Attacking School Segregation Root and Branch

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Since the Warren Court, minorities have relied on courts to defend against majority oppression. A key weapon in this battle for full citizenship, especially in the educational context, has been the equal protection clause.¹ Brown v. Board of Education declared that "[s]eparate educational facilities are inherently unequal" and are prohibited by the equal protection clause.² On the basis of Brown and its progeny, courts have integrated entire school systems.³

School desegregation has benefited disadvantaged groups enormously. In the generation since executive branch and court-ordered desegregation plans have significantly desegregated schools, minority student performance in desegregated public schools has improved greatly.⁴ Minorities’ performances on standardized achievement and intelligence quotient tests have risen in desegregated settings,⁵ as have career opportunities of minorities attending desegregated schools.⁶ According to one scholar, no reform short of individual tutorials can improve the quality of minority students’ education more than desegregating their schools.⁷

Courts have not completely fulfilled Brown’s promise, however. Some school systems have never been desegregated, while others have resegregated, while others have resegregated.

1. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1; see, e.g., J. HOCHSCHILD, THE NEW AMERICAN DILEMMA 11, 134 (1984) ("Desegregating elementary and secondary public schools is perhaps the most important means our generation has used to eradicate racism. . . . [W]ere it not for courts’ use of the equal protection clause, there would be little reduction in racial isolation [in schools] . . . .").
7. Address by James Liebman, NAACP Legal Defense Fund Conference, Airlie, Virginia (Nov. 4, 1988); see T. COOK, supra note 6, at 85 (finding that Blacks educated in desegregated schools are more likely to graduate from high school and college and to major in more remunerative subjects).
gated, placing minority educational gains in danger. The most recent thorough study of the condition of Blacks in America concludes that, to black students' detriment, "[s]egregation and differential treatment of blacks continue to be widespread in schools."9

One obstacle to the desegregation of schools is that plaintiffs must demonstrate that government actions are intentionally discriminatory rather than that they simply have discriminatory effects. According to post-

Brown Supreme Court doctrine, only intentional segregation offends the Constitution. Yet proving discriminatory intent by school boards has become increasingly difficult as school boards today are far more likely to mask discriminatory motives than in the past.10 Unlike twenty-five years ago when many school boards openly segregated schools, current government actors veil their intent by avoiding the creation of a "paper trail" that would facilitate findings of discrimination.11 Therefore, as one commentator has stated regarding proof of racially discriminatory intent, "[t]he important questions are all evidentiary."12 Discriminatory mo-


10. Discriminatory intent was not discussed by the Supreme Court in Brown because it was clear from the face of the statutes. In Keyes v. School District, 413 U.S. 189, 198, 208-10 (1973) (Denver), the Court confronted for the first time racial imbalance in a northern school system with no history of statutorily authorized school segregation. In that case, it held that segregation must be intentional to violate the Constitution. In Washington v. Davis, 426 U.S. 229, 239-42 (1979), an employment case under the equal protection clause, the Court required inquiry into the subjective purpose behind challenged governmental decisions. See also Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (reaffirming subjective standard of intent).

11. Many recent cases have founded on the issue of intent. E.g., School Board v. Baliles, 829 F.2d 1308 (4th Cir. 1987) (Richmond); Riddick v. School Bd., 784 F.2d 521 (4th Cir. 1986) (Norfolk); Bell v. Board of Educ., 683 F.2d 963 (6th Cir. 1982) (Akron); Alexander v. Youngstown Bd. of Educ., 454 F. Supp. 985 (N.D. Ohio 1978), aff'd, 675 F.2d 787 (6th Cir. 1982). Other suits simply are not brought because of the difficulty of proving intent. Norman Chachkin of the NAACP Legal Defense Fund, an organization at the forefront of school desegregation efforts in this country, states that the difficulty of proving intent deters the initiation of large numbers of cases. Telephone interview with Norman Chachkin, New York (Oct. 26, 1989).

12. See, e.g., Palmer v. Thompson, 403 U.S. 217, 225 (1971) (difficult for court to ascertain motivation of group of legislators); Hart v. Community School Bd. 512 F.2d 37, 50 (2d Cir. 1975) (Brooklyn) (same with school board); see also Lodge v. Buxton, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981) ("[T]here will be no 'smoking gun' to prove discriminatory intent," aff'd sub nom., Rogers v. Lodge, 458 U.S. 613 (1982) (voting rights case); United States v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir. 1980) (Indianapolis) ("[I]n an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find."). cert. denied, 459 U.S. 824 (1978); Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 Rutgers L. Rev. 673, 686 (1985) ("Both at the individual and institutional levels, racism is typically far more subtle, indirect, and ostensibly nonracial now than it was in 1964, during the full swing of the Civil Rights Movement. Consequently, detection and remedy have become more difficult."); Note, Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney, 79 Colum. L. Rev. 1376, 1413 (1979) (past equal protection decisions have educated officials not to rely on racial classifications).

13. Simon, Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitu-
Attacking School Segregation

tives are buried deeper, but they have not disappeared. As the recent racial incidents in the Bensonhurst section of Brooklyn and in Virginia Beach demonstrate, racial animus appears alive and well in the era since Brown.\textsuperscript{14} It is unlikely that school boards, which reflect the values of the community, would not also mirror this prejudice.

Recognizing the impossibility that a school board will confess to charges of racism, courts have admitted circumstantial evidence as relevant to the issue of discriminatory intent.\textsuperscript{18} The judicial choice of which evidence of the plaintiff to admit as relevant can be determinative of the outcome of a school desegregation case.\textsuperscript{16} In determining which circumstantial evidence is relevant, courts in practice have limited admissible evidence to that which focuses exclusively on school board actions.\textsuperscript{17} Courts deem other actors irrelevant unless plaintiffs can make the often impossible showing that the non-defendants acted in concert with the school board intentionally to segregate schools. Courts therefore exclude evidence of substantial prejudice in the community—the “roots” of the school board’s discrimination—or discrimination in other parts of municipal government—the “branches”—from serving as inferential proof of discriminatory motive by the school board.\textsuperscript{18}

This Note argues that exclusive judicial consideration of the school board’s behavior wrongly ignores the link between the school board and the broader political system and community of which the board is only a part.\textsuperscript{19} The Note attempts to help restore the efficacy of school desegregation litigation by examining more fully the social context in which school board decisions take place. Part I demonstrates that courts stringently...
limit circumstantial evidence considered relevant to a school board’s motivations, thereby excluding evidence of “root” and “branch” discrimination. Part II argues that because school boards and other municipal actors respond to constituents’ views on matters of race, evidence of community sentiment and the actions and omissions of other municipal actors can shed light on a school board’s motivations. Part II also demonstrates that exclusion of relevant evidence of intent in school cases conflicts with established judicial doctrine. Part III proposes that courts scrutinize evidence of the motivations of the community at large and of other municipal actors to infer school board intent.

I. TREATMENT OF CIRCUMSTANTIAL EVIDENCE IN SCHOOL DESEGREGATION CASES: JUDGES WEARING BLINDERS

In school desegregation cases, courts myopically focus only on the school board, ignoring the larger social context within which the board’s decisions are made. While case law in this area involves attempts by plaintiffs to find a school board liable for the actions of other municipal officials or community members, rather than to use these actions as circumstantial evidence of school board intent, the net effect is the same: it unnecessarily limits the inquiry to the school board to the exclusion of the community and other municipal actors. This trend is illustrated most clearly by an influential line of cases in the Sixth Circuit. The Court of Appeals held in 1966 that “evidence of alleged discrimination in the public and private housing markets” is irrelevant in a case against a school board because such discrimination, if it exists, is caused “by persons who are not parties to this case and the [School] Board has no power to rectify that situation.” Finally, in 1974, the Circuit held that “complicity” is required between the school board and discriminating non-parties to implicate the board. Finally, in 1982, the Circuit refused to examine evidence of discrimina-

20. Typical is Justice Powell’s concurring opinion in Austin Independent School District v. United States, in which he stated that “discrimination in housing—whether public or private—cannot be attributed to school authorities.” 429 U.S. 990, 994 (1976). In Swann v. Charlotte-Mecklenburg Board of Education, the Court limited its inquiry to the actions of local school authorities, explicitly ignoring the “myriad factors . . . that can cause discrimination in a multitude of ways . . . .” 402 U.S. 1, 22 (1971). The Court has not foreclosed inferring school authorities’ intent from others’ intent. However, by resolutely affirming a school-board-centered approach, the Court has reinforced lower courts’ tendencies to isolate school authorities from the broader political and social community. See Note, Judicial Right Declaration and Entrenched Discrimination, 94 YALE L.J. 1741, 1743-52 (1985) (discussing narrowing of Court’s school desegregation inquiry).


22. Deal, 369 F.2d at 60 n.4.

23. Higgins, 508 F.2d at 788.
Attacking School Segregation

Attacking housing policies by other governmental agencies as indicative of school board intent.

_Bronson v. Board of Education_, a 1983 district court case, epitomizes the Sixth Circuit limitations on admissible evidence in school desegregation cases. In that case, plaintiffs attempted to present evidence of widespread Cincinnati housing discrimination to prove that the school board intentionally discriminated in concert with housing authorities. The court, however, held that plaintiffs must establish that "the named Defendants acted in concert with these non-joined parties . . . in bringing about the racial composition of the challenged school systems." Failing that difficult demonstration, "[p]laintiffs are precluded from attempting to prove that other parties and/or agencies not before the Court acted with segregative intent individually and/or independently from the named Defendants in creating a de jure segregated community and/or school system . . . ." Put simply, as the court stated in a subsequent proceeding in 1984, "the conduct of other entities not named as Defendants . . . would simply have no relevance to the issues properly triable herein." Through this rigid compartmentalization of the school board separate from the rest of the community, the court heavily increased the plaintiffs' burden in that case.

Other courts have agreed with the Sixth Circuit's restrictive approach. For example, in the 1984 Norfolk desegregation case, _Riddick by Riddick_, the court refused to look at housing discrimination for inferences concerning discrimination in the school system. According to the _Riddick_ court,
school cases concern "the elimination of dual school systems," not housing discrimination.32

In sum, courts continually have rejected admission of "root" and "branch" evidence as circumstantial evidence of a school board's intent. Courts admit such evidence only when plaintiff can prove that the "root" or "branch" directly caused the school board to act in a discriminatory way or when the board is responsible for the discriminatory "root" or "branch" actions.

II. CURRENT EVIDENTIARY STANDARDS IGNORE THE SOCIAL CONTEXT OF DISCRIMINATION

The atomistic view of discrimination that courts typically hold in school desegregation cases ignores its pervasive nature in many communities.33

32. Id. (emphasis in original). Three cases, in particular, support this Note's thesis. The Third Circuit, in Hoots v. Pennsylvania, 672 F.2d 1107, 1115 (3d Cir.), cert. denied, 459 U.S. 824 (1982), stated that "[s]chool authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools because of community sentiment or the wishes of a majority of voters." (quoting lower court opinion, Hoots v. Pennsylvania, 359 F. Supp. 807, 822 (W.D. Pa. 1973)). Similarly, in United States v. Board of School Comm'r's, 456 F. Supp. 183, 187 (S.D. Ind. 1978), aff'd in part and vacated in part, 637 F.2d 1101, 1108 (7th Cir.), cert. denied 449 U.S. 838 (1980) (Indianapolis), the court ordered interdistrict relief when the state assembly ceased the city's expansion and thus prevented desegregation. The court reasoned that, even though there was no direct evidence of racial animus by representatives, particularly the suburban representatives must have voted to stop the city expansion for the express reason of preventing desegregation, because many residents had fled the city to avoid desegregation of the schools.

The only case in which a court explicitly admitted evidence of "root" and "branch" discrimination as relevant to determining school board intent, however, is United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988). In that case, the court stated that widespread racially-based community and municipal promotion of housing segregation constituted relevant evidence that the school board had intentionally fostered school segregation. Id. at 1489, 1497, 1537. Although Yonkers found that "root" and "branch" discrimination constituted evidence of school board intent to discriminate, it is unclear whether the court relied on this evidence in finding the school board liable for intentional discrimination. The evidence is reflected in only three sentences of a nearly 300-page opinion. In the rest of the opinion, the court uses evidence of discrimination by other branches of government not to infer evidence of the school board's intent but to show that the city government and school board acted in concert to segregate Blacks, thus making the school board liable See id. at 1534 (finding "interrelated governmental effort" by school board and city to foster school segregation). In summarizing the reasons for finding the school board's failure to implement a desegregation plan to be racially motivated, the court failed to mention previously-described opposition to housing desegregation. Id. at 1500. Further, the Second Circuit did not rely on the "root" and "branch" evidence in affirming the opinion. 837 F.2d at 1227, 1232. Yonkers still stands for the proposition that community and municipal discrimination can shed light on school board motivations. See infra notes 94-97 and accompanying text. Yet no court has indicated agreement with that portion of the opinion.

33. See Horowitz, The Jurisprudence of Brown and the Dilemmas of Liberalism, in HAVE WE OVERCOME? 183 (M. Namorato ed. 1979) ("[R]ace in this country has always stood as a constant reminder of the fact that each individual is not judged solely as an individual."); Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 339 (1987) ("[R]acism in America . . . is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities."); see also Suttles, supra note 8, at 67. See generally D. Bell, AND WE ARE NOT SAVED (1987) (discussing pervasiveness and persistence of discrimination); P. Watson, PSYCHOLOGY AND RACE (1973) (same); Simon, supra note 13, at 1047-49 (same). The historical evidence bears out discrimination's pervasiveness
As both political science evidence and documentation from previous civil rights cases demonstrate, discriminatory action is seldom localized in one particular body like a school board; racism in a community is not so neatly compartmentalized. By excluding evidence of community sentiment and of the actions of other governmental actors, courts incorrectly treat discrimination as an isolated phenomenon. In so doing, courts have developed evidentiary standards which diverge from established law in other civil rights areas.

A. Current Law Fails to Capture the Reality of Discrimination and School Board Operation

Empirical evidence demonstrates that the actions of school officials cannot be rigidly separated from those of constituents and other municipal officials. As David Kirp concludes, school systems are “deeply imbedded in their political contexts . . .” Because “[f]or most Americans the relevant unit [of concern] is probably their own jurisdictional community within which they share such collective goods as education,” threats by minority groups to control these resources will frequently be felt by large segments of the population. Indeed, studies and cases indicate that race-motivated school politics often dominate city politics.

1. “Roots”

Contrary to the apparent presumption of courts, studies show that school boards, elected and appointed, are deeply responsive to strongly

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across different social institutions. E.g., G. Fredrickson, The Black Image in the White Mind (1971) (describing Whites' beliefs); G. Myrdal, An American Dilemma (1944) (describing race relations in America); C. Vann Woodward, The Strange Career of Jim Crow (1966) (noting importance of law in maintaining system of segregation; Jim Crow laws during first half of century in South applied to all areas of social and political life, subordinating Blacks from cradle to grave because of belief in white superiority).

34. See infra notes 35-66 and accompanying text. The phrase “neatly compartmentalized” comes from an interview with John Tanner, Voting Rights Section, Civil Rights Division, Justice Department, Washington, D.C. (Nov. 23, 1988).

35. D. Kirp, Just Schools 169 (1982); see also I. Katzenelson, City Trenches 115 (1981) (describing interrelation of schools and politics).

36. Suttles, supra note 8, at 67.


38. Thirty-two states and Washington, D.C. exclusively elect school boards, Virginia’s are all appointed, and the other 18 states have both appointed and elected boards. Telephone interview with Rick Davis, National Association of School Boards, Washington, D.C. (Nov. 28, 1988).
held community sentiments. Elected school boards are particularly susceptible to segregative community sentiment. For example, in both Lansing, Michigan, and Richmond, California, the elected school boards voted to desegregate their schools and were promptly voted out of office in recall elections. Not surprisingly, in both cases the new boards halted the integration plan. A school board, knowing the views of the community, will not want to wait until public opposition is formed to act in accord with segregative sentiment, nor will a board often risk unpopular desegregative actions.

Neither are appointed school boards divorced from the rest of the political community: elected officials, after all, do the appointing. As the court in *United States v. Yonkers Board of Education* recognized, opposition to school desegregation often becomes a criterion for appointment to the school board. These appointed actors also remain subject to outside pressure. The mayor often holds significant power in a municipality, and electoral pressure may push her to oppose a school board's desegregation plans.

As Jennifer Hochschild has observed:

Mayors and school boards win elections presumably because a majority of the voters endorse their views on controversial, highly visible issues. . . . [L]ocal officials do not desegregate precisely because

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39. Although the school desegregation idea is popular among Whites and Blacks, particularly in a community with desegregated schools, busing for such purposes is highly unpopular among Whites. Rossell, *Desegregation Plans, Racial Isolation, White Flight, and Community Response*, in *The Consequences of School Desegregation* 13, 44-45 (C. Rossell and W. Hawley eds. 1983). Three-quarters of Americans believe that busing for desegregation would be "too hard," although 88 percent of white families who have done so find it very or partially satisfactory. G. Stone, L. Sedman, C. Sunstein & M. Tushnet, *supra* note 3, at 492.


41. D. Kirp, *supra* note 35, at 117; see L. Rubin, *Busing and Backlash* 147 (1972) (80% turnout in precincts where desegregation was most opposed in Richmond; busing advocates were overwhelmingly defeated).

42. See E.E. Schatschneider, *A Semi-Sovereign People* 38, 62-77 (1960) (arguing that governmental actors often keep an unpopular item off their agenda to prevent public mobilization on the issue, thus ensuring its defeat in a manner invisible to the public).

43. See S. Elkin, *City and Regime in the American Republic* 128 n.8 (1987) (implying that appointed officials, being "indirectly elected," respond to popular pressure in same way that elected officials do).


45. See S. Elkin, *supra* note 43, at 29-30 (finding mayors increasingly important relative to city council and department heads). The city council or mayor's influence over fiscal and other affairs may significantly affect the other decisions that a school board may make. D. Rogers, *supra* note 37, at 431 (finding New York City school board formally and informally dependent for money, school construction, and zoning decisions on city counselors, agencies, and administrators).

46. See, e.g., D. Kirp, *supra* note 35, at 92 (liberal mayor in San Francisco reversed course and became leader of opposition to school board's desegregation plan).
popular control is, in fact, effectively exercised. . . . [W]ere it not for courts, there would be little reduction in racial isolation. 47

2. "Branches"

Studies also show that where one municipal "branch" acts in a racially discriminatory manner in its own sphere, other branches are likely to do the same in theirs. 48 As Clarence Stone writes, "[T]he factors are more important in the American city today than the factor of race. Housing patterns, educational policy, attitudes on social policy issues, and employment opportunities are all intertwined with the factor of race." 49 Municipal officials come from the same community and share the local culture, and this culture often includes racial prejudice. 50 In addition, individuals may take on different roles within municipal government by serving in various organizations and offices over time. 51

Moreover, a municipality's different "branches" will often discriminate against minorities as a result of constituent pressure. 52 According to Danielson and Doig, authors of a study on New York municipalities' exclusion of Blacks and Hispanics,

By and large, suburban governments have been responsive to the [discriminatory] views shared by so many of their constituents. Local officials . . . have fostered exclusion by bulldozing black neighborhoods and ignoring the housing needs of those displaced. In addition, suburban governments have rezoned for commercial use land adjacent to black neighborhoods; school officials have frozen and manipulated school boundaries in order to foster and preserve segregated schools . . . [P]ublic policies . . . [therefore] encourage discrimination and segregation . . . . 53

Political science literature has confirmed the dependence of municipal actors on their political and social contexts, 54 particularly concerning matters of race. First, pluralist studies, focusing on interest group and electoral bargaining, identify innumerable, often non-obvious, interconnections among city officials. 55 These interrelations, as mentioned above, can take

47. J. Ho~schild, supra note 1, at 128-29, 134.
50. See D. Bell, supra note 33, at 4-6.
53. Id. at 104.
54. E.g., S. Elkin, supra note 43 (different municipal actors and agencies are interdependent and understandable only in relation to political and economic context).
55. E.g., E. Banfield & J. Wilson, City Politics (1963); R. Dahl, supra note 51 (studying
the form of authority over funding and other major decisions, mayoral appointment powers, job movements by an individual in a municipality, and social ties. Limiting judicial scrutiny of intent to one agency and its personnel ignores these reciprocal influences. Second, as economic views of politics predict, politicians tend to move to the political spectrum’s center in electoral competition, closely reflecting the majority of voters’ substantive views on matters of perceived importance. Such studies suggest that representatives, to retain constituents, will attempt to further their constituents’ views on matters of race. Anthony Downs emphasizes that politicians are more likely to respond when the costs of gathering the majority of constituents’ views on a particular issue are low and the intensity of the views held is high. Because of the easy identification of the emotional racial issue in a community, politicians in all spheres of government will either anticipate or respond quickly to widespread community animus against minority groups. Indeed, empirical research on the United States Congress has indicated that constituents’ views on civil rights have closely controlled the behavior of their representatives.

Judicial findings in civil rights cases also demonstrate that discrimination often occurs by municipal officials in different areas of government. In voting rights cases, for example, courts have often noted the pervasive character of official discrimination against minorities in widely varying spheres of municipal government, including schools. Moreover, the Supreme Court has frequently noted that segregation in housing and schools

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56. See cases cited supra note 37 (describing city council power of the purse over school board).
58. Id. at 64–69.
59. See supra note 42 (discussing government preemption of issues).
60. Miller & Stokes, Constituency Influence in Congress, in Empirical Democratic Theory 388, 398–401 (C. Cnudde & D. Neubauer eds. 1969). One congressman lost his seat primarily because he was thought to be “too moderate” on racial issues. Id. Politicians, appointed or elected, often act concerning school policy in anticipation of a campaign for a new office. E.g., J. Raffel, The Politics of School Desegregation: The Metropolitan Remedy in Delaware 103 (1980) (suggesting mayor opposed desegregation because of his impending Senate bid).
61. E.g., Rogers v. Lodge, 458 U.S. 613, 624–26 (1982) (finding county’s at-large system of election unconstitutional and that Burke County, Georgia Blacks suffered lingering discrimination in education, grand jury selection, county hiring, board and commission appointments, municipal services, elected officials’ responsiveness, and in their nearly total exclusion from political process); Cruz Gomez v. City of Watsonville, 852 F.2d 1186, 1196–98 (9th Cir. 1988) (striking at-large city election scheme and finding current discrimination against Hispanics in schools, housing, and employment, and past discrimination with present effects in other areas), cert. denied, 109 S. Ct. 1534 (1989); McMillan v. Escambia County, 748 F.2d 1037, 1044 (5th Cir. 1984) (affirming district court’s striking down of at-large voting districts and finding state-enforced discrimination against Blacks in electoral system and in creation of “two separate societies” in which churches, clubs, neighborhoods, and (until recently) schools remained segregated by race to detriment of Blacks); City of Pleasant Grove v. United States, 623 F. Supp. 782, 787–88 (D.D.C. 1985) (three-judge court) (invalidating attempted annexation and finding current discrimination by city in education, zoning, hiring, voting, and utility policies), aff’d, 479 U.S. 462 (1987); Hale County v. United States, 496 F. Supp. 1206, 1214 (D.D.C. 1980) (three-judge court) (disallowing preclearance of election plan changes and finding educational, economic, employment, and political discrimination against Blacks).
is closely linked. Unsurprisingly, plaintiffs who demonstrate unconstitutional school segregation often prove simultaneous and significant official housing discrimination. For example, the court in Penick v. Columbus Board of Education found housing segregation caused in part by Federal agencies, local housing authorities, and local zoning and annexation practices, and found blatant school segregation by school authorities as well. Successful civil rights actions concerning mixed subject areas, such as housing and employment, and employment and voting, support the proposition that a municipality that discriminates in one sphere of government might well be doing so in others. Courts that ignore discrimination by public officials other than school board members therefore overlook how thoroughly racial prejudice often finds expression in a community.


65. The Department of Justice found that a pattern of intentional discrimination by town officials (police, mayor, housing officials, and others) existed in Cicero, Illinois that excluded Blacks from both residing and working there. The town settled both the housing and employment counts in May, 1986, soon after the district court indicated that it would reinstate a preliminary injunction on the employment charge. Telephone interview with James Angus, Chief of the Employment Section, Civil Rights Division, Justice Department (Nov. 25, 1988).

B. Current Law Fails to Heed Other Areas of Civil Rights Law

In Village of Arlington Heights v. Metropolitan Housing Development Corp., the Supreme Court stated that determining whether a government actor harbors discriminatory intent under equal protection standards requires “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available” to determine if “discriminatory purpose has been a motivating factor in the decision.” Courts that exclude “root” and “branch” evidence as not relevant to school board intent undercut the Court’s command that the search of the available circumstantial evidence for discriminatory purpose must be vigorous and wide-ranging.

The narrow view courts take of admissible evidence in school desegregation cases is at odds with the acceptance of “root” and “branch” evidence as probative of decisionmakers’ intent in other civil rights cases.

1. “Roots”

In voting rights cases alleging denial of equal protection under the laws, the Supreme Court has endorsed the use of evidence regarding a wide variety of community practices to infer intentional voting rights discrimination. In White v. Regester, for example, the Court found “invidious discrimination . . . [in] education, employment, economics, health, politics and others” against Mexican-Americans and racial campaign tactics and other discrimination against Blacks to be relevant. The Court concluded that “[b]ased on the totality of the circumstances . . . and an intensely local appraisal of the . . . district in the light of past and present reality, political and otherwise,” the district court had correctly found invidious
Attacking School Segregation

discrimination. Likewise, in *Rogers v. Lodge*, the Court considered racial bloc voting to be probative of responsiveness by an elected county commission, and thus of its discriminatory intent.\(^4\)

Lower courts have complied with Supreme Court instructions to consider evidence of community sentiment as indicative of racial motivation in voting rights cases. One district court found, for example, that the historical and social context of the community, including extremely polarized racial bloc voting, had led to intentional discrimination in many spheres of government and to discrimination in adopting the questioned election plan as well.\(^5\)

In housing cases, as well, courts using equal protection clause intent standards admit evidence of community sentiment without requiring plaintiffs to show a direct causal link between that sentiment and subsequent municipal decisions to oppose housing desegregation.\(^6\) Thus courts will find that innocent-sounding statements can prove intent in housing cases when set against a backdrop of community racial animus.\(^7\) This approach stands in contrast to that used in school cases. For example, the *Yonkers* court used wider inferential "root" evidence to find discriminatory purpose in the housing count than it did in the school count.\(^8\)

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\(^4\) 458 U.S. at 624 ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences . . . .").

\(^5\) *City of Port Arthur v. United States*, 517 F. Supp. 987, 991, 1004-08 (D.D.C. 1981), aff'd, 459 U.S. 159 (1984). Although plaintiffs sued under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), the court used the "root" and "branch" evidence to find discriminatory intent as an alternative basis for striking down the proposed election plan. *Id.* at 1019. In *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir.), *cert. denied*, 469 U.S. 976 (1982), the court stated that "[a] history of pervasive purposeful discrimination may provide strong circumstantial evidence that the present-day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination." Though *Morengo* concerned § 2 of the Voting Rights Act, the court stated that "the same evidence is relevant to both [intent under the Fourteenth Amendment and effects-based] theories." 731 F.2d at 1574; see also *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982) (historical and social context relevant under equal protection standards), aff'd, 459 U.S. 1166 (1983); *Ammons v. Dade City*, 783 F.2d 982, 988 (11th Cir. 1986) (municipal services case); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986) (same).


\(^8\) Factors that the court considered in finding illicit housing motivation included evidence of private market discrimination, longstanding and increasing racial polarization, and the acceptance of racist opposition to housing desegregation as a fact of political life. United States v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1313, 1370, 1316 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988). In addition, the court discussed community prejudices with
2. "Branches"

Courts have also used discrimination by non-defendant governmental actors as circumstantial evidence of intent violative of the equal protection clause in civil rights cases other than school desegregation cases. For example, in the voting rights case of Rogers v. Lodge, the Supreme Court found past and present discrimination against Blacks in education, politics, grand jury selections, and county hiring, in addition to a lack of responsiveness to minority concerns by officials, to be indicative of intentional discrimination regarding voting rights. Moreover, in City of Pleasant Grove v. United States, the three-judge district court found that the city’s discriminatory housing, zoning, hiring, education, and utility policies indicated discrimination in voting as well. The lower court stated that "as a matter of law, the Court may, and it does, infer on the basis of this evidence . . . that racial bias was the purpose of Pleasant Grove’s [voter] annexation policy." This is precisely the approach that this Note proposes for school cases. The Supreme Court approved the district court’s reliance on a “variety of evidence” to find discriminatory intent.

Likewise, the District Court for the District of Columbia found that discrimination in such “branches” as schools, housing, employment, and municipal appointments and improvements implied that the city also intended to discriminate in voting. Finally, in a housing case, the Northern District of Ohio found that racially discriminatory acts by city leaders provided sufficient evidence to infer that subordinate local officials

respect to housing segregation, suggesting that such prejudices operate in different spheres of society. The court noted that city actions condoning segregative housing sentiment made it “all the more unlikely that individual minorities will be encouraged to try, or that individual whites will be encouraged to abandon the attitudes that have erected that [racial] barrier.”


80. 623 F. Supp. at 787; see also United States v. Marenco County Comm’n, 731 F.2d 1546 (11th Cir. 1984) (finding school discrimination, unresponsiveness by county officials, and variety of past discrimination evidence of vote dilution; discussed supra note 75), cert. denied, 469 U.S. 976 (1984); McMillan v. Escambia County, 748 F.2d 1037, 1044 (5th Cir. 1984) (“Discrimination against minorities outside of the electoral system cannot be ignored in assessing that system.”). McMillan arose under § 2 of the Voting Rights Act, but the court had previously found a Fourteenth Amendment violation in the same case using the same evidence. 688 F.2d 960 (5th Cir. 1982). But see Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion) (“Evidence of discrimination by white officials in Mobile . . . [is] tenuous . . . evidence of the constitutional invalidity of the electoral system . . .”). However, the fact situation in the more recent case of Rogers v. Lodge, 458 U.S. 621 (1982), was substantially similar to that in Bolden, in which the opinion received only plurality support. “Although professing fidelity to Bolden, Rogers allowed for a diametrically opposite result and liberalized the harsh evidentiary requirements set forth by the Bolden plurality.” Note, supra note 70, at 349. Thus, Rogers’ more lenient standards of relevant evidence, in line with this Note’s proposal for schools, apply to constitutional voting litigation.


intentionally discriminated as well, in accordance with "'the established, albeit informal, city policy . . . that it was proper' to practice racial discrimination." 83

Courts' refusal to permit "root" and "branch" evidence to serve as circumstantial evidence of intent in school desegregation cases is an anomaly in civil rights law. The disparate standards of evidence admissible to show intent prevents advances in school desegregation cases comparable to those in other fields.

3. Rules of Evidence

Exclusion of evidence regarding "roots" and "branches" also violates established rules of evidence. According to Rule 401 of the Federal Rules of Evidence, evidence is "relevant" and therefore must be admitted in the absence of an applicable exclusionary rule 84 if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 85 Courts consider two aspects of relevance under Rule 401. First, the evidence must be material; that is, it must be offered to prove a proposition at issue. Second, the evidence must be probative; in other words, it must affect the probability that the questioned proposition is true. 86 "Root" and "branch" evidence in school desegregation cases meets both of these criteria. First, it is material because evidence of community or municipal discrimination is offered to prove the intent of the local school board. Second, as demonstrated above, community and municipal discrimination increases the probability that a school board has intentionally discriminated. 87

No relevant exclusionary rule exists to bar admission of "root" and "branch" evidence. Rule 403 allows exclusion of relevant evidence if its probative value is "substantially outweighed" by the danger of unfair prejudice. 88 Under this rule, courts exclude evidence for unfair prejudice when it tends to prove an adverse fact about the defendant not properly at issue or will unfairly excite emotions against her. 89 Here, however, just as

87. See supra notes 33–66 and accompanying text.
88. Fed. R. Evid. 403 (governing exclusion of relevant evidence).
89. See, e.g., United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980); United States v. Johnson, 558 F.2d 744, 746 (5th Cir. 1977), cert. denied, 434 U.S. 1065 (1978); see also Fed. R. Evid.
courts found in the civil rights cases discussed above, circumstantial "root" and "branch" evidence does not unfairly excite the emotions in an inflammatory manner and is rationally connected to the ultimate fact to be proven—the school board's intent to discriminate. Moreover, as the policy of the Rule generally favors the admissibility of evidence, any doubts should be resolved in favor of admitting the "root" and "branch" evidence.

As demonstrated by both empirical research and the observations of courts in many areas of civil rights law, communities and municipalities that discriminate in one sphere of social or political life are likely to do so in others. Admission of such evidence as relevant to establish school board intent in desegregation cases would be consistent with empirical fact, cur-

403 advisory committee's note (unfair prejudice is "tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one"). Evidence must be more than "damning"; it must be "inflammatory." Brady v. Chemical Constr. Corp., 740 F.2d 195, 202 (2d Cir. 1984) (citation omitted). The appeal can also be prejudicial by appealing to incorrect logic. See Weit v. Continental Trans. Co., 706 F.2d 457, 467 (7th Cir. 1983); Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash. L. Rev. 479, 503-10 (1983) (defining unfair prejudice as that likely to lead to inferential error).

90. The civil rights cases cited supra notes 71-83 implicitly override Rule 403 for non-defendant "root" and "branch" evidence. See Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1133-35 (4th Cir. 1988) (admitting evidence of racist statements to reveal intent even though emotionally charged and not related to decision at issue; court stated Rule 403 should only "sparingly" exclude evidence).

91. See 1 J. Weinstein & M. Berger, Weinstein's Evidence § 403[03], at 403-46 (1989) ("The usual approach [under Rule 403] . . . is to view both probative force and prejudice most favorably towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value."); C. Wright & K. Graham, supra note 85, § 5214, at 263-64. Unfair prejudice must "substantially outweigh" probative worth; thus, to exclude proffered evidence there must be "significant tipping of the scales" against it. Id. § 5221, at 309. Finally, if prejudice outweighs probative worth, the judge is not required to exclude the evidence: she "may" do so. Dente v. Ridell, Inc., 664 F.2d 1, 5 (1st Cir. 1981).

Rule 404(b) states that "Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for . . . purposes, such as proof of motive, . . . intent, . . . or absence of mistake or accident." Fed. R. Evid. 404(b). The rule's scope is not limited to the defendant's own acts. C. Wright & K. Graham, supra note 85, § 5239, at 458 n.77 ("Nothing in the rule requires that the other crimes, wrongs, or acts be those of the person whose character is being proved."). Case law has largely been limited in this manner, though. See id. § 5239, at 427-68. But see, e.g., United States v. Multi-Management, Inc., 743 F.2d 1359, 1364 (9th Cir. 1984) (involving conspiracy). However, just as plaintiffs are allowed to present evidence of other racially discriminatory acts by a defendant to prove intent under Rule 404(b), see, e.g., United States v. Franklin, 704 F.2d 1183, 1187-88 (7th Cir.), cert. denied, 464 U.S. 845 (1983); Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1300 (9th Cir. 1981), plaintiffs should also be able to present evidence of acts of non-defendants in the same community. A series of discriminatory acts performed by the same defendant increases the probability that the act in question was done with discriminatory intent. Keyes v. School Dist., 413 U.S. 189, 207-08 (1973). Discriminatory acts by other community "roots" and "branches" do the same with regard to the school board, particularly because Rule 404(b) can apply to a municipal corporation, Lenard v. Argento, 699 F.2d 874, 896 (7th Cir.), cert. denied, 464 U.S. 815 (1983), which is similar to a school board. A court can, but need not, rely on Rule 404(b) in admitting "root" and "branch" evidence as probative of school board intent; Rules 401 and 402 alone would suffice. Cf. Miller v. Poresky, 595 F.2d 780, 788 (D.C. Cir. 1978) (Robinson, J., concurring) (holding past acts of discrimination by landlord relevant in civil rights action under, and thoroughly discussing, Rules 401, 403, and 404(b)); United States v. Beechum, 582 F.2d 898, 911-14 (5th Cir. 1978) (holding that test for Rule 404(b) is, first, that evidence is relevant under Rule 401 and, second, that probative value outweighs potential for undue prejudice under Rule 403), cert. denied, 440 U.S. 920 (1979).
rent judicial practice in other areas of civil rights law, and the rules of evidence.

III. PROPOSAL: A BROADER VIEW OF EVIDENCE RELEVANT IN DETERMINING SCHOOL BOARD INTENT

Courts should widen the standards of relevance and admissibility of evidence to include both community sentiment and the policies and actions of a municipality. To do so, courts must weigh this "root" and "branch" evidence, together with any direct evidence, on a case-by-case basis\(^2\) to determine the motivation of the school board.\(^3\)

*United States v. Yonkers Board of Education*\(^4\) illustrates how this type of evidence can be used to infer intentional discrimination by a school

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92. According to the ethnographer Suttles, *supra* note 8, at 61, 67, communities differ significantly in the amount of hostility they display toward minorities. Different judgments about the extent of discrimination are therefore appropriate in different communities.

The question of which evidence is admissible is governed by the Federal Rules of Evidence. See *supra* notes 84-91 and accompanying text. The district court's weighing of the totality of properly admitted evidence in a finding of discriminatory intent is a finding of fact, Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982), for which there are no *ex ante* standards. The intent finding is entitled to considerable deference under the *ex post* "clearly erroneous" appellate review standards of Fed. R. Civ. P. 52(a). See *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985). Because the district court's determination is likely to be binding, it is therefore crucial that the court consider all relevant evidence, including "root" and "branch" evidence.

93. Courts in voting cases draw an inference of intent from the totality of the circumstances; there can be no mechanical rule. See *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). This is true also of school cases. *See, e.g.*, *Davis v. School Dist.*, 309 F. Supp. 734, 741 (E.D. Mich. 1970) (Pontiac) (despite previous case finding no unconstitutional segregation in placement of Pontiac school, finding such violation is now appropriate because "this Court's consideration... has been broadened to... the composition of the entire Pontiac School System"), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

Courts should take circumstantial "root" and "branch" evidence into account in their inquiry into the "totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), to determine school board purpose. Instead of deciding the issue on a totality of the evidence standard, many courts have shifted to the school board the burden of proving the constitutional legitimacy of its decisions in various contexts, once plaintiff's *prima facie* evidence reached a court-determined threshold. *E.g.*, *Keys v. School Dist.*, 413 U.S. 189, 209-10 (1973) (Denver) (shifting burden to school board once Court found unconstitutional segregation in meaningful portion of school district); *Berry v. School Dist.*, 442 F. Supp. 1280, 1294 (W.D. Mich. 1977) (shifting burden to school board because of discrimination in teacher and student assignment and facility conditions); *Roseboro v. Fayetteville City Bd. of Educ.*, 491 F. Supp. 113, 118 (E.D. Tenn. 1977) (history of racial discrimination in defendant school board's system shifts burden to school board); *cf. Diaz v. San Jose Unified School Dist.*, 612 F.2d 411, 415 n.1 (9th Cir. 1979) (raising but not deciding issue). Once a plaintiff has established evidence regarding "root" and "branch" discrimination beyond the court-determined threshold level, a court should shift the burden to require the defendant school board to demonstrate that its decisions are independent of the larger discriminatory community or municipal government. See *Note, supra* note 12, at 1407 ("[W]hat is sought [in equal protection cases] is an indication of the probability that legislative actions have been infected by a race or gender bias. . . . Even if plaintiffs are unable to demonstrate conclusively that defendants have taken action predicated on illicit considerations of race or gender, the burden of proof on the issue . . . might properly shift to defendants . . . .") (emphasis in original); Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C.L. Rev. 879, 988-89 (1985) (court's finding of illicit purpose to be motivating factor of unknown strength "will be sufficient to shift the burden to the government to establish that the illicit motivations were not 'but for' cause").

94. *624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988); see Days, supra note 19, at 1767 (opinion asks right questions).*
board. In that case, the District Court for the Southern District of New York found that the atmosphere of racism in significant and influential portions of the community and government of Yonkers, as demonstrated by widespread opposition to housing desegregation, implied that the school board was also motivated by racial concerns. Although evidence of discrimination in areas besides housing may be relevant in future school desegregation cases, the *Yonkers* opinion demonstrates a perceptive and holistic understanding of how discrimination often manifests itself in a community.

A. Courts Should Admit "Roots" Evidence

In examining the "roots" of discrimination, courts should consider, among other things, the history of racism in a community, the character of the electorate, the political and social context of the particular community, and the community's attitudes towards minorities at the time of the alleged infractions. If segregation is a deeply held custom in a community, and the community's decisions generally reflect community racial animus, these facts should be considered in determining the motivation be-

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95. See *supra* notes 32, 78.

96. For example, plaintiffs in Rocky Mount City Bd. of Educ. v. Nash County Bd. of Educ., No. 89-836 (E.D.N.C. filed May 4, 1989), allege that defendant Nash County School Board (1) operated a dual school system that by purpose and effect operated as a "white haven," attracting Whites from the city school district and determining residential patterns, and (2) set the boundary between the two school systems to increase the number of Whites in the system. See Complaint at 2-3, 5-14. The Rocky Mount plaintiffs' case would be strengthened if the court allowed evidence of widespread discrimination by various elements of the county government to provide an indication of the motivations of the county school board. According to Susan Perry, Executive Director of Eastern Carolina Legal Services, the Nash County government acts in a racially discriminatory manner toward black communities in the county by, for example, providing inadequate water and sewer services as compared to those provided to predominantly white areas. She also sees a "total oversight" of the interests of the black residents in the economic development policies of the county. Telephone interview with Susan Perry, Wilson, N.C. (Nov. 26, 1989).

97. 624 F. Supp. at 1316, 1364, 1370, 1488-90, 1497-1500, 1533-37, 1544-45. One advantage of bringing more than one discrimination count simultaneously, as the plaintiffs did in *Yonkers*, is to make widespread discrimination explicit and thus more believable for each count. See *supra* notes 65-66 and accompanying text. There are many reasons, however, for plaintiffs to bring only a school case: other counts may already have been litigated; plaintiffs may lack resources or reason to bring additional counts; or the lawyers may lack expertise or have strategic reasons for bringing just one count.

98. The use of this factor is not unprecedented with respect to past school segregation. See, e.g., United States v. Missouri, 515 F.2d 1363, 1370 (8th Cir.), cert. denied, 423 U.S. 951 (1975); see also Harkless v. Sweeny Indep. School Dist., 554 F.2d 1353, 1357 (5th Cir. 1977) (finding discrimination in teacher rehirings by school system and noting relevance of past school segregation in district: "Overnight changes in racial attitudes, as we have sadly noted in the last twenty years, are rare.").


100. See Simon, supra note 13, at 1103 ("[C]ontemporaneous social-political conditions ... may shed light on the motivation with which a specific membership institution acted ... [because] institutions usually reflect and respond to the socially and politically dominant values in the community ... ").
hind a school board’s actions. In addition, if racial concerns overwhelm other issues at a particular time, this too should be considered. Factors such as formal and informal racial policies of dominant social institutions, racial bloc voting, campaigns based upon race, and extreme segregation in housing or social life should also serve as circumstantial evidence of a school board’s intent, just as these factors do in voting rights cases. Evidence might include newspaper articles, testimony of observers and affected parties, flyers and letters, statements by segregation proponents, descriptions of racially hostile audiences, and sociological studies of racial attitudes, as well as objective social and political conditions.

B. Courts Should Admit “Branches” Evidence

Courts should also consider actions of other municipal officials as circumstantial evidence of the motivation underlying school board decisions, including the municipality’s employment policies; fair housing, zoning, and land use decisions; racial rhetoric of politicians; voting rights violations; discrimination in the provision of municipal services; and unresponsiveness by officials to minority concerns. Evidence of discriminatory acts by school board members in other areas of life, relationships between school board members and other officials implicated in discrimination, or a common language employed by opponents of desegregation in different contexts should be admissible as well.

101. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (finding segregative attitudes so pervasive that they had force of law); Yonkers, 624 F. Supp. at 1316 (finding city officials acquiescing in housing discrimination because opposition to desegregation was “fact of life” in community).


103. In Yonkers, the newspaper articles were admitted as evidence for the housing count, and the rest of the preceding forms of evidence mentioned in the text were admitted for the school count. 837 F.2d at 1221, 1231.


105. According to Norman Chachkin, attorney with the NAACP Legal Defense Fund, courts in voting cases have looked, and in school cases should look more broadly at the question whether the local body listens to complaints of black citizens at all, whether or not they are connected to claims of racial discrimination. [This is] . . . the germ of nonresponsiveness — that all kinds of mundane, ordinary complaints or petitions from citizens become racial discrimination issues when they are voiced by black citizens to a board or body which doesn’t deal with blacks like other folks . . . .

Letter from Norman Chachkin to author (Dec. 25, 1988).

A judge always has the option of joining another municipal defendant pursuant to Fed. R. Civ. P. 19(a) if she feels that fairness requires giving the other “branch” the opportunity to defend itself against allegations of racial discrimination.
CONCLUSION

Just as the Fifth Circuit criticized a district court for treating "each school as an island," in a school desegregation case,\textsuperscript{106} this Note criticizes courts for treating school boards as islands, separate from and uninfluenced by the larger communities and the municipal governments in which they are situated. To fulfill the mandate of eradicating unconstitutional school segregation "root" and "branch," courts must admit circumstantial evidence of community sentiment and actions of other municipal officials as potential proof that a school board has acted with discriminatory intent.

\textsuperscript{106} United States v. Texas Educ. Agency, 600 F.2d 518, 525 (5th Cir. 1979).