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## Protecting the Dignity and Equality of Children: The Importance of Integrated Schools

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# PROTECTING THE DIGNITY AND EQUALITY OF CHILDREN: THE IMPORTANCE OF INTEGRATED SCHOOLS

by SHARON E. RUSH\*

“[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>1</sup>

—Justice Thurgood Marshall

## INTRODUCTION

“From the birth of the common school movement through early desegregation cases, schools were seen not simply as places where students learned how to read and write but also as places where they learned how to become better citizens.”<sup>2</sup>

—Professor James Ryan

Historically, most white people in the United States believed in the race myth: that they were superior to people of other colors.<sup>3</sup> Although only a myth, this belief operated in a real way as if it were the truth. It enabled both the federal and state governments to establish legal regimes that officially denied the humanity, including the dignity and equality, of everyone who was not white, a group commonly referred to as “people of color.”<sup>4</sup> It also is worth emphasizing, however,

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1. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

2. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 143 (2007) (footnotes omitted).

3. See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF AMERICAN LEGAL PROCESS* 9-10 (1996) (“[T]he precept of inferiority . . . posed as an article of faith that African Americans were not quite altogether human.”).

4. People of color have shown remarkable resistance to persistent inequality. See Thomas E. Kleven, *Brown’s Lesson: To Integrate or Separate Is Not the Question, But How to Achieve a Non-Racist Society*, 5 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 43, 43 (2005) (“Yet, African Americans coped with enforced segregation, maintaining strong family ties and group solidarity. Some thrived within the black community, and a few achieved success in the greater society, while continuing to endure the indignities of racism.”) (footnotes omitted).

that all people, including white people, have a racial color. Nevertheless, the phrase is helpful to depict the power dichotomy reflective of the race myth and will be used in this Article. In the United States, the myth's most heinous validation was found in the institution of slavery, followed by *de jure* segregation.

Eventually, the government would officially abolish slavery and rule *de jure* segregation in public schools unconstitutional in *Brown v. Board of Education of Topeka*.<sup>5</sup> Yet debunking the myth continues to be a challenge. This Article posits that one explanation for the persistence of the myth is the legal sanctioning and social acceptance of racially identifiable<sup>6</sup> public schools across the nation,<sup>7</sup> notwithstanding *Brown*'s mandate to integrate the schools.<sup>8</sup> The acceptance of such systems, particularly given the economic inequality built into them,<sup>9</sup> perpetuates the race myth. Only a belief in the inferiority of students of color can justify the persistent legal and social acceptance of providing them with inferior (less resource-rich) educations. But the corollary is also true and almost always ignored: only a belief in the superiority of white students can justify the persistent legal and social insistence that they be provided with superior (more resource-rich) educations.<sup>10</sup>

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5. 347 U.S. 483, 495 (1954).

6. A "racially identifiable" school is one that reinforces the race myth because it lacks "unitary status" or "racial diversity." These terms, as well as others, are not amenable to exact definition, but they describe meaningful concepts in the area of school integration. One purpose of this Article is to explore how such concepts relate to each other in the struggle to achieve racial equality. Ironically, even the term "racial equality" defies exact definition, but it also is richly meaningful and significant in a democracy.

7. See generally GARY ORFIELD, THE CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21<sup>ST</sup> CENTURY CHALLENGE (Jan. 2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf> (detailing the causes and effects of increasingly segregated public schools in the last few decades). For a critical analysis of this development, see Charles J. Ogletree, Jr., *All Deliberate Speed?: Brown's Past and Brown's Future*, 107 W. VA. L. REV. 625, 631 (2005). For recent statistics on the phenomenon that society is becoming more segregated even as it becomes more diverse, see Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 277-78 (2007).

8. People disagree on the core meaning of *Brown*. For example, Professor Molly McUsic argues that one main principle of *Brown* is that children are entitled to equal educational opportunities. She suggests that "[i]ntegration, albeit integration by economic class, is the most effective, least expensive way to provide a quality education to all children." Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1335 (2004). Other prominent scholars agree, however, that *Brown* was interpreted to direct schools to racially integrate; this was eventually articulated by the Court in *Green v. County School Board*, 391 U.S. 430, 442 (1968). Perhaps Professor Spann says it best: "Whatever *Brown* and the Equal Protection Clause ultimately mean, they cannot mean that it is now okay to resegregate our schools in a way that may be the harbinger of an even more general resegregation of our society." Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 469 (2009).

9. See generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. ed. 2004) (discussing the economic inequality inherent in the legal sanctioning of *de facto* segregated public schools post-*Brown*).

10. This is articulated most forcefully by Professor Spann, *supra* note 8, at 447-48, critiquing the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007):

The Supreme Court chose to give the seats to the white students, thereby sacrificing the inclusionary interest of minority students in an integrated education to the exclusionary convenience interests of white parents. Moreover, because white parents knew that

The primary goal of this Article is to promote the urgency of the need to invalidate the race myth and to suggest that integrated schools are the best, and perhaps the only way to stop sending a message that white children deserve to be educated in schools richer in resources than those attended by minority student populations. This powerfully indoctrinates white children into believing in the myth of white superiority even as society, including white society, officially eschews the myth of black inferiority.

For decades since *Brown*, many equality-minded people and the Supreme Court have premised their efforts to integrate public schools on the democratic belief that integrated schools help children—all children—become better citizens.<sup>11</sup> This premise derives from *Brown* itself, because *Brown* established the constitutional principle that children of color are equal human beings to white children and all children are constitutionally entitled to have their dignity and equality protected.<sup>12</sup> *Brown*'s holding that “[s]eparate educational facilities are inherently unequal”<sup>13</sup> is indelibly etched in the minds of many equality-minded Americans.<sup>14</sup>

To legally establish the obvious, that people of color are human beings *and* that white people are *not* a superior class of human beings, *Brown* and its progeny understood the necessity of invalidating the race myth. Public school integration was a means to achieve this democratic end.<sup>15</sup> Through day-to-day interactions across the color line, children are better able to learn the complexities of race and race relationships and more likely to see the fallacy of the myth. Integration of the schools was, and continues to be, an instrumental way to teach children, *particularly white children*, to respect and protect each other's human dignity.

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resegregation would be the result of overriding the integration plans that they sought to invalidate, the “convenience” interest of disappointed white parents ended up actually being an interest in renewed racial segregation.

*Id.*

11. See *Grutter v. Bollinger*, 539 U.S. 306, 330-32 (2003) (discussing the importance of diversity, and by extension integration, in creating the most productive classroom for student development).

12. See *Brown*, 347 U.S. 483, 495 (holding that segregation deprives children of color of equal protection of the laws guaranteed by the Fourteenth Amendment).

13. *Id.*

14. Unlike this Article, some scholars distinguish between voluntarily and involuntarily segregated schools and suggest that voluntarily segregated schools can promote the best interests of students of color. See Kleven, *supra* note 4, at 51 (“[T]he forced separation of the races is inherently unequal because it is imposed by whites as a means of maintaining white supremacy.”). *But see* James Marvin Perez, *Book Note: Brown's Demise*, 80 N.Y.U. L. REV. 712, 718 (2005) (reviewing CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004)) (arguing that “even voluntarily segregated schools . . . would be deemed inferior, regardless of whether African Americans obtain an equal education or not.”) (footnotes omitted).

15. Initially, the Court used the word “desegregation” and not “integration” to remedy the problem of *de jure* segregation. This helps explain why the *de jure/de facto* distinction has become central to evaluation of the constitutionality of race-conscious policies affecting public schools. See Lino A. Graglia, *Solving the Parents Involved Paradox*, 31 SEATTLE U. L. REV. 911, 921 (2008) (“The fraudulence of the *de jure—de facto* distinction that made the move from prohibiting to requiring race discrimination possible also makes possible a return to the prohibition by simply treating the distinction as valid.”) (emphasis in original). Regardless of *Brown*'s use of “desegregation,” its mandate was to integrate the schools.

Although dignity is not explicitly mentioned or protected in the Constitution, *Brown*'s and its progeny's mandate to integrate the public schools signify the importance of human dignity in a democracy's struggle to achieve racial justice.

Over the years, this core understanding of *Brown* has been misunderstood and all but forgotten. This undoubtedly reflects how hard and frustrating the struggle has been to achieve *Brown*'s goal in light of the massive resistance to public school integration.<sup>16</sup> Understandably, equality-minded people invoke *Brown* to argue for equalizing school resources—even as the schools remain racially identifiable.<sup>17</sup> They also rely on *Brown* to argue that something needs to be done to equalize the achievement outcomes between children of color and white children, who attend racially identifiable schools.<sup>18</sup> Without a doubt, economic equality and achievement equality are related,<sup>19</sup> and both are vital concerns in the struggle to achieve overall human equality. *Brown* can and should be invoked to support those efforts. But those aspects of the struggle for racial equality should be used to bolster and not detract from, or even abandon,<sup>20</sup> the main message of *Brown* about human equality.

As important as it is to continue to fight for economic and achievement equality,<sup>21</sup> and as frustrating as the struggle has been to achieve those goals in racially identifiable schools, this Article posits that unless the race myth is debunked, especially the myth of white superiority, even efforts to achieve economic and achievement equality in public education will be (and have proven to be) largely fruitless. This Article urges equality-minded people to stay the course on trying to understand and achieve *Brown*'s core lesson: integrated schools protect children's dignity by invalidating the myth of black inferiority and white superiority.

Dishearteningly, the Court's 2007 decision in *Parents Involved in Community*

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16. See *infra* Part II.A.2 (detailing the resistance to enforcement of *Brown*).

17. See, e.g., Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 577 (2009) (advocating that school officials focus less on achieving diversity and more on improving the quality of education in racially identifiable schools).

18. See, e.g., Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J. L. & EDUC. 431, 456-57 (2002) ("Most desegregation cases decided under *Brown*, however, are incapable of addressing the disparities that exist between the academic achievement of black and white students. Thus, only one of the problems identified in *Brown*—segregation (but not inequality)—is likely to be remedied . . ."); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 532-33 (1980) ("But successful magnet schools may provide a lesson that effective schools for blacks must be a primary goal rather than a secondary result of integration.").

19. See generally Klein, *supra* note 18, at 434 (recognizing economic factors out of the control of school districts which inherently affect achievement).

20. See, e.g., Nelson, *supra* note 17, at 584 ("[U]rg[ing] school officials to . . . craft and implement creative and effective initiatives that embrace and improve racially concentrated schools, rather than merely seeking to diversify them.").

21. *Id.* at 622 (arguing that embracing "minority-concentrated schools" is critical to fight against the "message of inherent inferiority that the closing of black schools conveyed not only to the black community but also to the country"). This effort is important, but the heart of the problem is the continuing validation of the race myth by white society. When people of color voluntarily segregate or abandon efforts for integration, they run the risk of inadvertently reinforcing the myth of white superiority, even as they are trying hard to guard against the myth of black inferiority.

*Schools v. Seattle School District No. 1*,<sup>22</sup> knocked the wind, yet again, out of the sails of equality-minded people who continue to believe in *Brown*'s core message. In *Parents Involved*, the Court held that public school officials who want to achieve racial diversity in their K-12 schools are only allowed to consider the race of prospective students in making individual school assignments if they can meet the strict scrutiny standard.<sup>23</sup> To meet strict scrutiny, school officials must demonstrate that the use of such classifications is "narrowly tailored" to achieve a "compelling government interest."<sup>24</sup> The continuing existence of racially identifiable schools in light of *Parents Involved* provides an excellent opportunity to reaffirm the meaning of the concept of equality in the context of *Brown*. To emphasize, *Brown* was concerned about protecting human equality, and this required the Court to protect the dignity and equality of all children.<sup>25</sup>

An analysis of the United States' journey to achieve racial equality must center on the importance of school integration. It provides an opportunity to examine what integration means and why it continues to be essential to dispel the race myth. Part I of this Article explores several pre-*Brown* cases where the Court laid a foundation for understanding how segregation violates human dignity. Initially the Court erroneously presumed that segregation violated only the dignity and equality of people of color and that it had no relationship to or affect on the dignity and equality of white people.<sup>26</sup> As Part II demonstrates, these erroneous presumptions have yet to be corrected—even as post-*Brown* decisions including *Parents Involved* repeatedly acknowledged that segregation violates the dignity and equality of people of color. Part II also illustrates that *Brown* and its progeny reinforced the importance of integration by protecting the values of dignity and equality. It does so by exploring alternative legal paths the Court could have taken that would not have protected those values. The Court chose to strike down *de jure* segregation and order school integration<sup>27</sup> because integration is the only way to renounce the myth.

Finally, the damage caused by the Court's persistent failure to acknowledge that segregation violates the dignity of *all* children, including white children, is exacerbated and perpetuated in *Parents Involved*. Part III examines how that case dissociates the values of dignity and equality from school integration—even as *those values relate to children of color*. Because "[s]eparate . . . [is] inherently unequal,"<sup>28</sup> Part III emphasizes how integration continues to be essential in the

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22. 551 U.S. 701.

23. *Id.* at 720.

24. *Id.*

25. See *Brown*, 347 U.S. at 495 (holding that because "separate educational facilities are inherently unequal," they violate the Equal Protection Clause).

26. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) ("[T]he underlying fallacy of the plaintiff's argument . . . [is] that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is . . . solely because the colored race chooses to put that construction upon it."), *overruled by Brown*, 347 U.S. 483; *Brown*, 347 U.S. at 494 ("To separate [children of color] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

27. *Brown*, 347 U.S. at 494-96; *Brown v. Bd. of Educ. of Topeka ("Brown II")*, 349 U.S. 294 (1955).

28. *Brown*, 347 U.S. at 495.

struggle to achieve racial equality. Integrated schools provide children with the opportunities to develop cross-racial understanding and *finally* reject the race myth. Given the importance of education to children, as acknowledged by the Court in *Brown* and later on,<sup>29</sup> adults are obligated to teach the next generation the lessons it will need as tomorrow's leaders in the ongoing movement to secure and protect the democratic values of dignity and equality.

## I. THE PATH TO *BROWN*'S MANDATE TO INTEGRATE THE SCHOOLS

### A. *The Race Myth: The Underlying Premise Defining Race Relations Prior to Brown*

Following the end of slavery, white society instituted the legal regime of *de jure* segregation, the legally enforced separation of the races. In 1896, in *Plessy v. Ferguson*,<sup>30</sup> the Court upheld the constitutionality of the "separate but equal" doctrine in public transportation.<sup>31</sup> The case arose in the context of a state law that required railroads to maintain separate cars for whites and blacks.<sup>32</sup> The significant constitutional question before the Court was whether the law violated the Fourteenth Amendment's guarantee of equal protection of the laws.<sup>33</sup> The Fourteenth Amendment, of course, was ratified following the end of the Civil War and was intended to establish and protect the citizenship rights of the newly freed slaves.<sup>34</sup>

Before equality-minded people even get to the question of the constitutionality of *de jure* segregation, they must ask *why* white society would want to segregate itself legally from people of other colors? There is only one answer: it believed in the validity of the race myth. But adherence to this belief also created dissonance in the minds of many equality-minded whites because it defied reality: people of all colors are human beings, and white people are not a superior class of human beings. White society tried to manage the dissonance by creating the "separate but equal" doctrine and by putting the burden of perpetuating racial injustice on people of color.<sup>35</sup> Said the Court: "[I]f the enforced separation of the two races stamps the

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29. *See id.* at 493 ("Today, education is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); *see also* *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.").

30. 163 U.S. 537, *overruled by Brown*, 347 U.S. 483.

31. *Plessy*, 163 U.S. at 552.

32. 1890 La. Acts No. 111, 152, *repealed by* 1972 La. Acts No. 262, §1.

33. *See Plessy*, 163 U.S. at 542-43.

34. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. 36, 73 (1872) ("That [the] main purpose [of the first clause of the Fourteenth Amendment] was to establish the citizenship of the negro can admit of no doubt.").

35. *See* D. Marvin Jones, *Plessy's Ghost: Grutter, Seattle and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583, 600-01 (2008) ("[T]he court was skeptical of whether the necessary causal link between race and disproportionate exclusion was present; instead, it could have been blacks' own fault. . . . [The Court] also hints, in the spirit of *Plessy*, that the problem of blacks may be natural; maybe they

colored race with a badge of inferiority . . . it is not by reason of anything found in the [law], but solely because the colored race chooses to put that construction upon it.”<sup>36</sup>

As long as white society believed that they and people of color could live separately and “equally,” then white society believed it could preserve its democratic image. White society also had an answer for people of color who rightfully challenged the humanity of the “separate but equal” doctrine: they could blame the people of color for having low self-esteem. As long as white society told itself that people of color were responsible for their continuing subordination following slavery, white society did not have to confront its own undemocratic legal regime.<sup>37</sup> Stated alternatively, by “blaming the victims” for its own inhumane treatment of people of color, white society validated the race myth even as it pretended that the myth did not exist.

Occasionally, however, white society got backed into the corner on the issue of racial equality and the only way out, for those who believed in a democratic society, was to modify the operation of the “separate but equal” doctrine. Two such occasions arose when Lloyd Gaines and Heman Marion Sweatt, aspiring black lawyers, had no law schools to accommodate them in a *de jure* segregated society that did not even believe in their humanity.<sup>38</sup> Relying on the principle of equality, they knew their only hope to achieve their dreams was to challenge the whites-only admissions policies in the existing law schools.<sup>39</sup> The Supreme Court’s response to their suits offers insights into the meaning and importance of integration in the struggle to protect human dignity and ultimately achieve racial equality.

### *B. Early Pre-Brown Hints into the Meaning of Integration*

#### 1. What Integration Does Not Mean

In 1938 in *Missouri ex rel. Gaines v. Canada*,<sup>40</sup> the Court ordered Missouri to admit Gaines to its whites-only law school.<sup>41</sup> At the time, there was no law school at all for blacks to attend.<sup>42</sup> Missouri’s elementary and high schools were segregated pursuant to state law (*de jure* segregation) and Missouri’s courts interpreted its segregation laws to extend to colleges and professional schools. Relying on state law, Missouri offered to pay for Gaines to attend school out of

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would rather play basketball than be entrepreneurs.”). See also Sharon E. Rush, *Sharing Space: Why Racial Goodwill Isn’t Enough*, 32 CONN. L. REV. 1 (1999) (exploring in-depth white society’s denial of racism).

36. *Plessy*, 163 U.S. at 551.

37. See Jones, *supra* note 35, at 596 (“Of course, if whites are the naturally superior race, not only are whites absolved from moral responsibility—their superior position in society is inevitable—but also blacks are the cause for their own degradation. The fault is in their gene pool.”) (emphasis in original).

38. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950).

39. See *Gaines*, 305 U.S. at 342 (After graduating from Lincoln University with a Bachelor of Arts, Gaines applied to the University of Missouri Law School, as the all-black Lincoln University did not have a law school); *Sweatt*, 339 U.S. at 631 (At time when no Texas law schools admitted blacks, Sweatt was denied admission to the University of Texas Law School solely because he was black.).

40. 305 U.S. 337.

41. *Id.* at 352.

42. *Id.* at 345.



state, but the Court fought for his admission and held Missouri obligated to provide an equal education to blacks.<sup>43</sup> If there was no separate school for blacks, then Missouri had to admit blacks to the white school.<sup>44</sup>

Admittedly, *Gaines*' message about the relevance and importance of integration to the protection of dignity and the achievement of racial equality is, at best, ambiguous. On the one hand, *Gaines* is consistent with *Plessy* and the "separate but equal" doctrine. It was not the existence of an unequal school for blacks that resulted in the Court's holding; rather, it was the total absence of a school blacks could attend.<sup>45</sup> Because no separate school existed, even a separate but equal school, then the schools for whites had to be open to blacks as well.<sup>46</sup> How the Court's decision moves in the general direction of protecting dignity, however, is not obvious.

But, from a different perspective, *Gaines* stands for the important message that Jim Crow laws did have constitutional limits.<sup>47</sup> Put most poignantly, *Gaines* struck a blow, albeit not a huge one but nevertheless a significant one, to the validity of the race myth.<sup>48</sup> Moreover, the absence of a black law school had nothing to do with anything blacks brought upon themselves—notwithstanding *Plessy*'s insistence that blacks had only themselves to blame if they *felt* unequal to whites.<sup>49</sup> This was white society's constitutional violation that resulted from the *real* way it treated blacks, and white society was constitutionally obligated to remedy the harm by admitting *Gaines* to the white law school.<sup>50</sup>

The Court reaffirmed the *Gaines* principle in the famous 1950 case of *Sweatt v. Painter*.<sup>51</sup> Sweatt also aspired to be a lawyer, but Texas did not have a law school for blacks.<sup>52</sup> When he challenged the whites-only admissions policy at the

43. *Id.* at 342-43, 351-52.

44. *See id.* at 351-52 ("[T]he State was bound to furnish [Gaines] within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race . . . [Gaines] was entitled to be admitted to the law school of the State University . . .").

45. *See id.* at 352 ("[P]etitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.") (emphasis added).

46. *Gaines*, 305 U.S. at 351-52.

47. *See* Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 701 (1992) ("[T]he constitutional violation must stem from the frustration of *Gaines*' subjective desire to attend the in-state school. . . . *Gaines* was entitled to an equal right to vindicate this personal desire even if it was shared by no other member of his race."); *see also* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 462 (2002) ("In *Gaines*, the Court . . . completed the conversion of the doctrine of separate but equal from Jim Crow's shield to a sword at his throat.")

48. *See* Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Toward Desegregation*, 36 J.C. & U.L. 945, 948 (2010) ("While *Gaines* did little more than emphasize the 'equal' in the separate-but-equal doctrine, the case was immensely important as a symbol of support of the rights of black citizens and of the Supreme Court's intention to uphold those rights.")

49. *See Plessy*, 163 U.S. at 551 (Stating that if the "enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.")

50. *See Gaines*, 305 U.S. at 350 ("[T]he obligation of the State [is] to give the protection of equal laws . . . within its own jurisdiction . . . That obligation is imposed by the Constitution upon the States . . . [I]t [is] the constitutional duty of Missouri when it supplied [legal education] courses for white students to make equivalent provision for negroes.")

51. 339 U.S. 629.

52. *Id.* at 631. The lower court continued Sweatt's case for six months to give Texas time to

University of Texas, Texas quickly adopted plans to create a law school for blacks so that the University would not have to admit Sweatt or other blacks.<sup>53</sup> Under *Plessy*, of course, blacks were entitled to attend an equal, albeit separate, school.<sup>54</sup> The Court acknowledged that the University of Texas Law School “may properly be considered one of the nation’s ranking law schools.”<sup>55</sup> In comparison, plans for the law school for blacks did not even provide for an “independent faculty or library.”<sup>56</sup> In short, Sweatt argued that the imagined law school for blacks, even upon completion, would not come close to satisfying the equality requirement of the “separate but equal” doctrine.<sup>57</sup> The Court unanimously agreed and Sweatt was offered admission to the University of Texas.<sup>58</sup>

Within months of his Supreme Court victory, Gaines mysteriously disappeared and never enrolled in the newly constructed Lincoln Law School established for blacks after the *Gaines* ruling.<sup>59</sup> Sweatt’s lawsuit left him “emotionally and physically exhausted.”<sup>60</sup> He had his appendix removed during his first year of school and missed several weeks of classes before deciding to give up the pursuit of law.<sup>61</sup>

Regardless of the fact that neither Gaines nor Sweatt earned his law degree, their cases remain landmark decisions along the equality path because they provide hints into the relationship between the democratic values of equality and dignity, and the role integration plays in protecting them. Their cases do this by the intriguing questions they raise. Specifically, if Gaines had enrolled at the University of Missouri, would he have “integrated” Missouri’s segregated law school? It is tempting to think that he would have integrated the school because of his presence in an otherwise all-white school. Yet the dictionary defines “integration” as “the intermixing of people or groups previously segregated.”<sup>62</sup> This definition suggests that it is a stretch to say that one black student could integrate a whole school of white students. But Sweatt and the “handful” of other blacks at the University of Texas raise the same concern. How many students of a different race would it take to integrate a school? Common sense calls for a more meaningful understanding of integration. Another pre-*Brown v.*

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establish a law school for blacks. *Id.* at 632.

53. *Id.* at 632.

54. *Plessy*, 163 U.S. at 550-51.

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

56. *Id.*

57. *See id.* at 634 (“[T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”).

58. *Id.* at 636.

59. Chad Garrison, *The Mystery of Lloyd Gaines*, RIVERFRONT TIMES (Apr. 4, 2007), <http://www.riverfronttimes.com/2007-04-04/news/the-mystery-of-lloyd-gaines/>.

60. NAT’L BAR ASS’N, 26TH ANNUAL MID-YEAR CONFERENCE PROGRAM, HEMAN MARION SWEATT AWARDS LUNCHEON, 3 (Apr. 28, 2006), available at <http://nationalbar.org/pdf/NBALuncheonProgramFinal06.pdf>.

61. *Id.* Eventually, Sweatt earned a master’s degree in the field of community organizations from the Atlanta University Graduate School of Social Work and became the assistant director of the National Urban League’s southern regional office. *Id.*

62. THE NEW OXFORD AMERICAN DICTIONARY 882 (1st ed. 2001).

*Oklahoma State Regents for Higher Education*,<sup>63</sup> sheds some light on this question of what it means for a school to be integrated.

George McLaurin challenged the constitutionality of Oklahoma's laws that prohibited him, on account of his race, from pursuing a master's degree in education at the University of Oklahoma.<sup>64</sup> A lower federal court held the laws unconstitutional. In response, the Oklahoma legislature amended its laws to allow McLaurin to attend the University.<sup>65</sup> Again, it might be tempting to say that his solitary presence as the only black student in the entire school integrated the university. Even if one were to bite at this temptation, one must also be aware of what happened to him once he was physically present within the school. Astoundingly, the amended laws also required that McLaurin be segregated from his white classmates *within* the school.<sup>66</sup> Specifically, he was prohibited by law from going into certain places and rooms in the university. He listened to lectures on the mezzanine outside the lecture hall and ate at a separate time in the lunchroom.<sup>67</sup> He was isolated, in every respect, from his white classmates. Thus, in reality or even according to the dictionary, McLaurin did *not* integrate the University of Oklahoma.

Thus far, *Gaines*, *Sweatt*, and *McLaurin* help to elucidate what integration is not. Integration is not the presence of one or even a handful of racial minority students in an otherwise all white school. Nor is integration achieved when students of different races are isolated from each other within the same school. That is simply intra-school segregation.<sup>68</sup>

Yet, in the culture of "separate but equal," having even one black man in an all-white school did *something* to promote racial equality. One wonders what that was. Would it be fair to say that the black students in *Gaines*, *Sweatt*, and *McLaurin* desegregated their respective schools? Interestingly, the dictionary defines "desegregation" as the "end [of] a policy of racial segregation."<sup>69</sup> Clearly, the blacks admitted to the Universities of Missouri, Texas, and Oklahoma did not desegregate those schools because the Court did not rule *de jure* segregation unconstitutional and would not overrule the "separate but equal" doctrine until *Brown*.<sup>70</sup> *Brown*, of course, at a minimum, did desegregate public schools, but it also required integration, as I explore in Part II below. How ironic and lacking in common sense would it be to conclude that *Gaines*, *Sweatt*, or *McLaurin* could have integrated his respective school and yet not have desegregated it?

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63. 339 U.S. 637 (1950).

64. *Id.* at 639. I explore this in more depth in my article, Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373 (1996).

65. *McLaurin*, 339 U.S. at 639-40.

66. *Id.* at 639.

67. *Id.* at 640.

68. This is a persistent problem in the modern classroom with respect to special education and magnet classes. *See infra* Part I.B.2 (discussing the ongoing problems surrounding inter- and intra-school segregation).

69. THE NEW OXFORD AMERICAN DICTIONARY 462 (1st ed. 2001).

70. *See, e.g., Brown*, 347 U.S. at 495 (holding segregation in public schools unconstitutional).

## 2. What Integration Means: Sharing Space with Dignity

“We accord persons dignity by assuming that they are good, that they share the human qualities we ascribe to ourselves.”<sup>71</sup>

—Nelson Mandela

Logically, one must conclude that integration is a multi-faceted concept. For purposes of this Article, at least two conditions are necessary (but not sufficient) in order for a school to be integrated in the context of racial equality. One condition involves the physical presence of students of different races in the same school. I call this “physical integration,” and it is this condition that tends to take center stage when questions of racial equality in education arise.<sup>72</sup> This is understandable because the first step in the journey to end *de jure* segregation was to open up public spaces to people of color so they could step into the world previously available only to whites, where all of the promises and opportunities are offered to *everyone* who lives in a democracy. For some people, racial equality is achieved once the public spaces are legally made available to everyone regardless of race, that is, desegregated, even if no people of color enter into those spaces, resulting in *de facto* segregation. For other people, racial equality is achieved when even one racial minority steps into that public space and has a physical presence in it. Yet the situations in *Gaines*, *Sweatt*, and *McLaurin* suggest that for a school to be physically integrated, it must be attended by a reasonable number of students of different races, although how much of a racial mixture is sufficient to achieve physical integration is unclear.<sup>73</sup> More recently, this concern has arisen in the context of schools trying to achieve a “critical mass” of racial minority students or trying to achieve “racial balance.” In fact, as I explore below,<sup>74</sup> the Court struggled with this question of what constitutes a “critical mass” in 2003 in *Grutter v. Bollinger*,<sup>75</sup> and it addressed the question of “racial balancing” in 2007 in *Parents Involved*.<sup>76</sup> This Article suggests that the “bottom line” is that schools have to have enough integration to debunk the race myth.<sup>77</sup>

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71. Nelson Mandela, Farewell Address to South African Parliament (May 10, 2004), available at <http://www.news24.com/SouthAfrica/News/Full-text-of-Mandelas-speech-20040510>.

72. See, e.g., *Gaines*, 305 U.S. at 352 (holding minority student-plaintiff allowed physical admittance); *Sweatt*, 339 U.S. at 636 (dealing specifically with physical admittance of student-plaintiff); *Brown*, 347 U.S. at 494 (focusing on the emotional and developmental impact of the physical segregation of school children).

73. Compare *Gaines*, 305 U.S. at 352 (holding conformance possible by simple admission of minority student-plaintiff), and *Sweatt*, 339 U.S. at 636 (requiring only that black student-plaintiff be granted admission), with *McLaurin*, 339 U.S. at 642 (holding that, in addition to admission, minority student-plaintiff “must receive the same treatment at the hands of the state as students of other races”).

74. See *infra* Part III (discussing how recent Supreme Court decisions have wrestled with how racial integration and racial equality are related and what acceptable means may be employed to achieve diversity).

75. 539 U.S. 306.

76. 551 U.S. 701.

77. See Liu, *supra* note 7, at 312-13 (“Whatever answer the Court may give [about what level of integration is enough], it should reflect a pragmatic judgment that balances the benefits of achieving a meaningful degree of school integration against the risks of reinforcing the perception or reality of racial

The second condition of integration is one of the missing links in the racial equality chain: it relates to how people of different races are treated within the school. How students are treated is about protecting their dignity. If students are treated as if the race myth were valid, then dignity integration is missing. Here, it is worth emphasizing the duality of the race myth. Today, equality-minded people understand that the dignity of people of color is violated when laws, policies, or official decisions are premised explicitly on the myth of black inferiority and their enforcement results in the dehumanization of the people of color.<sup>78</sup> This was the situation in *Gaines*, *Sweatt*, and *McLaurin*, for example.<sup>79</sup> Naturally, the corollary effect of the dehumanization of people of color is the super-humanization of white people.

But my point is even deeper. Some equality-minded people are less likely to understand how dignity integration also is missing in schools when laws, policies and official decisions are not explicitly premised on the myth of black inferiority but nevertheless promote the myth of white superiority and result in the unnatural exaltation of whiteness.<sup>80</sup> This happens, for example, when magnet programs attended predominantly by white students are situated in schools attended predominantly by students of color. Such decisions usually are implemented to promote racial equality by physically integrating the school.<sup>81</sup> In reality, however, such plans violate the students' dignity because of the virtual intra-school segregation that usually occurs.<sup>82</sup> Moreover, students in magnet programs enjoy far more resources and have access to far better educations than the non-magnet students.<sup>83</sup> This is the race myth playing out, and it violates the dignity of everyone in the school community.

Reconsider Oklahoma's treatment of *McLaurin* even after he was admitted to the university. To continue to isolate him from his classmates not only raises questions about whether he physically integrated the university, but it also clearly violated his dignity. The only reason the state wanted to segregate him from his classmates was because of its belief in the race myth. Pursuant to the myth of black inferiority, white students were being taught that *McLaurin* was not worthy of

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division in society.”).

78. *Cf. Brown*, 347 U.S. at 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 law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”).

79. *See Gaines*, 305 U.S. at 349 (“By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race.”); *Sweatt*, 339 U.S. at 631 n.1 (“It appears that the University has been restricted to white students, in accordance with the State law.”); *McLaurin*, 339 U.S. at 641 (“These restrictions . . . signify that the State, in administering the facilities it affords for professional and graduate study, sets *McLaurin* apart from the other students. The result is that [he] is handicapped in his pursuit of effective graduate instruction.”).

80. *See Nelson*, *supra* note 17, at 598 (“School officials that employ [physical integration] policies often concentrate on the racial makeup of their institutions while neglecting the broader unequal educational opportunities being provided to minority students.”) (footnote omitted).

81. *See id.* at 610 (“Originally [magnet programs were] created to promote integration and diversity”). Ironically, this was part of Seattle's policy in *Parents Involved*. *See Parents Involved*, 551 U.S. at 816-18 (defining plan including use of magnet schools to increase integration in Seattle schools).

82. *See Nelson*, *supra* note 17, at 610 (“In reality, the classrooms in which students are educated are often not racially diverse at all.”) (footnote omitted).

83. *Id.* at 611.

interacting with them. The way he was treated had nothing to do with his feelings about the way he was treated. He might or might not have “bought into” the validity of the race myth, and one hopes he did not.<sup>84</sup> White society could not have cared less about his feelings. Significantly, whenever one aspect of the race myth is operational, both sides are. Consequently, pursuant to the myth of white superiority, McLaurin’s white classmates were being taught to believe that they were “too good” to interact with him. Individual whites, of course, might not have believed in it, but the myth evidenced itself throughout society and presented a systemic, institutional problem. This unnatural privileging of the white students, premised on the deceitful race myth, also violated their dignity.

Amazingly, the Supreme Court in *McLaurin* understood that Oklahoma’s laws violated the dignity of McLaurin and his white classmates.<sup>85</sup> This can be deduced from the Court’s reasoning even though it did not use the word “dignity.” For example, the Court opined that one reason the intra-school segregation violated his equal protection was because it prohibited the “intellectual commingling of students”<sup>86</sup> and prevented McLaurin from “exchang[ing] views with other students.”<sup>87</sup> To be able to commingle and exchange views implies not just that McLaurin could learn from his white classmates, but also that his white classmates could learn from him. The students would and should be able to learn from each other. Some of the lessons undoubtedly would be intellectual in nature, but perhaps one of the biggest lessons they would learn from each other is that the race myth is invalid. Giving the students a chance to share their intellectual passion and also their common humanity protects their dignity and promotes racial equality.

Naturally, the Court’s holding in *McLaurin* did not guarantee that McLaurin and his white classmates would interact with each other. He was free to ignore the students, and they were free to ignore him. But *McLaurin* suggested the students’ personal choices about how to treat each other were irrelevant.<sup>88</sup> The constitutional point was that the state could not preempt their personal choices. “The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices, and choices.”<sup>89</sup> This point is a dramatic departure from the *Plessy*

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84. Whether (*de jure* or *de facto*) segregation “causes” low self-esteem in children of color is a hotly contested issue raised by *Brown*, 347 U.S. at 395 n.11. Justice Thomas adamantly opined that diversity policies stigmatize students of color by sanctioning the idea that they are unable to be admitted to educational programs based on merit. *See, e.g., Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (“When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”). His point is different from the point in this Article: maintaining racially identifiable and unequal schools validates the race myth. The late Justice Thurgood Marshall agreed and opined in *Board of Education v. Dowell*, 498 U.S. 237, 263 (1991), that “the persistence of racially identifiable schools perpetuates the message of racial inferiority.” This contentious point is the focus of Part II.B *infra*.

85. *See McLaurin*, 339 U.S. at 641 (noting that McLaurin’s “unequal training” affects others directly).

86. *Id.*

87. *Id.*

88. *Id.* at 641-42.

89. *Id.* at 641.

opinion that law does not validate the race myth just because it requires segregation.<sup>90</sup>

To summarize thus far, state-imposed inter- and intra-school segregation denies the dignity of all students because they are not allowed an opportunity “to engage in discussions and exchange views with [each other].”<sup>91</sup> Stated most emphatically, they are never given a chance to learn for themselves that the race myth is invalid and inconsistent with democratic values. The *McLaurin* Court understood this but failed to give this principle effect by overruling *Plessy*.<sup>92</sup> It left the resounding message of the validity of the race myth intact by choosing to address the issue narrowly: “under *these* circumstances” the Fourteenth Amendment prohibits race-based alternative treatment by the state.<sup>93</sup> *Brown*, however, was up to the task and understood that integration—in its fullest sense, including physical and dignity integration—was necessary to stop the damage caused by the myth and finally bury the myth itself.<sup>94</sup>

## II. THE *BROWN* COURT’S CHOICES

*Gaines*, *Sweatt*, and *McLaurin* lay a foundation for understanding the fundamental harm of segregation: it dehumanizes all people by validating the race myth. One can deduce that the justices in *Brown* grasped the depth of the harm caused by segregation by analyzing and comparing the rationale they did not employ to support their opinion that “separate educational facilities are inherently unequal”<sup>95</sup> with the rationale they did employ. Such a comparison provides insights into the relationship between dignity and equality and the importance of integration in protecting them.

### A. *The Rationale Not Employed*

#### 1. Uphold the “Separate but Equal” Doctrine and Focus on Economic Equality

Rather than tackle the question whether *de jure* segregation is unconstitutional, *Brown* could have adhered to *Plessy* and upheld the “separate but equal” doctrine. Had it done so, it would have had to confront the obvious economic inequality between the white and colored schools. It was well established that the schools for whites and those for people of color were woefully unequal.<sup>96</sup> *Brown* could have tried to remedy the economic inequality by ordering that more resources be expended on the colored schools. Moreover, renowned scholars and

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90. See *supra* Part I.A. (discussing how the pre-*Brown* case *Plessy*, 163 U.S. 537, based its argument on a the assumption that blacks could live separately but equally, and that if legal segregation made blacks feel inferior, it was solely because they chose to interpret the law to have this effect).

91. *McLaurin*, 339 U.S. at 641.

92. *Id.* at 641-42.

93. *Id.*

94. *Brown*, 347 U.S. at 494-95.

95. *Id.* at 495.

96. See generally KLUGER, *supra* note 9 (discussing inequality in busing, facilities, teachers, teaching salaries, teaching materials, per-student funding, length of school year and availability of high schools).

historians present compelling evidence from the legislative history that an original interpretation of the Fourteenth Amendment is consistent with the position that the public schools were intended to be segregated but also equal.<sup>97</sup>

Thus, upholding the “separate but equal” doctrine was a viable constitutional choice for *Brown*. Presumably, if the Court had upheld *Plessy* and ruled that the segregated schools were economically unequal, it would have been motivated and even constitutionally compelled to address the inequality.<sup>98</sup> However, a judicial acknowledgement that people of color were entitled to attend schools economically equal to those of white students would have done little to invalidate the race myth. Significantly, the only reason for mandating that children be segregated on the basis of race—even if their schools are economically equal—is a belief in the validity of the race myth. For white society to acknowledge that people of color have constitutional status sometimes does not altogether debunk the myth, but reinforces it because they should have that constitutional status all the time by virtue of being human. Thus, a choice to protect economic equality in the face of segregation would have left the myth intact and reinforced it. Recall *Gaines*, *Sweatt*, and *McLaurin*.<sup>99</sup> If the Court had taken this “separate but equal” path, the link between dignity and integration would have been missing. Without dignity protection, racial equality remains elusive.

This Article suggests this missing link is the primary reason *Brown* did not choose this path. In fact, the Court explicitly ignored reality and assumed that the separate schools did enjoy equal resources.<sup>100</sup> The Court phrased the question presented: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”<sup>101</sup> In short, *Brown* avoided the constitutional challenges associated with economic inequality in schools in order to deal with what it saw as a greater obstacle to equality: segregation’s role in perpetuating the race myth.

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97. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955) (“Hence one may surmise that the Moderates believed they were guaranteeing a right to equal benefits from state educational systems supported by general tax funds. But there is no evidence whatever showing that for its sponsors the civil rights formula had anything to do with unsegregated public schools . . . .”); see also Michael J. Klarman, *Brown, Originalism and Constitutional Theory*, 81 VA. L. REV. 1881 (1995) (arguing that originalism does not support *Brown*). But see Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 941 (1995) (arguing that originalist interpretations of the Fourteenth Amendment support *Brown*).

98. *Plessy*’s holding is based on a theory of “separate but equal,” which allowed it to avoid finding a violation of the Equal Protection Clause in legally mandated racial segregation. *Plessy*, 163 U.S. at 551-52.

99. See *Gaines*, 305 U.S. at 337, 351-52 (holding that Missouri could not satisfy the demands of “separate but equal” by paying for legal training of blacks at neighboring state law schools, while maintaining a segregated law school within the State); *Sweatt*, 339 U.S. at 636 (holding unanimously that the equal protection clause required that a black student be admitted to the University of Texas Law School, since the school for blacks did not afford equal facilities); *McLaurin*, 339 U.S. at 642 (holding that under the equal protection clause a black student must receive the same treatment at the hands of the state as students of other races).

100. *Brown*, 347 U.S. at 492-93.

101. *Id.* at 493.



## 2. Strike Down the “Separate but Equal” Doctrine and Do Nothing More

The Court could have followed a second path and simply struck down *de jure* segregation in public schools. Fortunately, *Brown* did overrule *Plessy* and held that the “separate but equal” doctrine in public schools is unconstitutional.<sup>102</sup> If the requirement that schools be segregated by law had been the only harm evident to the Court in *Brown*, however, it would have been easy for the Court to remedy it. The Court’s opinion could have stopped with its ruling that *de jure* segregation is unconstitutional. The remedy would have been to invalidate those laws that required segregation in public schools.

Under this rationale, it would have been unconstitutional to deny children of color<sup>103</sup> admission to a public school because of race, but this alone would not necessarily have resulted in the end of segregation. Indeed, historically, many public schools went to great lengths to keep the schools segregated even after *Brown*. For example, Arkansas officials refused to allow nine black students to attend a public school because the officials asserted that Arkansas was not obligated to follow *Brown*’s mandate.<sup>104</sup> In *Cooper v. Aaron*,<sup>105</sup> the Court dispelled such notions and reaffirmed the principle of *Marbury v. Madison*<sup>106</sup> that the Constitution is the supreme law.<sup>107</sup> Nevertheless, and notwithstanding *Cooper*, schools devised other ways to avoid admitting children of color to white schools.<sup>108</sup> Finally, Congress stepped in and passed the 1964 Civil Rights Act to ensure the enforcement of *Brown*.<sup>109</sup>

Why such resistance to the end of the “separate but equal” doctrine? One logical reason posits that white society continued to act on its belief in the validity of the race myth. This belief, of course, mandated that whites and people of color live separately throughout society, resulting in segregation in housing and other social institutions.<sup>110</sup> In turn, the high correlation between poverty and race was set as well.<sup>111</sup> Professor James Ryan calls this failure to acknowledge that school

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102. *Id.* at 495.

103. I intentionally refer to children of color being denied admission to the previous whites-only schools and not vice versa because there never has been an on-going struggle to secure admission of white students into the schools attended predominantly by students of color. Of course, the controversy over affirmative action and attempts to diversify schools has made the issue of whites being denied admission to public schools on account of their race relevant in constitutional law. Ironically, though, when whites are denied admission arguably on account of race, the schools they want to attend are predominantly attended by other whites—not students of color. This flip-flopping of *Brown*’s core message, in light of the persistence of racially identifiable and unequal schools, in fact, is at the heart of the controversy surrounding the Court’s plurality opinion in *Parents Involved*, explored *infra* at Part III.C.

104. Charles J. Ogletree, Jr., and Susan Eaton, *From Little Rock to Seattle and Louisville: Is “All Deliberate Speed” Stuck in Reverse?*, 30 U. ARK. LITTLE ROCK L. REV. 279, 281 (2008).

105. 358 U.S. 1 (1958).

106. 5 U.S. 137 (1803).

107. 358 U.S. at 18.

108. See McUsic, *supra* note 8, at 1337 (pointing out that school districts resisted *Brown* by, among other tactics, shutting down or by employing school vouchers for white children to attend private schools).

109. 42 U.S.C. § 1971, 2000a-h (2000) (originally enacted as Pub. L. No. 88-352, 78 Stat. 241).

110. Ryan, *supra* note 2, at 140-41.

111. See GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY,

segregation is largely the result of residential segregation the “gaping hole in the Court’s desegregation jurisprudence.”<sup>112</sup> Undoubtedly, if the Court had taken this path, the schools constitutionally not only could have, but would have, remained largely *de facto* segregated.<sup>113</sup> The end of *de jure* segregation, without more, would have done little to ensure that public schools were integrated. It would have done little to promote racial equality, particularly in education. But it would be the continuing belief in the race myth that would help explain why white society would continue to accept such inequality and *feel no obligation or motivation to remedy it*.

Here it is worth returning to Justice Harlan’s dissent in *Plessy*.<sup>114</sup> Consider that, at the time *Brown* was decided almost sixty years after *Plessy*, Justice Harlan’s dissent in that case proved true. Although he courageously disagreed with the *Plessy* Court about the constitutionality of *de jure* segregation, he further opined that:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind . . . .<sup>115</sup>

Curiously, Justice Harlan’s dissent seemed to suggest that even if *de jure* segregation is unconstitutional, racial equality would continue to escape the United States—*forever and as a matter of constitutional liberty*.

What could possibly justify such enduring inequality? Perhaps a subconscious<sup>116</sup> (or conscious) belief in white superiority explains it. The validity of the race myth is so entrenched in white society’s psyche<sup>117</sup> that even someone as equality-minded as Justice Harlan could explicitly opine that whites will always be the superior race even if the Constitution is color-blind.

Thus, had *Brown* simply ruled *de jure* segregation unconstitutional and done nothing more to remedy the human inequality, this path constitutionally would not have resulted in physical integration. Without physical integration, dignity integration also is missing. Nor would the races have voluntarily physically

WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 16 (2005) (“Studies have shown that there is a strong relationship between percent poor and percent minority in a school; specifically, the share of schools that are high poverty increases as the minority population in a school increases.”).

112. Ryan, *supra* note 2, at 140-41.

113. *Id.* at 141-42.

114. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

115. *Id.*

116. See Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (arguing that “a large part of” the behavior that produces racial discrimination is influenced by subconscious motivations).

117. *Id.* at 322. See also Rush, *Sharing Space: Why Racial Goodwill Isn’t Enough*, *supra* note 35 (providing an in-depth exploration of white society’s general denial of persistent racial inequality and racism).

integrated for a variety of practical, among other, reasons. But a significant limitation on white society's willingness to integrate the schools physically was its continued belief in the race myth. This path would have resulted in a *de facto Plessy* school system. Looking back, almost all equality-minded people would see that such a system would have violated the principles of dignity and equality. The mystery is why equality-minded people today cannot see how the sanctioning of racially identifiable and unequal schools, particularly if the system is called what it is—a *de facto Plessy* system—continues to violate the principles of dignity and equality.

Thus, it is important to emphasize that *de facto* segregation, particularly at the time of *Brown*, validated the race myth. Nothing but a belief in the myth of white superiority and the inhumanity of people of color could justify white society's deep desire to segregate itself after *Brown* ruled *de jure* segregation unconstitutional.<sup>118</sup> But if the Court had taken this path and simply struck down *de jure* segregation, then white society's resistance to integration or, stated alternatively, its insistence on remaining segregated, also would have been much less controversial. For the *Brown* Court, it was important to do more than simply rule *de jure* segregation unconstitutional.<sup>119</sup> But even the Court itself was unsure exactly what the remedy should be and it put off that decision until it decided *Brown II* a year later.

#### *B. The Chosen Rationale: Attack Segregation and Mandate Integration of Schools*

*Brown* took a third path because it understood to a large degree that segregation itself was the harm that needed to be remedied. Chief Justice Warren, in the opinion of the Court wrote: "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 law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."<sup>120</sup> Notice that the Court opined that legally mandated segregation exacerbates—does not cause—the harm. Segregation—even without the sanction of law—causes the harm.<sup>121</sup>

Logically, one must ask what is the harm of segregation, whether it be *de jure* or *de facto*? It denies the equality and dignity of all people by sanctioning the validity of the race myth. Controversially, relying on social science studies,<sup>122</sup> *Brown* nevertheless correctly highlighted how erroneous and destructive of equality and dignity the race myth is. In one of its most famous lines, the Court said that "[t]o separate [black] children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be

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118. See Regina Austin, *Back to Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-Brown Era*, 6 J. APP. PRAC. & PROCESS 79, 81 (2004) ("At the root of [the post-*Brown* failures] lies the pervasive ideological insistence on the inevitability of black inferiority and white supremacy and the naturalness of the unequal distribution of resources and opportunities that they justify.").

119. See *Brown*, 347 U.S. at 494 (noting the detrimental effect segregated schools have on children).

120. *Id.*

121. See *id.* ("A sense of inferiority affects the motivation of a child to learn.").

122. *Id.* at 494 n.11 (citing to several psychological studies supporting the assertion that *de jure* segregation harms black children).

undone.”<sup>123</sup>

This is a direct acknowledgement of, and assault on, the validity of the race myth. *Brown* emphatically explained that segregation denied black children their dignity. As explored in Part III below, because of the dual nature of the race myth, the harm in *Brown*, although not mentioned by the Court but one of the main points of this Article, also was suffered by white children who lived under the false reality that they were a superior class of human beings.<sup>124</sup>

What remedy could help to redress that harm? *Brown II* held that the way to remedy the harm suffered by black children was for the “District Courts to take such proceedings and enter such order and decrees consistent with this opinion as are necessary and proper to admit [them] to public schools on a racially nondiscriminatory basis with all deliberate speed.”<sup>125</sup> Clearly, for the students involved in the litigation, admission to the whites-only schools was their remedy. The physical integration of public schools, brought about by the *Brown* litigation was an unparalleled moment in constitutional history. It was the beginning of an official exposure by the Supreme Court—interpreting the supreme law of the land—that the race myth was just that—a myth!

This interpretation of *Brown* not surprisingly, even if controversially,<sup>126</sup> supports the proposition that *Brown*’s mandate is that public schools had to be integrated. Eventually, in *Green*, the Court made this crystal clear and opined that the school board in that case “must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly [from a dual system] to a [unitary] system without a ‘white’ school and a ‘Negro’ school, but just schools.”<sup>127</sup> In other words, *Green* interpreted *Brown*’s mandate to mean that schools could not be racially identifiable. In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>128</sup> the Court ordered that students be bused to various schools if that was what was necessary for a school district to achieve unitary status.<sup>129</sup>

Significantly, the effort behind *Brown*’s mandate served a purpose much deeper than just achieving physical integration in schools. Bringing children of different races together was premised on protecting their dignity.<sup>130</sup> Integration, in

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123. *Id.* at 494. The reinforcement of the race myth that resulted from the Court’s failure to address the harm segregation also causes white children is explored in Part III *infra*.

124. *See, e.g.*, Jordan Blair Woods, Comment, *Taking the “Hate” Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489, 517 n.139 (2008) (“Even though many white Americans do not overtly express racist thinking, it does not mean that their underlying belief structures have not been saturated with an ideology of difference that says white is always, in every way, superior.”).

125. *Brown*, 349 U.S. at 301.

126. *See, e.g.*, Graglia, *supra* note 15, at 912-13 (suggesting that *Brown* merely required desegregation and that the persistence of racially identifiable schools motivated the Court in *Green*, 391 U.S. at 440-41, to move to an interpretation of *Brown* that required integration in previously *de jure* segregated schools).

127. *Green*, 391 U.S. at 442.

128. 402 U.S. 1 (1971).

129. *Id.* at 29-31.

130. *See* Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1093 (1984) (“As a restorative measure, integration is designed to undo much of the intended discrimination that went hand-in-hand with the establishment of segregation. To the extent intentional segregation instilled in blacks feelings of inferiority, integration restores the dignity of the

other words, was a rich concept that was built on an understanding that dignity and integration went hand-in-hand and both were viewed by *Brown* as necessary to achieve racial equality.<sup>131</sup>

### III. POST-BROWN CONFUSION: EQUALITY BECOMES A MOVING TARGET

The *Brown* Court deserves enormous credit for advancing racial equality because its decision marked the beginning of the end of the “separate but equal” doctrine in all public places. Nevertheless, as mentioned above, the opinion is limited and imperfect for one critical reason: the Court’s acknowledgment that segregation harms black children focused on debunking the myth of black inferiority, but the Court’s opinion said nothing about the invalidity of the myth of white superiority.<sup>132</sup> This important omission allowed white society to continue to function, often subconsciously, on the myth of white superiority even as it officially and consciously denounced the myth of black inferiority.

The harmful consequences of this omission are numerous and enormous. In the area of education, this omission facilitated a move by the Court away from the heart of *Brown*’s core meaning about human equality and its relationship to racial integration in two iconic cases that, with hindsight, have contributed to the confusion about the true meaning of *Brown*. In the first case, *San Antonio School District v. Rodriguez*,<sup>133</sup> the Court upheld the constitutionality of economic inequality in *de facto* segregated schools.<sup>134</sup> *Brown*, of course, was not about economic equality, but neither is economic equality irrelevant to racial equality, especially in light of the reality that schools in the United States are largely racially identifiable and economically unequal.<sup>135</sup> In the second case, *University of*

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minority.”).

131. See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 763 (2006) (“[I]n these segregation cases members of our highest court displayed a genuine concern for the value of human dignity. They may not have articulated their opinions in the language of dignity, but their expressed outrage at the insidious government-sponsored disparagement of blacks is most clearly and persuasively formulated by direct appeal to this powerful concept.”(citing William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES 47 (Michael J. Meyer & William A. Parent eds. 1992))).

132. See Leon A. Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney’s Defense and Justice Thurgood Marshall’s Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1705 (1996) (supporting the idea that Thurgood Marshall helped to debunk the myth of black inferiority by emphasizing that “no one in their right mind could ever imagine, and no court under the rule of law could possibly determine, that blacks were inferior to other human beings,” though his work did not emphasize the flip side—that whites are not a superior race).

133. 411 U.S. 1 (1973).

134. *Id.* at 50-51 (“While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of ‘some inequality’ in the manner in which the State’s rationale is achieved is not alone a sufficient basis for striking down the entire system.”).

135. See, e.g., Derrick Darby, *Educational Inequality and the Science of Diversity in Grutter: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 767 (2009) (discussing post-*Brown* challenges in realizing equal opportunity for blacks beyond merely implementing and enforcing anti-discrimination laws, including widespread socioeconomic racial inequalities that arguably did not give blacks equal access to civil and political participation in American society).

*California Regents v. Bakke*,<sup>136</sup> the Court dropped its focus on the relationship between equality and integration and instead began to adopt the concept of diversity in education, which might or might not include racial diversity.<sup>137</sup> Remarkably, both *Rodriguez* and *Bakke* were decided in the 1970s—a period during which the Court held fast in other cases to *Brown*'s true meaning about the relationship between integration in education and racial equality.<sup>138</sup> This confusing period is traceable to *Brown*'s failure to tackle, in its entirety, the invalidity of the race myth.

#### A. The Sanctioning of Economic Inequality in Education

##### 1. *Rodriguez* Muddles *Brown*'s Message about Human Equality

*Brown*'s strong message about the importance of integrating public schools to protect children's dignity met social and practical obstacles. Understandably, given the persistence of racially identifiable and unequal schools, advocates of racial equality logically invoked *Brown* to focus the Court's attention on achieving economic equality in education.<sup>139</sup> In *Rodriguez*,<sup>140</sup> decided less than twenty years after *Brown*, the Court had an opportunity to revisit the presumption made in *Brown* about economic equality between white and black schools by addressing the question whether it is constitutional for states to fund schools based on local property taxes.<sup>141</sup> Pursuant to such taxing schemes, per pupil expenditures naturally are higher in school districts with higher property tax bases and are lower, sometimes significantly, in districts with lower property tax bases.<sup>142</sup> For example, in *Rodriguez*, the plaintiffs resided in districts with lower property tax bases and the per pupil expenditure was \$356,<sup>143</sup> while per pupil expenditure in the more affluent parts of the city was \$594.<sup>144</sup> The plaintiffs alleged that the discrepancy violated the Equal Protection Clause of the Fourteenth Amendment.<sup>145</sup>

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136. 438 U.S. 265 (1978).

137. *Id.* at 317-18.

138. *See Swann*, 402 U.S. at 30-31 (placing a premium on integration, mandating busing to effectively desegregate Charlotte); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 200 (1973) (holding that purposeful discrimination in a substantial portion of a school system provided a legitimate foundation for an inference of district-wide discriminatory intent triggering *Brown*'s requirement to "effectuate a transition to a racially nondiscriminatory school system").

139. Brief for American Jewish Congress as Amicus Curiae Supporting Petitioner at 20, *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968) (No. 695), 1968 WL 129317 ("If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for 'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.").

140. 411 U.S. 1 (1973).

141. I explore this in greater depth in my article, Sharon E. Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 8-11 (1997) [hereinafter Rush, *The Heart of Equal Protection*].

142. *Rodriguez*, 411 U.S. at 15-16.

143. *Id.* at 12.

144. *Id.* at 13.

145. *See id.* at 6 ("[T]he panel rendered its judgment in a *per curiam* opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth

Curiously, the Court omitted any consideration of racial equality from its analysis. Significantly, the *Rodriguez* plaintiffs were Mexican-American and the racial composition of the students in their schools was approximately 90% Mexican-American and “over 6% [was] Negro.”<sup>146</sup> In contrast, the racial composition of the wealthier school district was “predominantly ‘Anglo,’ having only 18% Mexican-Americans and less than 1% Negroes.”<sup>147</sup> The Court accepted Texas’ conclusion that the reason the predominantly Mexican-American students received less per pupil than their Anglo counterparts was “happenstance,”<sup>148</sup> and therefore constitutionally unimportant. Because racial equality was not an issue and because the Court held that education is not a fundamental right,<sup>149</sup> the state’s financing scheme merely had to meet rational basis review and thus easily passed constitutional muster.<sup>150</sup>

Recall that *Brown* ignored the extant economic inequality between the white and black schools so that it could focus on the concept of racial equality in the context of segregation and held that *de jure* segregation in public schools is unconstitutional.<sup>151</sup> Certainly, everyone knew that race and poverty were highly correlated at that time in history (and continue to be today). Yet within one generation, which is not even enough time for the vestiges of *de jure* segregation to disappear, *Rodriguez* ignored the extant racial inequality due to *de facto* segregation in schools so that it could focus on the economic equality. The Court held that economic inequality in the still *de facto* segregated schools is constitutional.<sup>152</sup>

Given that *Brown* was concerned about human equality and took the first step toward protecting the dignity of children of color by ruling *de jure* segregation unconstitutional,<sup>153</sup> *Rodriguez* could have bolstered its decision about human equality by addressing how this type of segregation is inconsistent with *Brown*’s message to allow economic inequality to exist in racially identifiable schools. Unfortunately, *Rodriguez* did not take the logical step after *Brown* and failed to

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Amendment.”).

146. *Id.* at 12.

147. *Id.* at 12-13.

148. *See Rodriguez*, 411 U.S. at 53 (“Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on ‘happenstance.’”); *Id.* at 55 (“[W]e cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.”).

149. *Id.* at 37 (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

150. *Id.* at 55 (“The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest . . . . We hold that the Texas Plan abundantly satisfies this standard.” (citing *McGinnis v. Royster* 410 U.S. 263, 270 (1973)). Justice Marshall at least cites *Sweatt* and *McLaurin* to support his opinion that the Texas financing scheme is inconsistent with the Court’s prior jurisprudence that “unequal” schools are prohibited by the Constitution. *Id.* at 84-85 (Marshall, J., dissenting). His dissent, however, is not based on race but rather on the plan being arbitrary and failing rational basis review. *Id.* at 129-30.

151. KLUGER, *supra* note 9, at 716.

152. *See Rodriguez*, 411 U.S. at 6 (reversing the decision of the District Court); *id.* at 12-13 (establishing the economic inequality is *de facto* segregated schools).

153. *Brown*, 347 U.S. at 495 (holding that “separate but equal” is unconstitutional in the “field of public education”).

take notice of the correlation between racial and economic inequality in education.<sup>154</sup> Instead, *Rodriguez* upheld the constitutionality of economic inequality in education and essentially eliminated the possibility that the Court will find that there is a constitutionally significant relationship between economic and racial equality in education cases even where schools are racially identifiable—as they were in *Rodriguez*—because of *de facto* segregation.<sup>155</sup>

By sanctioning the existence of racially identifiable and unequal schools,<sup>156</sup> *Rodriguez* seriously undermined *Brown*'s primary message about the importance of integration in the struggle to achieve racial equality. In this way, not only did efforts to connect *Brown*'s racial message with the economic status of the plaintiffs in *Rodriguez* fail, but the Court's unwillingness to address the link between race and poverty has diminished the significance of *Brown*'s message about the importance of integration in the struggle to achieve human equality.

Simultaneously, the tragic reality of segregation is settling in as constitutionally and socially acceptable in American jurisprudence. Early into the twenty-first century, public schools are racially identifiable and racial minority schools are disproportionately poor.<sup>157</sup> Researchers at the Harvard Civil Rights Project, particularly Professor Gary Orfield, describe this stark reality:

Studies have shown that there is a strong relationship between percent poor and percent minority in a school; specifically, the share of schools that are high poverty increases as the minority population in a school increases. Similarly, as white enrollment increases, the share of schools that are high poverty schools correspondingly decreases. For example, 88 percent of high minority schools (more than 90 percent minority) are high poverty schools (more than 50 percent of the students are on free and reduced lunch). The corresponding share of low minority schools (less than 10 percent) that are also high poverty schools is 15 percent. The reality of segregation by race and poverty means that, while the majority of white students attend middle class schools, minority students in racially segregated schools are very likely attending a school of concentrated poverty. These patterns are not limited to cities; increasingly, suburban rings with increasing minority enrollment also experience segregation by poverty and race.<sup>158</sup>

By disclaiming any constitutionally significant relationship between race and poverty and unequal schools,<sup>159</sup> *Rodriguez* sanctioned a paradigm that sets up an intractable problem in the struggle to achieve human equality, particularly in education. *Rodriguez* muddles the message of *Brown* because it suggests that

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154. Rush, *The Heart of Equal Protection*, *supra* note 141, at 10.

155. *Id.*

156. *Rodriguez*, 411 U.S. at 55.

157. See GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 16 (2005) (examining the link between the racial makeup of public schools and economic inequality).

158. *Id.*

159. *Rodriguez*, 411 U.S. at 56.



neither physical nor dignity integration in public schools is important.

To summarize, the disconnect between the Court's reasoning in *Brown* and *Rodriguez* sanctions the existence of racially segregated and economically unequal schools. From the perspective of *Rodriguez*, it seems that *Brown* actually chose the second path analyzed above—strike down *de jure* segregation and do nothing more.<sup>160</sup> That is, it seems the *Rodriguez* Court interpreted *Brown* to stand for the proposition that students are harmed by attending segregated schools only if the segregation is mandated by law.<sup>161</sup> But as examined above, *Brown* opined that segregation itself is harmful to children.<sup>162</sup> As explored in the next part, numerous post-*Brown* decisions also premised their rulings on the same understanding.

## 2. Paradoxically, Integration Efforts Continued after *Rodriguez*

In reality, and *Rodriguez* notwithstanding, post-*Brown* decisions were heavily invested in ensuring the integration of public schools. Recall that *Green* ordered the end of racially identifiable schools,<sup>163</sup> and *Swann* subsequently upheld the use of busing students to schools to achieve integration and comply with *Brown*'s mandate to achieve a unitary system of education devoid of racial discrimination.<sup>164</sup> Moreover, and usually to the chagrin of white parents, busing plans often required white children to attend the less resource-rich schools that children of color claimed as their own.<sup>165</sup> Decades after *Brown*, courts throughout the country functioned under an interpretation of *Brown* that the harm of *de jure* segregation was not just that it was legally mandated, but that segregation itself was harmful.<sup>166</sup>

But “why” remains the question. Why did the courts care so much about school integration even as they allowed in *Rodriguez* for schools to be economically unequal and racially identifiable? The answer lies in understanding *Brown*'s true meaning: integration is necessary to invalidate the race myth, the whole race myth. Not only does the widespread social and legal acceptance of

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160. See discussion *supra* Part II.A.2 (analyzing how merely striking *de jure* segregation in schools would likely not have ended *de facto* segregation).

161. See *Rodriguez*, 411 U.S. at 54-55 (holding disparities in educational quality derived from public school financing structure does not create unconstitutional segregation).

162. See *Brown*, 347 U.S. at 495 (declaring that such segregation constitutes “a denial of the equal protection of the laws”); see also *id.* at 493 (Here, the Court notes that children who attend segregated schools and receive substandard education will suffer in their professional lives because they have not been exposed to the wide array of cultural and inherently democratic values that are crucial to the proper functioning of American society).

163. *Green*, 391 U.S. at 442.

164. *Swann*, 402 U.S. at 30-32.

165. STEVE FARKAS & JEAN JOHNSON, PUB. AGENDA & PUB. EDUC. NETWORK, TIME TO MOVE ON: AFRICAN AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS 26-27 (1998) (finding that only twenty-two percent of white parents support busing for racial integration).

166. *But see Milliken*, 418 U.S. at 735 (distinguishing between *de jure* and *de facto* segregation and finding that only the former permitted remedial school busing legislation); Ryan, *supra* note 2, at 140 (suggesting this distinction came too late because whites had already fled to the suburbs and left the inner-city schools to the children of color, making integration virtually impossible in any event). The Court's distinction in *Milliken* between *de jure* and *de facto* segregation is central to the Court's opinion in *Parents Involved*. Still, consistent with *Brown*, the Court continues to believe in integration, albeit under the rhetoric of “diversity.” *Parents Involved*, 551 U.S. at 720-22 (recognizing “diversity” as a “compelling interest” for purposes of applying strict scrutiny standard of review).

racially identifiable and unequal schools send a message of the validity of the race myth, but children who are separated from each other are less likely, and perhaps unable, to learn that they are racially equal.<sup>167</sup> Without integrated schools, they are less likely to learn the necessary skills they need to develop healthy race relations built on respect for each other's human dignity.<sup>168</sup> Stated alternatively, public spaces must be inhabited by people of all races in order for the civic and social lessons to be learned that are necessary in a democratic society to attain and sustain racial equality.<sup>169</sup> Integration is critical to the achievement of this goal and this explains why the Court sanctioned it, albeit in limited forms, in the context of higher education even before *Brown* in cases like *Gaines*, *Sweatt*, and *McLaurin*.<sup>170</sup> Those early cases, when read in the context of the modern cases in which the Court sanctions "diversity," help to elucidate why integration continues to be imperative.

### *B. The Shift from Equality to Diversity in Education*

Imagine a young person of color who attended grammar and high school during *de jure* segregation or shortly thereafter and who wanted to attend medical school in the United States. Given the reality that K-12 segregated schools were terribly unequal with respect to their resources,<sup>171</sup> it would have been unrealistic to expect applicants of color to be as academically competitive *on paper* as white applicants. A young person of color applying to medical school in the early 1970s simply was unlikely to have the equivalent educational background as most of the white applicants. This did not mean, of course, that applicants of color (or even whites) who did not have an equal educational background compared to other applicants would have been unqualified to be admitted to medical school. Rather, the admission of qualified applicants of color to the historically white medical schools would reflect white society's commitment to *Brown*'s core message: integration of schools—even at the college level—protects students' dignity and equality. This commitment, however, would be couched, not in terms of wanting an

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167. See Liu, *supra* note 7, at 282-83 ("The importance of racially integrated public schools to promoting tolerance and mutual respect in our multiracial society requires little elaboration given the Court's own pronouncements on the issue. Across many contexts, the Court has made clear that irrational prejudice, animus, and stereotypes distort the proper functioning of our democracy.") (footnote omitted).

168. See *id.* at 284 (arguing that individuals who attend diverse schools at a young age are more likely to attend more diverse colleges and universities, to inhabit more diverse neighborhoods, to seek employment at more diverse institutions, and to maintain diverse groups of friends at a later age).

169. *Id.* at 282-83.

170. *McLaurin*, 339 U.S. at 641 (holding the practice of segregating an African-American student from the rest of the law school student body serves to "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession"); *Sweatt*, 339 U.S. at 635 ("The State must provide legal education for the [African-American] petitioner in conformity with the Equal Protection Clause of the Fourteenth Amendment and provide it at soon as it does for applicants of any other group." (quoting *Sipuel v. Bd. of Regents*, 332 U.S. 631, 633 (1948))); *Gaines*, 305 U.S. at 351 (holding that Missouri was bound to furnish to African-Americans facilities for legal education "substantially equal to those which the State there afforded for persons of the white race").

171. See Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1470 (2003) (referring to statistics from 1972 that show that on average, white children received fifteen to twenty percent more in education funding than black children).

integrated class, but rather in terms of wanting a diverse class.

### 1. *Bakke* and Diversity

The University of California at Davis Medical School (“Davis”), a public university, took a leadership role in trying to promote racial equality by integrating its medical school.<sup>172</sup> In the early 1970s, pursuant to faculty policy, the school decided to do its best to ensure that at least sixteen self-identified racially and/or economically disadvantaged applicants were accepted into its class of 100 students.<sup>173</sup> The school asserted several reasons for its policy, two of which are central to this Article, to increase the enrollment of disadvantaged students to remedy past societal discrimination and to provide a diverse educational experience for all of its students in the class.<sup>174</sup>

Alan Bakke, a white male applicant who did not categorize himself as “disadvantaged,” was rejected admission by Davis two years in a row.<sup>175</sup> In each year his credentials on paper outmatched those of other applicants who were admitted, including those self-identified as “disadvantaged.”<sup>176</sup> Bakke alleged that Davis’ admissions policy violated his equal protection rights and discriminated against him on the basis of race.<sup>177</sup> He filed suit in California state court and won at the trial and appellate levels.<sup>178</sup> The Supreme Court decided to hear his case and upheld the decisions of the California courts.<sup>179</sup>

The first reason in support of the school’s policy—to remedy past societal discrimination—was insufficient to make the policy constitutional. The Court held that this rationale could not withstand constitutional scrutiny because the school’s policy was not implemented by the state for the purpose of correcting specific legal wrongs.<sup>180</sup> This was quite significant because, as noted, the applicants to Davis were the first generation after *Brown* that even had a chance to attend desegregated schools in preparation for higher education.<sup>181</sup> As it was, their elementary and high schools likely were segregated and had far fewer resources compared to the public schools attended by most whites because not enough time had elapsed for the black schools to catch up to the white ones between *Brown* and the first post-*Brown* generation’s applications to Davis.<sup>182</sup> Whatever discrimination those applicants

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172. *Bakke*, 438 U.S. at 273 n.1.

173. *Id.* at 274-75.

174. *Id.* at 305-06. The two other reasons for the school’s admissions policy were that it wanted to provide role models to younger generations and to increase the chances that the applicants would return to their communities and provide much needed medical care. *Id.*

175. *Id.* at 276-77.

176. *Id.* at 277 n.7.

177. *Bakke*, 438 U.S. at 277-78.

178. *Id.* at 279-80.

179. *Id.* at 271. The Supreme Court affirmed the judgments, holding the special admissions program unlawful and directing Davis to admit Mr. Bakke, though the Court reversed the California courts’ judgment enjoining Davis from considering race during the admissions process. *Id.* at 271-72.

180. *Id.* at 305 (“[T]here has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts.”).

181. *Id.* at 371-72 (Brennan, J., concurring in part and dissenting in part).

182. *See Bakke*, 438 U.S. at 372 (“[T]he conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official

suffered during their school years was not “past” discrimination: it shaped their lives. Moreover, to think the schools would ever become economically equal required the assumption that white society was trying to achieve racial equality, but the opposite was true: parts of the country resisted *Brown* with a vengeance.<sup>183</sup> Recall that in *Rodriguez*, the Court constitutionalized the disconnect between economic and racial equality in education.<sup>184</sup> If ever there was a time when implementation of an affirmative action policy could have been traced to the need to remedy past discrimination, it was *Bakke*.

Simultaneously, and in complete contradiction to *Bakke*’s reasoning, the Court continued to uphold *Brown*’s mandate and held fast to the need to integrate public schools.<sup>185</sup> In fact, as late as 1992, fourteen years after *Bakke*, *United States v. Fordice*<sup>186</sup> concluded that the need to integrate public schools to eliminate the effects of *de jure* segregation applied to public universities.<sup>187</sup> In *Fordice*, Mississippi’s public universities remained racially identifiable long after *Brown* ended *de jure* segregation.<sup>188</sup> Moreover, Mississippi’s public universities had admissions policies that were racially neutral and offered potential applicants a “freedom of choice.”<sup>189</sup> There was a catch, however. Racially identifiable schools had different admissions standards.<sup>190</sup> Admissions standards were much higher at the historically white colleges.<sup>191</sup> This concerned the Court because in the early 1960s, the University *intentionally* adopted a policy that required higher standardized test scores at the white universities for purpose of ensuring that few, if any, blacks would qualify.<sup>192</sup> The Court traced the current admissions policies back to those set with a discriminatory purpose, even as it said there was no discriminatory purpose in the current policies:

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of [the Constitution], even though the State has abolished the legal requirement that whites and blacks be educated separately and has

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discrimination and yet come to the starting line with an education equal to whites.” (citation omitted) (Brennan, J., concurring in part and dissenting in part).

183. See, e.g., *Green*, 391 U.S. at 432-33 (reviewing a racially segregated school system maintained after *Brown*).

184. *Rodriguez*, 411 U.S. at 23-24.

185. See *id.* at 30 (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” (quoting *Brown*, 347 U.S. at 493)).

186. 505 U.S. 717 (1992).

187. *Id.* at 727.

188. *Id.* at 736.

189. *Id.* at 727.

190. *Id.* at 734-35.

191. *Id.*

192. *Fordice*, 505 U.S. at 733-34.

established racially neutral policies not animated by a discriminatory purpose.<sup>193</sup>

Once stripped of its mixed-signals, the Court's reasoning is quite telling about the importance of integration in educational equality and also racial equality. In the 1960s, of course, shortly after *Brown*, it was not surprising that people of color would score lower than whites on standardized tests. This was the essence of Bakke's complaint; he scored much higher on the MCAT than did the "disadvantaged" applicants.<sup>194</sup> In any event, it would be blatantly unconstitutional to set admissions standards for the purpose of excluding racial minorities.<sup>195</sup> But notice that *Fordice* explicitly clarifies that Mississippi's policies were not motivated by a discriminatory purpose.<sup>196</sup> Rather, the Court addressed the "segregative effects" of the different admissions standards.<sup>197</sup> In other words, Mississippi's "racially neutral" policies that nevertheless maintained racially identifiable schools—forty years after *Brown*—were still constitutionally suspect.<sup>198</sup> But *Fordice* also had to get around the "disparate impact" cases in which the Court established the principle that disparate impact, without intent, is insufficient to support a claim of race discrimination.<sup>199</sup>

*Fordice*, for all of its mixed signals, is remarkably true to *Brown*'s message about the importance of integration, explicitly applying *Brown* to public colleges and universities.<sup>200</sup> Moreover, *Fordice* acknowledged that present admissions standards in Mississippi higher education were not only "traceable to the *de jure* system and were originally adopted for a discriminatory purpose, [but also had] present discriminatory effects," causing universities to remain racially identifiable.<sup>201</sup> The Court held that Mississippi needed to comply with *Brown* and eliminate its dual system of segregated colleges and universities without actually saying that the school officials intended the racially discriminatory results—even if school officials should have recognized that some actions of the State continued to foster segregation.<sup>202</sup> By tracing the school officials' decisions back to the time of

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193. *Id.* at 731-32 (footnote omitted).

194. *Bakke*, 438 U.S. at 277.

195. *See id.* at 289 (finding that universities cannot establish admissions limitations based upon race and ethnicity).

196. *Fordice*, 505 U.S. at 735.

197. *Id.* at 734-35.

198. *Id.* The claim against Mississippi was based on the Equal Protection Clause and Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000d-2000d-7 (1964). *Id.* at 724.

199. *See* *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."); *Keyes*, 413 at 209-10 (holding that while racial imbalance is not itself unconstitutional, there is a presumption that a present racial imbalance is the result of intentional state action in an area previously *de jure* segregated).

200. *See Davis*, 426 U.S. at 240 ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

201. *Fordice*, 505 U.S. at 734-37 (cataloguing the disparate effects on African American applicants by relying solely on ACT scores).

202. *Id.* at 729 ("The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination' . . . . If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939))).

*de jure* segregation, which was logical and reflected the reality that schools remain racially identifiable and unequal because of *de jure* segregation, the Court supported *Brown*, while repeatedly affirming a disparate impact theory.<sup>203</sup>

Some of the dissonance between *Bakke* and *Fordice* is cushioned by *Bakke*'s acceptance of Davis' other relevant justification for its admissions policy: to admit a diverse class.<sup>204</sup> Although the Court struck down as unconstitutional the set-aside policy, it was constitutionally sympathetic to Davis' mission to admit more students of color because they added "diversity" to the classroom and college community.<sup>205</sup>

A state college or university's interest in admitting a diverse class, particularly a racially diverse class, illustrates the richness of the concept of integration. First, racial diversity cannot exist unless there is a physical presence of students of different races in the class.<sup>206</sup> Simultaneously, because diversity adds a benefit to *all* students in the class, this means that the physical presence of racially diverse students alone is not sufficient to meet the school's goal. Rather, the racially diverse students must contribute to each other's education. Justice Powell opined 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>207</sup> Inherent in diversity is the understanding that beneficial lessons have to come from students themselves.<sup>208</sup> Students' racial identities, experiences, opinions, and views inform and enrich other students in ways that a non-racially diverse class cannot. In this way, a racially diverse class is an integrated class because both physical and dignity integration are valued.

Ironically, admissions policies have traditionally looked to admit diverse classes because schools are communities. Some students will be interested in the humanities, others in the sciences. Some will play sports and others will play music or participate in drama. If a school wants to have a debate team, or a choir, or a volunteer club, it has to admit students who are interested in assuming those leadership roles. College communities need their students to be diverse in order for those very communities to exist and thrive. Because every student in the community has a unique personality, interests, talents, opinions, and experiences, as a matter of human nature, every class is diverse.

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203. *See, e.g., id.* at 741 ("We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal protection issue where one or more of the institutions become or remain predominately black or white. But here the issue is whether the State has sufficiently dismantled its prior dual system . . . [or whether it] interfere[s] with student choice and tend[s] to perpetuate the segregated system."); *id.* at 742-43 ("Because the former *de jure* segregated system of public universities in Mississippi impeded the free choice of prospective students, the State in dismantling that system must take the necessary steps to ensure that this choice now is truly free.").

204. *Bakke*, 438 U.S. at 311-12 (The attainment of a diverse student body is clearly "a constitutionally permissible goal for an institution of higher education.").

205. *Id.* at 312 ("[T]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.").

206. *Id.* at 401-02 ("If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors" to positions of influence, affluence, and prestige.).

207. *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

208. *Id.* at 312.

## 2. *Bakke*: What Happened to Equality?

Notwithstanding this reality, the concept of diversity in education is highly controversial. Much of the controversy stems from the idea that diversity is broadly defined and that *Bakke*'s definition of diversity included racial diversity.<sup>209</sup> This is worth emphasizing: diversity is controversial because it includes racial diversity. Amazingly, including racial diversity within the broader concept was controversial from the get-go, *even though* admitting a racially diverse class at the time of *Bakke* was simply a statement by school officials that they needed, at a minimum, to physically integrate their classes.<sup>210</sup> After all, busing was inappropriate at the college level even though this remedy was mandated all around the country for public schools K-12 as a means to comply with *Brown* and achieve racial equality.<sup>211</sup>

Somehow the link between equality and integration became all but untethered in *Bakke* as the rhetoric focused on "diversity."<sup>212</sup> Consequently, *Bakke* took a much narrower approach than perhaps was necessary, focusing not on the concrete goals of integration and racial equality, but on the ambiguous concept of "diversity." Perhaps this helps explain why Justice Powell, who supported the diversity rationale, highlighted that it is a broad concept.<sup>213</sup> As long as diversity is broadly defined, it is less threatening to the racial groups in power because they too can add diversity to a class. To emphasize his point, Justice Powell said that students who herald from different geographical regions can add diversity to a class.<sup>214</sup> From this perspective, each of the 100 students in Davis' class could have come from a different state or country and the class would have been diverse. But if the students had all been from one racial group (white), the class would not have been integrated. Although he watered down his opinion, Justice Powell seemed to understand that college officials must be allowed to consider the race of an

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209. *Id.* at 317 (Much of this controversy stems from the fact that the *Bakke* court broadly defined diversity, stating that "*race* or *ethnic background* may be deemed a 'plus' in a particular applicant's file.") (emphasis added).

210. *Bakke*, 438 U.S. at 272.

211. *Swann*, 402 U.S. at 29-30 (discussing the importance of busing students as an effective means of dismantling a dual system of education).

212. *Bakke*, 438 U.S. at 314 ("Ethnic diversity . . . is only one element in a range of factors . . ."); see also Annalisa Jabaily, *Color Me Blind: Deference, Discretion, and Voice in Higher Education After Grutter*, 17 CORNELL J.L. & PUB. POL'Y 515, 527 (2008) (arguing that when *Bakke* "translated racial categories into a diverse standard it introduced colorblindness into a purportedly race-conscious program").

213. *Bakke*, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."); see also Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 964 (2004) (Justice Powell's view was narrow, for he valued "racial and ethnic diversity only to the degree that it brought about a diversity of 'experiences, outlooks, and ideas.'" (quoting *Bakke*, 438 U.S. at 314)).

214. *Bakke*, 438 U.S. at 314 ("An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—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.").

applicant as one aspect of the diversity mosaic.<sup>215</sup> Race cannot be the decisive factor, but it may be a “plus” factor.<sup>216</sup>

It is worth emphasizing that Justice Powell watered down the independent significance of racial diversity—an effective and efficient way to physically integrate public colleges to promote racial equality—at a time when compliance with *Brown* was strongly resisted around the country.<sup>217</sup> If white society resisted measures to promote racial equality at the time of *Brown* and shortly thereafter, it is not surprising that support for measures like affirmative action was weak from its inception.<sup>218</sup> What is startling, however, is the Court’s recent sanctioning of Justice Powell’s diversity rationale in *Grutter v. Bollinger*.<sup>219</sup> *Grutter*’s reasoning parallels the suggestions in this Article that integration requires a physical presence of different races within a school, and it also requires that all students’ racial identities be treated with dignity.<sup>220</sup>

### 3. *Grutter*: Diversity, Integration and Hints of Equality

In 2003, *Grutter* explicitly affirmed Justice Powell’s rationale in *Bakke* and held that seeking to achieve a diverse class is a compelling state interest and, thus, public colleges and universities may take race into account in their admissions decisions.<sup>221</sup> The case arose in the context of a white applicant who was denied admission to the University of Michigan Law School (Michigan) and challenged Michigan’s use of race in the admissions process.<sup>222</sup> *Grutter* carefully explained that the use of race to achieve diversity can only be done in the process of a holistic review of each applicant’s file.<sup>223</sup> Like Justice Powell, the *Grutter* majority emphasized that diversity is a broad concept and the many ways in which an applicant may contribute to a school’s diversity.<sup>224</sup> On these points, *Grutter* adopted Justice Powell’s opinion in *Bakke* and thereby turned his watered down version of racial equality into established law.

Notwithstanding the similarities, however, the majority opinion in *Grutter* is

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215. *Id.* at 317 (The file of an applicant can be “examined for his contribution to potential diversity without the factor of race being decisive.”).

216. *Id.*

217. *See, e.g., Cooper*, 358 U.S. at 26 (acknowledging the existence of public hostility toward school desegregation post-*Brown*).

218. *Bakke*, 438 U.S. at 307 (“We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”).

219. 539 U.S. at 325.

220. *Id.* at 330. The University of Michigan Law School’s admissions policy promotes “cross-racial understanding,” helping to break down racial stereotypes and enabling a better understanding among students of persons of different races. Said benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.” *Id.*

221. *Id.* at 325.

222. *Id.* at 316.

223. *Id.* at 334 (“[A]n admissions program must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’” (quoting *Bakke*, 438 U.S. at 317)).

224. *Grutter*, 539 U.S. at 337-38.



remarkably and significantly different from Justice Powell's in at least two ways. First, it is sensitive to the dual nature of integration.<sup>225</sup> With respect to physical integration, the Court accepted that it is constitutionally permissible for states to admit a "critical mass" of racial minority students.<sup>226</sup> The concept of "critical mass" is not about numbers or percentages,<sup>227</sup> although there has to be more than a "token" representation of a particular racial group.<sup>228</sup> A "critical mass" of racial minority students is related to the concept of dignity integration.<sup>229</sup> The Court noted, "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."<sup>230</sup> The presence of a critical mass of racial minority students breaks down stereotypes.<sup>231</sup>

As this Article posits, the most important racial stereotype to debunk is the race myth. To do so, students must develop interracial relationships that expose the systemic power imbalance inherent in the myth. Naturally, there is no guarantee that integrated schools will improve race relations. But it is also true that race relations continue to be strained in society and that developing deeper understandings of race and its complexities could only help to improve them. Because children spend significant amounts of time in school, it is logical to focus the effort there. Certainly, to continue to sanction the resegregation of unequal schools merely reinforces the myth and further entrenches it.

This is not to say that all members of a racial group think alike, of course, as the Court acknowledges.<sup>232</sup> To mandate the presence of certain groups in a student body is to stereotype them based on race or other characteristics, and the Supreme Court rightfully eschews these stereotypes.<sup>233</sup> *Grutter* itself noted that one reason the University of Michigan Law School wanted to admit a critical mass of minority students was to ensure the presence of enough minority students to debunk any stereotypes that might attach to them.<sup>234</sup>

Thus, *Grutter* emphasized that the physical presence of racial minority students was not the primary reason for its support of the diversity rationale.<sup>235</sup> Rather, the Court repeatedly explained that it is the racial minority and racial

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225. *Id.* at 329-33 (recognizing the importance of a "critical mass"); *id.* at 319 (acknowledging the value of minority voice representation).

226. *Id.* at 322-23 ("[A] 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.'" (quoting *Bakke*, 438 U.S. at 320)).

227. *Id.* at 319.

228. *Id.* at 333.

229. *See Grutter* 539 U.S. at 329 (finding a diverse student body is at the heart of the university's institutional mission); *id.* at 333 (noting that a critical mass of minorities is necessary to secure the educational benefits of a diverse student body).

230. *Id.* at 333.

231. *Id.* at 330.

232. *Id.* at 333.

233. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 541-42 (1996) ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.") (citation omitted).

234. *Grutter*, 539 U.S. at 333.

235. *Id.* at 329.

majority students interacting with each other that goes to the heart of the matter.<sup>236</sup> Through their “robust exchange of ideas,”<sup>237</sup> they can learn from each other how to mediate the color line and gain “cross-racial understanding.”<sup>238</sup> It encourages, perhaps even forces, some people to cross the color line. The Court noted that given the “increasingly diverse workforce and society,”<sup>239</sup> the Law School, and institutions of higher education more generally, have a compelling interest in preparing students, particularly as professionals, to work successfully in their multi-racial environments.<sup>240</sup> To have students of different races interacting with each other, particularly in respectful ways, is the essence of an integrated class. Students in an integrated class teach each other what human and racial equality mean. They become better citizens and, according to *Brown*, fulfill one of the major purposes of education.<sup>241</sup>

Closely related to this goal, the second way in which *Grutter* differs from Justice Powell’s *Bakke* opinion is especially important. The Court bolstered its sanctioning of diversity by addressing the importance of the all-but-forgotten issue of racial equality<sup>242</sup>—an issue that is related to, but different from, diversity—in the context of education, the Court explicitly said the following:

[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity . . . . 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>243</sup>

This language supports the Court’s reasoning behind constitutionalizing the diversity rationale, but behind the need to do this is the compelling requirement that our society achieve racial equality. Moreover, *Grutter* supports this by referring to and relying on the principles of *Sweatt*<sup>244</sup> and *Brown*,<sup>245</sup> cases premised on dignity integration.

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236. *Id.* at 330.

237. *Id.* at 329.

238. *Id.* at 330.

239. *Id.*

240. *Grutter*, 539 U.S. at 330.

241. *Id.* at 331.

242. *See id.* at 331-32 (“[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”).

243. *Id.* at 331-33.

244. *See id.* at 331 (“This Court has long recognized that ‘education . . . is the very foundation of good citizenship.’” (quoting *Brown*, 347 U.S. at 493)).

245. *See id.* at 332 (“[L]aw schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’” (quoting *Sweatt*, 339 U.S. at 634)).

Unfortunately, and detracting from the goal, *Grutter* does not stand for the proposition that state colleges and universities must administer race-conscious admissions procedures; it simply means they can elect that option as long as each applicant's file is individually reviewed and an applicant's race is only one factor among many other criteria used in the evaluation process.<sup>246</sup> Consistent with *Grutter*, other states require race-blind admissions procedures.<sup>247</sup>

Interestingly, even states that adhere to race-blind admissions express strong support for racial diversity and try to achieve it in myriad other ways.<sup>248</sup> They may expend significant resources recruiting at high schools attended predominantly by racial minorities.<sup>249</sup> They express in the media how much they value racial diversity and use pictures in their brochures of racial minorities who are already enrolled to lure potential students to campus who also value racial diversity.<sup>250</sup> Significantly, this might mean that more white students apply to and choose to attend a particular school, because a school that lacks racial diversity can be unattractive to equality-minded people of all races.<sup>251</sup> School officials know this and readily spend financial and personnel resources to try to attract racially diverse students.<sup>252</sup>

Because states are free under *Grutter* to use race-conscious or race-blind admissions processes, they can experiment and decide which alternative best helps them achieve their goal of admitting a diverse class, particularly a racially diverse class. Texas, ironically, adopted a race-blind process following a lawsuit that challenged the use of race in admissions at the University of Texas in 2000, well before *Grutter*.<sup>253</sup> *Hopwood v. Texas*<sup>254</sup> further analyzed the diversity rationale when the Fifth Circuit Court of Appeals struck down Texas' race-conscious admissions policy.<sup>255</sup>

In 2003, however, the University of Texas Board of Regents passed a resolution giving university officials permission to consider race in their

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246. *Grutter*, 539 U.S. at 334.

247. Michelle Locke, *Race-Blind Admissions Turn 10: As Campus Notes Decade of Race-Blind Admissions, Affirmative Action Foe Targets Five More States*, GRAND RAPIDS PRESS, May 13, 2007, at A10 (noting that Michigan, Florida, and Texas have revised their policies in order to implement race-blind admissions).

248. See, e.g., Jacques Steinberg, *Colleges Marketing Easy Sell to Applicants: No Fee and No Essay*, N.Y. TIMES, Jan 26, 2010, at A1 (highlighting the trend in colleges toward hiring professionals to implement marketing campaigns in order to increase diversity in applicant pool).

249. See, e.g., Maurice Dyson, *In Search of the Talented Tenth: Diversity, Affirmative Access, and University-Driven Reform*, 6 HARV. LATINO L. REV. 41, 72 (2003) (noting that Texas and Florida have aimed their recruitment efforts at non-traditional feeder schools in predominantly minority areas).

250. See, e.g., Lisa Lapin, *Stanford Woos Minority Students*, SAN JOSE MERCURY NEWS, Feb. 22, 1987, at 1B (stating that Stanford designs brochures to look more friendly by filling them "with pictures of smiling Hispanic, black and American Indian students").

251. Steinberg, *supra* note 248, at A1 (describing how the College of Saint Rose's diversity marketing campaign increased enrollment of Asian, Hispanic, African American students from seven percent to eighteen percent, and coincided with an total increase in applications).

252. *Id.*

253. See, e.g., Ron Nissimov, *Hopwood Decision Stands; Colleges in State Can't Use Race in Admissions Decisions*, HOUS. CHRON., Dec. 22, 2000, at A37 ("In its 1996 *Hopwood* decision, the 5th Circuit effectively stopped all Texas colleges and universities from using race as an admissions factor").

254. 236 F.3d 256 (5th Cir. 2000).

255. *Id.* at 275.

admissions processes as long as their policies complied with *Grutter*.<sup>256</sup> The University of Texas conducted a comprehensive study of its admissions process and issued a report in 2004 detailing why it was returning to a race-conscious policy.<sup>257</sup> Briefly, the University found that its race-neutral policy had failed to enable it to admit a “critical mass of minority students sufficient to provide an optimal educational experience in 1996 (the pre-*Hopwood* period), and after seven years of good faith race-neutral admissions policies, the University still has not reached a critical mass at the classroom level.”<sup>258</sup> The report highlighted that a non-diverse classroom prevented the University from fulfilling its mission of producing tomorrow’s leaders.<sup>259</sup> Recently, a district court upheld the new policy because it complied with *Grutter*.<sup>260</sup>

The decision by the University of Texas to return to a race-conscious admissions policy highlights the importance of racial diversity in education. Admittedly, the concept of diversity can be so broadly defined that it becomes meaningless. Significantly, though, it is worth remembering that the concept itself arose in the context of racial diversity in education at a time when racial equality was a primary national goal.<sup>261</sup> “Diversity” in education, by definition, is about inclusion, or in the parlance of *Brown* and the busing cases, it is about integration and achieving racial equality.<sup>262</sup> Although it is possible for a space to be desegregated but not integrated, it is impossible for a space to be diverse and not integrated—as diversity was originally understood. It would fly in the face of *Brown* and *Grutter* to accept a definition of diversity that lacked the critical aspect of racial diversity. No matter what other factors might go into the diversity pot, it seems axiomatic with respect to equality principles that race cannot and should not come out of it. Presumably, as long as a diverse education is important, then equality-minded people will ensure that racial diversity continues to be an essential variable in the diversity equation. Moreover, racial diversity is a quality that most public colleges and universities aspire to achieve in their communities.<sup>263</sup>

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256. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 593 (W.D. Tex. 2009); University of Texas, Office of Admissions, *Addition of Race and Ethnicity to Admission Criteria* (Dec. 2003) <http://www.utexas.edu/student/admissions/about/notices.html> (last visited Sept. 27, 2010).

257. *Proposal to Consider Race and Ethnicity in Admissions*, UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS (June 25, 2004), [http://www.utexas.edu/student/admissions/about/admission\\_proposal.pdf](http://www.utexas.edu/student/admissions/about/admission_proposal.pdf).

258. *Id.* at 24.

259. *Id.* at 24-25; *Fisher*, 645 F. Supp. 2d 587, 602 (“In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow. For the University to adequately prepare future leaders, it must include a critical mass of students from traditionally underrepresented backgrounds.”).

260. *Fisher*, 645 F. Supp. 2d at 609. The plaintiffs have appealed to the Fifth Circuit, which heard arguments on August 3, 2010. A decision is not expected for several months. Associated Press, *Appeals Court Hears Case Over UT Admissions*, CBS 11 (Aug. 3, 2010, 2:02 PM), <http://cbs11tv.com/education/University.of.Texas.2.1840464.html>.

261. *See, e.g.*, Janet Cooper Alexander, *TM*, 44 STAN. L. REV. 1231, 1232 (1992) (“Thurgood Marshall applied his formidable talents to the central constitutional, political, and moral issue of our history: the struggle for racial equality and justice, and against racial discrimination and segregation.”).

262. *See Brown*, 347 U.S. at 495 (“Separate educational facilities are inherently unequal . . . . We have now announced that such segregation is a denial of the equal protection of the laws.”).

263. *See, e.g.*, Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2394-95 (2000) (“[T]o the extent that legality is a factor, *Bakke*, which has not been explicitly overruled, endorsed the limited use of racial preferences. Public universities have

### C. *The Shift Away from Diversity in K-12*

Most people interested in achieving racial equality in education are beginning to understand and work within the parameters of *Grutter*. The situation at the University of Texas is illustrative. Building on this momentum, *Parents Involved* examined the relevance of diversity in K-12 public schools and had an opportunity to clarify and build on *Brown*'s deepest meaning—that racial equality requires dignity integration.<sup>264</sup> Unfortunately, Chief Justice Roberts's plurality opinion in *Parents Involved* reflects an ongoing confusion about the meaning and importance of integration in public schools. His opinion shies away from *Grutter* and reverts to an understanding of integration that focuses only on having students of different races physically sharing the same space and minimizes the importance of even this concept in the quest for racial equality.<sup>265</sup> The responsibility for this reversion lies not just with the Court but also with the school officials who failed to articulate pedagogical reasons for their "voluntary integration" plans intended to promote diversity in their schools.<sup>266</sup>

#### 1. *Parents Involved*

##### a. The States' Interests

In *Parents Involved*, the Court struck down two school districts' voluntary plans to achieve "racial balance" in their K-12 student populations.<sup>267</sup> Seattle's plan involved a detailed selection procedure for student assignment.<sup>268</sup> If too many students chose the same school, the plan provided that the first tiebreaker would be sibling enrollment, and the second tiebreaker would be the student's race.<sup>269</sup> In those situations where race became relevant, a student would be admitted or denied depending on whether the decision met the school's goals to achieve "racial balance," which officials defined by the racial demographics of the area.<sup>270</sup> Similarly, Jefferson County public schools in Louisville, Kentucky, tried to achieve

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relied in good faith on this precedent and, in particular, on the diversity rationale endorsed by Justice Powell's opinion.") (footnotes omitted).

264. *See Parents Involved*, 551 U.S. at 746 (Roberts, C.J., majority opinion) ("In [*Brown*] we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.") (citation omitted).

265. *See id.* at 734 (Roberts, C.J., majority opinion) ("While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications.").

266. *Id.* at 827 (Stevens, J., dissenting).

267. *Id.* at 748 (Roberts, C.J. plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

268. *Id.* at 711-12 (Roberts, C.J., majority opinion).

269. *Id.* Specifically, "[i]f an oversubscribed school [was] not within 10 percentage points of the district's overall white/nonwhite racial balance, it [was] what the district call[ed] 'integration positive,' and the district employ[ed] a tiebreaker that select[ed] for assignment students whose race . . . serve[d] to bring the school into balance.'" *Parents Involved*, 551 U.S. at 712 (Roberts, C.J., majority opinion).

270. *Id.* at 712 (Roberts, C.J., majority opinion).

“racial balance” in their non-magnet schools by adopting guidelines that allowed officials to consider the race of students in their school assignments. Louisville defined “racial balance” as maintaining “a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.”<sup>271</sup> Parents of two students, one from Seattle and the other from Jefferson County, who were denied admission to their top-choice school because of race, challenged the constitutionality of the voluntary plans under equal protection.<sup>272</sup>

Seattle asserted that its plan was designed “to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools.”<sup>273</sup> Jefferson County asserted that it wanted its students to reap the intangible socialization benefits that attach to attending racially integrated school.<sup>274</sup> Both districts asserted the general interest in having racially diverse schools and relied on *Grutter* to support the constitutionality of their plans.<sup>275</sup>

## b. The Court’s Reasoning

### i. A Brief Synopsis of *Parents Involved*

The Court ruled that the plans were unconstitutional because they were not narrowly tailored and, therefore, failed to pass strict scrutiny.<sup>276</sup> Chief Justice Roberts, in a part of his opinion that commanded only a plurality of votes, suggested that a school district’s interest in using race to assign public students to schools in grades K-12 is not compelling.<sup>277</sup> The plurality opinion mentioned that

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271. *Id.* at 716 (Roberts, C.J., majority opinion).

272. *Id.* at 714, 717 (Roberts, C.J., majority opinion).

273. *Id.* at 725 (Roberts, C.J., plurality opinion).

274. *Id.*

275. *Parents Involved*, 551 U.S. at 725-26 (Roberts, C.J., plurality opinion); see Brief for Petitioner-Appellant, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908), 2006 WL 3381292, at \*7, \*8, \*12 (arguing that the Seattle school district’s plan violates *Grutter* because school enrollment is diverse without racial preference, racial balance cannot be a compelling government interest, and the district’s race preference is not narrowly tailored). *But see* Brief for Respondent-Appellee, *Parents Involved in Cmty. Schs. v. Seattle Sch. No. 1*, 551 U.S. 701 (2007) (No. 05-915), 2006 WL 2944684, at \*15 (arguing that Jefferson County’s plan satisfies *Grutter* when modified for the elementary and secondary school context because its flexibility and limited use of race, among other factors, are narrowly tailored to the compelling government interest of a competitive educational system).

276. *Parents Involved*, 551 U.S. at 735 (Roberts, C.J., majority opinion).

277. *Id.* at 729-32 (Roberts, C.J., plurality opinion). The majority addresses the states’ asserted interests in achieving diversity, but distinguishes the use of diversity in higher education from its use in K-12 schools. *Id.* at 722-25 (Roberts, C.J., majority opinion). The principal difference, according to the Court, is that diversity was held to be a compelling state interest in *Grutter* because applicants could be given individualized evaluation of their entire record as part of the admissions process. *Id.* In K-12 education, there is no admissions process that would enable such individualized review. *Id.* Instead, a student’s race, when it was relevant in *Parents Involved*, became determinative. *Id.* at 723 (Roberts, C.J., majority opinion). Importantly, however, Justice Kennedy and the four dissenters considered diversity at the K-12 level is a compelling state interest. *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 865 (Breyer, J., dissenting). Justice Breyer’s opinion is worth emphasizing on this point. He opined, “[j]ust as diversity in higher education was deemed compelling in *Grutter*, diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori*, a compelling state interest.” *Id.* at 865 (Breyer, J., dissenting).

the Court has previously found only two interests that satisfy strict scrutiny in the area of racial equality—remediating past discrimination and achieving diversity in higher education—neither of which was involved in this case.<sup>278</sup> Justice Thomas concurred separately on this point, calling attempts to integrate the schools part of a “faddish social theor[y].”<sup>279</sup> Justice Kennedy joined the opinion but concurred separately to state that he believed that race can be considered in some circumstances, like deciding where to build new schools, for the purpose of achieving integration.<sup>280</sup> The four dissenters, Justices Breyer, Ginsburg, Stevens, and Souter, would have upheld the plans and believed strongly that prior cases, particularly *Brown*, supported the constitutionality of factoring race into student assignment plans.<sup>281</sup> Behind this description of the justices’ views about the use of race in school assignments are many pages of contentious debate among them about the true meaning or continuing vitality of *Brown*.<sup>282</sup>

#### ii. A Clear Message: Rejecting the “Black/White” Paradigm

In light of the goal to achieve racial equality, *Parents Involved* did move one step forward. Specifically, the Court questioned the legitimacy of both districts’ plans because their racial classifications were binary.<sup>283</sup> Seattle categorized students as either white or nonwhite,<sup>284</sup> and Louisville categorized them as black or “other.”<sup>285</sup> The Court, quite understandably, was puzzled by this narrow conception of race. It pointed out that some schools had significant percentages of whites, Asians, and Latinos but they were not considered racially diverse.<sup>286</sup> Even if one takes the position that discrimination against blacks is an especially acute problem because of the history of slavery, one must still admit that racial diversity is far more complex than a binary conception allows. To achieve racial equality for everyone, modern plans must factor in the complexities inherent in racial identities

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278. *Id.* at 720-22 (Roberts, C.J., majority opinion).

279. *Id.* at 780 (Thomas, J., concurring).

280. *Id.* at 788-89 (Kennedy, J., concurring in part and concurring in the judgment).

281. *Parents Involved*, 551 U.S. at 864 (Breyer, J., dissenting).

282. *See id.* at 746-48 (Roberts, C.J., plurality opinion) (“What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?”); *see id.* at 798-803 (Stevens, J., dissenting) (“[The 1968 Supreme Court] was more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”); *see also id.* at 842-43 (Breyer, J., dissenting) (“[I]t was *Brown*, after all, focusing upon primary and secondary schools, not *Sweatt v. Painter*, focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed.*, focusing on graduate schools, that affected so deeply not only Americans but the world.”) (citations omitted).

283. *Id.* at 723, 735 (Roberts, C.J., majority opinion). Professor Liu agrees that considering race in binary terms “is not a trivial concern.” Liu, *supra* note 7, at 287. However, Professor Liu also notes that “[t]he largest component of racial segregation in large central-city school districts is white/nonwhite segregation, and Seattle is no exception.” *Id.* (footnote omitted). In the context of Seattle, the white/nonwhite distinction therefore made sense.

284. *Parents Involved*, 551 U.S. at 723 (Roberts, C.J., majority opinion).

285. *Id.*

286. *Id.* at 724 (Roberts, C.J., majority opinion) (“But under the Seattle plan, a school with fifty percent Asian-American students and fifty percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with thirty percent Asian-American, twenty-five percent African-American, twenty-five percent Latino, and twenty percent white students would not.”).

and acknowledge that diversity, particularly racial diversity, cannot be achieved by focusing only on the black or nonwhite/white paradigm.<sup>287</sup> Indeed, the paradigm must be rejected to achieve racial equality.

### iii. A Confusing Message: The Importance of Physical Integration

Chief Justice Roberts emphasized throughout his plurality opinion that both Seattle's and Louisville's plans were designed to achieve racial balancing and nothing more.<sup>288</sup> Citing *Grutter*, the Court repeated that "outright racial balancing" is "patently unconstitutional."<sup>289</sup> The Court confidently asserted this observation as if it were simple and clear, but it actually is quite confusing. It raises questions about *Brown*'s meaning, which likely was a major reason Justice Kennedy joined only parts of the opinion.<sup>290</sup> After all, as Justice Kennedy and the dissenters highlighted, racial balancing is related to integration and integration is related to equality.<sup>291</sup> Thus, to say that racial balancing for its own sake is unconstitutional implies that there is no relationship between racial balancing and racial equality. Realistically, it would be helpful to move away from this categorical conclusion, which is misleading and unhelpful, and try to further articulate what that relationship is.

School officials who try to achieve "racial balance" in their schools undoubtedly are influenced by *Brown*'s integration mandate. Even if one accepts that "racial balancing for its own sake" is unconstitutional, how many schools really try to achieve racial balance just for the fun of it or just because they like the idea? In reality, assuming officials act in the best interest of their students, they try to achieve some racial balance (mixture, integration, diversity) in their schools because they believe that their schools are "better" as a result.

This attempt at creating racial balance is where *Brown* started when it ended *de jure* segregation in schools and is what the country worked so hard to achieve through school integration efforts well into the 1990s. "Racial balance" suggests there is or should be a quantitative element to the qualitative value of integration. This suggestion relates to what integration means in the context of *Gaines*, *Sweatt*, and *McLaurin*.<sup>292</sup> It also is related to the "critical mass" concept that educators in

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287. For the limitations of such a focus, see Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997). A binary (black/white) paradigm of race "operates to exclude Latinos/as from full membership and participation in racial discourse," and this "exclusion serves to perpetuate not only the paradigm itself but also negative stereotypes of Latinos/as." *Id.* at 1215.

288. *Parents Involved*, 551 U.S. at 711 (Roberts, C.J., majority opinion) (framing the underlying legal question as whether public schools "may choose to classify" students based on race and rely upon said classification in assigning schools); *id.* at 720 (Roberts, C.J., majority opinion) (applying strict scrutiny because of individual race-based benefit from government).

289. *Id.* at 730 (Roberts, C.J., plurality opinion) (citing *Grutter*, 539 U.S. at 330).

290. *Id.* at 787-88 (Kennedy, J., concurring in part and concurring in the judgment).

291. *See id.* at 797-98 (Kennedy, J., concurring in part and concurring in the judgment) ("This Nation has a moral and ethical obligation to fulfill its historical commitment to creating an integrated society that ensures equal opportunity for all of its children."); *id.* at 864 (Breyer, J., dissenting) ("[T]he law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools . . . . [T]he fate of race relations in this country depends upon unity among our children . . . .").

292. *See* discussion *supra* Part I.B.1 (pointing out the differences between integration and the policy



*Grutter* held out as their standard to measure when they had achieved diversity.<sup>293</sup> Trying to attain some level of “racial balancing,” then, should not be so easily scorned and condemned.

Rightfully, the Court looked for some qualitative link to the racial balancing goals of Seattle and Louisville.<sup>294</sup> What, if anything, could make racial balancing constitutional? The Court strictly scrutinized the plans and struck them down because it was unpersuaded the plans were necessary to achieve established compelling state interests in this area.<sup>295</sup> Specifically, the Court reaffirmed that only two state interests meet strict scrutiny with respect to the use of race: remedying the effects of past intentional racial discrimination<sup>296</sup> and promoting diversity in higher education.<sup>297</sup>

The Court quickly dismissed the application of the first interest because Seattle schools had never been segregated by law.<sup>298</sup> While Louisville schools had been segregated, they had achieved unitary status pursuant to a court order dissolved in 2000.<sup>299</sup> The implications of this are confusing. Even if Seattle schools were never segregated, that does not mean that the district has no interest in having racially integrated schools. Racially integrated schools are essential to achieve racial equality. The fact that Louisville schools were segregated by law is clearly relevant to the issue of racial equality, especially given that they achieved unitary status only a few years before the lawsuit in *Parents Involved* started.<sup>300</sup> The Court’s emphatic insistence that racial balancing for its own sake is unconstitutional fails to acknowledge that even if the cities were trying to achieve some measure of integration for its own sake, there is a relationship between that and racial equality.

Naturally, the Seattle and Louisville plans were not implemented only to achieve racial balance in the schools. The officials were trying to overcome tremendous racial inequality in their school system, characterized by “pain, inhumanity, and social degradation.”<sup>301</sup> But the Court held that the schools failed to articulate what they were really trying to achieve.<sup>302</sup> This is why the Court

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of de-segregation)

293. *Grutter*, 539 U.S. at 319.

294. *Parents Involved*, 551 U.S. at 720 (Roberts, C.J., majority opinion).

295. *Id.* at 732 (Roberts, C.J., plurality opinion).

296. *Id.* at 720 (Roberts, C.J., majority opinion).

297. *Id.* at 722 (Roberts, C.J., majority opinion).

298. *Id.* at 721 (Roberts, C.J., majority opinion) (“Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to the court-ordered desegregation decrees.”).

299. *Id.* at 720 (Roberts, C.J., majority opinion) (“In 2000 the District Court that entered that decree dissolved it, finding that Jefferson County had ‘eliminated the vestiges associated with the former policy of segregation and its pernicious effects,’ and thus had achieved ‘unitary’ status.” (citing *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 1999))).

300. *See Parents Involved*, 551 U.S. at 720 (Roberts, C.J., majority opinion) (noting that the desegregation decree was dissolved in 2000 and the case was argued in 2006).

301. *See Liu*, *supra* note 7, at 306 (“A full telling of that story would begin by describing the pain, inhumanity, and social degradation caused by state imposed school segregation. It would describe the individual potential which segregation suppressed; the spirit and determination of those who overcame the obstacles it imposed; and the moral strength of those who fought the legal, social, and political battle against it and other forms of discrimination.” (citing *Hampton v. Jefferson Cnty. Bd. of Educ.*, 72 F. Supp. 2d 753, 755 (W.D. Ky. 1999))).

302. *See Parents Involved*, 551 U.S. at 726-27 (Roberts, C.J., plurality opinion) (indicating that the

dismissed their second alleged interest in diversity.<sup>303</sup> The schools' purported interests in achieving diversity were neither well-articulated nor well-implemented; their goals simply mirrored the demographics of the areas.<sup>304</sup> The schools did not show why or how their plans provided educational benefits.<sup>305</sup> Fatally, they also focused only on achieving racial diversity, not the broad-based diversity upheld in *Grutter*.<sup>306</sup> *Parents Involved* also added that the reasoning of *Grutter* is particular to the unique context of higher education where the exchange of ideas and First Amendment values play a special role.<sup>307</sup> Accordingly, a majority of the Court concluded that "[t]he present cases are not governed by *Grutter*."<sup>308</sup>

What about the constitutionality of the states' asserted interests in the "intangible socialization benefits" that are achieved in a racially integrated environment? Would that interest pass strict scrutiny? Unfortunately and disappointingly, the Court does not evaluate whether this interest would pass strict scrutiny because the officials failed to tie this goal to their plans. Their plans were rigidly tied to mirroring the districts' racial demographics and not to anything pedagogical.<sup>309</sup> In other words, the Court was able to bypass a constitutional analysis of the most critical issue in the entire case because the plans were not narrowly tailored to do anything but achieve racial balance within a narrow black/white paradigm.<sup>310</sup>

#### iv. The Missing Message: The Importance of Dignity Integration

Many equality-minded people wonder what happened between *Grutter* and *Parents Involved*. Are these cases reconcilable? The answer is both "yes" and "no." Here it is helpful to step back and ask why the schools even cared about racial integration? Were the schools trying to remedy a problem—a "backward-looking justification"?<sup>311</sup> Or were they trying to enhance the education environment—a "forward-looking justification"?<sup>312</sup> Chief Justice Roberts, in his plurality opinion, suggested that the schools' plans were backward and not forward-looking; for the plurality, this difference was the constitutional difference.<sup>313</sup>

It is misleading, however, to phrase the problem of racial inequality in education as either "backward" or "forward-looking" because the persistence of racially identifiable and unequal schools is the result of a history of discrimination

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school district's goals did not seem to match with its methodologies).

303. *Id.*

304. *Id.*

305. *Id.*

306. *See id.* at 729 (Roberts, C.J., plurality opinion) (calling the effort to achieve diversity "solely by reference to the demographics of the respective school districts . . . a fatal flaw").

307. *Id.* at 724 (Roberts, C.J., majority opinion).

308. *Parents Involved*, 551 U.S. at 725 (Roberts, C.J., majority opinion).

309. *See id.* at 726 (Roberts, C.J., plurality opinion) ("The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.").

310. *Id.* at 729 (Roberts, C.J., plurality opinion).

311. *Id.*

312. *Id.*

313. *Id.*

that was never remedied.<sup>314</sup> This reality notwithstanding, Chief Justice Roberts emphasized in his plurality opinion, “[t]his working backward to achieve a particular type of racial balance, rather than looking forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent.”<sup>315</sup>

(a) The Backward-looking Justification

Assuming school officials adopted their plans because they were trying to fix a problem, what was that problem? Admittedly, the problem was not *de jure* segregation, nor was the problem trying to remedy the effects of past *de jure* segregation.<sup>316</sup> The Court highlighted that Seattle had never been segregated by law and that Louisville had complied with the court order to attain unitary status.<sup>317</sup> Try as it might, the Court could not find a constitutional problem with respect to the racial composition of the schools, and therefore could not find the plans were constitutionally necessary to solve a racial inequality problem.<sup>318</sup>

The Court’s focus suggests that it interpreted the harm in *Brown* to be only *de jure* segregation and perhaps its immediate aftermath. Chief Justice Roberts dramatically ended his plurality opinion by stating that *Brown* held that race cannot be considered in student assignments and concluded that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>319</sup> This focus and reasoning inspired criticism from Justices Stevens<sup>320</sup> and Breyer<sup>321</sup> that the Chief Justice’s opinion changes the fundamental meaning of *Brown*.

Chief Justice Roberts *Parents Involved* plurality opinion boiled down to this: the officials were trying to achieve racial balance that simply mirrored the area’s demographics.<sup>322</sup> Racial imbalance in itself is not unconstitutional and “‘outright racial balancing’ is ‘patently unconstitutional.’”<sup>323</sup> Accordingly, the Court held that trying to balance the imbalance by using a student’s race to make an assignment

314. See Spann, *supra* note 8, at 452-53 (“[T]he *Parents Involved* majority’s] insistence on prospective colorblind race neutrality has both the intent and the effect of protecting the existing allocation of societal resources from remedial attempts at redistribution. Moreover, they intend this result even though they know that the existing distribution of societal resources remains highly tainted by the continuing effects of past discrimination.”) Again, one should be reminded of Justice Harlan’s dissent in *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

315. *Parents Involved*, 551 U.S. at 729 (Roberts, C.J., plurality opinion).

316. *Id.* at 720-21 (Roberts, C.J., majority opinion) (citing *Hampton*, 102 F. Supp. 2d at 360).

317. *Id.*

318. See *id.* at 720 (Roberts, C.J., majority opinion) (“We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that ‘the Constitution is not violated by racial imbalance in the schools, without more.’” (quoting *Milliken*, 433 U.S. at 280 n.14)).

319. *Id.* at 748 (Roberts, C.J., plurality opinion).

320. *Id.* at 798-99 (Stevens, J., dissenting) (“There is a cruel irony in The Chief Justice’s reliance on our decision in *Brown* . . .”).

321. *Parents Involved*, 551 U.S. at 803-04 (Breyer, J., dissenting) (“The plurality pays inadequate attention to this law . . . [I]t reverses course and reaches the wrong conclusion. In doing so, it distorts precedent . . . and it undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality.”).

322. *Id.* at 726-27 (Roberts, C.J., plurality opinion).

323. *Id.* at 730 (Roberts, C.J., plurality opinion) (quoting *Grutter*, 539 U.S. at 330).

could not be a constitutional remedy.<sup>324</sup> The Court failed to see or to acknowledge the connection between racially imbalanced schools and unequal educational opportunities, and how racial balancing can be yet another way to achieve dignity integration, which is essential to equality.<sup>325</sup>

(b) The Forward-looking Justification

Without a problem to solve, the only other way to justify the plans, according to the Court, was to fit them into the context of *Grutter*'s diversity rationale. Instead of trying to remedy a problem, then, the plans could have been defended by showing they were designed to provide pedagogical benefits that attach to diverse classrooms.<sup>326</sup> Again, this was an asserted interest of both districts, but only in vague terms that failed to meet strict scrutiny standards because they were not narrowly tailored to meet the goal.<sup>327</sup>

A critical point needs to be interjected. We must reject any hint that integration enhances the capacity of children of color to succeed academically. This might be one reason why many people, including Justice Thomas, vehemently objected to "integration plans" because any suggestion that children of color need to attend schools with white children in order to succeed is insulting.<sup>328</sup> He wrote, "[i]n reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement."<sup>329</sup> While integration initially served the purpose of racial mixing, it also served the purpose of equalizing the economic resources that became available to the students of color who were bused to the white and generally more resource-rich schools. Today, dignity integration more accurately describes why integration is inextricably tied to racial equality. It is perhaps the only way to invalidate the race myth, and, in particular, the part of the myth that promotes white superiority. Dignity integration benefits all students.

(c) A Little Bit of Both: Backward- and Forward-Looking

[Justice Robert's opinion] suppose[s] that past discrimination has no present day effects and that racial stereotypes, bias, and embedded inequalities do not infect our social institutions.<sup>330</sup>

—Professor Charles Ogletree and Susan Eaton

324. *See id.* at 747 (Roberts, C.J., plurality opinion) ("What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?").

325. *See id.* at 843 (Breyer, J., dissenting) (asserting that racially balanced schools create more effective pedagogical environments and provide better educational opportunities to students as a result).

326. *Id.* at 726 (plurality opinion) ("The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.").

327. *See Parents Involved*, 551 U.S. at 726 (Roberts, C.J., plurality opinion) ("[I]t is clear that the racial classifications employed by the districts [in *Parents Involved*] are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.").

328. *Id.* at 761 (Thomas, J., concurring).

329. *Id.*

330. Ogletree & Eaton, *supra* note 104, at 287-88.

School officials who try to achieve “racial balance” or “integration” in their schools should never assert that physical integration is the constitutional end. It is not. It is time to recognize that integration in the context of education is inextricably tied to dignity integration.<sup>331</sup> In *Parents Involved*, Justice Kennedy generally understood this, although the four dissenters understood it better. Specifically, Justice Kennedy invoked *Brown* to suggest that race can be considered sometimes for the purpose of achieving *Brown*’s objective of equal educational opportunity.<sup>332</sup> He also attacked the whole race myth, not just the myth of black inferiority. Justice Kennedy subsequently opined that “[t]he Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of *all*,”<sup>333</sup> then further stating, “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for *all* of its children.”<sup>334</sup>

So how did Justice Kennedy, with all due respect, miss the proverbial boat? One possible explanation comes from Professor Kevin Brown’s analysis of Justice Kennedy’s opinion in *Parents Involved*. Justice Kennedy’s vote with the majority to strike down the voluntary integration plans was rooted in his belief, based on experience, that classifying *individuals* on the basis of race is constitutionally impermissible.<sup>335</sup> Again, drawing on experience, such a practice violates the individual’s dignity, but the use of race-conscious measures that do not focus on individuals does not harm an individual. Based on his experiences as a black man, Professor Brown justifiably asserts that Justice Kennedy’s distinction is “irrational”<sup>336</sup> but “has merit.”<sup>337</sup> Professor Brown explains:

The principal concern of underrepresented minorities—including me—is not being treated as members of a racial or ethnic minority, but being treated in a negative manner because we are racial or ethnic minorities. It is not the denial of individuality that is the harm; it is the fact that some person, some institution, or some institutional practice has affirmatively disadvantaged us because we are minorities. However, regardless of my experience as a black person dealing with my race, my experience of interacting with and observing the experiences of so many white people dealing with their

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331. Ironically, even if the Court had upheld the plans in *Parents Involved*, dignity integration still would have been missing because the plans sanctioned intra-school segregation in student placements. For an excellent analysis and critique of this aspect of the Seattle situation, see Nelson, *supra* note 17, at 607-10 (describing a case study provided by author where an extraordinarily diverse school in Seattle still fails to afford minority students with the equal educational opportunities that for full-scale dignity integration).

332. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment).

333. *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

334. *Id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

335. Kevin Brown, *Reflections on Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 744-45 (2008).

336. *Id.* at 747.

337. *Id.*

race has clearly attuned me to the reality that many whites are not accustomed to thinking of themselves as members of a racial group. Many whites are much more likely to find the fact they are treated as a white person, as opposed to an individual, demeaning. Thus, my experience of being a black person tells me that it is negative treatment accorded to me because I am black that is the harm. My experience also is that so many white people react to the denial of their individuality when they are treated as being white as a harm in and of itself. The distinction Justice Kennedy draws is irrational and illogical when comprehended against my experience of being a black person. However, my experience of observing and interacting with so many whites when they are being treated as a member of a racial group tells me that Kennedy's distinction has merit.<sup>338</sup>

Reading and reflecting on Professor Brown's observations and insights into Justice Kennedy's concurrence reminds me of Justice Harlan's dissent in *Plessy*. Even as Justice Harlan "got it," he arguably did not.

In contrast, Justice Stevens related that the Chief Justice's reliance on *Brown* to strike down the plans was a "cruel irony,"<sup>339</sup> and he accused the Chief Justice of "rewrit[ing] the history of one of this Court's most important decisions."<sup>340</sup> Finally, Justice Breyer's dissent asserted that "[a]ll of those plans represent local efforts to bring about the kind of racially integrated education that *Brown* . . . long ago promised."<sup>341</sup> Furthermore, the dissent lamented that "[t]he plurality's position . . . would break that promise."<sup>342</sup> Still, the dissenting Justices and Justice Kennedy supported the proposition that dignity integration is at the heart of *Brown*. On this point, the plurality missed a giant-leap opportunity and further weakened the link between *Brown* and racial equality.

## 2. The Relevance of Diversity in K-12

Unfortunately, given that *Parents Involved* held that the Constitution all but prohibits voluntary integration plans in public schools,<sup>343</sup> it comes as no surprise that the Court created tremendous confusion with respect to the relationship between integration and diversity and the relevance, if any, of diversity in grades K-12. The Court's rejection of the need to integrate *de facto* segregated schools and its obfuscation of the importance of diversity in K-12<sup>344</sup> are a double blow to

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338. *Id.*

339. *Parents Involved*, 551 U.S. at 798-99 (Stevens, J., dissenting).

340. *Id.* at 799 (Stevens, J., dissenting).

341. *Id.* at 803 (Breyer, J., dissenting).

342. *Id.* at 868 (Breyer, J., dissenting).

343. *Id.* at 721-23 (Roberts, C.J., majority opinion). Justice Kennedy does, however, leave open the possibility that race can be considered in some circumstances. For example, he opines that it would be constitutional to consider race in deciding where to build new schools. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment).

344. *Parents Involved*, 55 U.S. at 787-88 (Kennedy, J., concurring in part and concurring in the judgment) (arguing that integrating schools and providing equal opportunities regardless of race is a compelling government interest in and of itself); *see also id.* at 770-71 (Thomas, J., concurring) (limiting the importance of diversity to higher education, namely because it requires the free exchange of ideas in order to achieve an educational goal that is not present at the secondary level).

*Brown*. The *Grutter* Court understood the vital importance of diversity at the higher education levels, but the *Parents Involved* Court failed to see the relevance of diversity and its relationship to integration at the lower school levels. The links of the chain need to be connected to achieve racial equality.

Toward this end, it is helpful to return to *Plessy*. The persistence of the myth is at least partially attributable to the adoption of a philosophy that espouses colorblindness. Justice Harlan is credited with introducing this philosophy into society, when he bravely dissented in the odious *Plessy* case and opined that we are a colorblind society.<sup>345</sup> Recall, however, that he also opined that whites will always be the dominant race as long as they hold fast to “principles of constitutional liberty.”<sup>346</sup>

One will never know with certainty exactly what Justice Harlan meant. Because Justice Harlan was an equality-minded person, it is difficult to imagine that he believed that people of color were inherently inferior to whites and that whites would always be the dominant race. In this possible interpretation of his opinion, Justice Harlan supported the race myth and even suggested it is an integral part of constitutional liberty. On the other hand, he might have been suggesting that blacks, although not inherently inferior, would never be equal to whites because the racial divide is so large that it can never be bridged. Even this more ostensibly benign interpretation of his opinion reflects the race myth because it suggests that whites can just hold onto their privileged status and that they have no obligation to even try to achieve racial equality. It is critical that this interpretation of Justice Harlan’s opinion is built explicitly on white superiority and therefore implicitly on black inferiority. This is the race myth.

Moreover, it bears emphasizing, that Justice Harlan dissented in *Plessy*, and it is all too easy to think that just because he dissented and announced “our Constitution is color-blind,”<sup>347</sup> that he rejected the majority’s validation of the myth. He arguably did not. Similarly, Justice Kennedy departed company with the plurality in *Parents Involved* to distinguish his opinion about the legitimacy of using race—at least sometimes—to achieve *Brown*’s promise.<sup>348</sup> But ultimately, he failed to uphold very modest voluntary integration plans that did not even violate his own concerns about using race; the student assignments could not have assaulted the individual dignity of the students involved in the cases because students were not assigned to schools based on any merit.<sup>349</sup> On reflection, there is no reason to be color-blind unless one is trying to mask one’s negative feelings

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345. *Plessy*, 163 U.S. at 559 (1896) (Harlan, J., dissenting) (declaring there is no superior or dominant class of citizens in the eyes of the law and the Constitution).

346. *Id.* at 559 (Harlan, J., dissenting). I explore this in more depth in my previous work. Sharon E. Rush, *Emotional Segregation: Huckleberry Finn in the Modern Classroom*, 36 U. MICH. J.L. REFORM 305, 313-15 (2003); see discussion *supra* Part II.A.2 (analyzing Justice Harlan’s *Plessy* dissent, in which he espouses both colorblindness and inherent white superiority.)

347. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

348. See *Parents Involved*, 551 U.S. at 795-96 (Kennedy, J., concurring in part and concurring in the judgment) (“Notwithstanding these concerns, allocation of benefits and burdens through individual racial classifications was found *sometimes permissible* in the context of remedies for *de jure* wrong.”) (emphasis added).

349. See *Brown*, *supra* note 335, at 753 (“Justice Kennedy allows public school authorities to produce as much integration as they can, without unduly upsetting the sensibilities of white students, white parents, and white voters.”); see also Liu, *supra* note 7 at 313 (“But the history of the Seattle plan is a story of increasingly modest uses of race.”).

about race. Such negative feelings are rooted in the myth.

Significantly, equality-minded individuals who value diversity in education understand, at least on some level of consciousness, the ways in which color-blindness conflicts with the goal mentioned above. A critical component of diversity is racial diversity for all of the reasons explored in this Article. In reality, to espouse a color-blind philosophy and also try to achieve diversity in education is confusing and even oxymoronic. Diversity is not color-blind.

Thus, many adults with the best of intentions, often subconsciously believe the race myth and teach their children to believe the same. If they better understood how racial dynamics function, then presumably they would work to denounce it and eliminate it. As Professor Liu highlights:

[T]he socialization goals of school integration go beyond cultivating harmony in interpersonal relations. A critical part of what it means to be educated for citizenship in a multiracial society is to understand racial dynamics as a *social* not merely interpersonal phenomenon, shaped not only by individual attitudes and prejudices but also by the demographic structure of the surrounding community.<sup>350</sup>

The endeavor to invalidate the race myth is not only critically important in the classroom, but it is most likely to be achieved in such a setting.

Both *Grutter* and *Parents Involved* are correct to find that diversity is important in education. *Grutter*, of course, involved a law school. But *Parents Involved* specifically limited *Grutter*'s diversity rationale to institutions of higher education, suggesting it has no relevance in grades K-12.<sup>351</sup> This is grossly misguided. Research studies show that children are conscious of racial differences, and aware of the race myth, beginning at extremely young ages.<sup>352</sup>

Imagine a nursery school room in which the following exchange takes place:

Aaron (4, white) taunts Amy (4, Black/white). She is alone, playing quietly near the gazebo. He approaches her and sticks his tongue out, informing her, "You can't celebrate Kwanzaa, you're not Black." Amy retorts, "Oh yes I am. You don't know. You're stupid." "I'm not," he replies, sniffing at her and adding, "and you're not Black." "I am too Black!" Amy responds hotly. "My Dad is Black and so is his parents, my granddad and grandma." "Stupid!" he shouts at her. "You're stupid!" she yells right back. "You don't know nothing about me." She rises and faces Aaron with an angry glare on her face. Aaron responds in kind, and they glare at each other until he

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350. Liu, *supra* note 7, at 289.

351. See *Parents Involved*, 551 U.S. at 724-25 (Roberts, C.J., majority opinion) (reiterating not only the importance of maintaining diversity specifically in the university environment, but also subsequent limitations that were placed on race-based assignment plans in primary and secondary schools).

352. See DEBRA VAN AUSDALE & JOE R. FEAGIN, *THE FIRST R: HOW CHILDREN LEARN RACE AND RACISM* 1-2 (2001) (illustrating that children gain knowledge regarding certain racial epithets after being exposed to certain everyday sources of sociological information, and that while children may not completely comprehend certain terms or their context, many demonstrate a base understanding of the same at a very young age).



finally backs down and leaves. Amy resumes her play.<sup>353</sup>

Clearly, both Aaron and Amy are quite aware of their racial differences. Moreover, Aaron is very comfortable telling Amy that she really is not black and therefore cannot legitimately celebrate Kwanzaa. This is the “white superiority” myth being played out in nursery school.

How ridiculous would it be to wait until Aaron and Amy are in college before society and the law take steps to ensure that Aaron and Amy have diverse classrooms so they can gain greater cross-racial understanding? If young children are not taught to respect the dignity of all people, then by the time they become adults, they will have lived for over twenty years believing, perhaps subconsciously, in the validity of the race myth. By then, it is almost impossible for an equality-minded white person to see himself or herself as harboring subconscious racist beliefs because it is so out of character that it makes many whites angry at the suggestion. From the perspective of an equality-minded white person, only “real” racists—self-identified white supremacists, Ku Klux Klan members, and people who use the “n-word”—believe in the validity of the race myth. Because they do not fit those definitions, they are not “racist.”

In a society committed to racial equality, perhaps the real question is why, in the twenty-first century, does the Supreme Court have to decide issues like those raised in *Grutter* and *Parents Involved*? How do the Aarons and Amys get to the college and professional school levels without cross-racial understanding and respect? Is it because they have never met? What have they been learning about racial differences in grades K-12? How much sense does it make, in a society committed to the democratic ideal of racial equality, to maintain *de facto* segregated schools when its history of racial segregation and economic inequality is premised on the myth? It is far more logical to create diverse classrooms in K-12 so that by the time children reach college, the real purpose behind diversity is more likely to be achieved. And what is that real purpose? It is to fulfill *Brown*'s promise, as reinforced by *Grutter*, to achieve racial equality, which necessarily means eliminating the race myth and enabling all public spaces to be shared equally by people of all different races.

#### CONCLUSION

Naturally, at the time of *Brown*, if the Court had chosen to remedy only *de jure* segregation and had not required that schools be integrated, the schools probably would have remained racially identifiable *because* the race myth still defined white society's view of what race relations should be. White society segregated the schools on purpose. Parts of white society forcefully resisted the integration of public schools. Realistically, after centuries of segregation and the treatment of blacks as less than human, announcing an end to *de jure* segregation

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353. *Id.* at 71. See Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, *supra* note 35 (discussing white society's denial of racism). See also, SHARON E. RUSH, *LOVING ACROSS THE COLOR LINE: AN ADOPTIVE MOTHER LEARNS ABOUT RACE* (2000). In my book, I share many of the struggles and lessons I have had to learn about race and acknowledge that my experience loving across the color line has enabled me to learn about racial dynamics in much more informative ways.

was not going to do much for racial equality as a practical matter. On some level, the Court understood that unless schools were integrated, children of different races would remain isolated from each other and there would be little hope that future generations would learn that the race myth is invalid. Without learning that lesson, racial equality would remain elusive.

*Brown* and its progeny, including *Parents Involved*, were correct to emphasize that outlawing *de jure* segregation was an essential first step in the quest to eliminate the race myth. Moreover, integrating the schools also is a logical and essential step in the same direction, because the physical presence of students of color in schools attended only or predominantly by white students further evidences a rejection of the race myth. Similarly, although this is not what *Brown* addressed, the presence of white students in schools attended only or predominantly by students of color also debunks the race myth.

Notwithstanding *Brown*'s insightful observations, *Parents Involved* is a stark reminder of how *Brown*'s equality journey has stopped abysmally short of its goal. As *de facto* segregation settles in as an acceptable reality by much of society, including by many Supreme Court justices, it is that much easier to neglect *Brown*'s deeper meaning: to remove the race myth from schools. *Parents Involved* is tragic, not just because of its surrender to *de facto* segregation, but because of its rejection of the importance and relevance of diversity integration in its fullest sense, in grades K-12.

