values, such as patriotism, respect for formal authority, and the values enshrined in democracy. However, the phrase has a more narrow meaning. The narrow construction allows schools to satisfy the goal of inculcating tolerance for political diversity by preventing schools from engaging in "narrow political or partisan indoctrination." Pico, 457 U.S. at 879.


226. For a further discussion of this issue, see Brown, supra note 161, at 19.

227. The secular purpose has been decisive in four cases. Lawrence Tribe, American Constitutional Law 1206 (2d ed. 1988). See generally Lee v. Weisman, 112 S. Ct. 2649 (1992) (holding that prayer at a public high school graduation ceremony constituted coercion to participate in a religious exercise); Edwards v. Aguillard, 482 U.S. 578 (1987) (striking a statute requiring teachers to teach creation science whenever they taught theory of evolution);
whether or not the removal of books from a school library violates the constitutional rights of students.228 The Supreme Court used a motive test to determine violations of the Equal Protection Clause in the school desegregation case of Keyes v. School District No. 1,229 where it distinguished de jure segregation from de facto segregation.

Examining the intent of governmental officials is a good way to elucidate the meaning attached to a given community's actions. State and local governmental officials who make educational policy are either elected by the majoritarian political process or appointed by elected officials. If their views are too far removed from their community's values, then the political process remedies this situation. As a result, decisions about education made by state and local government officials tend to embody a community's consensus values. Therefore, a purpose test is a good means of determining the values that various governmental actions inculcate.

B. Legal Conceptualizations of Challenges to Immersion Schools

In City of Richmond v. J.A. Croson Co.,230 a majority of the Supreme Court held that strict scrutiny applies to governmental classifications based on race, regardless of the presumed beneficiaries.231 But the analysis of the constitutionality of immersion schools as entities is not as simple and straightforward as applying the strict scrutiny test to the decision to establish these schools. Affirmative action programs normally involve two aspects of equal protection analysis. For example, the city of Richmond's affirmative action program determined eligibility by making racial classifications. Moreover, race was the primary motivation for the Richmond program. Immersion schools can be differentiated from affirmative action programs because they do not involve racial classification of students.

The constitutional analysis of immersion schools occurs in the process of legally conceptualizing this phenomena. The proper analysis depends,


228. In Pico, both the plurality opinion authored by Justice Brennan and the concurring opinion of Justice Blackmun cited to a motive test. The Court held that removing books from the school library violates the Constitution if school officials intended to deny students access to ideas with which they disagreed. Board of Educ. v. Pico, 457 U.S. 853, 879-80 (1982). However, the Court found that removal decisions based on the books' educational suitability are valid. Id. at 855-56 (Blackmun, J., concurring).

229. See Keyes v. School Dist., 413 U.S. 189 (1973). I have defended the use of the motive test in the school desegregation cases in another article. *See generally* Brown, supra note 161. In that article, I argued that the primary effect of education manifests in the form of the values being inculcated. Therefore, within the context of public education, a motive test is actually an effects test. Id. at 14.


231. Justice O'Connor, joined by Chief Justice Rehnquist, Justice White, and Justice Kennedy, adopted strict scrutiny as the requisite test for the Equal Protection Clause, regardless of the race of those benefitted or burdened. Id. at 493-94. Justice Scalia, in a separate concurring opinion, also endorsed the concept of strict scrutiny regardless of the classification of the governmental purpose. Id. at 520.
therefore, on the conception. There are four likely conceptions of immer-
sion schools that will produce one of three disparate results. What compli-
cates the equal protection analysis is that each of these conceptions and
 corresponding analyses will be present in some more or less distinct form.
 How courts conceptualize the schools will determine their legality.

1. Immersion Schools as Schools of Choice

For purposes of constitutional analysis, proponents of immersion
schools will attempt to characterize them as schools African-Americans
choose to attend. This conceptualization views immersion schools primarily
from the perspective of the academic function of public schools. It involves
two aspects of the decision to establish and operate immersion schools.
First, despite the racial reasons supporting the decision to establish immer-
sion schools, academic reasons are paramount. Second, since immersion
schools will admit students on a racially neutral basis, immersion schools do
not require the government to treat students as members of a racial or
ethnic group. Conceptualizing immersion schools in this manner makes it
more probable they will survive an equal protection challenge.

a. Establishment of immersion schools as an academic decision

There are a number of different ways to view the decision to establish
immersion schools as motivated by legitimate pedagogical concerns. One of
the primary tasks of educators involves the modification of the traditional
educational program to fit the particular abilities, interests, or needs of the
individual students in their charge. Proponents may argue
that the decision to establish immersion schools is analogous to the decision
to set up educational tracks or schools for students with special problems.
Likewise, immersion schools are analogous to magnet schools concentrat-
ing on African-American studies.

Finally, proponents could argue that immersion schools are a type of
laboratory experiment for school districts. The recent attention surround-
ing proposals, which supposedly improve academic achievement, makes
this argument plausible. Immersion schools provide educators with a
setting in which they can evaluate the effectiveness of various curricula and
teaching techniques in order to determine what is appropriate to meet the
needs of students. In fact, New York, Milwaukee, and Detroit—each of
which operates immersion schools—indicate that their immersion schools
are experimental, which provides them with an opportunity to find out

232. Professor Sedler, in a legal memorandum advising the Detroit School Board on the
legality of its proposal to establish all-male academies, characterized all-male schools as
responding to male students with special needs, regardless of race. Memorandum from Robert
A. Sedler, Professor of Law, Wayne State University, and Legal Consultant to the Detroit
Public Schools on the Male Academy, to Arthur M. Carter, Interim Deputy Superintendent for
Community Confidence, Detroit Public Schools (May 7, 1991) (on file in the University of Iowa
College of Law Library).

233. See generally Education Reform in the '90s (Chester E. Finn, Jr. & Theodor Rebarber
eds., 1992) [hereinafter Educational Reform in the '90s]; National Comm'n on Excellence in
what works and what does not.\textsuperscript{234}

\textbf{b. Impact of allowing students to choose immersion schools}

Our society values giving effect to individual choice.\textsuperscript{235} With respect to public education, choice always plays a significant role. We assign students to school not by random lot or I.Q., but by residence.\textsuperscript{236} Family residence normally lies within the choice, albeit restricted by financial ability and other considerations, of the student's parent(s) or guardian(s). In addition to operating standard neighborhood schools, as indicated earlier, some areas operate magnet schools, which students may choose to attend.\textsuperscript{237} Some school districts allow their students to choose to attend any school in the entire school district; moreover, Minnesota provides that option for any public school in the state.\textsuperscript{238} Proponents of immersion schools will emphasize the choices of parents and students to attend these schools, rather than on the motivations of educational officials in creating them.

The racial separation of students resulting from the establishment of immersion schools differs from de jure segregated schools. With de jure segregation, school officials racially classify students by using a student's race as a criteria for determining school assignments. Immersion school attendance is voluntary. The schools are not exclusive; in fact, all students may apply regardless of race. From this thesis, proponents can argue that the school district does not violate the individuality of students by classifying and treating them as members of a racial group.\textsuperscript{239} Any de facto segregation is merely the result of private decision making. De facto segregation resulting from people's preferences normally survives constitutional scrutiny.\textsuperscript{240}

The Supreme Court rejected freedom of choice as a means to eliminate the vestiges of de jure segregation in the companion cases of \textit{Green v. New Kent County}\textsuperscript{241} and \textit{Monroe v. Board of Commissioners}.\textsuperscript{242} However, choice in the context of immersion schools is an entirely different matter. The duty imposed by \textit{Green} applies only to school systems required

\textsuperscript{235} Paul Gerwirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728, 730 (1986).
\textsuperscript{236} John E. Coons & Stephen D. Sugarman, Education by Choice: The Case for Family Control 7 (1978).
\textsuperscript{237} Id. Choice also exists within schools. Some students enroll in academic, college prep, general, or vocational classes. Id. Schools often permit students in junior high and high school to select certain elective courses. Id. This allows the students to tailor their education to their particular interests. Id.
\textsuperscript{238} Education Reform in the '90s, supra note 233, at 36, 47.
\textsuperscript{239} See Freeman v. Pitts, 112 S. Ct. 1430, 1452 (1992) (Scalia J., concurring) (stating that the states should not have the power to legislate racial classifications to remedy the effects of past discrimination). See generally City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (noting that school choice is determinative of the continued existence of de jure segregation).
\textsuperscript{240} Gewirtz, supra note 235, at 750.
\textsuperscript{241} 391 U.S. 430 (1967).
\textsuperscript{242} 391 U.S. 450 (1967).
to disestablish their existing dual school system. The holdings in Green and Monroe do not apply to school systems that have eliminated prior discriminatory conduct and schools that have never practiced de jure segregation. Immersion schools established in those districts, therefore, will escape analysis under Green and Monroe.\textsuperscript{243}

Additionally, establishment of immersion schools differs from issues arising under traditional affirmative action.\textsuperscript{244} Since disputes regarding affirmative action primarily center around the distribution of finite resources, they often involve a zero-sum game.\textsuperscript{245} There are typically only so many promotions or jobs to be preserved,\textsuperscript{246} so many governmental contracts or licenses to be let,\textsuperscript{247} or so many higher education admissions positions to be filled.\textsuperscript{248} For racial and ethnic minority members to win, individual whites must lose.\textsuperscript{249} As a result, when the government establishes a program to assist racial minorities, not only does it classify people as members of a racial or ethnic group, it also creates losers. Individuals who do not fall into certain racial or ethnic categories lose opportunities to


\textsuperscript{245} See, e.g., Mark Kelman, Concepts of Discrimination in "General Ability" Job Testing, 104 Harv. L. Rev. 1158, 1183 (1991) (discussing how many people view antidiscrimination law in employment as replacing white workers with minorities in a fundamentally unaltered employment and compensation scheme); Antonin Scalia, The Disease as Cure: "In order to get beyond racism, we must first take account of race.", 1979 Wash. U. L.Q. 147, 156 (1979) (arguing that affirmative action programs should be directed at the poor and disadvantaged but not at members of select racial groups). But see Ronald Dworkin, Are Quotas Unfair?, in Racial Preference, supra note 244, at 178-79 (concluding that affirmative action is consistent with a belief in colorblindness, because the long-term goal is "to reduce the degree to which American society is . . . racially conscious . . . "). Increasing the number of blacks who are at work in these professions will, in the long run, reduce the sense of frustration and injustice and radical self-consciousness in the black community so that blacks can begin to think of themselves as individuals who can succeed like others through talent and initiative. By the same token, professional association between whites and blacks will decrease the degree to which whites think of blacks as a race rather than as individuals. See Gotanda, supra note 43, at 62-63 ("[M]odern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist. There is no legitimate rationale for the automatic rejection of all governmental consideration of race.").


\textsuperscript{249} It is easy to see how affirmative action programs operate as a means of attacking racial subordination. The benefits derived from such programs are tangible. See, e.g., Bakke, 438 U.S. at 401 (Marshall, J., concurring) ("It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America."); Gotanda, supra note 43, at 49; Paul R. Spickard, Why I Believe in Affirmative Action, in Racial Preference, supra note 244, at 105-09.
receive some tangible benefit.\textsuperscript{250} Immersion schools do not necessarily involve the usurpation of scarce resources. Students who attend immersion schools merely attend a school in the district that is different than the one they otherwise would have attended. In some cases, the immersion school may even be the same school with appropriate modifications. In either case, the school district must provide for students' education. School districts will probably want to place African-American teachers in immersion schools.\textsuperscript{251} But in many situations this preference will simply lead to reassigning African-American teachers from one school to another.\textsuperscript{252} Therefore, it will not involve the loss of a vested expectancy right similar in degree to that existing in the layoff program struck down by the Supreme Court in \textit{Wygant v. Jackson Board of Education}.\textsuperscript{253} As a result, immersion schools do not necessarily raise concerns about reducing societal resources available to non-minorities. Nor do they involve the possibility of replacing presumably more productive whites with less productive racial or ethnic minorities.\textsuperscript{254} If the real objection to race-based decision making by government officials is that the government is affirmatively disadvantaging persons because of their race,\textsuperscript{255} then immersion schools may not necessarily invoke

\begin{itemize}
  \item \textsuperscript{251} If the school district, however, assigns teachers based on racial preference, it could raise issues concerning affirmative action programs. See \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 275-76 (1986) (concluding that the role model theory was not sufficient justification for race-based distinctions with respect to teacher layoffs). School districts, however, may not necessarily give preference to teachers at these various schools because of race. In Milwaukee, for example, two-thirds of the teachers at one of the African-American immersion schools are white. School districts, however, could base their decisions on certain non-racial criteria related to qualifications to teach in immersion schools. One qualification could be the number of credit hours of African-American studies a particular teacher has completed.
  \item \textsuperscript{252} If the school, however, deems it necessary to recruit new African-American teachers in order to staff these programs, then the traditional affirmative action concerns will resurface.
  \item \textsuperscript{253} 476 U.S. 267 (1986).
  \item \textsuperscript{254} This is the converse of the optimistic argument about antidiscrimination. The optimistic argument asserts that elimination of the underemployment of minorities will spur overall economic growth. Economic growth occurs as more qualified minority employees replace less qualified majority employees. See Paulette M. Caldwell, Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation, 46 U. Pitt. L. Rev. 555, 579-83 (1985) (describing federal efforts to end employment discrimination).
strict scrutiny under the Equal Protection Clause. This distinction may be what led former President Bush to voice his support for African-American male academies. While Bush is an ardent opponent of affirmative action, he publicly indicated his support for separate schools for African-American males. Furthermore, Bush suggested that, if necessary, we change the law to ensure their legality.

2. Colorblindness Analysis of Immersion Schools

One may analyze the decision to establish immersion schools as a socializing decision. The message sent or the values inculcated by the decision to establish and operate immersion schools provides the primary consideration in this analytical framework. Some Justices on the Supreme Court support a colorblind interpretation of the Equal Protection Clause. Because of the socializing function of public education, a colorblind approach to the Equal Protection Clause would have special appeal for disputes involving public education. The colorblind interpretation is the embodiment of what has been called the moral imperative of race neutrality flowing from the Equal Protection Clause. As Justice Stewart

Majority, 63 Ind. L.J. 301, 350-53 (1987) (describing the burdens which may be placed on nonminorities constitutionally); Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78, 78-80, 91-97 (1986) (describing the current use of affirmative action as not being equally absolved).

256. Because the Court's decisions in both affirmative action and school desegregation cases involved situations where the government's race-based decision making incidentally harmed individuals, the Court did not address a situation where governmental race-based decision making may not actually harm a vested interest of an individual. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (stating classifications based on race alone implicate personal rights to dignity and respect); Fullilove v. Klutznick, 448 U.S. 448, 525, 532 (1980) (Stewart, J., dissenting) (arguing both that, under our Constitution, the government may never act to the detriment of a person solely because of that person's race and that by making race a relevant criterion the government implicitly teaches the public that rewards and penalties can legitimately be granted according to race and that people can and should view themselves and others in terms of their racial characteristics).


258. See Croson, 488 U.S. at 521 (Scalia, J., concurring) (arguing that the only time state or local government should use racial classifications is when there is a "social emergency rising to the level of imminent danger to life and limb ... [only this type of situation] can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind ... "); see also Clarence Thomas, Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation, 30 How. L.J. 983, 993 (1987) ("The 'superiority' of the white race would appear to depend on its acknowledgement that it is not superior but equal and a 'color-blind Constitution' would insulate that this revolutionary principle would always be kept in mind."). Aspirations of colorblind governmental decision making have a long history in American jurisprudence dating back to the famous Harlan dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

259. Justice O'Connor stated in Metro Broadcasting that the FCC preference "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the government by history and the Constitution." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting). Justice O'Connor also asserted that race-based decision making would fracture the country and lead to an "escalation of racial hostility and conflict." Id. Race-based decisions violate the societal goal of fair, individualized decision making. James F. Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results
stated, "[B]y making race a relevant criterion . . . the Government implicitly teaches the public . . . that people can, and perhaps should, view themselves and others in terms of their racial characteristics."\(^{260}\)

If the value of racial equality is drawn from a conception of society as a collection of knowing individuals, it will require that the government not engage in race-based decision making. Like the other fundamental values flowing from the individualized conception of society, this definition of the value of racial equality embodies the universal notion of knowing individuals who are devoid of social characteristics such as race, gender, religion, and sexual orientation.\(^{261}\) Government would generally violate this interpretation of the value of racial equality when it makes decisions that account for race.\(^{262}\) This is the application of the colorblind notion of the Equal Protection Clause applied not to governmental classifications, but to governmental decision making.

By establishing immersion schools, the government implements educational policy to account for the educational concerns of African-Americans. When school officials make decisions based upon explicit racial considerations, the meaning conveyed by those actions tells children that race does matter and that one can and should attach significance to race. Separate schools specifically designed for African-Americans introduce a characteristic that people do not choose. Bringing race into the design and development of educational programs introduces characteristics that violate the quintessential notion of the knowing individual enshrined in the implicit model of education.

### 3. Immersion Schools Failing Strict Scrutiny

The Supreme Court has not yet formally accepted the rigidity of a colorblind application of the Fourteenth Amendment. A focus on race-
based decision making involved in establishing immersion schools would probably lead a given court to employ a strict scrutiny analysis. Commentators have referred to the strict scrutiny test as strict in appearance, but fatal in fact.\textsuperscript{263} When applying strict scrutiny, the Equal Protection Clause starts from an implicit standard that race is irrelevant for purposes of governmental decision making.\textsuperscript{264} This implicit standard treats race as an apolitical description of skin color. To attach significance to race is, therefore, presumptively irrational. To satisfy strict scrutiny, racially motivated governmental action must be justified by a compelling state interest. Furthermore, the racially motivated action must be narrowly tailored to advance that compelling state interest.\textsuperscript{265}

Proponents will have to argue that a compelling state interest justifies the establishment of immersion schools. Proponents must formulate their arguments with care to avoid making them appear grounded in racial prejudice and stereotyping. As a result, their attempt to meet the first prong of the strict scrutiny test may cause them to fail to meet the second part of that test.

\textit{a. Providing a compelling state interest}

The first part of the strict scrutiny test requires that proponents of immersion schools provide a compelling justification for their race-based decision making. It is probable that the condition of African-Americans, both in society at large and in educational institutions, can provide a compelling justification for the decision to establish immersion schools.

As discussed earlier, advocates for immersion schools often cite social statistics regarding the conditions of African-Americans outside of educational institutions to help justify the need for such schools. Possessing an understanding of these statistics within a conceptual framework that emphasizes how the dominant culture influences the social environment of blacks, however, does not provide legitimate legal justifications for immersion schools. Such an argument will be understood as an attempt to justify immersion schools as a response to societal discrimination. An argument structured along these lines will be (mis)understood through the conceptual framework of society as a collection of knowing individuals. As a result, the argument will be misunderstood and will sound like an attempt to justify the establishment of immersion schools with reference to the existence of

\textsuperscript{263} Tribe, supra note 227, at 1451. Tribe emphasizes that "[w]hen expressed as a standard for judicial review, strict scrutiny is, in Professor Gunther's formulation, 'strict' in theory and usually 'fatal' in fact." Id. (quoting Gerald Gunther, The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)).

\textsuperscript{264} See supra notes 259-61 and accompanying text.

\textsuperscript{265} City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). The Court's most recent cases dealing with issues of affirmative action, Croson and Metro Broadcasting, suggest race-conscious measures based on the deference accorded Congress and federal authorities under the Fourteenth Amendment are more acceptable than measures adopted by state and local officials. However, this distinction may only be important to Justice White since the majority opinion in Metro Broadcasting is very similar to the dissent in Croson. Moreover, the dissent in Metro Broadcasting is very similar to the majority opinion in Croson.
widespread irrational racial prejudice voluntarily held by many individual white Americans. African-Americans will come into contact with a number of these individuals throughout their lives. The alternative education provided by immersion schools is necessary to prepare African-Americans to reaffirm their basic dignity and humanity when they encounter racial prejudice. Immersion school education is necessary to provide black students with strategies and techniques to overcome these racial obstacles.

For proponents of immersion schools, despite the likelihood of judicial misunderstanding, societal discrimination is still an attractive argument. As a justification, it does not require any negative assertions about African-Americans. However, attempts to supply a compelling state interest with reference to societal discrimination will fail. The Supreme Court has consistently rejected societal discrimination as a compelling justification for purposes of strict scrutiny analysis. The Court has indicated that notions of societal racism are too amorphous to justify race-based decision making.

Without the justification of societal discrimination, proponents for immersion schools will be forced to articulate compelling justifications by asserting claims of racial distinctiveness. Claims of racial distinctiveness have always embodied a potentially explosive situation because they usually further derogatory beliefs about African-Americans. Such will be the case in the instance of immersion schools as well.

Providing legal evidence is a process of selecting useful information and discrediting harmful information. In order to supply compelling justifications for the educational significance of race, proponents will have to provide useful evidence. They must stress the poor economic and academic condition of African-Americans. This requirement will trap proponents of immersion schools into a discourse that encourages them to portray African-Americans in the worst possible light. Furthermore, they will have to ignore or discredit positive information. In fact, the more deplorable a portrayal of African-Americans the better the chances of demonstrating a compelling state interest.

The facts in Garrett v. Board of Education demonstrate the structure of this argument. The school board introduced evidence pertaining to the
poor economic condition of African-American males, their high dropout rates, their high unemployment rates, and their high crime rates. Even though the district court held that the academies were unconstitutional, this evidence persuaded the district court that the lamentable condition of African-American males provided the school board with a substantial governmental interest to justify gender segregated schools.

Proponents of immersion schools reinforce the negative social construction of African-Americans in dominant American culture by pointing to empirical evidence of the deplorable condition of African-Americans. As a result, despite the legal resolution, the very act of attempting to defend these schools against a race-based conception will stigmatize all African-Americans by suggesting that they are academic and social deviants.

b. Failing the narrowly tailored requirement

Proponents may establish compelling justifications for the decision to establish immersion schools by reciting negative social statistics about the condition of African-Americans. However, basing the decision on such statistics runs the risk of violating the second part of the strict scrutiny test. By citing negative social statistics, proponents seem to justify the decision to establish such schools by resting upon negative stereotypes of African-Americans as lazy, unintelligent, poor, and prone to violent behavior.

Justice O'Connor noted that the narrowly tailored aspect of the strict scrutiny test prevents the use of illegitimate racial prejudice or stereotypes. Even though racial generalizations may have some empirical basis, they inevitably do not apply to all African-Americans. Therefore, the negative implications of the statistics stigmatize some blacks to which the facts do not apply. The attempt to supply a compelling state interest could, therefore, cause the failure of immersion schools to pass the narrowly tailored aspect of strict scrutiny.

270. Id. Virtually every commentator pointing to the need for immersion schools, either for all blacks or just males, justifies them by citing to objective statistical information concerning the condition of blacks. See, e.g., Jawanza Kunjufu, Detroit's Male Academies: What the Real Issue Is, Educ. Week, Nov. 20, 1991, at 29; see also Garrett, 775 F. Supp. at 1007 (rejecting Detroit's proposal to establish African-American male academies in part because it excluded females who also face a crisis because of their school dropout rates, tendencies to engage in criminal activities, and loss of self-esteem). "You cannot be raised in a culture that was for centuries committed to the notion of your inferiority and not have some doubt in this regard—doubt that is likely to be aggravated in most integrated situations." Steele, supra note 56, at 25. Educators assume healthy self-concepts are necessary in order for students to do well in school. Banks, supra note 130, at 99; see also Bouma & Hoffman, supra note 99, at 72-81 (concluding that the Court's recognition of the psychological damage to African-American children is at the heart of the educational problems encountered by many Negro children).

By contrast, psychologist William Cross, Jr. contests the proposition that African-Americans suffer from low self-esteem in his book, Shades of Black. See generally Cross, supra note 96. Cross reviews the literature on self-esteem, noting that studies on self-esteem show that African-Americans generally test at normal or above-normal levels. Id.

271. Garrett, 775 F. Supp. at 1007. Even though the court found the existence of a substantial governmental interest, it concluded that the male-only plan was not narrowly tailored. Id. at 1008.


As indicated earlier, one of the main justifications for immersion schools is to take into account the cultural conflict. The legal system and many Americans see the cultural conflict as a product of the choice made by some African-Americans to interpret social phenomena through the veil of African-American culture. As a result, they characterize Afrocentric educators' arguments about an inevitable clash of two competing and conflicting cultures as a claim of racial distinctiveness made by African-Americans. Americans who make this recharacterization misunderstand the arguments based on inevitable cultural conflict. For those who believe that the performance of African-Americans in public schools relates to African-American culture, the impediment to the performance of African-Americans in public schools is African-American culture, not inevitable cultural conflict. If the inevitable cultural conflict is downplayed, the proponents' arguments take on a different caste within the legal system. Then the decision to establish immersion schools appears to be a decision based upon negative stereotypes.

4. Surviving Strict Scrutiny

The compelling state interest analysis articulated previously remains the same. However, the interpretation of the narrowly tailored aspect of the strict scrutiny test changes. Parents who choose to send their children to immersion schools do so on an individualized basis. As a result, proponents may argue that individuals choose to attend these schools. To the extent anyone is stigmatized, the only ones stigmatized are those who choose to be stigmatized when they decide to attend these schools. Therefore, overgeneralizations based on racial stereotypes do not exist in the rationale for immersion schools.

In this legal conception, immersion schools take on a remedial appearance. They respond to specific deficiencies of their students which cannot be adequately addressed in the traditional educational programs. Educational officials who create immersion schools do not perceive African-Americans as deficient students. Rather, they establish these schools for deficient students who happen to be African-American.

C. Implications Resulting from United States v. Fordice for the Conception of Immersion Schools

At this time, the Supreme Court has not addressed the constitutionality of immersion schools. However, the Court's recent opinion in United States v. Fordice...
States v. Fordice\textsuperscript{276} emphasizes the importance of determining the conceptual basis for immersion schools. In this opinion, the Court addressed the obligation of a state to eradicate the vestiges of its operation of a dual school system at the university level for the first time.

Over the years, the state of Mississippi established eight publicly funded universities, five for white students and three for African-Americans.\textsuperscript{277} As late as 1986, these universities overwhelmingly drew their faculties and student bodies from the racial groups that they were founded to serve.\textsuperscript{278} The Supreme Court imposed a remedial duty that focused on specific policies and practices of the university system. The Court held:

If the State perpetuates policies and practices traceable to its prior [dual university] system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.\textsuperscript{279}

First, the Supreme Court vacated the decision of the en banc panel of the Fifth Circuit. Then, the Court remanded the case to the lower court to apply this test to the Mississippi university system. The latter part of the Court's opinion applied the test articulated above to four policies and practices of the existing Mississippi university system.\textsuperscript{280} One of the practices highlighted by the Court was the operation of eight universities by Mississippi. Because of an insufficient record, the Court did not decide whether it was necessary to close any of the universities. On remand, it directed the lower court to investigate the necessity of maintaining all eight universities.

The Court did not specifically address whether the educational policy justifications could sustain historically black colleges. Justice White, writing for the Court, however, stated:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley

\begin{quote}

277. The three universities established for blacks were Jackson State University, Alcorn State University, and Mississippi Valley State University. The five universities established for whites were University of Mississippi, Mississippi State University, Mississippi University for Women, University of Southern Mississippi, and Delta State University. Id. at 2732.

278. In 1986, 99% of all white students (26,759 out of 26,953) enrolled in one of the historically white institutions, and 71% of the black students (9,125 out of 12,826) enrolled in one of the historically black institutions. Imbalance existed among the students and the faculty. In 1986, less than 5% of the faculty at any of the historically white institutions were African-American. African-Americans constituted more than two out of three of the faculty at the three historically black institutions. Ayers v. Allain, 893 F.2d 732, 735-37, vacated en banc, 914 F.2d 676 (5th Cir. 1990), vacated sub nom. See generally United States v. Fordice, 112 S. Ct. 2727 (1992).

279. Fordice, 112 S. Ct. at 2737.

280. The four policies were admission standards, program duplication, institutional mission assignments, and continued operation of all eight public universities. Id. at 2738-43.
\end{quote}
[the historically black colleges] solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for all its citizens and it has not met its burden under Brown to take affirmative steps to dismantle its prior de jure system when it perpetuates a separate, but "more equal" one.\textsuperscript{281}

Two of the Justices, writing concurring opinions, specifically interpreted the impact of the Court's opinion on the constitutionality of the continued operation of historically black colleges. Like the model of immersion schools, historically black colleges are open on a racially neutral basis and structured around the culture and social environment of African-Americans.

Justice Thomas wrote that the Court had not foreclosed "the possibility that there exists 'sound educational justification' for maintaining historically black colleges as such."\textsuperscript{282} Thomas praised historically black colleges for their leadership in developing educational opportunities for blacks. Thomas noted that a state is not forbidden from operating "a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional diversity is without 'sound educational justification.'"\textsuperscript{283}

If courts apply Justice Thomas's logic to the decision to establish immersion schools, the decision would be viewed as an academic one. Courts would see immersion schools as schools of choice because of their open enrollment policies.

In contrast, Justice Scalia's separate opinion demonstrates the possibility of dispute with Justice Thomas's assertion that this kind of institutional diversity is based on sound educational policy. Scalia interprets the Court's opinion as rejecting the possibility that a state may consciously follow a policy of facilitating the continued existence of historically black colleges. He argues that no educational policy can justify public universities that cater to a predominantly black clientele.\textsuperscript{284} In this part of the opinion, Scalia also implies that courts would treat public schools offering an Afrocentric curriculum the same way they would treat historically black colleges. Scalia noted that the only conceivable educational value of fostering such a policy is the belief that blacks should receive their education in a predominantly black setting.\textsuperscript{285} Scalia writes that an acknowledgement of this as an educational value contradicts the principle that justified compulsory integration in Green.\textsuperscript{286}

\textsuperscript{281} Id. at 2743.
\textsuperscript{282} Id. at 2746 (emphasis added).
\textsuperscript{283} Id. (emphasis added).
\textsuperscript{284} Id. at 2752.
\textsuperscript{285} Id.
If Justice Scalia's interpretation of the Court's opinion applies to immersion schools, the Court will view the decision to establish these schools as racially motivated. Scalia seems to argue that the Court's definition of "sound educational policy" must encompass a prohibition against race-based considerations. If Scalia's interpretation of sound educational policy applies to the decisions to create immersion schools, the race-based nature of their creation will cause them to fail under a strict scrutiny analysis.

CONCLUSION—THE PARADOXES RESULTING FROM THE LEGAL ANALYSIS OF IMMERSION SCHOOLS

Each of the three resolutions of the legal conflict involving the establishment of immersion schools will result in a paradox. First, in justifying immersion schools, courts can ignore the fact that immersion schools appeal to African-Americans and view them as racially neutral, since they are open to all. What to some (many, most) would appear to be racially motivated decision making actually would be deemed an educational decision, which happens to have a racial overtone. In effect, this would cause immersion schools, designed for African-Americans, to be labelled race-neutral. In addition, such a conceptualization of immersion schools reinforces the notion that the impact of culture on individual African-Americans is primarily a matter of choice because enrollment is a matter of choice. But the justifications for immersion schools flow from a belief that the impact of culture is not a matter of choice. As a result, the primary justifications for the schools evaporate.

Second, courts can invalidate immersion schools from the perspective that they violate the Equal Protection Clause. In an effort to uphold the Equal Protection Clause's requirement of equal treatment, courts would be confining African-Americans to an educational situation that cannot take account of the disparate social environment created for them by the conflicting influences of African-American and dominant Anglo-American cultures. Such a result amounts to a declaration that the public schools treat African-American students equally even though they are receiving an inappropriate education. By forcing African-Americans to remain in educational institutions insensitive to their social environment and the cultural conflicts that exist for them, courts sanction inequality for African-American students through the guise of equality.

The third resolution is for courts to uphold the decision of educators to establish immersion schools because it survives strict scrutiny. The Court's upholding immersion schools for this reason will force proponents to provide reasons that make their race-based decision making compelling. This will require proponents to paint the most negative picture about the plight of African-Americans. The more miserable the condition of African-Americans is portrayed, the better the chances of establishing the compelling interest needed to justify immersion schools. In providing objective evidence about the negative condition of African-Americans, however, proponents rationalize the derogatory beliefs about African-Americans. As a result, the need to supply legal justification will force proponents of immersion schools to argue the reasonableness of the social construction of
African-Americans in our dominant culture. Since one of the primary justifications for immersion schools is the negative social construction of African-Americans, this solution reinforces the problem which makes the solution necessary.

In short, there is no solution to this problem that will not lead to a paradox. A paradox is unavoidable because public education is an acculturating institution. Culture necessarily influences the attitudes, opinions, and experiences of individuals in public schools. Law, by contrast, attempts to make decisions by abstracting those decisions from the social conditions that influence them. While education focuses on the impact of culture in molding the person, law focuses on the concept of individuals who choose what and how they want to be. For education, culture is important. For law, culture is not. It is the interplay of these different cognitive frameworks that creates the contradiction in any solution to the problem of soundly educating African-Americans.