

Florida A & M University Law Review

Volume 6

Number 1 *Social Justice, Development & Equality:
Comparative Perspectives on Modern Praxis*

Article 6

Fall 2010

Stagnant Magnet Schools--An Un-Compelling Use of Race-Conscious Policy

Justin Audilet

Follow this and additional works at: <http://commons.law.famu.edu/famulawreview>

Recommended Citation

Justin Audilet, *Stagnant Magnet Schools--An Un-Compelling Use of Race-Conscious Policy*, 6 Fla. A&M U. L. Rev. (2010).
Available at: <http://commons.law.famu.edu/famulawreview/vol6/iss1/6>

This Note is brought to you for free and open access by Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Florida A & M University Law Review by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@fam.u.edu.

STAGNANT MAGNET SCHOOLS – AN UN-COMPELLING USE OF RACE-CONSCIOUS POLICY

*Justin Audilet*¹
Thurgood Marshal School of Law

SYNOPSIS

In celebration of *Sweatt v. Painter* this note seeks to examine the question of when magnet schools stop serving a compelling state interest. Instead of providing a hypothetical school district to evaluate this question, research has been done on a Southeast Texas school district that is a modern example of integration. To understand the district's current use of magnet schools, the district's history of integration is reviewed. This note further examines the nature of a magnet school, its purpose, and when a magnet school becomes un-compelling and stagnant. This note concludes that the future of race-conscious policies in public schools must stop using children as tools to achieve an integrative idea, and that a demographic change in school district leadership must challenge the status quo of using race-conscious policies in order to focus on the quality of children's education among their peers.

TABLE OF CONTENTS

I. INTRODUCTION	164	R
II. AN ARCHETYPE OF INTEGRATION, PAST AND PRESENT	165	R
III. MAGNET SCHOOLS IN THEORY AND PRACTICE	171	R
IV. BEAUMONT'S DISTRIBUTION OF MAGNET SCHOOLS	173	R
V. MAGNET SCHOOL COSTS	178	R
VI. MAGNET SCHOOL STAGNATION	179	R
VII. THE FUTURE OF ADDRESSING SCHOOL INTEGRATION	180	R
A. <i>Children as Tools</i>	180	R
B. <i>Leadership and Challenging the Status Quo</i>	182	R

1. Justin Audilet is currently a 3L at the Thurgood Marshall School of Law in Houston, Texas. Thank you Lord for the opportunity and blessings. Thank you to my family for the time to focus on writing. Thank you to Michael "E.J." Archuleta, II for lending a sharp ear and critical feedback in the writing of this note.

I. INTRODUCTION

This year marks sixty years since the decision of *Sweatt v. Painter*.² Heman Sweatt was a Texas native who attended high school and college in Texas.³ In 1946, Sweatt applied to the University of Texas Law School, but was denied admission because he was black. To accommodate Sweatt, Texas created a separate law school for him to attend the following year.⁴ This law school, which is currently the Thurgood Marshall School of Law, was built to keep Sweatt from attending school with whites.⁵ Thurgood Marshall brought suit against the University of Texas to challenge the university's policy against black attendance.⁶ As a plaintiff, Sweatt was a necessary tool used by the N.A.A.C.P in implementing their legal offensive.⁷ The Supreme Court ultimately held that the Fourteenth Amendment required Sweatt to attend the University of Texas Law School, but refused to consider the viability of the separate but equal doctrine.⁸

Sweatt deserves praise on this anniversary because he was steadfast and made many sacrifices for black civil rights.⁹ While attending law school Sweatt suffered from illnesses, financial pressures, and divorced his wife during his enrollment.¹⁰ Despite the Supreme Court's holding, Sweatt never finished law school due to his many hardships.

The *Sweatt* decision was one of many Supreme Court precedents that paved the way to overturn the separate but equal doctrine. Thurgood Marshall succeeded in extending civil rights owed to blacks in *Brown v. Board of Education (Brown I)* when the Court held the doctrine of separate but equal unconstitutional and that black children had been denied equal protection of the law guaranteed by the Fourteenth Amendment. Without *Sweatt*, this outcome may not have been possible.

2. *Sweatt v. Painter*, 339 U.S. 629 (1950).

3. The Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/SS/fsw23.html> (last visited July 27, 2010).

4. *Sweatt*, 339 U.S. at 633.

5. *Id.*

6. *Id.* at 630.

7. Sherman P. Willis, *Bridging the Gap: A Look at the Higher Public Education Cases between Plessy and Brown*, 30 T. MARSHALL L. REV. 1, 37 (2004).

8. *See supra* note 2, at 636.

9. *Id.*

10. *Id.*

Since *Brown I* and its progeny, school districts across the country have worked to integrate.¹¹ Out of the struggle to integrate public schools, magnet schools have become constitutionally permissible to address *de jure* segregation for public schools under court order to desegregate¹² and allow public schools that are not under court order to address *de facto* segregation. This note seeks to examine when magnet schools may be constitutionally un-compelling. In an attempt to examine the issue of when magnet schools stop serving a compelling state interest, research conducted on a Southeast Texas school district provides an archetype of integration. To understand the schools current use of magnet schools, one must examine the district's history of integration. This school district has traversed the integration spectrum from being entrenched in a dual school system under white leadership, to being court ordered to desegregate and achieve unitary status as an integrated school in 1984. Finally, under the guidance of black leadership, this school district has implemented magnet school programs in racially isolated neighborhoods to address its concern for *de facto* segregation. This note concludes that when magnet schools, such as the ones discussed herein, become stagnant and un-compelling, the use of old integrative ideas that perceive school children as tools should be abandoned for emphasis on educating children, regardless of their color.

II. AN ARCHETYPE OF INTEGRATION, PAST AND PRESENT

When discussing integration in public schools, it is hard to imagine the process that actually took place to integrate public schools after the separate but equal doctrine was struck down. In Texas, many school districts practiced *de jure* segregation before *Brown I*. While images of soldiers and police officers may come to mind when thinking about the initial steps of integrating blacks into formerly all white schools in the South, the process of integration in Texas was not as dramatic. This discussion briefly explores the city of Beaumont's journey to integrate its public schools and provides a backdrop of why the current school district's leadership seeks to address *de facto* segregation today with the use of magnet schools.

11. Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O'Neill and Possible Remedies for Racial Isolation*, 29 CONN. L. REV. 1187, 1190-95 (1997) (discussing a concise evolution of school desegregation law).

12. See e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 353 (4th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) (en banc) (Wilkinson, C.J., concurring in part) (noting that magnet school admission policy which was adopted while school district was under desegregation order should be upheld).

In the 1950s Beaumont actually had two independent school districts that served the city. One school district was the South Park Independent School District (South Park ISD) and the other was the Beaumont Independent School District (Beaumont ISD). These school districts were led by white superintendents and had white school board members.¹³ Leadership is important because the men who established policies for the school districts had operated under the separate but equal doctrine. Any change to the status quo was unwelcome for many whites after *Brown I*, but the public school leaders of Beaumont made due and slowly started the process of integration.¹⁴

In 1954, black school children in Beaumont who were denied the same equal education opportunity as white children were allowed to integrate with white students. Thurgood Marshall and the N.A.A.C.P. succeeded in the landmark case of *Brown I*. The Supreme Court held the doctrine of separate but equal unconstitutional and found that black children were denied equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁵ Both Beaumont school districts reacted to the decision by assessing their respective districts and began considering plans to adjust resources to accommodate an integrated school system.¹⁶ Some problems facing the school districts included social adjustments, deficiency in black student education, and limited school building capacities.¹⁷ It was apparent that getting students to integrate would not be an easy task to undertake. Despite these challenges, schools and state officials waited until the Courts final mandate before making any changes in school policy.¹⁸

The Court's decision in *Brown v. Board of Education (Brown II)* mandated schools "to effectuate a transition to a racially nondiscriminatory school system."¹⁹ The Court in *Brown II* took into account the challenges that many school districts would face logistically in integrating an entrenched dual school system.²⁰ In issuing its mandate, the Court recognized that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities

13. See e.g., Richard H. Head, *Public School Desegregation in Beaumont, Texas, 1954-69*, 46 (May 1970) (unpublished Masters thesis, Lamar State College of Technology) (on file with John Gray Library, Lamar University) (copy on file with author).

14. See e.g., Head, *supra* note 13, at 48.

15. *Id.* at 495.

16. Head, *supra* note 13, at 9.

17. *Id.* at 9-10; see also *Id.* at 85.

18. Head, *supra* note 13, at 4.

19. *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301 (1955).

20. *Id.* at 299.

constitutes good faith implementation of the governing constitutional principles.”²¹ The Court gave federal district courts equitable oversight over dual school systems within their districts in order to supervise public schools in desegregating.²²

Both Beaumont school districts took different paths in order to integrate their schools. Serious attempts at integrating schools in Beaumont did not occur until the early 1960s. In 1962, Beaumont ISD denied a black student admittance to its school; the student sued.²³ Consequently, the federal district put Beaumont under court order and approved Beaumont ISD’s voluntary desegregation plan to integrate one grade per year.²⁴ The following year, Beaumont ISD abandoned its plan and integrated all grades at once under a freedom of choice plan.²⁵ In 1968, Beaumont ISD began reporting its desegregation progress to Department of Health, Education, and Welfare (HEW).²⁶

After Congress passed the Civil Rights Act of 1964, South Park ISD began voluntarily desegregating its schools under the direction of HEW’s guidelines.²⁷ The school district chose a freedom of choice plan that was implemented in 1966.²⁸ Not long after this voluntary step, HEW found that South Park ISD was not in compliance with the Civil Rights Act of 1964.²⁹ A report issued in 1968 found, among other things, that South Park ISD built two new schools that were located in racially isolated neighborhoods.³⁰ South Park ISD’s decision to build the two schools in their respective locations was found to hinder the process of integration under its freedom of choice plan and perpetuate its dual system.³¹ In 1970, South Park ISD was placed under a court order to desegregate.³² As an effect of the court order, enrollment of

21. *Id.* (alteration in original).

22. *Id.* at 300.

23. Head, *supra* note 13, at 85.

24. *Brown v. Hendrix*, 228 F. Supp. 698, 700 (E.D. Tex. 1964) (designating that integrating a grade a year under the student assignment plan was acceptable).

25. Head, *supra* note 13, at 87.

26. *Id.* at 89.

27. *Id.* at 49.

28. *Id.* at 55.

29. *Id.*

30. *Id.* at 70. (noting that Forest Park High School was built far away from any concentrations of minorities and that Odom Junior High was built in an area with a high concentration of Blacks.)

31. *Id.* at 69-70.

32. *Huch v. United States*, 439 U.S. 1007 (1978) (Reinquist, J., dissenting).

non-minority students began to decrease across the city of Beaumont as instances of white flight to surrounding cities occurred.³³

During both school districts' attempts to remedy *de jure* segregation, both adopted a freedom of choice plan that gave parents the choice to decide what school their child would attend. When the effectiveness of the plans are considered, South Park ISD had only eighteen percent of black students enrolled in former all white schools while Beaumont ISD's plan had only twenty-five percent of black students attending former all white schools.³⁴ Both schools had a comparable impact on integrating when compared to their former dual systems.³⁵ Although this impact was marginally effective in integrating the school districts, the ability to choose ones school was liked by many blacks and whites in the community.³⁶ The use of a freedom of choice plan, however, began to be questioned as an effective desegregation remedy. In 1968, the Supreme Court held that freedom of choice plans were unacceptable when other desegregation tools existed.³⁷ The Court's judicial standard of gauging school integration shifted to evaluating the racial makeup of "faculty, staff, transportation, extracurricular activities, and facilities."³⁸

While both school districts were under the supervision of the federal district court during this period, the state of Texas was found to be funding schools that were not adhering to their affirmative duty to eliminate dual school systems.³⁹ The federal government brought suit against the Texas Education Agency (TEA) and, after many court decisions, Civil Action 5281 ("modified order") was entered against the State.⁴⁰ The modified order instructed the TEA to stop funding schools that participated in dual school systems and who did not comply with the constitutional mandate to desegregate.⁴¹ The modified order car-

33. *United States v. South Park Indep. Sch. Dist.*, 491 F. Supp. 1177, 1183-1184 (E.D. Tex. 1980).

34. *Head*, *supra* note 13, at 90.

35. *Id.*

36. *Id.* at 89.

37. *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430, 441 (1968).

38. *Id.* at 435; *see also* *Brown v. Board of Ed.*, 432 F.2d 21, 23, n.3 (5th Cir. 1970).

39. *Green*, 391 U.S. at 437-438.

40. *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970); *United States v. Texas*, 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd and modified*, 447 F.2d 441 (5th Cir. 1971).

41. *United States v. Texas*, 356 F. Supp. 469, 470 (1972) ("[I]nitiating by the government in an attempt to enforce Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment, directed the Commissioner of Education of the State of Texas (hereinafter Commissioner) and the Texas Education Agency, pursuant to definite procedures, to withhold funds and accreditation from school districts that failed to meet the constitutional requirement to eliminate the vestiges of the dual school system. This court's

ried with it the mandate of the Fourteenth Amendment and supremacy of federal law.⁴² Neither school district in Beaumont lost funding under the modified order for failure to comply with their duty in eliminating the past vestiges of their dual school systems.

Under individual court orders to desegregate and aware that the State could not fund schools who continued perpetuating dual systems, both districts continued on their separate paths to integration. Beaumont ISD continued working at integrating⁴³ while South Park ISD found itself litigating whether it had achieved unitary status based on concerns in demographic shifts in the community.⁴⁴ In the case of South Park ISD, the federal district court found South Park ISD to be unitary, but the Fifth Circuit Court of Appeals declared otherwise.⁴⁵ Ultimately, South Park was found not to be unitary and was subject to continued court supervision.⁴⁶

In 1983, Beaumont ISD was abolished and the district was annexed to South Park ISD. The following year, the school district was officially renamed Beaumont Independent School District (BISD).⁴⁷

order concerned student transfers, changes in school district boundaries, school transportation, extracurricular activities, faculty and staff practices, student assignment, and curricula and compensatory education. With minor modifications, the order was affirmed by the Fifth Circuit.”); *See also* *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1532 (5th Cir. 1993) (“[T]he court order was directed to the executive branch of the state government, ordering that branch to cease activities that tended to reinforce, renew, or encourage segregation”); *Cf. Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency*, 533 F.3d 258, 269 (5th Cir. 2008) (noting that schools who were not participating in segregation practices at the time the modified order was entered into are not subject to its remedial provisions absent a showing of an intent to intentionally discriminate).

42. *Texas*, 356 F. Supp. at 473 (ordering state temporary restraining order void that interfered with Civil Action 5281); *but see Texas*, 457 F.3d at 475 (discussing that “racial composition of public schools in Texas has changed drastically” thus calling into question the orders “dwindling relevance”; *Id.* at 478 n.8 (“The guideline[s]. . . [are] a cause of voluminous continuous record keeping and monitoring by TEA and all Texas school districts. Because the State calculates that it would cost more to challenge the guideline than to enforce it, the State’s limited education resources remained devoted to the highly questionable bureaucratic exercise of implementing the guideline.”); *Id.* at 482 (the court does not deny the validity of the modified order as long as it is implemented consistently with the Supreme Court’s current precedent).

43. *See* *Beaumont Indep. Sch. Dist. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 855 (5th Cir. 1974).

44. *See Huch*, 439 U.S. 1007, 1007-12 (1978) (Reinquist, J., dissenting).

45. *See generally* *United States v. South Park Indep. Sch. Dist.*, 566 F.2d 1221-1223 (5th Cir. 1978).

46. *See generally* *United States v. Texas Educ. Agency*, 699 F.2d 1291, 1292 (5th Cir. 1983).

47. *Beaumont Independent School District, Texas Association of School Boards*, <http://www.tasb.org/policy/pol/private/123910/pol.cfm?DisplayPage=AA%28LOCAL%29.pdf&QueryText=AA%20LOCAL> (last visited Feb. 15, 2010).

The court consolidated the desegregation orders of both schools.⁴⁸ BISD achieved unitary status in 1984 when it was determined that the school had met its affirmative duty in remedying the effects of an unconstitutional dual system.⁴⁹ The federal district court closed the case and declared that all desegregation matters were now “entrusted to the school board members guided in their conduct by the constitution they have sworn to uphold.”⁵⁰ Integration in the South was at its highest in the eighties when Beaumont achieved its unitary status.⁵¹ Since this time, school districts across the country have slowly trended toward re-segregating.⁵² Many scholars have asserted that the judiciary has not done enough to ensure that schools remain integrated.⁵³ Despite the call for continued intervention from the judiciary, not much discourse in scholarly literature focuses on the need for effective leadership on a local school district level. When considering the Beaumont school districts in the early 1950s, the former all white leadership was successful, albeit it for the wrong reasons, in achieving their dual systems at a time when separate but equal was normative. As the desire to integrate public schools still continues today, the question becomes how effective is this goal even when the demographics of school district leadership and community change.

The demographics of present day Beaumont, its school district, and school leadership are substantially different from the 1950s. The population of Beaumont in 2000 was 113,866 and was comprised of a

48. *Covington v. Beaumont Indep. Sch. Dist.*, 714 F. Supp. 1402, 1404 & n.2 (1989) (citing *United States of America v. Tex. Educ. Agency*, No. B-6819-CA (E.D. Tex. July 19, 1984)).

49. *Id.* at 1404 (achieving unitary status is monumental, court supervision ends and the school is not allowed to make its decisions based on race). See also Johnathan Fishbach, Will Rhee, and Robert Cacaie, *Race at the Pivot Point: The Future of Race-Base Policies to Remedy De Jure Segregation after Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 494-95 (2008).

50. *Covington*, 714 F. Supp. at 1409 n.23 (quoting *United States of America v. Texas Educ. Agency*, No. B-6819-CA (E.D. Tex. July 19, 1984)).

51. See Sheryll D. Cashin, *American Public Schools Fifty Years after Brown: A Separate and Unequal Reality*, 47 HOW. L. J. 341, 352 (2004).

52. *Id.*

53. See e.g., Wendy Parker, *The Decline of Judicial Decision Making: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1644 (2003) (district courts “have the power and ability to effectuate more meaningful desegregation of public schools than they have undertaken”); Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1014 (1994) (“[T]he Court is declaring victory over the problem of school inequality and simply giving up”).

slim majority of white residents.⁵⁴ The school board today is comprised of a black majority⁵⁵ and the school is lead by a black superintendent.⁵⁶ District wide, the school educates 19,265 students.⁵⁷ Out of this number, the district's ethnicity consists of 64.2% Blacks, 15.6% Hispanics, 16.8% Whites, 0.2% Native American, and 3.3% Asian/Pacific Islander.⁵⁸

With black leadership in place and a diverse student body comprised mostly of minorities, Beaumont's school district is still pre-occupied with integrative, race-conscious policies. It took Beaumont approximately thirty years to deconstruct its dual system in order to achieve unitary status. Beaumont is an archetype of integration because, despite practicing *de jure* segregation and achieving unitary status, shifts in demographics and populations have influenced the school district's desire to address what appears to be, on the surface, *de facto* segregation. To address this issue, the current district leadership has implemented magnet schools to address re-segregation concerns.

III. MAGNET SCHOOLS IN THEORY AND PRACTICE

After *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*⁵⁹ was decided, Justice Kennedy's opinion became the "crux" in allowing race conscious measures in public schools.⁶⁰ School boards use magnet schools as desegregation tools because they seek to promote diverse student bodies in elementary and high schools.⁶¹ Achieving a diverse racial composition is a permissible goal.⁶² Magnet schools are still constitutional because it is reasoned that targeted recruiting of students and "allocating resources for special programs"

54. U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/48/4807000.html> (last visited Feb. 15, 2010) (noting the difference between White and Black persons yields only a marginal majority of .6% White residents).

55. See Beaumont Independent School District, <http://www.bmtisd.com/school-board/> (last visited Feb. 15, 2010).

56. See Beaumont Independent School District, <http://www.bmtisd.com/superintendent/> (last visited Feb. 15, 2010).

57. Texas Education Agency, <http://ritter.tea.state.tx.us/perfreport/aeis/2009/district.srch.html> (select "PDF" radio button; select search by "District Number"; enter "123910" into text box; select "continue") Section II Page 1.

58. *Id.*

59. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

60. Nancy Conneely, *After PICS: Making the Case for Socioeconomic Integration*, 14 TEX. J. ON C.L. & C.R. 95, 110-111 (2008).

61. See *Parents Involved in Cmty. Sch.*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part).

62. *Id.*

are “race conscious” mechanisms, but do “not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”⁶³

Magnet schools derive their attractive forces from the special programs that they offer. The attractiveness of magnets allows for the voluntary movement of students to address *de facto* segregation.⁶⁴ As desegregation tools, magnets promote ideas of: quality education achieved in a diverse setting, specialized curriculum aimed at attracting white parents to send their kids to the respective magnet, and a better environment of equality among the students.⁶⁵

Two different types of magnet schools may exist. One type is a dedicated magnet where the whole student body in attendance volunteered to attend that school without any coercion.⁶⁶ The second type is a program-within-a-school magnet in which a small racially balanced magnet program exists within a larger school that is fed by a predetermined neighborhood attendance zone that usually consists of one race.⁶⁷

Not all magnet schools are successful in achieving their goals.⁶⁸ The success of a magnet school depends upon the specific arrangements under which the school operates.⁶⁹ It has been recognized that when operating a school, the first consideration is given to where the school will be built.⁷⁰ Generally, school districts with large proportions

63. *Id.*

64. *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995); *Board of Educ. v. Dowell*, 498 U.S. 237, 265 n.9 (1991).

65. Christine H. Rossell, *Magnet Schools as a Desegregation Tool: The Importance of Contextual Factors in Explaining their Success*, 14 URBAN EDUCATION 303, 304 (1979).

66. Rossell, *supra* note 11, at 1224.

67. *Id.*

68. Ellen Goldring & Claire Smrekar, *Magnet Schools and the Pursuit of Racial Balance*, 33 EDUCATION AND URBAN SOCIETY 17, 19-20 (2000).

69. *Id.* at 19.

70. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971) (noting the complexities in selecting a new school site, but also acknowledging that people gravitate to school facilities); Head, *supra* note 13, at 69 (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOL, 45 (1967)) (“The selection of a site for a new school, the determination of its size and attendance area, and the decision on whether to build a new school or adopt some other alternative, such as enlarging an older school, help determine the racial composition of schools.”); Christine H. Rossell and David J. Armor, *The Effectiveness of School Desegregation plans*, in 24 AMERICAN POLITICS RESEARCH 267, 298 (1996) (“But even magnet schools have their limits and must be strategically designed and implemented if they are to be effective desegregation tools.”); Kimberly J. Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV 277, 342 (2009)

of minority enrollment have difficulty achieving racial desegregation.⁷¹ Magnet schools in districts that experience a drop in non-minority enrollment have difficulty in reducing minority group isolation.⁷² In some contexts, whites tend to integrate schools while blacks segregate them.⁷³

IV. BEAUMONT'S DISTRIBUTION OF MAGNET SCHOOLS

When the superintendent of Beaumont schools assumed his duties in 1996, he addressed many issues that he felt the BISD was facing at the beginning of his tenure.⁷⁴ Particularly, the superintendent had a concern with "racial desegregation (BISD was still under a court order) . . . and the importance of keeping a superhighway (Interstate-10) from becoming a boundary permanently dividing the community into its western and eastern portions."⁷⁵ Furthermore, the superintendent took into account what he mistakenly considered white flight in its early stages within the school district when he crafted his assignment plan.⁷⁶ The superintendent's misguided concerns for racial

("[M]agnet schools in non-Hispanic, white neighborhoods are more likely to achieve integration than those in minority neighborhoods.").

71. Goldring, *supra* note 68, at 19.

72. *Id.* at 21, *see also* U.S. Dept. of Educ., Office of the Under Secretary, Evaluation of the Magnet Schools Assistance Program, 1998 Grantees xii (2003), http://www.air.org/news_events/documents/MagnetSchoolsFinalReport.pdf. [hereinafter *Magnet Schools Assistance Program*].

73. Goldring, *supra* note 68, at 19.

74. COSMOS CORP., WORKSHOP VI: SUPERINTENDENTS' COGNITIVE STYLES AND LEADERSHIP STRATEGIES TO FOSTER ACADEMIC IMPROVEMENT 22-1(2003), <http://www.cosmoscorp.com/Docs/Ideabook/WorkshopVI.pdf>.

75. *Id.* These concerns reveal a lot about the superintendent's goal in addressing *de facto* segregation, not *de jure* segregation. Beaumont was not under a desegregation order when the superintendent took office. Unitary status was achieved in 1984. The order that Dr. Thomas is referring to is Civil Action 5281 (the modified order). This modified order, as discussed above, was entered against the State of Texas, not BISD. *See also* Beth Gallaspy, *Supreme Court Ruling not likely to affect BISD*, ACCESS MY LIBRARY, July 30, 2007, <http://www.accessmylibrary.com/article-1G1-166941438/supreme-court-ruling-not.html>. (discussing BISD erroneous reliance on statewide desegregation order to defend its transfer policy).

76. *Compare* United States v. South Park Indep. Sch. Dist., 491 F. Supp. 1177, 1179 (E.D. Tex. 1980) (noting a local college professor "presented information from the Texas Education Agency which indicated to him that since the implementation of the desegregation Order the SPISD [South Park ISD] has undergone a steady decline in overall enrollment and a steady increase in the proportion of Blacks in the student body. He testified that during this same period other area school districts with predominately White enrollments, such as the Lumberton School District and the Vidor School District, experienced dramatic increases in White student enrollments. For example, the enrollment at the Lumberton School District, located five miles north of the SPISD, has doubled."), *with*

balancing in the community served, in part, as the rationale for his student assignment plan.

Part of the superintendent's student assignment plan was to renovate Hebert High School⁷⁷ in order to open Ozen Magnet High School.⁷⁸ The school was implemented to attract a diverse student body, especially white students.⁷⁹ In total, BISD currently has three high schools: Ozen Magnet High School, Central Medical Magnet High School,⁸⁰ and West Brook High School. Ozen and Central are both located on the east side of Interstate-10 in neighborhoods where predominantly black and Hispanic residents reside. Ozen has a supermajority of black students when compared to whites and Hispanics.⁸¹ Central has a supermajority of black students when compared to white and Hispanics.⁸² West Brook is located on the west side of Interstate-10 where a majority of white residents enroll their students in school.⁸³ West Brook is the closest high school out of all three high schools that has an ethnically balanced enrollment.⁸⁴ West Brook has a majority of black students when compared to white students; however, it is nothing similar to Ozen and Central's supermajorities.⁸⁵

COSMOS CORP., *supra* note 74, at 22-2. ("An underlying sensitivity was the continuing threat of large-scale 'White Flight' that seemed to be at its early stages in Beaumont. . .").

77. Hebert was a former all Black school during the integration period before it was closed.

78. *Magnet Schools Assistance Program*, *supra* note 72, at 11.

79. COSMOS CORP., *supra* note 74, at 22-2 n.3.

80. Central opened up its magnet programs in 2006.

81. 2008-09 Campus AEIS Report, <http://ritter.tea.state.tx.us/perfreport/aeis/2009/index.html>, (select "Campus Report"; select search by "Campus Number"; enter "123910004" into text box; select "continue") (reporting Ozen student enrollment by ethnic category: African-American 89.2%, White 2.8%, Hispanic 2.8%, Native American 0.3%, and Asian/Pacific Islander 1.4%).

82. 2008-09 Campus AEIS Reports: <http://ritter.tea.state.tx.us/perfreport/aeis/2009/index.html>, (select "Campus Report"; select search by "Campus Number"; enter "123910001" into text box; select "continue") (reporting Central student enrollment by ethnic category: African-American 81.9%, White 2.7%, Hispanic 14.7%, Native American 0.0%, and Asian/Pacific Islander 0.7%).

83. 2008-09 Campus AEIS Reports: <http://ritter.tea.state.tx.us/perfreport/aeis/2009/index.html>, (select "Campus Report"; select search by "Campus Number"; enter "123910008" into text box; select "continue") (reporting West Brook student enrollment by ethnic category: African-American 41.6%, White 39.3%, Hispanic 12.3%, Native American 0.2%, and Asian/Pacific Islander 6.5%).

84. Compare 2008-09 Campus AEIS Report, *supra* note 81 (reporting Ozen student enrollment by ethnic category), and 2008-09 Campus AEIS Report, *supra* note 82 (reporting Central student enrollment by ethnic category), with 2008-09 Campus AEIS Report, *supra* note 83 (reporting West Brook student enrollment).

85. *Id.*

White students at West Brook are even more of a minority when the rest of the student population is considered as whole.⁸⁶

The goal of achieving a certain racial composition is good when there is enough color to go around. Based on the number of students that attend schools within the district, BISD does not have enough white students to spread around in order to obtain a meaningful measure of diversity.⁸⁷ Take a moment to consider, theoretically of course, what would happen if all white students at the three high schools are grouped together and divided up equally among the schools.⁸⁸ Each school would now be comprised of approximately 14.9% of white students. If the same calculation is performed for black students, then each school would be comprised of 70.7% black students.⁸⁹ In addition, the same calculation would yield a distribution of 9.9% for Hispanic students.⁹⁰ This theoretical distribution would be as diverse of a student body as BISD could achieve through its current student enrollment among all three of its high schools.

If 14.9% of white students is the most that can be distributed across the three high schools in an effort to achieve a diverse student body, then Ozen and Central stand only to obtain a net gain of 12.1 and 12.2%, respectively, in white students.⁹¹ This begs the question of whether designating magnet schools in racially minority neighborhoods are effective when the maximum return on an equal racial balance of whites across the school district would only gain the predominately minority schools a 12% increase in white students. Would a marginal 12% gain in white attendance have a meaningful impact on the other black or Hispanic students? On the other hand, Ozen would only experience an 18.5% reduction of black students at its school⁹²

86. 2008-09 Campus AEIS Report, *supra* note 83.

87. Other percentages of students not represented are a small number of American Indians and Asian/Pacific Islanders and their number does not have significant impact for the purposes of the following calculations.

88. Here I am adding up the percentage of white students of Ozen 2.8%, Central 2.7%, and West Brook 39.3% and dividing by three in order to distribute the students represented.

89. Here I am adding up the percentage of black students of Ozen 89.2%, Central 81.9%, and West Brook 41.6% and dividing by three in order to distribute the students represented.

90. Here I am adding up the percentage of Hispanic students of Ozen 2.8%, Central 14.7%, and West Brook 12.3% and dividing by three in order to distribute the students represented.

91. Compare *supra* text accompanying notes 88-89 with *supra* note 88 (when 14.9% is applied to Ozen and Central you have an offset against their existing white enrollments of 2.8 and 2.7% respectively).

92. Compare *supra* text accompanying notes 88-89 with *supra* note 89 (when 70.7 percent is applied to Ozen's black student enrollment you have an offset against their existing black enrollment of 89.2%).

and Central would only experience an 11.2% reduction in black students in its school.⁹³ Considering that white students may be considered a minority at West Brook High School, they would certainly be more of a minority if spread as evenly as possible across all three high schools.

To achieve diverse enrollments at its high schools, BISD has allocated its magnet schools in racially isolated neighborhoods. This carrot-and-stick approach exists to entice white students to enroll in the magnet programs.⁹⁴ Yet, this approach only detracts from the diverse student body that exists at West Brook.⁹⁵ This allocation of magnet schools has the effect of defining students who attend Ozen and Central by their race and should be subject to strict scrutiny. The distribution of the magnet schools in Beaumont reflects the superintendent's plan in addressing *de facto* segregation and his concern for white flight. In allocating both magnet schools on the east side of Interstate-10, BISD's magnet schools have the effect of reinforcing minority isolation. This reinforcement classifies each school by the neighborhood in which the school is located.

When magnet schools are distributed among racially isolated neighborhoods for a prolonged period of time, this note argues that they become stagnant and have an effect of perpetuating segregation.⁹⁶ Students who live in the school district and attend BISD's magnet schools do so on the east side of town. The east side of town is key because this is part of the superintendent's focal point in addressing his student assignment plan.⁹⁷ The high schools on the east side of town (Ozen and Central) are designed to attract white students from the west side of town in order to achieve the district's concern for *de facto* segregation. The problem that arises is that not that many white students attend both magnet schools in BISD.⁹⁸ There are not even enough white students to affect meaningful diversity.⁹⁹ In fact, enrollment at Ozen and Central has experienced some enrollment decline over the past couple of years.¹⁰⁰ The limited amount of white students

93. Compare *supra* text accompanying notes 88-89 with *supra* note 89 (when 70.7% is applied to Central's black student enrollment you have an offset against their existing black enrollment of 81.9%).

94. COSMOS CORP., *supra* note 74, at 22-2 n.4.

95. See *supra* notes 84-86 and accompanying text.

96. See *infra* Part VI.

97. See *supra* note 74 and accompanying text.

98. See *supra* notes 81-86 and accompanying text.

99. See *supra* notes 87-93 and accompanying text.

100. Emily Guevara, *Ozen Enrollment is on Steady Decline*, BEAUMONT ENTERPRISE, Dec. 20, 2009, <http://www.beaumontenterprise.com/news/local/79708557.html>.

enrolled in the district does not take advantage of the magnet school programming. Do the magnet school kids feel that they have a wind-fall of an education opportunity because white students do not enroll in the programs? Or do the minority school kids feel sub-standard because white students do not enroll in the magnet schools because they are in racially isolated neighborhoods? The answer to both questions may be answered by appropriate sociological research that explores the student's attitudes and beliefs about their education environment. For the purposes of this note, if one were to presume that high school children cogently appreciate the education opportunities afforded to them while they are in school, then the latter question may be an accurate conscious or sub-conscious view of BISD's minority school students. If the latter question is correct, then BISD's distribution of magnet schools in racially isolated neighborhoods may define its students by race and provides an example of why the use of magnet schools as race-conscious policy should be abandoned as constitutionally permissible.

By focusing on a division between the eastern and western portions of Beaumont, BISD has implemented its magnet schools on the eastern side of the city and has not publically considered the prospects of a magnet school in the western portion of the city. When you consider the 1996 school year, BISD's superintendent crafted his student assignment plan¹⁰¹ while West Brook had a majority of black students¹⁰² and Central had a majority of black students.¹⁰³ At this time, the campus that Ozen now occupies was a ninth grade campus where BISD ninth graders attended before attending high school at Central and West Brook. Ozen did not have an established student enrollment by which to gauge the need for a magnet program; West Brook and Central did. Even if Ozen or Central were the first schools to receive a magnet program, West Brook would still have enough minority students to have a successful magnet school program.¹⁰⁴ By design, the west side of Beaumont does not have any magnet high schools.¹⁰⁵ The

101. COSMOS CORP., *supra* note 74, at 22-1.

102. 1996-97 Campus AEIS Report, <http://ritter.tea.state.tx.us/perfreport/aeis/97/index.html> (select "Campus Report"; select search by "Campus Number"; enter "123910008" into text box; select "continue") (reporting West Brook student enrollment by ethnic category: African-American 50.8%, White 41.4%, Hispanic 4.4%, Native American 0.5%, and Asian/Pacific Islander 3.0%). When all five categories are considered, Whites are a minority.

103. 1996-97 Campus AEIS Report, <http://ritter.tea.state.tx.us/perfreport/aeis/97/index.html> (select "Campus Report"; select search by "Campus Number"; enter "123910001" into text box; select "continue") (reporting Central student enrollment by ethnic category: African-American 82.3%, White 9.7%, Hispanic 5.9%, Native American 0.0%, and Asian/Pacific Islander 2.0%).

104. *See supra* notes 71-73 and accompanying text.

105. *See supra* note 74 and accompanying text.

goal of attracting white students has only perpetuated each magnet school's racial isolation because white students choose not to attend the district's magnet school programs.¹⁰⁶ Considering these factors, one may question whether the continued use of magnet school programming, although rather unsuccessful, will continue into the future in the eastern portion of Beaumont, or will there be an opportunity to implement magnet school programming on the western side of town.

V. MAGNET SCHOOL COSTS

Allowing West Brook to have a magnet school program means that it will receive an increase in resources for its students on the west side of town. Magnet schools receive better resources in terms of instruction, supplies, and equipment.¹⁰⁷ The location of BISD's magnet schools has merit because documented problems associated with minority schools include "lack of financial resources."¹⁰⁸ Research indicates that on average school districts spend 10 percent more per student on magnet schools.¹⁰⁹ When evaluating TEA data concerning the category of cost per student, by program, with-in total operating expenditures,¹¹⁰ Ozen and Central have a higher cost per student than West Brook. When compared to West Brook, Central has a 16.7% higher cost per student.¹¹¹ In addition, when comparing Ozen to West Brook, Ozen has a 38.9% higher cost per student.¹¹² Thus, in relation to prior research, BISD generally spends above average on a per student basis for its magnet high schools than its non-magnet high school.

106. See *supra* note 94 and accompanying text.

107. Eboni S. Nelson, *Examining the Cost of Diversity*, 63 U. MIAMI L. REV. 577, 609-10 (2009).

108. *Id.* at 619; see also F. Micheal Higgingbotham, *An Open Letter to Barack Obama*, 32 U. HAW. L. REV. 1, 19 (2009) (arguing that equalization of the quality of education in public schools includes increased funding in the poorest school districts); Angela Mae Kupenda, Jacqueline M. Jackson, 34 T. MARSHALL L. REV. 93, 104 (2008) (arguing that minority schools should receive increased funding instead of predominately White schools).

109. Goldring, *supra* note 68 at 18.

110. See AEIS report and glossary, <http://ritter.tea.state.tx.us/perfreport/aeis/2009/glossary.html>; ("Total Operating Expenditures by Program (2007-2008) (Comparison of the total operating expenditures by function is substantially similar. Repeating the data here would be redundant in regard to the comparisons made.)

111. This number was derived from the difference in the two schools' cost per student. The difference was then divided by West Brook's total cost per student and multiplied by one hundred and rounded to the nearest decimal.

112. This number was derived from the difference in the two schools' cost per student. The difference was then divided by West Brook's total cost per student and multiplied by one hundred and rounded to the nearest decimal.

Some of the programs made available through BISS magnets include dance, gymnastics, and video production.¹¹³

VI. MAGNET SCHOOL STAGNATION

The increased funding at magnet schools becomes un-equal when magnet schools lose their popularity, and fail to meet the diversity goals for which they were established. Magnet schools do serve a purpose by encouraging diverse student bodies when first implemented. However, as a magnet school's attractiveness dissipates, fails to attract, or becomes stagnant, the magnet becomes a race conscious shell that does no more than usurp funding and opportunities from other schools. In the case of BISS, one could argue that its magnet schools have lost any attractiveness they once had.¹¹⁴ By continuing funding of magnet programs without attracting a higher number of white students¹¹⁵ and by not allowing black students who do not attend the magnets to attend,¹¹⁶ unequal educational opportunities arise for both white and black students at BISS. This unequal education offering does not serve a government interest "in ensuring all people have equal opportunity regardless of their race."¹¹⁷

However, any white or black student at West Brook could voluntarily go to any of the two other magnet schools if space is available at any time. In fact, any white or black student could voluntarily go to another school in another district, state, or country at any time. In addition white flight could continue to occur, or white decline¹¹⁸ may present itself. Regardless of which scenario occurs, if you went fishing with certain bait but you failed to catch the minimum number of fish you intended to catch, would you keep using the same bait? Would the

113. Guevara, *supra* note 87.

114. *Id.*

115. See *Magnet Schools Assistance Program*, *supra* note 70 at viii (2003) (Between 1998 and 2001, only 57% of magnet schools succeeded in "preventing, eliminating, or reducing minority group isolation.").

116. Eboni, *supra* note 90 at 611; see also Conneely, *supra* note 58 at 112 (2008) ("While magnet schools in a district may create diversity within themselves, the remaining public schools in that district will still face the challenges of integrating without explicitly using race as a controlling admission factor.").

117. *Parents Involved in Cmty. Sch.*, 551 U.S. at 787-88.

118. White decline was coined to refer the anticipated phenomenon of White population stagnating while other racial populations continue to grow. See also Darnell L. Weeden, *Race-Conscious Equality Confronts America, President Obama, Justice Sotomayor, Professor Gates, and Sergeant Crowley*, 35 T. MARSHALL L. REV. 113, 136 (2009) ("America's changing racial profile is a compelling reason to reject either race-based segregation or race-based affirmative action agendas.").

voluntary actions of the fish deter you from changing your bait? Some day BISS's magnet schools may attract white students away from its non-magnet schools, but how long should the district leadership wait? Indeed, the schools may attract new students who move into the district, but at what cost should the magnet schools programs continue to exist when stagnation sets in?

When magnet schools stagnate, should the unequal opportunities continue to exist, or should school districts abandon their programs? On the one hand, the school districts that keep their stagnant programs open have a constitutionally valid, race-conscious reason to distribute funding and opportunities unequally. On the other, how constitutionally permissible is it to have such race conscious programs when the reality of achieving any meaningful integration presents itself as marginally greater than 10 percent of white students.

VII. THE FUTURE OF ADDRESSING SCHOOL INTEGRATION

Why is an analysis of BISS's history and magnet schools relevant to *Sweatt* and the future of race-conscious policies in public schools? BISS presents an archetype of integration since *Brown* that would not have been remotely possible without Heman Sweatt's sacrifice. Post-*Brown* Beaumont school districts had white leadership that was forced under segregation orders to remedy its dual school systems. BISS has achieved unitary status and is currently led by a group of black leaders that have chosen magnet schools to address its concern with *de facto* segregation. It is arguable whether BISS's attempts in addressing *de facto* segregation have been successful. While current constitutional interpretation allows for limited use of race-conscious policies in public schools, unguided misuse of these policies may lend themselves to perpetuating *de facto* segregation. By discussing BISS magnet school stagnation, the following remarks may be useful in addressing where race-conscious policies fit in the future of public schools.

A. Children as Tools

Sweatt, as an adult man, voluntarily attended an all white law school in an effort to challenge the separate but equal ideology.¹¹⁹ What he did was groundbreaking. Today, no one would argue that Sweatt's actions did not contribute to the fight for equality among mi-

119. See *supra* Part I.

norities. Sweatt was a tool that helped destroy the wall that segregation presented for racial minorities. Without Sweatt, the separate but equal doctrine may very well be the law of the land today.

When compared to today, school children are used as tools to achieve the integrative idea.¹²⁰ BISD uses magnet school programs in order to influence parents to enroll their children in a high school located in different neighborhoods. The parents are given the choice to voluntarily do so, but this choice comes with a subordinating effect. White children are manipulated because the magnet schools seek them out for diversity purposes. White children, who may want to take part in the sociological experiment, may volunteer to attend any of the magnet schools. In reality few actually volunteer to do so. . Minority children are manipulated because they are thought of as sub-standard and in need of a white presence to obtain a quality education. There is no current study that measures children's responses, including their feelings or thoughts concerning children of other colors who are adverse to attending their respective high schools.

Regardless of color, parents are the primary determinate in where their children attend high school. Unlike Heman Sweatt, who voluntarily chose to attend a school where he was not wanted, children do not voluntarily choose where to attend high school. Yet, the current black leadership view the need to attract white students to racially isolated neighborhoods is still desirable to enrich the education of many minorities students that outnumber White students. Essentially, BISD's attempt in using race-conscious magnet school policies to address *de facto* segregation is the equivalent to beating the proverbial dead horse.¹²¹ A school policy that seeks to manipulate students as tools for an intangible idea, such as diversity, should not be pursued when formal court ordered integration has already occurred. Such a policy overlooks the promise and capability of minority students who need to believe that white students are not required in their high school in order for minority students to achieve success beyond high school. This form of manipulation, although constitutional, should not be allowed as a viable school policy.

120. See e.g., Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1, 42,44 (1994) ("[T]he belief that Black people are inferior to White people underlies the call for integration and causes integration to take on its subordinating quality.") (alteration in original).

121. Craig L. Jackson, *Hebert High School and the Brown Aftermath-Good Intentions and Troubled Policy*, 21 T. MARSHALL L. REV. 45, 47-53 (1996) (providing insight into Professor Jackson's experience of being forced to leave an all Black Hebert High School in order to be integrated with other White students.)

B. *Leadership and Challenging the Status Quo*

Sweatt challenged the status quo of separate but equal and deserves praise because without his sacrifice America would still live in the shadow of separate but equal. Thurgood Marshall also challenged the status quo of separate but equal and successfully argued for its abolishment. These two men possess certain visionary qualities that allowed them to look past social “norms,” and envision what the “norm” should be.

On the other hand, BISD’s leadership is following the status quo of integrative ideas. This means that they view the need for race-conscious policies in managing student enrollments as necessary in order to address concerns regarding racial imbalances in school enrollment. BISD’s leadership is analogous to the white leadership of the 1950s. This group of white leaders followed the status quo of separate but equal. They were compelled to maintain white dominance over minorities by not challenging social norms. Despite BISD’s successful integration in the 1980s, it still chooses to address *de facto* segregation in its school district with magnet schools. Departing from the status quo is not blind abandonment of civil rights or racial equality because:

After forty years of court-ordered desegregation in the South and twenty-six years of court-ordered mandatory reassignment desegregation remedies, a body of empirical evidence has been amassed on the realization of these dreams with the implementation of school desegregation remedies in hundreds of school districts around the U.S. This evidence covers the extent of actual integration achieved in the face of [W]hite and middle class flight; the gains in academic achievement on the part of [B]lack and Hispanic students in the face of glacially slow changes in [B]lack family income, residential integration, and occupational status; and the improvement in race relations and the self-esteem of students attending desegregated schools when these same students come from very different worlds and have very different statuses. The evidence indicates that school integration is a weak, and in some cases counter-productive, treatment for these social ills.¹²²

BISD and other school leaders must recognize this contemporary knowledge respecting the purpose of the Fourteenth Amendment and the effects that stagnant magnet schools have in perpetuating segregation and unequal education opportunities. Magnet school programs are currently constitutionally acceptable. However, they are not necessary in empowering minority students. BISD’s magnet

122. Rossell, *supra* note 11 at 1188 (alteration in original).

schools have operated for some time, but their influence on diversity within the school district is questionable. The continued use of stagnant magnet schools conveys the district leadership's preoccupation with integrative theory that may have had a purpose in the past. Unlike Sweatt and Marshall, BISD's leadership has failed to fight the status quo of integrative policies by using race-conscious magnet schools. It is imperative that BISD leadership and other black leaders realize that past theories, used to remedy concerns for racial imbalances, may not function as effectively today.

The future of BISD's school policies, and other school districts similarly situated, must be colorblind.¹²³ This proposition could not be any truer when applied to the public education of young and impressionable children. BISD's leadership should challenge the status quo and the fear of re-segregation. Challenging the status quo does not mean advocating a separatist view decrying diversity. It means getting past the obsession of race-conscious policies and doing what educators should be doing in the classroom; providing children with resources for quality education among their peers.

123. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
