

## RACIAL INTEGRATION AS A COMPELLING INTEREST

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The premise of this symposium is that the principle and ideal developed in *Brown v. Board of Education*<sup>2</sup> and its successor cases lie at the heart of the rationale for affirmative action in higher education. The principle of the school desegregation cases is that racial segregation is an injustice that demands remediation. The ideal of the school desegregation cases is that racial integration is a positive good, without which “the dream of one Nation, indivisible”<sup>3</sup> cannot be realized. Both the principle and the ideal make racial integration a compelling interest. The Supreme Court recognized these claims in *Grutter v. Bollinger*. However, it failed to take full advantage of them. It thereby failed to answer crucial questions that must be answered by policies subject to strict scrutiny. In this essay, I shall display the links tying *Grutter* to *Brown*, discuss the vulnerabilities of *Grutter* in the absence of an explicit grounding in *Brown*, and demonstrate how the affirmative action policy upheld in *Grutter*, when explicitly grounded in *Brown*, survives strict scrutiny. To understand this argument, it is helpful first to explain the integrationist perspective that underlies it.

### I. THE CONTINUING CAUSES OF BLACK DISADVANTAGE

The integrationist perspective begins with a diagnosis of the causal mechanisms that continue to systematically disadvantage blacks.<sup>4</sup> Sixty years after *Brown* declared state-sponsored racial

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2. 347 U.S. 483 (1954).

3. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

4. Blacks are the main focus of race-based affirmative action programs and of most research into the causes of race-based disadvantage. I therefore focus on their situation. Other groups may be proper targets of affirmative action if they suffer disadvantages analogous to those affecting blacks, or if they suffer from other disadvantages that

segregation unconstitutional, and fifty years after the Civil Rights Act of 1964 banned racial discrimination in employment, blacks remain seriously disadvantaged on nearly every measure of well-being.<sup>5</sup> Given that discrimination and overt hostility toward blacks have declined since these landmark legal events, what continues to keep blacks back? Two stubborn legacies of white supremacy play pivotal roles in sustaining black disadvantage: segregation and racial stigma.

Residential segregation is the norm for blacks of all socioeconomic classes in the United States.<sup>6</sup> Segregation of neighborhoods leads to segregation of public schools—levels of which *increased* in the 1990s.<sup>7</sup> Jobs, too, tend to be racially segregated.<sup>8</sup> Black segregation from the mainstream has profound socioeconomic consequences. It isolates blacks from the predominantly white informal social networks that govern access to economic opportunities. It confines blacks to regions experiencing severe job decline, without adequate means of transportation to the white suburbs where jobs are being created.<sup>9</sup> It deprives blacks of investment opportunities, because their homes do not appreciate in value as white suburban homes do.<sup>10</sup> Lack of housing appreciation, in turn, undermines their access to the credit

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affirmative action can remedy.

5. See Council of Economic Advisors for the President's Initiative on Race, *Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin* (1998) (<http://www.access.gpo.gov/eop/ca/pdfs/ca.pdf>) for representative statistics.

6. DOUGLAS S. MASSEY AND NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 64 tbl. 3.1 (1993). Although based on 1980 Census figures, this remains the definitive work on black residential segregation in the U.S. That segregation has declined only modestly in Census 2000 is confirmed by Lewis Mumford Center, *Ethnic Diversity Grows, Neighborhood Integration Lags Behind* 1-2, 5 (Dec. 18, 2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page1.html>.

7. Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?* 18-19 (January 2004) <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

8. TIMOTHY BATES, *BANKING ON BLACK ENTERPRISE: THE POTENTIAL OF EMERGING FIRMS FOR REVITALIZING URBAN ECONOMIES* 140 (1993) (documenting high between-firm segregation related to race of firm owner); DONALD TOMASKOVIC-DEVEY, *GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION* 24 (1993) (documenting high within-firm segregation).

9. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); Michael A. Stoll et al., *Within Cities and Suburbs: Racial Residential Concentration and the Spatial Distribution of Employment Opportunities Across Sub-Metropolitan Areas*, 19 *J. POL'Y ANALYSIS & MGMT.* 207 (2000).

10. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 150-1 (1995).

needed to start businesses.<sup>11</sup> Segregation multiplies and spreads the effects of employment discrimination, by filling blacks' social networks with people who have been similarly shut out of job opportunities. It concentrates and thereby multiplies poverty, exclusion, and disadvantage. Concentrated disadvantage reduces the tax base while increasing the demands on public services in cities where blacks live, resulting in higher tax burdens for poorer services—especially, worse schools—than what whites enjoy.<sup>12</sup> Segregation also impedes the formation of cross-racial political coalitions, by ensuring that public services devoted to black areas will have no spillover benefits for other groups.<sup>13</sup> These consequences of de facto segregation affect middle class as well as poor blacks.<sup>14</sup>

A second broad cause of continuing black disadvantage is racial stigma—habits of racial classification, perception generalization, and interpretation, and modes of identification that mark blacks as unworthy, undeserving, pathological, and alien—not fully “us.”<sup>15</sup> Slavery constituted blacks as a dishonored race; Jim Crow branded them as an untouchable caste. Although the overt hostility of such “old-fashioned” racism has waned, it has left behind subtler forms of systematic bias against blacks, residing more in cognitive than affective mechanisms, more unconscious than willingly avowed as such.<sup>16</sup> Pervasive stigmatization of

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11. THOMAS D. BOSTON, *AFFIRMATIVE ACTION AND BLACK ENTREPRENEURSHIP* 76-79 (1999).

12. See Thomas J. Phelan & Mark Schneider, *Race, Ethnicity, and Class in American Suburbs*, 31 *URB. AFF. REV.* 659, 673 (1996) (calculating that, controlling for differences in affluence, “black/multiethnic” suburbs pay 65% higher tax rates than white suburbs); Ruth Hoogland DeHoog et al., *Metropolitan Fragmentation and Suburban Ghettos*, 13 *J. URB. AFF.* 479, 486-90 (1991) (concluding that suburban blacks had worse public services when they lived in a majority black town as compared to a metropolitan government in which they were a minority).

13. See MASSEY & DENTON, *supra* note 6, at 154-55.

14. See John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America*, 5-6, 13-14, 19 (Lewis Mumford Center, October 13, 2002), <http://mumford1.dyndns.org/cen2000/SepUneq/SUReport/SURepPage1.htm> (finding that due to segregation, middle-class blacks and Hispanics are less able than whites to move into middle-class neighborhoods, and so have less access than whites to the superior public services available in such neighborhoods); MARY PATTILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 28-30 (1999) (noting that proximity of black middle-class neighborhoods to poor neighborhoods means that “residential returns to being middle class for blacks are far smaller than for middle-class whites”).

15. See GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002).

16. See Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STANFORD L. REV.* 1161 (1995) (surveying research on cognitive racial biases).

blacks has been documented in survey research,<sup>17</sup> psychological experiments,<sup>18</sup> and content analyses of the media.<sup>19</sup>

Racial stigma, besides constituting a profound expressive harm to blacks, has multiple deleterious material effects. It causes subtle forms of unconscious employment discrimination.<sup>20</sup> It underlies discrimination in consumer markets.<sup>21</sup> It causes what Glenn Loury calls “discrimination in contact”—pervasive tendencies of nonblacks to shun contact with blacks, or limit their contact to formal, arms-length relationships.<sup>22</sup> This shunning is manifested in such phenomena as white flight, low rates of intermarriage with blacks, the reluctance of nonwhites to adopt black children, and the exclusion of blacks from informal networks of association and mentorship that are so critical to educational and career advancement. Racial stigma thereby impairs the opportunities of blacks to develop their talents.<sup>23</sup> It also frames public discourse so as to characterize the disadvantages of blacks as “their” problem rather than “ours,” as manifestations of biological inferiority or cultural pathology rather than externally imposed disadvantages. Such framings induce “racial negligence” on the part of political institutions: systematic failures to investigate the often grossly disadvantageous impact of public policies on blacks, and indifference to these impacts when they come to light.<sup>24</sup> Blacks’ awareness of the ways they are stigmatized also causes material as well as psychological harm.

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17. See DONALD R. KINDER & LYNNE M. SANDERS, *DIVIDED BY COLOR* 106-20, 272-76 (1996) (arguing that modern antiblack prejudice is a form of subtle racial resentment); see also David O. Sears, *Symbolic Racism*, in *ELIMINATING RACISM: PROFILES IN CONTROVERSY* (Phylis Katz and Dalmas A. Taylor eds., 1988).

18. See John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM* 3, 3-8 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (showing how those who profess adherence to colorblind principles treat blacks less favorably than whites when their behavior is not monitored); A.G. Greenwald, D.E. McGhee, & J.L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 *J. PERSONALITY & SOCIAL PSYCHOL.* 1464 (1998) (documenting unconscious negative racial stereotypes in test subjects).

19. MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA AND THE POLITICS OF ANTIPOVERTY POLICY* (1999) (finding that news media portray blacks as “problem cases” for welfare out of proportion to their actual representation among such cases).

20. See Krieger, *supra* note 16.

21. Ian Ayers, *Pervasive Prejudice?: Unconventional evidence of race and gender discrimination 29-33, 68-78* (explaining documented discrimination against blacks in retail car sales by stereotype-based statistical discrimination).

22. LOURY, *supra* note 15, at 95-99.

23. *Id.* at 99-103.

24. *Id.* at 80-82 (citing American indifference to vast disparities in rates of imprisonment of blacks compared to other racial groups).

“Stereotype threat”—stressful responses to situations in which blacks anticipate that their behavior might be judged as confirming a demeaning stereotype—impairs black performance on standardized tests and thereby limits their educational opportunities.<sup>25</sup> There is also growing evidence that the psychological stress of stigmatization and its attendant daily humiliations—which affects middle class<sup>26</sup> as well as poor blacks—has deleterious effects on health.<sup>27</sup>

Centuries of massive state and private racial discrimination created the segregation and racial stigma that so gravely disadvantage blacks today. But once established, these mechanisms are individually self-sustaining. De facto job segregation, by isolating blacks from the social networks that could lead them out, begets more segregation.<sup>28</sup> Racial stereotypes cause stereotype-reinforcing habits of perception: greater readiness to notice stereotype-confirming than stereotype-defying features of blacks, lesser readiness to notice heterogeneity within the black population.<sup>29</sup> Moreover, racial stereotypes, when they induce race-based differential treatment, can generate evidence that seems to confirm the stereotype. If taxi drivers are reluctant to pick up blacks for fear that they will be robbed, honest blacks may be more likely than black robbers to give up trying to hail taxis, leaving a pool of black taxi-hailers disproportionately composed of robbers—hence confirming the taxi drivers’ stereotype.<sup>30</sup>

Racial segregation and racial stigma are also mutually self-reinforcing. Stigma causes white flight, which causes residential segregation. Job segregation introduces a racial element to managers’ stereotypes about those most fit for the job, which causes managers to hire people for the job whose race matches that of

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25. Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

26. See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993) (documenting personal experiences of discrimination suffered by middle-class blacks); Joe Feagin, *The Continuing Significance of Race: Antiracist Discrimination in Public Places*, 56 AM. SOC. REV. 101 (1991) (same).

27. See, e.g., Max Guyll, Karen A. Matthews, & Joyce T. Bromberger, *Discrimination and Unfair Treatment: Relationship to Cardiovascular Reactivity Among African American and European American Women*, 20 HEALTH PSYCHOL. 315 (2001) (finding that subtle race-based mistreatment raises the blood pressure of African American women).

28. However, residential segregation could not persist without continuing housing discrimination. See MASSEY AND DENTON, *supra* note 6, 96-109.

29. Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321-22 (2000).

30. LOURY, *supra* note 15, at 30-31.

the incumbents.<sup>31</sup> Thus, these mechanisms of systematic black disadvantage survive long past the end of formal state discrimination and the waning of intentional, illegal private-sector discrimination. They “lock in” the effects of past purposeful state and private discrimination, generate subtler forms of often unconscious and legal discrimination, and inflict myriad kinds of direct damage to blacks that are unmediated by any form of discrimination.

## II. RACIAL INTEGRATION AS A REMEDY AND IDEAL

No controversial or sophisticated moral assumptions are needed to recognize that the mechanisms of systematic racial disadvantage described above are deeply unjust. Segregation and racial stigma are the continuing effects of massive wrongdoing in the past. Justice requires that one not only cease intending to wrongfully injure others, but also dismantle any wrongfully established mechanisms that continue to do damage even in the absence of a continuing intention to do so. This is not a matter of reparations for past wrongs. The wrongs are still happening.

Even if current racial stigmatization and segregation were not caused by past wrongdoing, they would still be unjust. Racial stigmatization harms people on the basis of invidious stereotypes and other pernicious cognitive biases. Racial segregation violates even a weak principle of racial equality of opportunity, confined to the idea that one’s racial status should not figure in causal mechanisms that put one at a profound disadvantage in access to opportunities.

The real difficulty is not in judging that segregation and racial stigmatization are unjust, but in figuring out how to undo them. Current antidiscrimination laws are insufficient, because much segregation and stigma are self-sustaining. Nor can such laws be extended to cover discrimination in contact, because that would violate individual rights to freedom of association in intimate relations. States have limited power to prevent white flight.

States do have the power to integrate their own institutions, especially the public schools. If racial segregation is the problem, then racial integration is a remedy. This remedy serves to correct injustices within the state and to ameliorate segregation in the

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31. BARBARA F. RESKIN, *THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT* 35-36 (1998).

wider world. The school-age and college years are a formative period of life, during which people form friendships, acquaintances, and habits of association that persist through adulthood. Students who have attended more racially integrated schools are more likely to have racially diverse friends, co-workers, and neighbors than those who have attended racially homogeneous schools.<sup>32</sup> Racial integration of schools is therefore a direct remedy for the isolation from social networks that is a prime cause of black economic disadvantage, and an indirect spur to integration in other domains.

Racial integration is also a remedy for stigmatization. By integration, I mean the joint participation on terms of equality of members of different racial groups in a social setting. According to the “contact hypothesis,” prejudice is reduced by sustained, institutionally supported intergroup cooperation among equal status individuals (i.e., peers or co-workers).<sup>33</sup> Cooperation toward a shared goal induces favoritism toward those in the cooperative group, which can override race-based biases.<sup>34</sup> When people focus on achieving common goals with peers, they have reasons to search for and use individuating information about the cooperators, rather than relying on stereotypes.<sup>35</sup> The participation of more than token numbers of a stigmatized group in the cooperative enterprise thereby helps break down stereotypes and reduces discrimination against members of the group.<sup>36</sup> Racial integration in a cooperative setting also facilitates the formation of interracial friendships and associations that have a life outside that setting. Even those who do not personally form such relationships become more racially tolerant when they know their friends have interracial friendships.<sup>37</sup>

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32. J.H. Braddock & J.M. McPartland, *The Social and Academic Consequences of School Desegregation*, 4 EQUITY & CHOICE 5 (1988); J.H. Braddock, M.P. Dawkins & W. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics*, 31 INT’L J. CONTEMP. SOC. 273, 281 (1994).

33. GORDON ALLPORT, *THE NATURE OF PREJUDICE* 261-281 (1954).

34. Reskin, *supra* note 29, at 324; *see also* SAMUEL L. GAERTNER, & JOHN F. DOVIDIO, *REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL* (2000).

35. Reskin, *supra* note 29, at 324.

36. Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences in Performance Ratings*, 76 J. APPLIED PSYCHOL. 263, 265-66 (1991).

37. Stephen C. Wright, Arthur Aron, Tracy McLaughlin-Volpe, & Stacy A. Ropp, *The Extended Contact Effect: Knowledge of Cross-Group Friendships and Prejudice*, 73 J. PERSONALITY & SOC. PSYCHOL. 73 (1997).

Integration is not only a remedy for injustice. It is also part of the democratic ideal. Democracy is a system of collective self-governance among equal citizens, in which we work out, collectively and inclusively, our rules for living together in society. To enjoy democratic legitimacy, the terms of interaction through which we work out these rules must credibly claim to be reasonably responsive to the legitimate concerns of all. To achieve such responsiveness requires a robust civil society, in which people from different walks of life exchange their views about the problems they face, their interests, values, conflicts, hopes and fears. As Robert Post has argued, the “capacity to regard oneself from the perspective of the other . . . is the foundation of the critical interaction necessary for active and effective citizenship.”<sup>38</sup> Given the realities of race in the U.S., people of different races occupy different walks of life. So in the U.S., democracy requires racial integration of the main institutions of civil society, the places where discussions of public import among citizens take place: public accommodations, workplaces, schools, and neighborhoods.

The same point applies to society’s elites, those who play a pivotal role in formulating and adopting policies of public import. Elites, to be legitimate, must serve a representative function: they must be capable of and dedicated to representing the concerns of people from all walks of life, so that the policies they forge are responsive to these concerns. An elite drawn only from segments of society that live in isolation from other segments will be ignorant of the circumstances and concerns of those who occupy other walks of life. Moreover, when people from certain walks of life are not present to make claims, their interests and concerns are liable to be neglected. An elite that does not include members drawn from all walks of life will therefore be ignorant, irresponsible, and lack democratic legitimacy. In societies where one’s race places one in a different walk of life, and where elites are not racially integrated, elites are liable to produce policies that are racially negligent. Democratic elites must therefore be racially integrated, lest they lack the competence and legitimacy to perform their representative function.<sup>39</sup>

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38. Robert Post, Introduction: After *Bakke*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 13, 23 (Robert Post & Michael Rogin eds., 1998).

39. This argument does not depend on the thought that only blacks can represent blacks. Such a thought would be disastrous, since it would entail that the function of white elites is to represent whites. Rather, elites as a whole are charged with representing the people as a whole. They cannot competently perform this function without being racially inclusive.



In societies divided by racial segregation and stigmatization, competence in interracial interaction cannot be assumed. Stigmatization breeds racial contempt; segregation breeds racial ignorance, distrust, and discomfort. Educating citizens for democracy, and elites for their representative function, requires that such problems be overcome. This requires practice in social interaction on terms of equality with individuals of different races. It therefore requires the actual participation on terms of equality of people of different racial status in elite institutions. Racial integration of elite educational institutions is therefore, in the context of the ways race informs people's life circumstances and identities in the U.S. today, an imperative of both justice and democracy.

### III. FROM *BROWN* TO *GRUTTER*: DEVELOPING THE INTEGRATIONIST PERSPECTIVE

I have argued that racial integration of civil society is a morally and politically compelling interest. The same arguments support the claim that it is a constitutionally compelling interest. This is the conclusion of *Grutter v. Bollinger*, which develops the integrationist ideal emerging from *Brown v. Board of Education*. In tracing *Grutter* to *Brown* and not just *Bakke*,<sup>40</sup> I emphasize its expansive scope and broad justification, rooted in concerns of social justice and democracy. The "diversity" defense of affirmative action, articulated in Justice Powell's *Bakke* opinion, limits integration to those cases in which it can be shown to yield educational benefits. *Grutter* advances a more robust integrationist perspective, which affirms racial integration as a compelling interest apart from its educational benefits. It therefore returns to the integrationist tradition of *Brown* and its successors, without explicitly grounding itself in that tradition.

Let us first trace the development of the integrationist perspective in the desegregation cases. *Brown* found that *de facto* racial segregation was harmful to blacks, and that *de jure* segregation was stigmatizing.<sup>41</sup> These harms were the basis of the Court's holding that "separate but equal" schools are "inher-

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40. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

41. 347 U.S. 483, 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.").

ently unequal”<sup>42</sup> and hence a violation of Equal Protection. However, *Brown II* did not even mention segregation, calling only for the elimination of “discrimination” by the public schools.<sup>43</sup> It therefore left open the question of whether the state’s obligation was simply to end its own racial discrimination, or to actually dismantle segregation. *Green v. County School Board of New Kent County*<sup>44</sup> settled this question. It held that school boards found to have practiced *de jure* segregation could not fulfill their constitutional obligation simply by ending the practice of assigning children to schools on the basis of race, while handing off the job of maintaining segregation to the private choices of students and their parents. They had an “affirmative duty to take whatever steps might be necessary to convert to a unitary [i.e., integrated] system.”<sup>45</sup> The “constitutionally required end” is “the abolition of the system of segregation *and its effects*.”<sup>46</sup> In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court held that this end could justify the assignment of teachers and students to schools on the basis of their race.<sup>47</sup> It thereby declared that the ideal of colorblindness is subordinate to the equal protection demand to abolish segregation and its effects.

Some post-*Brown* desegregation cases also acknowledged integration as a democratic ideal, and the special role schools play in advancing this ideal. In *Swann*, the Court acknowledged that, while courts lacked the authority to order schools to pursue racial integration for its educational benefits,

School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational

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42. *Id.* at 495.

43. *Brown v. Board of Education*, 349 U.S. 294 (1955).

44. 391 U.S. 430 (1968).

45. *Id.* at 437-38 (rejecting “freedom of choice” plan for assigning students to schools).

46. *Id.* at 440, quoting *Bowman v. County School Board*, 382 F.2d 326, 333 (C.A.4th Cir.1967) (concurring opinion) (emphasis added).

47. *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 19, 28 (1971) (rejecting claim that the Constitution requires teachers to be assigned to schools on a “color blind” basis, when *de jure* teacher assignments had enabled schools to be racially identified; rejecting “racially neutral” student assignments when they “fail to counteract the continuing effects of past school segregation”; and requiring race-conscious “affirmative action” to achieve desegregation).

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policy is within the broad discretionary powers of school authorities . . . .<sup>48</sup>

In *Keyes*, Justice Powell, writing in partial concurrence, claimed that

In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.<sup>49</sup>

This passage endorses both the antistigmatization and democratic education arguments for racial integration.

Justice Powell's views on school desegregation are particularly important, because Powell devised the diversity defense of affirmative action. In *Keyes*, Powell characterized the constitutional right found in *Brown* and its successors as an affirmative right to racial integration:

I would now define it as the right, derived from the Equal Protection Clause, to expect that . . . local school boards will operate integrated school systems within their respective districts. This means that school authorities . . . must make and implement their customary decisions with a view toward enhancing integrated school opportunities.<sup>50</sup>

Powell advanced this view in the context of an extended argument that the distinction between *de jure* and *de facto* segregation be abandoned.<sup>51</sup>

Had the Court accepted Powell's view of the constitutional irrelevance of the distinction between *de fact* and *de jure* segregation, Powell's case for affirmative action in higher education could have been more straightforward. In *Bakke*, Powell could have argued that, in practicing affirmative action in admissions, colleges and universities are simply fulfilling their Constitutional duty to "implement their customary decisions with a view toward enhancing integrated school opportunities." But since the *de jure/de facto* distinction remained in force, and the Davis Medical School had not been found to have violated the Consti-

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48. *Id.* at 16.

49. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 242 (1973).

50. *Id.* at 225-26.

51. *Id.* at 222-25.

tutional prohibition on *de jure* segregation, it had no constitutional duty to integrate its student body.<sup>52</sup>

Powell held instead that colleges and universities have a constitutional right, following from their First Amendment right to academic freedom, to promote “a diverse student body.”<sup>53</sup> He tied this compelling interest in “diversity” to the need to educate an elite for national leadership. Observing the connection between diversity in the student body and opportunities of students “to learn from their differences,”<sup>54</sup> Powell concluded that “the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>55</sup> This diversity argument is congruent with the integrationist argument that elites in a democratic society, in which racial ascriptions and identities place people in different walks of life, need to be educated in racially integrated settings. In other words, “diversity” is another way of talking about integration. This was understood at the time *Bakke* was litigated.<sup>56</sup> Powell’s diversity argument is continuous with his claim in *Keyes* that schools have a compelling interest in “promoting the values of an integrated school experience.”

When Powell sought to specify more concretely the educational benefits of diversity, he argued that people of different races may bring perspectives that elites need to know if they are to competently serve a diverse population:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or dis-

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52. 438 U.S. 265 at 300-01 (rejecting analogy of Davis Medical School’s affirmative action case to school desegregation cases, because in the former, “there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification”).

53. *Id.* at 311-12.

54. *Id.* at 312-13 n.48 (quoting William Bowen, then President of Princeton University).

55. *Id.* at 313.

56. Justice Brennan represented the Harvard admissions plan, which Powell cited as an exemplar of “diversity,” as aiming “to achieve an integrated student body” *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring in judgment and dissenting in part). Justice Tobriner of the California Supreme Court, dissenting in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34 (1976), identified the defendant’s purpose as “the attainment of a racially integrated, diverse medical school student body.” *Id.* at 66. Tobriner connected the diversity rationale to the integrationist aim of *Brown*, complaining of the “sad irony” that “the first admission program aimed at promoting diversity ever to be struck down under the Fourteenth Amendment is the program most consonant with the underlying purposes of the Fourteenth Amendment,” one of which he just identified, in the previous sentence, as “the promotion of integration.” *Id.*

advantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.<sup>57</sup>

This is an application of the integrationist argument that the nation's elite needs to be racially integrated if it is to avoid racial negligence.

Although Powell's diversity argument shared some continuities with the integrationist perspective, it altered the path of school integration in three key ways. First, "diversity" includes race as but one factor among others. It follows that schools may not, under the diversity defense, administer a preferential admissions system in which race is the only diversity factor considered.<sup>58</sup> Second, Powell's diversity argument divorced educational from social justice concerns. It follows that schools may seek racial diversity by means of racial preferences even if this is not needed to undo the causes of racial injustice, so long as diversity advances other educational goals. Third, Powell's argument excluded integrationist practices intended to advance racial justice in ways that do not operate through the educational benefits of diversity. Under the diversity defense, schools may seek integration to promote *educational* remedies for racial injustices—for example, to break down racial stereotypes, make information about the differential racial impact of policies salient, and promote competence in interracial engagement. But the diversity defense does not support the use of race to effect noneducational remedies—for example, to remedy de facto segregation.

Powell's detachment of the diversity argument from explicit concerns of racial justice had enormous cultural consequences. His substitution of "diversity" for "integration" and its associated muting of concerns about racial justice set the stage for a vast expansion of the perceived uses of "diversity." Diversity-related programming exploded. Most importantly, "diversity" escaped the confines of Powell's original educational rationale. Other institutions, such as leading corporations, correctional institutions, and the military, began to practice "diversity." In Powell's scheme, schools were uniquely entitled to use racial preferences to promote diversity because they could cite a an-

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57. 438 U.S. 265 at 314.

58. *Bakke*, 438 U.S. 265 at 314-15; *Wessman v. Gittens*, 160 F.3d 790, 798 (rejecting Boston Latin School's admissions program for failure to consider nonracial diversity factors).

other constitutional right, their First Amendment right to academic freedom, which justified the use of race.<sup>59</sup> Noneducational institutions offered other rationales for diversity—the need to stay globally competitive,<sup>60</sup> to secure the obedience of black inmates in correctional “boot camps,”<sup>61</sup> to enhance the effectiveness of the military.<sup>62</sup>

Thus, when the Supreme Court reconsidered the diversity defense in *Grutter*, it packed a greater variety of claims into “diversity” than Powell ever imagined. On its surface, *Grutter* merely reaffirmed *Bakke* in holding that affirmative action is justified to obtain “the educational benefits that flow from a diverse student body.”<sup>63</sup> Yet, in arguing that the interest in these benefits is compelling, *Grutter* appealed to the interests of the wider society. It allowed selective schools to piggyback their own diversity defense on the demand of other institutions, notably the military and leading corporations, for a racially diverse, highly educated elite to staff their positions.<sup>64</sup> *Grutter* also highlighted racial integration as both an educational remedy for racial injustice and as an ideal in itself. Regarding integration as an educational remedy, Justice O’Connor, writing for the Court, accepted the University of Michigan Law School’s claims that a racially diverse student body “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”<sup>65</sup> Diversity thereby “better prepares students for an increasingly diverse workforce and society.”<sup>66</sup>

O’Connor’s most significant new focus, however, was on the importance of racial integration *over and above its educational benefits*. In part this reflects a concern with the legitimacy of the elite:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership

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59. 438 U.S. at 312.

60. Brief of General Motors Corp. as Amicus Curiae in *Grutter v. Bollinger*, Nos. 02-241 and 02-516.

61. *Wittmer v. Peters*, 87 F.3d 916.

62. Consolidated Brief of Lt. Gen. Julius W. Becton et al as Amicus Curiae in *Grutter v. Bollinger*, No. 02-241, 02-516.

63. 539 U.S. 306, 307.

64. *Id.* at 331.

65. *Id.* at 330, quoting App. to Pet. for Cert. 246a.

66. *Id.* at 331, quoting Brief for American Educational Research Association et al. as *Amici Curiae* 3. Strangely, O’Connor does not cite *Swann* in support of the same proposition.

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be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>67</sup>

Integration of elite institutions is also necessary to ensure that opportunities for success at the highest level are effectively open to all racial groups:

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>68</sup>

Most importantly of all, racial integration is an ideal in itself:

Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.<sup>69</sup>

These last three rationales depart from Powell's exclusive focus on the educational benefits of diversity. They do not justify diversity as advancing educational goals at all. Rather, they affirm the integrationist perspective that opened this paper. Notwithstanding its diversity rhetoric, *Grutter* expands upon the full-blooded integrationist ideal developed by *Brown* and its successors.

#### IV. THE VULNERABILITIES OF *GRUTTER* AND THEIR SOLUTION IN *BROWN*

O'Connor's ostensible reliance on Powell's diversity rationale for affirmative action left her opinion vulnerable to two types of objection raised by the dissenting justices in *Grutter*. The first focuses on the ways the diversity defense licenses racial preferences for purposes unconnected to racial justice and democracy. The second focuses on the failure of the diversity defense to meet strict scrutiny. Both defects can be corrected by resituating *Grutter*'s defense of affirmative action in the integrationist tradition following *Brown*.

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67. *Id.* at 332.

68. *Id.* at 332-33.

69. *Id.* at 332.

Justice Thomas dissented from the Court's holding in part because "marginal improvements in legal education do not qualify as a compelling state interest."<sup>70</sup> If they did, then they could equally well justify racial segregation. In support of this claim, Thomas cited studies suggesting that black students learn less in racially diverse settings than in all-black schools.<sup>71</sup> His point was that goals unconnected to the pursuit of racial justice can easily be turned against that pursuit. If white students' standardized test scores were marginally improved in a racially homogeneous setting, no one would accept that these educational benefits would be sufficiently compelling to entitle a school to discriminate against minority applicants. This double-edged sword applies as well to the corporate use of "diversity" to enhance global competitiveness. If corporations found that assigning only Asian-American employees to do business in Asia enhanced their global competitiveness, no one would accept this as a justification for barring blacks and Hispanics from those assignments.

The diversity defense, whether limited to educational settings, as Justice Powell intended, or expanded in service of corporate goals, as Justice O'Connor allows, has no answer to the double-edged sword. The integrationist defense, by contrast, can exclude racial segregation as a permissible means toward educational and corporate goals. It limits compelling educational goals to those that are specifically linked to remedying racial injustice—e.g., breaking down stereotypes—and promoting integration as a democratic ideal—e.g., teaching people to interact competently across racial lines. It does not permit corporate goals to be pursued at the expense of integration.

The second vulnerability of *Grutter* lies in its deference to schools practicing affirmative action.<sup>72</sup> Dissenting Justices

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70. *Id.* at 357.

71. *Id.* at 364. Thomas' suggestion that black beneficiaries of affirmative action would be better off at Historically Black Colleges is belied by the best studies of this issue. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 61, 114-15, 143-45, 199 (1998) (finding that blacks admitted to more selective schools graduate and attain advanced degrees at higher rates, earn higher incomes, and report higher satisfaction with their college experience than comparably qualified black students at less selective schools). HBC's do an extraordinary job for their students, but their programs are mainly geared toward black students with substantially lower educational preparation than the black students who attend selective schools, and so for the most part cannot offer the latter the challenging curricula they need, and get, at selective schools.

72. 539 U.S. 306, 328 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions.").



Rehnquist, Scalia, Kennedy and Thomas repeatedly complained that *Grutter's* deference was unprecedented and incompatible with strict scrutiny.<sup>73</sup> Had O'Connor situated her opinion in the context of the school desegregation cases, she could have shown that the dissent was mistaken. Deference to the greater expertise of school authorities and to the value of local control have been the constitutional norms in judging whether schools *already* found guilty of practicing unconstitutional *de jure* segregation are complying with *Brown's* requirement to desegregate.<sup>74</sup> Indeed, the dissenters in *Grutter* have repeatedly insisted on the doctrine of deference to school authorities in desegregation cases, even though their conduct is subject to strict scrutiny.<sup>75</sup>

Although O'Connor's deferential approach was historically consistent, it missed an opportunity to legitimize affirmative action by demonstrating that it can meet the demands of a more rigorous and skeptical examination. Strict scrutiny of racial classifications demands that the use of race be narrowly tailored to fit the state's compelling interest. The dissenters argued that the University of Michigan Law School's affirmative action policy failed narrow tailoring requirements in several areas: (1) in the relative weight given to admission of each of the groups granted preference; (2) in operating racial quotas that are indistinguishable from unconstitutional racial balancing; and (3) in the consideration of race-neutral alternatives. In each case, *Grutter* could have met the narrow tailoring challenge had it appealed to precedents set by the school desegregation cases.

(1) *Relative weights given to members of preferred racial groups.* Justice Rehnquist observed that the University of Michigan Law School systematically preferred African-American applicants to Hispanic applicants with at least equal qualifications, to the point where it had a "critical mass" of African-Americans nearly twice the size of that for Hispanics. This preference is incompatible with the diversity defense, which holds that a "critical mass" of each disadvantage racial group may be pursued for

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73. *Id.* at 379-80, 386 (Rehnquist); at 387, 393 (Kennedy); at 350, 361 (Thomas).

74. See Wendy Parker, *What School Desegregation Teaches Affirmative Action*, Wake Forest Public Law and Legal Theory Research Paper Series Research Paper No. 03-13 (August 2003) (<http://ssrn.com/abstract=439141>).

75. *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (majority opinion by Rehnquist, joined by Kennedy, O'Connor, Scalia, and Thomas); *Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992) (majority opinion by Kennedy, joined by Rehnquist, White, Scalia, and Souter) (Justice Thomas took no part in the case); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (majority opinion by Rehnquist, joined by Kennedy, O'Connor, Scalia, and White). See generally Parker, *supra* note 74.

educational objectives only.<sup>76</sup> Shouldn't it take as many Hispanics to break down Hispanic stereotypes against them, as it takes African-Americans to break down stereotypes about blacks? The diversity defense, because it ties the significance of race to its educational effects, has no answer to Rehnquist's objection.

Suppose instead that we based *Grutter* on an integrationist defense of affirmative action. Then the groups to be included in affirmative action preferences are those groups who currently suffer systematic disadvantage due to substantial de facto segregation from the mainstream. African-Americans, Hispanics, and Native Americans fit this criterion. The objective of affirmative action is to remedy this segregation and its effects. The weight given to this objective for each group is tied to the urgency of each group's need for integration—that is, the degree of severity of the segregation they suffer. African-Americans are the most extremely segregated racial group in the U.S.; Hispanics are next.<sup>77</sup> This justifies the greater weight the Law School gave to African-American over Hispanic admissions.

(2) *Quotas and racial balancing.* Rehnquist and Kennedy charged that the tight correlation between the percentage of each minority group in the applicant pool and the percentage of total offers granted to each minority group shows that the Law School was engaged in unconstitutional racial balancing.<sup>78</sup> This complaint confuses ends with means. Racial balancing cannot be a legitimate end in itself, because it amounts to racial discrimination for its own sake.<sup>79</sup> But the school desegregation cases do accept racial balancing as a means to other goals, including dismantling segregation and promoting democratic ideals of living together in a pluralistic society.<sup>80</sup> It is impossible to tell, simply by looking at admissions figures, whether a school is actually seeking racial balance,<sup>81</sup> and if so, whether this is an end in itself

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76. 539 U.S. 306, 381.

77. See *Lewis Mumford Center*, *supra* note 6, 1 (reporting that at current trends of black integration, it would “take forty more years for black-white segregation to come down even to the current level of Hispanic-white segregation.”)

78. 539 U.S. 306, 383 (Rehnquist), 2371 (Kennedy).

79. *Bakke*, 438 U.S., at 307.

80. *Swann*, 402 U.S. at 16, 28. The First Circuit Court of Appeals rejected racial balancing as a permissible means toward diversity, absent a showing that racial proportional representation was needed for specifically educational goals. *Wessman v. Gittens*, 160 F.3d 790, 797-98 (1st Cir. 1998). However, as a means toward desegregation, it remains constitutional. I argue below, part V, that claims to the contrary are based on a confusion between the powers of Federal Courts and other state bodies to implement remedies for segregation.

81. Kennedy's inference is unwarranted because it ignores the dynamic effects of a

or a means to another goal. One must examine what the school does with the diversity it achieves in the student body to assess its objective. If it fails to use that diversity to spur interracial discussion and cooperation then the inference that the school is operating an unconstitutional racial spoils system may be correct. But if it promotes actual integration—i.e., interracial cooperation and dialogue—then it is using racial balancing as a tool, not as an end in its self.

(3) *Race-neutral alternatives.* It is not impossible to racially integrate a law school, or any other school, using race-neutral alternatives. What is impossible under current conditions is doing so, consistent with a selective admissions system. Thus, to defend its system of racial preferences in admissions, the University of Michigan Law School had to argue that it had a compelling interest in *two* goals: racial diversity and selectivity. Justice Thomas argued that having a law school at all, much less an elite law school, cannot be a compelling interest.<sup>82</sup> Therefore, if it wants racial diversity, it should sacrifice selectivity.

Thomas' argument that states have no compelling interest in having law schools is unpersuasive. States have a compelling interest in fulfilling their constitutional functions, and thus in any conditions instrumentally necessary to fulfilling their functions. Among these functions is the administration of the laws. One cannot administer laws without trained lawyers, and hence not without law schools. By contrast, Thomas' argument that the University of Michigan Law School's desire to maintain its elite status does not constitute a compelling interest is correct.<sup>83</sup> The desire of a school to maintain an elite reputation cannot justify racial discrimination. If it could, then if its elite reputation rested on its racial homogeneity, it could assert a compelling interest in discriminating against racial minorities. This is another instance of the double-edged sword.

Against this, defenders of diversity can justly complain that it is unfair to characterize the interest at stake in *Grutter* as merely reputational. The state's compelling interest is in having

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school's admissions policies on its pool of applicants. Suppose applicants from each racial group have roughly similar risk aversion—that is, suppose the median threshold probability of rejection, above which they would not apply to an institution, is the same for each racial group. Then the percentage of students from each racial group in the pool of admitted students will mirror their proportion in the applicant pool, regardless of a school's admissions goals.

82. *Grutter*, 539 U.S. at 358-59.

83. *Id.* at 360.

an elite educated to the highest standards. When a school softens its admissions standards across-the-board to achieve diversity, it will end up admitting a student body that is, by and large, not prepared for the most advanced courses. It will therefore need to shift resources toward less challenging courses, at the cost of advanced courses. Hence, to promote learning at the most advanced levels, educational systems need selective schools. This reply does not fully meet Thomas' objection, however. Insofar as diversity is held to be compelling *only* as an educational interest, why must the same schools that specialize in diversity education *also* specialize in the most advanced education? Even if the state educational system as a whole has compelling interests in both, it does not follow that each school taken individually does.

To answer this objection, we must look beyond the purely educational goods at stake—and hence beyond the diversity defense—to the wider, noneducational, democratic purposes served by elite education. The integrationist defense identifies these purposes as having an elite that is legitimate, representative, and competent to serve the interests of citizens from all walks of life. *To advance these compelling interests, the elite must not only be racially integrated; its diverse members must be educated together.*<sup>84</sup> Only so can they develop competence in interracial interaction. Only so can they develop a *shared* responsiveness to the interests of citizens from all walks of life. So long as responsiveness to the interests of different racial groups is *divided* among elites according to their race, rather than taken up as a shared responsibility, this Nation will continue to be divided into de facto racial blocs. “The dream of one Nation, indivisible” therefore requires that the same institutions that provide advanced education to elites also practice racial integration. This dream is not reducible to “diversity” conceived as an instrument for advancing purely educational goals. It is the full-blooded integrationist ideal itself, extended to civil society as a whole.

Justice Thomas suggested that even if these points were conceded, it is still possible to integrate selective schools using race-neutral criteria.<sup>85</sup> Even if we ignore the dramatic drops in the enrollment of blacks entailed by using ostensibly “race-

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84. Cf. Sam Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 682 (1998) (arguing that race-conscious admissions is the only way universities can pursue their dual mission of achieving national excellence and integrating all groups into the nation's elite).

85. Grutter, 539 U.S. at 361.

neutral” criteria of admission,<sup>86</sup> Thomas’ claim is still questionable. Facially race-neutral admissions criteria have succeeded even this much only because they have been selected for their racially differential impact. But the distinction between using an overt racial classification for its differential racial impact, and using a proxy for race to achieve the same impact, is a distinction without a difference. Thomas acknowledged as much in condemning Columbia University’s use of race-neutral intelligence tests to reduce the number of Jews it admitted.<sup>87</sup> The same point works in reverse. If it is acceptable to select race-neutral criteria to increase the representation of disadvantaged racial groups in the student body, it is acceptable to aim at this goal directly, using racial classifications.<sup>88</sup> Racial means are *inherently* the most narrowly tailored means available to achieve this goal.

#### V. GRUTTER AS THE CULMINATION OF BROWN

I have argued that *Grutter* is more effectively defended by appeal to *Brown* and its successor cases than by appeal to *Bakke* alone. *Grutter* also represents the culmination of an integrationist perspective whose development was cut short in later successor cases to *Brown*. Against the claim that *Grutter* develops the principle of *Brown*, it might be thought that *Brown* and its successors are limited to the claim that the state has a compelling interest in remedying *de jure* segregation. By contrast, *Grutter* affirms that the state has a compelling interest in remedying *de facto* segregation, and in pursuing integration as a democratic ideal. Since it is assumed that *de jure* segregation is largely consigned to the past, *Brown* and its successors might be thought to be irrelevant to *Grutter*.

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86. Thomas noted a 30% drop in black students at Boalt Hall after the passage of a referendum banning affirmative action in California. *Id.* at 366-67. The University of Texas Law School suffered a 64% drop in black students from 1997-2001, due to the ban on affirmative action imposed by *Hopwood v. State of Texas* 78 F.3d 932 (5th Cir., 1996). Brief of the American Educational Research Association et al as Amicus Curiae in *Grutter v. Bollinger*, No. 02-241, 28.

87. *Grutter*, 539 U.S. at 369 (“Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that “we have not eliminated boys because they were Jews and do not propose to do so.”).

88. Kathleen Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1054. Some may still have the nagging feeling that the use of explicit racial preferences to achieve a permissible race-conscious goal is objectionable. I argue that this feeling is groundless in *Integration, Affirmative Action, and Strict Scrutiny*, 77 NYU L. REV. 1195, 1231-37, 1266-70 (2002). See also LOURY, *supra* note 15, 133-41, 148-54, for different arguments toward a similar conclusion.

However, the supposed gap between *de jure* and *de facto* segregation is smaller than it appears. When a state has violated equal protection, the Constitution demands not just that the violations cease, but that the effects of past violations be eliminated.<sup>89</sup> Furthermore, states have a compelling interest in avoiding “passive participation” in private racial discrimination.<sup>90</sup> *De facto* school segregation is both a continuing effect of past *de jure* segregation, and reflects the transmission of private racial discrimination into its own institutions. Schools therefore have a compelling interest in remedying it.

The Supreme Court recognized this point in early desegregation cases. *Green* held that schools guilty of *de jure* segregation had not fulfilled their duties by ceasing their own racial discrimination, if their schools remained *de facto* segregated due to their transmission of individually legal but racially discriminatory choices of students and their parents.<sup>91</sup> *Swann* held that schools are constitutionally responsible not only for undoing the *direct* segregative effects of their own discrimination, but for the *indirect* effects their segregative actions have on private housing choices.<sup>92</sup> Similarly, in *Keyes*, the Court held Denver responsible for desegregating its entire school system, even though proof of segregative intent was shown only for a small portion of its schools. This was in part because segregation of one part of the district’s schools indirectly influenced the racial composition of the other schools by encouraging segregated patterns of residential development that further segregated neighborhood schools.<sup>93</sup>

Justices Douglas and Powell, writing separately in *Keyes*, carried this reasoning about the substantive interests of Equal Protection to its logical limits. They argued that the distinction between *de jure* and *de facto* segregation should be abandoned.

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89. *Green v. New Kent County School Board*, 391 U.S. 430, 440 (1968) (The “constitutionally required end” is “the abolition of the system of segregation *and its effects.*”) (emphasis added). Cf. *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O’Connor, J., concurring) (acknowledging “compelling governmental interest in redressing the *effects* of past discrimination”) (emphasis added).

90. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989) (arguing that a city may use race to allocate contracts to avoid passive participation in discrimination by local construction industry).

91. 391 U.S. at 440-41.

92. 402 U.S. at 21 (observing that school districts often “promote segregated residential patterns” in their choices of where to close and open schools).

93. 413 U.S. at 201-02. *Keyes* pointedly declined to rule on the merits of the lower court’s determination that even when courts could not order desegregation in cases of mere *de facto* segregation, the Constitution nevertheless required that school districts operate integrated schools even when the segregation is only *de facto*. 413 U.S. at 214 n. 18, citing 313 F. Supp. 73, 96.

Douglas stressed that what matters, constitutionally, is not whether the state had a formal *intent* to segregate, but simply whether state action *caused* patterns of school segregation that could have been avoided had “affirmative action” been taken.<sup>94</sup> A constitutional violation occurs whether school segregation is due to the intentional policy of the school district, or its passive transmission of the effects of the segregative policies of other agents—for example, racially restrictive covenants, or “racial ghettos” built with public funds by urban development authorities.<sup>95</sup> Justice Powell extended this definition of state action to include state *acquiescence* in the impact of private housing choices on the racial composition of schools. *Swann* already required school districts convicted of *de jure* segregation to remedy not merely that portion of segregation traceable to its intentional segregation, but segregation due to private housing choices that it had encouraged or facilitated. It would be constitutionally inconsistent to refuse to extend this latter requirement to school districts that had not also been convicted of segregative intent, although they facilitated private racial discrimination (white flight) *or transmitted its effects*.<sup>96</sup> To vindicate each student’s constitutional right to education in an integrated setting,<sup>97</sup> “school boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation.”<sup>98</sup>

The Court declined to follow Powell’s and Douglas’ opinions. But its reasons for doing so were based on reservations about the scope of *judicial* powers of enforcement, not on views about the constitutional interests of other state bodies in remedying segregation. In *Milliken*, the Court overturned a judicially imposed interdistrict remedy for Detroit’s *de jure* segregation, in part because it would make the District Court “a de facto ‘legislative authority’ . . . and then the ‘school superintendent’ for the entire area.”<sup>99</sup> The courts lacked the competence to administer school districts to the extent required to effect the proposed

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94. 413 U.S. at 214.

95. *Id.* at 216 (“When a State forces, aids, or abets, or helps create a racial “neighborhood,” it is a travesty of justice to treat that neighborhood as . . . free from the taint of state action.”)

96. *Id.* at 227 (“Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle.”).

97. *Id.*

98. *Id.* at 236

99. *Milliken v. Bradley*, 418 U.S. 717, 743-44 (1974) (“This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.”).

remedy. They also lacked the legitimacy to do so, given that such administration would require them to make political decisions (concerning, for example, the allocation of local tax dollars across city boundaries) traditionally held to be the proper province of elected officials. Local control of education is a paramount consideration that limits the degree to which courts will find school districts responsible for equal protection violations.

The same concern for local control pervades *Board of Education v. Dowell*.<sup>100</sup> In *Dowell*, the Court permitted a desegregation decree to be dissolved and a locally designed student reassignment plan to be adopted, even if this immediately led to the de facto resegregation of schools, provided that the school district had proved its good faith by complying with the original decree for enough time, and it had eliminated “the vestiges of past discrimination” “to the extent practicable.”<sup>101</sup> It reasoned that the federal system allocated to Courts only a temporary power to issue injunctions requiring desegregation. “Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.”<sup>102</sup> Hence,

Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that “necessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.” See [*Milliken II*], 433 U.S. at 280-82.<sup>103</sup>

On its face, *Dowell* proposed two distinct criteria for when a desegregation decree should be dissolved: when the local school district has complied with it “for a reasonable period of time” and when it has actually remedied “the effects of past intentional discrimination.” The substantive Equal Protection norm is, of course, the latter. However, as Justice Scalia argued in *Freeman v. Pitts*, the extent of judicial enforcement of this norm is determined almost entirely by the Court’s presumptions about the causal connections between prior *de jure* and current *de facto* segregation.<sup>104</sup> *Dowell* and *Freeman* shift the presumption to-

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100. 498 U.S. 237.

101. *Id.* at 250.

102. *Id.* at 248.

103. *Id.*

104. 503 U.S. at 503.



ward school boards, in the interest of protecting the Tenth Amendment powers of the states, as delegated to the local boards. This means that Courts must presume that, once the state has complied with desegregation orders for a period of time, demographic shifts during that period should not be attributed to prior state action even when they exacerbate de facto segregation, and even when they are caused by racially motivated blockbusting and white flight.<sup>105</sup> As *Freeman* stressed, “the ultimate objective has not changed—to return school districts to the control of local authorities.”<sup>106</sup> For this reason, Courts should hold school boards accountable only when their action is the proximate cause of de facto segregation.<sup>107</sup>

These are doctrines about the burdens of proof, not about substantive equal protection norms. They are justified by institutional considerations about the limits of judicial power vis a vis other state bodies. *It follows that they cannot be invoked to limit the power of other state bodies to remedy segregation.*<sup>108</sup> To the contrary, their whole point is to *expand* the power of schools and other state bodies to use their discretion in running the schools,

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105. *Id.* at 480 (observing the de facto segregation of De Kalb County School System was caused in part by blockbusting); *Id.* at 506 (Scalia, concurring, noting role of white flight).

106. *Id.* at 490 (“Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.”).

107. *Id.* at 491. Scalia also argued that after such a lapse of time, it is unreasonable to suppose that there is any significant causal connection between past de jure segregation and present de facto segregation. *Id.* at 506. This is erroneous. Current patterns of extreme black segregation could not exist in the absence of the segregation earlier achieved through massive federal, state, and municipal action. For, given blacks’ current preference to live in integrated neighborhoods, white flight alone could not succeed in creating observed patterns of overwhelmingly white neighborhoods, unless some such neighborhoods had already been created through prior action, and maintained through continuing discrimination. See MASSEY AND DENTON, *supra* note 6, 96-97. Moreover, prior state action has actively promoted black stigmatization and antiblack prejudice in society at large, and therefore is causally responsible for white flight.

108. This is an application of Lawrence Sager’s famous argument that some constitutional norms are systematically underenforced by the courts due to institutional concerns, such as federalism, or the courts’ lack of competence and legitimacy in domains traditionally managed by the other branches of government. In such cases, Sager argued, the constitutional norms are “legally valid to their full conceptual limits,” although the responsibility for enforcing them to those limits must lie with other state bodies. Lawrence Sager, *Fair Measure: the Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978). On the view argued here, any state body has a compelling interest, on grounds of equal protection, in remedying de facto segregation in which any state action played a causal role, even if that role is too indirect to entitle a Federal Court to order it to act.

including their discretion in assigning students to schools. For example, in *Milliken*, no constitutional principle would have prevented the state of Michigan from consolidating the 54 school districts in the Detroit metropolitan area into a single district. The consolidated district would then have been free to implement a comprehensive desegregation plan including all of the schools within its borders, as a remedy for the illegal segregation found in Detroit's schools.

In other rulings, the Court has recognized the distinction between the powers of Federal Courts and of other state bodies to promote integration. In *Bustop v. Board of Education*, students who were to be bused pursuant to a massive desegregation remedy ordered by state court under California's equal protection clause asked the Supreme Court to issue a stay, on the ground that individuals have a "federal right" to be "free from racial quotas."<sup>109</sup> Justice Rehnquist refused to do so, arguing that California's status as a distinct sovereign entity entitled it to enforce stronger equal protection norms in desegregation cases, under its own state constitution, than Federal courts can require.<sup>110</sup> The Court has also held that the Federal equal protection clause forbids states from barring local governments from using busing to remedy mere de facto segregation.<sup>111</sup>

*Grutter* represents the culmination of this line of thought. The first successor cases to *Brown* articulate the substantive Equal Protection norm: that states that have ever practiced segregation (which, as *Keyes* observed, means all states) must remedy its effects and avoid passive participation in the racially discriminatory choices of private parties, even when these choices are legal. The desegregation cases from *Milliken* on limit the scope of judicial powers to enforce this norm, in the interest of respecting the autonomy of other state bodies to formulate their own educational policies. *Grutter* holds that this autonomy includes the power to use racial means to integrate the institutions of civil society—whether to remedy the *de facto* segregation that

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109. 439 U.S. 1380, 1382 (1978).

110. *Id.* at 1383 ("While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.")

111. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (striking down a state initiative forbidding local governments from implementing school busing for purposes of racial integration). *Cf. Lee v. Nyquist*, 318 F.Supp. 710 (WDNY 1970) (striking down New York law forbidding appointed school boards from using race-based student assignments to remedy de facto segregation).

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would otherwise occur (as an effect of past *de jure* segregation or private discrimination) or as a means to promote equal opportunity and democratic ideals. As *Grutter* affirms, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>112</sup>

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112. *Grutter*, 539 U.S. at 332.