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AFTER THE DESEGREGATION ERA: THE LEGAL DILEMMA POSED BY RACE AND EDUCATION

KEVIN BROWN*

I. INTRODUCTION

My remarks follow those of Judge Carter not only in presentational order for the panel, but also in the order of educational, historical and political realities as they present themselves in America in 1993, as opposed to 1954. When the Supreme Court issued its opinion in Brown v. Board of Education,¹ it did more than issue an opinion that specified a legal remedy for de jure segregation. Not only did it spark a political movement in America, but it also became a major force driving American educational theory. Public educators accepted the twin and contradictory notions in Brown: that cultural ideology² does not matter in designing and executing an educational program; but to the extent that it does, it is the cultural ideology of African-Americans that educators must help African-Americans to overcome. Brown v. Board of Education can therefore be seen as the inspiration and justification for applying assimilationist theories to the education of African-Americans.

Following Brown, educational theorists sought both to physically integrate blacks in public schools and to culturally assimilate them. Accepting the Supreme Court's opinion in Brown as gospel, public schools sought to work the same assimilating magic on African-Americans³ that they had worked on

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2. I will use the terms “cultural ideologies” and “cultural systems of meanings” interchangeably.

3. 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. Often individual blacks will be treated by others (including other blacks) as part of our dominant society’s view of black
non-Anglo European immigrants two generations before. This assimilationist educational philosophy was assumed to be basically sound, and remained intact throughout much of the desegregation era without being seriously challenged.

Despite the desires, intentions and efforts of millions of Americans, the war to integrate public schools has not accomplished this objective. Gary Orfield reported that the amount of physical integration in public schools reached its zenith in approximately 1972. Since that time segregation has remained relatively constant.\(^4\) Even though much progress occurred in desegregating public schools in the South, nearly one-half of all African-American public school students in the Northeast attend schools that are ninety percent or more black. Nationwide, sixty-three percent of African-Americans attend schools where a majority of the students are black and thirty-two percent attend schools that are at least ninety percent or more black.\(^5\)

Not only has America failed to desegregate its public schools, but the Supreme Court in its last two significant school desegregation decisions, Board of Education of Oklahoma City v. Dowell\(^6\) and Freeman v. Pitts,\(^7\) has also set the judicial stage for the termination of school desegregation decrees. There are currently over 500 school districts under some form of court supervision.\(^8\) Termination of these decrees will return faculty and student school assignment decisions back to the control of local and state education officials. Education officials will be able to adopt, or readopt, race neutral student placement methods, such as neighborhood school assignments,\(^9\) and possibly freedom of persons. To me, therefore, any person of African descent in America will have his or her 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 is to make the dual connection between people of African descent and American society.


5. See Gary Orfield, Desegregation in the Public Schools, 1968-1980, Focus, Oct. 1982, at 4, 5 (a publication of the Joint Center of Political Studies). Orfield produced a study of segregation in the 1980s in public schools where he has argued that there was an increase in segregation during the 1980s. Recent studies measuring changes in segregation between 1967 and 1986 in large urban districts show that for African-Americans, desegregation appears to be related to the existence of court-ordered desegregation plans. The studies also noted that only 3.3% of white students now attend schools in central city school districts. Gary Orfield & F. Monfort, Racial Change and Desegregation in Large School Districts 3 (1988); Gary Orfield, School Desegregation in the 1980s, Equity Choice, Feb. 1988, at 25.


9. 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. The constitutionality of such
choice plans. Because student assignments will no longer be motivated by an attempt to maintain a desegregated student body, the result of the termination of a large number of existing desegregation decrees during the 1990s will be an increase in the amount of racial separation in public schools. With this in mind, it is probably safe to conclude that public schools have already achieved the maximum amount of desegregation that will be achieved in the near future.

Since the Supreme Court’s decision in Brown nearly forty years ago, the federal judiciary has been the primary force behind attempts to desegregate the public schools. The realization that racial separation in public schools will not soon disappear, and more importantly that there are no longer any significant institutional forces driving desegregation is, like the Court’s opinion in Brown, likely to have a significant influence on educational theory, particularly as it applies to African-Americans. Development of educational theory based upon a notion of standardized programs across racial and ethnic groups will become passé.

In fact, on the heels of the Supreme Court’s school desegregation termination opinions are new efforts that, if allowed to proceed, could fundamentally redesign public education for many African-Americans. Public school systems in Detroit, Milwaukee and New York City have established, and are currently operating, what could be called “African-American immersion schools.” These schools are developed to take into account the social environment and culture of African-Americans. As a result, they employ alternative teaching techniques and strategies and use alternative teaching materials to accomplish their educational mission. Among the educational techniques they employ is the use of Afrocentric curricular materials. Afrocentric curriculum is an emerging educational concept, and therefore remains somewhat vague. Generally speaking, an Afrocentric curriculum teaches basic courses from a perspective that uses Africa, and the socio-historical experience of Africans and African-Americans, as its reference point. As a result, an Afrocentric curriculum provides black students with an opportunity to study concepts, history and the world from a perspective that places them, and their ancestors, at the center.

The social and political implications of public school systems establishing and operating schools specifically designed for blacks is obvious. We can, therefore, expect a constitutional challenge to the decision of educators to

policies is to be determined with reference to the traditional mandate of the Equal Protection Clause. Dowell, 498 U.S. at 245.

10. Residential segregation of African-Americans in the United States has changed only slightly since 1960. In studies done in the 29 metropolitan areas which have populations of blacks in excess of 150,000 (just over half of the total U.S. black population), residential segregation improved only slightly between 1960 and 1980. See COMMITTEE ON THE STATUS OF BLACK AMERICANS, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 78-79 (1989).
establish such schools. How should the legal system respond to such a constitutional challenge?

The Supreme Court's most recent opinions addressing issues related to public education have repeatedly articulated that the primary objective of public education is the inculcation of fundamental values necessary for the maintenance of our democratic system.11 Because education is primarily an acculturating process, it is only natural that educators would be concerned about the influence of culture on the social environment of African-Americans as they approach educational reforms for blacks. The underlying assumption supporting immersion schools is that the educational needs of African-Americans should not be divorced from the influence that significant cultural systems will exert on the attitudes, opinions and beliefs they hold, as well as the social experiences they will encounter when they interact with the dominant culture.

In this essay, I will conduct a cultural analysis of the decision to establish immersion schools. I will attempt to show that this analysis actually embodies three different cultural ideologies. From the perspective of two of these ideologies, the need for separate education for African-Americans will appear obvious. However, because neither of these analyses provides legitimate legal justifications for race-based decision making within the legal system's cultural ideology, they will not function as justifications for immersion schools. The result is that proponents of immersion schools will be forced to characterize the schools as something which they are not in order to survive constitutional analysis.

II. CULTURAL ANALYSIS

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.12 Immersion schools provide educators with the opportunity to develop educational programs for African-American students that are responsive to the contradictory influences of African-American and dominant American cultures.


A. 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 is not developed in a vacuum. We are not free agents bound only by our own independent choices, perceptions and understandings of the world. Rather, our consciousness is influenced and conditioned within the context of various cultural systems of meanings. As a result, becoming an individual in American society, or any other society, is accomplished under the guidance of historically developed cultural systems of meanings. Cultural ideology is the patterned system of knowledge and conceptions which a given group has evolved from its collective past and progressively modifies and augments to give meaning to, and cope with, the problems of its existence. These systems of meanings provide the general design for living and the patterns which various groups use to interpret reality. They allow individuals in a given community to form, order, point and direct their lives. In short, cultural systems of meanings are the invisible mediums through which human understanding occurs.

In America, as in any given society, there is a dominant cultural system of meanings. The ideas, attitudes and beliefs that are dominant in this society, like ideas in any society, are constantly changing and metamorphosing. Some ideas, however, come to us as the result of a very long socio-historical process and run deep in the pantheon of the dominant American belief system. Democracy, pursuit of wealth by the individual, meritocracy and freedom for individuals are cultural ideas that have a long social history and are deeply ingrained in our dominant belief system.

Among the knowledge contained in our dominant cultural system of meanings will be knowledge related to the general competence, in routine matters, of individuals falling into various social categories. Significant social classifications in our society include an individual's occupation, academic


credentials, race, gender, sexual orientation, socio-economic status and religion. Each of the subcategories under these classifications carries with it certain common knowledge about the personality traits and characteristics of people in those categories. For example, this knowledge tells us that people with law degrees, when compared to most people in our society, tend to be highly motivated individuals. It also tells us that people who dropped out of high school are more likely to engage in violent criminal behavior than college graduates, and that nurses tend to be compassionate and caring individuals.

We rely upon this knowledge to interpret our interactions with others, often without being aware of it. Our minds think with the aid of this knowledge. Nevertheless, the attitudes, opinions and beliefs which are the products of cultural systems of meanings are generally experienced by the individuals enculturated with such meanings as a reflection of their rational deductions from their own objective observations. As a result, we will often ascribe personality traits and other characteristics to individuals that are consistent with those generally believed to be possessed by people who inhabit the particular social categories the individuals we interact with inhabit. In this way, the identities that others ascribe to us—as well as the identities we ascribe to others—are in part defined by the construction of the social categories that we—or they—inhabit in a given cultural system of meanings.

Socially constructed categories in the dominant culture are an important part of an individual’s identity.15 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

15. Michael J. Sandel, Liberalism and the Limits of Justice, 147-54 (1982). In his book, Michael 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 final 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 construction in some real way defines a part of who they are.
social situations people will interpret others' statements, appearances, and actions within our dominant cultural understanding.\footnote{See Robert Post, \textit{The Social Foundations of Privacy: Community and Self in the Common Law Tort}, 77 Cal. L. Rev. 957, 972-74 (1989).} 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 consciousness and experiences that individuals in our society have with others.\footnote{Stanley Ingber, \textit{Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in Public Schools}, 1987 U. ILL. L. REV. 15, 17 (1987).}

2. The Connotations Attached to African-Americans

We can both influence whether we inhabit most social categories in our dominant culture and let others know that we inhabit those categories. For example, it can be said that we have some control over our occupation, religion (arguably), educational credentials or marital status. In addition, others generally do not know these attributes or other attributes, such as our criminal history, employment record or sexual orientation, unless we choose to inform them. As a result, we have a considerable amount of control over whether the judgments attached to most social categories that we inhabit will be introduced into any given social situation.

Race, and gender, however, are unlike almost any other social categories. We do not choose these categories and because these are generally visible characteristics, they will be present when we are present. Our dominant culture's socially constructed meanings for these categories are therefore constantly threatening to assert themselves in many social situations we encounter. This is something that is simply beyond the control of the individual.

Our dominant racial attitudes and beliefs are the products of American society's particular socio-historical experience and heritage. Racial attitudes have played a central role in the American socio-historical experience, predating the establishment of the political union itself.\footnote{See, e.g., \textit{Dred Scott v. Sanford}, 60 U.S. 393 (1856) (noting that the beliefs of the founders were based upon the notion that people of African descent were considered so far inferior that they had no rights which a white man need respect).} While the dominant social meanings of black people have changed over time, what it means to be black in the dominant American culture has always been defined in derogatory terms.

While everyone has a race, what sets African-Americans apart is the particularly negative connotation attached to their racial social category. African-Americans are still described, as they have traditionally been, as poor, lazy, lustful, ignorant and prone to criminal behavior. No matter how much
an individual black resists, these notions will exert a tremendous influence on his or her life. As a result, African-Americans inhabit a racial social category where they will be interpreted in such a way as to place them at a consistent disadvantage. These background conditions are not transitory, but will form the unseen backdrop of many of their social interactions throughout their entire lives.

The measure of the benefit of any education is in how well it prepares the student to deal with the situations that they will encounter throughout their lives. One of the primary objectives of immersion schools is to teach African-Americans strategies and techniques to employ in order to overcome the obstacles placed in their path by being involuntary members of a racial social category with such a negative connotation.

B. Existence of Cultural Conflict in Public Education

Traditionally, public education in American society, even when formally referred to as multicultural, has employed an assimilation model.\textsuperscript{19} Even though most Americans would view this model as culturally neutral or reflecting the appropriate culture, it nevertheless embodies the Anglo-American cultural bias of the dominant American culture. Despite this bias, this model has generally been successful when applied to voluntary immigrants from non-Anglo Europe, Central America and Asia. That success, however, has not been replicated by other racial and ethnic groups whose ancestors were not voluntary immigrants to the United States. Recent comparative work by educational anthropologists such as John U. Ogbu and Margaret A. Gibson, has begun to document how involuntary minorities throughout the world respond to their educational experience differently from voluntary immigrants.\textsuperscript{20} The poor academic performance in public schools by African-Americans is replicated by other involuntary minorities throughout the world and in the United States—the Koreans and Burakumin in Japan, the Maoris in New Zealand, the Aborigines in Australia, and the American Indians and certain Latino groups in the United States.\textsuperscript{21}

The success or failure of the traditional assimilation model of public education may, therefore, have much to do with the respective cultures of various ethnic groups. As ethnic groups approach public education, these groups tend to have their own cultural system of meanings that provides them with an alternative understanding from that of the dominant culture of how their host society works and their place in that order. Their understanding of public education is a part of this overall understanding. The group's cultural

\textsuperscript{19.} JAMES A. BANKS, MULTIETHNIC EDUCATION: THEORY AND PRACTICE 12 (2d ed. 1988).

\textsuperscript{20.} MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES (John U. Ogbu & Margaret A. Gibson eds. 1991) [hereinafter MINORITY STATUS AND SCHOOLING].

\textsuperscript{21.} Id.
interpretation will influence the success or failure of members of that community in public schools. The following is a brief summary of John Ogbu's distinction between how the cultures of voluntary immigrants and involuntary minorities, such as African-Americans in the United States, interpret their group's experience in their host country.\(^{22}\)

Voluntarily immigrating to a country in search of a better life provides the culture of immigrants with a very different reference point for understanding their economic, social, political and educational experience in their host country. Ethnic groups coming to America, for example, generally immigrate because they believe that it will result in greater economic or social opportunities or more political freedom than that which existed at home. The culture of voluntary immigrants tends to compare their economic, social, political and educational situation to what they left behind. This comparison generally allows them to develop a positive comparative framework for interpreting their conditions in their new country. If voluntary immigrants did not generally believe they were better off in their host country, many of them could, and some of them do, exercise the option of returning to their native land.

Voluntary immigrants also come with their native culture intact. Their native culture was, therefore, not structured around the discrimination that they experienced in their host country. Voluntary immigrants also see the cultural differences between themselves and dominant group members as something that they must overcome in order to achieve their goals for a better life. This, after all, is what brought them to their host country originally. As a result, cultural and language differences enshrined in public schools are not generally perceived as oppositional nor as threats to the identity that they wish to maintain.

Voluntary immigrants can, and often do, face prejudice and discrimination in American society and public education. When confronted with this discrimination, the cultures of voluntary immigrants tend to interpret the economic, political and social barriers against them as temporary problems which can be overcome with the passage of time, hard work and more education. Their positive comparative framework provides them with a good deal of evidence to prove that despite the discrimination they face, they are still better off in their host country. By viewing the obstacles they face as flowing from their lack of knowledge about their host country, education becomes an important element in their strategy of getting ahead. Even though voluntary immigrants know their children may suffer from prejudice and discrimination and their culture is often disrespected by public schools, voluntary immigrants tend to view this as the price for the benefit derived from being in the new country. Their positive comparative framework is also aided by the fact that their view of public education is shaped by the condition of

education in their homeland. Because opportunities for education in the United States generally far exceed opportunities provided for most immigrants in their native land, it is even easier to maintain a favorable view of education despite the prejudice and discrimination they may encounter.

While voluntary immigrants come to their host country to improve their condition, involuntary minorities were brought into their present society through slavery, conquest or colonization. Their cultural experience of incorporation into their host society does not include the voluntary aspect of attempting to improve their lives that exists for voluntary immigrants. As a result, involuntary minorities differ from immigrants in their perceptions, interpretations and responses to their social, political, economic and educational situation. Involuntary minorities do not have a homeland in the same sense that voluntary immigrants do in which to make a comparative assessment of their condition. Their comparative reference tends to be the dominant group. Because the dominant group is generally better off, their comparative framework leads to a negative interpretation of their condition. Their cultural interpretation tends to lead toward resentment, and toward perceiving themselves as victimized by institutionalized discrimination perpetuated against them by dominant group members and the institutions, such as public schools, that dominant group members control. As a result, involuntary minorities tend to distrust members of the dominant group and the societal institutions, including public schools, which they control.

The response of involuntary minorities to prejudice and discrimination is also very different. Unlike voluntary immigrants, they cannot point to the fact that they are foreigners as a means in which to explain the prejudice or discrimination they encounter. They tend to understand the prejudice or discrimination that they experience in society and school as related to the fact that they are members of a victimized group. Unlike foreigners who view their condition in this society as temporary, involuntary minorities tend to view their subordinate condition as more or less permanent.

As an involuntary minority group, the culture of African-Americans stands in a very different relational position to that of dominant American culture from that of the cultures of voluntary immigrants. As with other involuntary minorities, the cultural interaction between African-Americans and the dominant group arose after the former became an involuntary minority. In order to live with subordination, the culture of African-Americans developed coping responses. These responses are often perceived by African-Americans as oppositional to that of the dominant group. African-American culture is therefore more at odds with that of the dominant American culture enshrined in the assimilationist model of public schools than the native culture brought to this country by voluntary immigrants.

These cultural differences also function as boundary-maintaining mechanisms that differentiate involuntary minorities from their oppressors, dominant group members. They give involuntary minorities a sense of a social
identity and self-worth. As a result, unlike voluntary immigrants, involuntary minorities interpret cultural differences as differences of identity to be maintained, not overcome. Accepting certain ideas and beliefs and learning certain aspects of the dominant group's culture is perceived as detrimental to their social identity.

When public schools ignore or undervalue the culture of involuntary minorities, such as African-Americans, it is likely to have consequences far more negative for their education than it did or will have for voluntary immigrant groups. Immersion schools provide educators with the opportunity to reduce the cultural conflicts that exist between the Anglo-American culture embodied in the traditional educational program and that of their black students, thereby eliminating a primary cause of the poor performance of African-Americans in public schools.

III. LEGAL CONCEPTUALIZATION OF IMMERSION SCHOOLS

The United States Constitution is the supreme law in America and, as a result, it is the primary document that American society uses to justify its most important normative choices. The Equal Protection Clause of the Fourteenth Amendment is the provision of the Constitution applicable to matters of racial discrimination. Both the interpretation of the Equal Protection Clause and the arguments related thereto, which are considered acceptable as adequate legal justifications, are structured around a certain conception of social reality. It is this legal conception of social reality—i.e. the legal cultural system of meaning—which is at the crux of the dispute regarding the constitutionality of immersion schools.

A. The Role of Government in the Vision of Society Implicit in the Equal Protection Clause

The vision of society implicit in the Supreme Court's interpretation of the Equal Protection Clause generally conceives society as a collection of knowing individuals. These "knowing individuals" are viewed as autonomous, self-directed, self-determining, free-willed and rational individuals. Because these knowing individuals are self-determining and free-willed, their attitudes, opinions and beliefs are not seen as products of various cultural systems of meanings, but rather as individually arrived at. The effect of the social action


of these knowing individuals is presumed to be controlled by their intent. These knowing individuals are in this way seen as the authors of their own thoughts and the captains of their respective ships.

The Equal Protection Clause's conceptual structure of society as a collection of knowing individuals contains its own cultural system of meanings for interpreting social events and, particularly for purposes of this essay, the role of government. The role of government within this conception of society is to mediate the conduct of these knowing individuals so as to allow them to pursue their own desires and to prevent them from unjustly interfering with the rights of their fellow persons. Government must therefore strive to achieve a sort of neutrality, respecting equally every knowing individual's pursuit of their various objectives. In order for government to maintain that balance it can neither seek to advance the parochial interest of a particular group, nor fail to treat people as self-directing and self-determining individuals.

The legal system does recognize that some characteristics of individuals such as race, gender and ethnicity are not the result of choice. Unlike educators who propose immersion schools, the Supreme Court's interpretation of the Equal Protection Clause generally considers that the proper resolution of problems related to these characteristics is for government to transcend those characteristics in favor of treating everyone the same. For government to treat knowing individuals the same requires that government treat them as if they are devoid of unchosen characteristics. Government decisions to treat people as members of a racial group are initially considered wrong and will require compelling justifications.  

B. The Model of Education Implicit in the Equal Protection Clause

The Model of knowing individuals requires special tailoring for those individuals who are children. 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.  

26. Government is not prohibited from classifying people based on race or gender. When racial classifications are used, courts will apply what is called strict scrutiny. In order to survive the test, government must supply a compelling state interest and adopt a scheme that is narrowly tailored to meet that interest. See Croson, 488 U.S. at 469. The test has been called "strict in appearance but fatal in fact." 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).

27. See, e.g., 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"); Richard L. Roe, Valuing Student Speech: The Work of Schools as Conceptual Development, 79 Cal. L. Rev. 1271, 1277 (1991) ("Furthermore, the immaturity of children is thought to make them more
children do not enter situations as knowing individuals, their goals, preferences, and interests do not receive the same weight as those of adults.

Though children do not fit the ontological premise of knowing individuals, the Equal Protection Clause's conception of society as a collection of knowing individuals, 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. Since the requirement of governmental neutrality is implicit in this concept of the social world, governmental neutrality 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. Education performs a uniquely individualistic function geared towards promoting the capacity of individuals to decide for themselves. This academic function is viewed as value neutral, because it is intended to increase the capacity of individuals to choose, not toward limiting their choices.

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. This function predicates value neutrality on instilling fundamental values into children that make it possible for their fellow knowing individuals to pursue their desires without undue influence. These fundamental


30. 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 also Pico, 457 U.S. at 864 (acknowledging that schools are vehicles for instilling fundamental social values); Hazelwood Sch. Dist v. Kuhlmeier, 484 U.S. 260, 272 (1988) (describing the schools' role as a mechanism for introducing children to cultural values). See generally JOHN G. SAYLOR & WILLIAM M. ALEXANDER, CURRICULUM PLANNING FOR MODERN SCHOOLS (1966); MARK YUDOF ET AL., KIEP & 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).
values are implicit in our democratic form of government and flow from a conception of our society as a collection of knowing individuals.

1. The Academic Function of Public Schools

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

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.

Schools also afford opportunities for students to pursue individual interests. In junior high and high school, students routinely choose elective 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.

2. The Socializing Function of Public Schools

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. 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. 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 educational environment. Value choices also determine how information will be presented—i.e. teaching techniques. 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.

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

34. Compulsory school attendance laws in most states require children to attend some 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.

35. 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 molding people to be exactly like one another; and as the mold in which it casts them is that which please 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.

JOHN S. MILL, ON LIBERTY 190-91 (1859).

The Court evaluates the socializing aspect of public education by examining the values instilled by the public schools and deemphasizing the pedagogical ramifications. Regardless of any pedagogical benefits, no justification exists for academic decisions made by 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,38 patriotism,39 belief in self-sufficiency,40 belief in racial equality,41 and a commitment to faithfully discharge the duties imposed by citizenship. The inculcation of these values relate to a conception of society as a collection of knowing individuals in one of two ways. These values either promote the ability of 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 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.


38. Fraser, 478 U.S. at 681 (1986) (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 view expressed may be unpopular.” Id.

The liberal construction of the phrase "tolerance for political diversity" conflicts with inculcation of certain political values, such as patriotism, respect for formal authority, and the values enshrined in democracy. However, the term 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." Board of Educ. v. Pico, 457 U.S. 853, 879 (1982).


C. Legal Conceptualizations of Challenges to Immersion Schools

In *City of Richmond v. J.A. Croson Co.*, a majority of the Supreme Court held that strict scrutiny applies to governmental classifications based on race, regardless of the presumed beneficiaries. But the analysis of the constitutionality of immersion schools is not as simple and straightforward as applying the strict scrutiny test to the decision to establish these schools. The constitutional analysis of immersion schools occurs in the process of legally conceptualizing this phenomena. The proper analysis depends, therefore, on the conception. There are four likely conceptions of immersion schools that will produce one of three disparate results. What complicates 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. This conceptualization focuses primarily on two aspects of the decision to establish and operate immersion schools. First, despite the racial reasons supporting the decision to establish immersion schools, academic reasons are presumed to be paramount. Therefore, the decision to establish immersion schools is seen primarily as an educational decision with racial implications. 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. For example, 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, they could argue that immersion

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42. 488 U.S. 469 (1989).
43. 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.
schools are analogous to magnet schools concentrating on African-American studies.

Finally, proponents could argue that immersion schools are a type of laboratory experiment for school districts. The recent attention surrounding 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 what works and what does not.

b. Impact of Allowing Students to Choose Immersion Schools

Our society values giving effect to individual choice. 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. 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 can choose to attend. 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. Proponents will place emphasis on 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


47. EDUCATION REFORM IN THE 90’S, supra note 44, at 36, 47.
them as members of a racial group. Any de facto segregation is merely the result of private decision making. De facto segregation resulting from people’s preferences normally survives constitutional scrutiny.

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. The primary aspect of this conceptualization is to view the decision to establish such schools as a racially motivated decision with pedagogical implications. As a result, this conception will focus primarily on race-based decision making.

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


49. Gerwirtz, supra note 45, at 750. I am assuming that any school system establishing immersion schools is not under an obligation to disestablish a dual school system. If a school system is under such an obligation, then a federal court will have to assess whether the establishment of such a school is consistent with this obligation.

50. See Croson, 488 U.S. at 521 (Scalia, J., concurring) (arguing that the only time state or local government should use racial classification 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 equal but superior and a ‘color-blind Constitution’ would insure that this revolutionary principle would always be kept in mind.”). Aspirations of colorblind governmental decisionmaking 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).

Stewart 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."\footnote{52}

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 decisionmaking. 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.\footnote{53} Government would generally violate this interpretation of the value of racial equality when it makes decisions that account for race. This is the application of the colorblind notion of the Equal Protection Clause applied not to governmental classifications, but to governmental decisionmaking.

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 decisionmaking involved in establishing immersion schools would probably lead a given court to employ a strict scrutiny analysis. When applying strict scrutiny, the Equal Protection Clause starts from an implicit standard that race is irrelevant for purposes of governmental decisionmaking. To attach significance to race is, therefore, presumptively irrational. To satisfy strict scrutiny, racially motivated governmental action must satisfy a compelling state interest. Furthermore, the racially motivated action must be narrowly tailored to advance a compelling state interest.\footnote{54}

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.

\footnote{1990 DUKE L.J. 758, 796 (1990); see also Michael J. Perry, The Disproportionate Adverse Impact Theory of Racial Discrimination, 125 PA. L. REV. 540, 550 (1977).}

\footnote{52. Fullilove v. Klutznick, 448 U.S. 448, 532 (1980)(Stewart, J., dissenting).}

\footnote{53. KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 10 (1988).}

\footnote{54. Croson, 488 U.S. at 493. 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.
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 decisionmaking. 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.

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 widespread irrational racial prejudice voluntarily held by many individual white Americans.

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 decisionmaking.\(^5\)

Without the justification of societal discrimination, proponents of 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 for African-Americans because they usually further derogatory beliefs about African-Americans.\(^6\) 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

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56. For a discussion of the dilemma created for African-Americans asserting claims of racial distinctiveness, see Martha Minow, Learning to Live with the Dilemma of Difference: Bilingual and Special Education, 48 LAW & CONTEMP. PROBS. 157, 160-64 (1985).
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.

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 tend to be 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 they 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.

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 who choose to make this a problem. 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

57. Croson, 488 U.S. at 493.
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 arguments of the proponents take on a different understanding within the legal system. Then the decision to establish immersion schools also appears to be a decision based upon negative stereotypes. Hence the possibility for the legal system viewing the decision to establish immersion schools as resting on illegitimate racial stereotypes exists in two different aspects.

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 these 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 one 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 education 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-Americans.

IV. 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 conceptualizing these 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

59. During desegregation, educators did not accept or respect the culture of African-Americans. Education did not reduce the conflict between the cultures. Subsequently, educators viewed the choice to adopt the deficit culture as the reason for the poor educational performance of African-American. For a truly disheartening portrait of Black students as flawed "products", see generally Jonathan Kozol, DEATH AT AN EARLY AGE: THE DESTRUCTION OF THE HEARTS AND MINDS OF NEGRO CHILDREN IN THE BOSTON PUBLIC SCHOOLS (1967).

60. While this analysis may appear to be similar to that presented earlier in this piece, the analysis here differs from previous discussion. See supra notes 44-48 and accompanying text (discussing decisions to attend immersion schools as a matter of choice). This analysis differs from earlier discussion in that it considers application of strict scrutiny.
happens to have racial implications. 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 of immersion schools for this reason will force proponents to provide reasons that make their race-based decisionmaking 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 and we are much more products of our culture than choosers of our culture. 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.