Race and Education:

the History, the Status, the Prospect

JACK GREENBERG

BIOGRAPHICAL STATEMENT

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Jack Greenberg was assistant counsel and then director-counsel to the NAACP Legal Defense and Educational Fund from 1949 to 1984. He has argued forty cases before the U.S. Supreme Court, including the landmark case of *Brown v. Board of Education,* in 1954, which declared racial segregation unconstitutional. He joined the Columbia Law School faculty in 1984 and teaches constitutional, civil, and human rights law, as well as civil procedure. In 1996, he received the American Bar Association's Thurgood Marshall Award for his long-term contributions to the advancement of civil rights, civil liberties, and human rights in the United States. In 2001 he was awarded the Presidential Citizens Medal by President Bill Clinton for his enduring work in defense of civil rights.

Over the years, Prof. Greenberg has participated in human rights missions to the Soviet Union, Poland, South Africa, the Philippines, Korea, Nepal, and elsewhere. Prof. Greenberg is a founding member of the Mexican-American Legal Defense and Education Fund, and the creator of the Earl Warren Legal Training Program. He has also been a member of various organizations, including the Asian American Legal Defense and Education Fund and the Human Rights Watch (1978-98), to name a few.

Publications include *Race Relations* and *American Law* (1959); "Litigation for Social Change," (1973); *Cases and Materials on Judicial Process and Social Change* (1976); *Dean Cuisine: The Liberated Man's Guide to Fine Cooking* (with Vorenberg, 1991); *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (1994); and articles on civil rights, capital punishment, and other subjects.

Professor Greenberg received both his undergraduate and law degrees from Columbia University.

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INTRODUCTION

School integration, on the 50th anniversary of *Brown v. Board of Education*, remains unfinished business of overwhelming import. Education is the principal route by which African Americans will achieve full equality. This has been recognized for centuries. But it is not for African Americans alone that full equality is imperative. The nation cannot be secure so long as the legacy of slavery is branded on African Americans, more than 13 percent of the U.S. population who, on average, earn less, own less, live shorter and less healthy lives, and more than occasionally, in frustration and anger, have rioted to express their frustration, even though many individual members of that group have found success.

Slave owners knew that the key to keeping control was to prohibit the education of slaves. The converse is true. Education is required to expunge completely the legacy of the pre-Civil War years—not merely education but fully equal education. Decades of experience demonstrate that integrated education is best for imparting the learning that schools teach. Just as important, it is through integrated schooling that a student becomes a full player in the life of the community. A student who can interact with his or her peers without regard to race is able to come face to face with opportunity.

This monograph addresses the great historic wrong of segregating African-American children in school. Although its focus is African-American education, the segregation of Hispanic children has grown at an alarming pace in recent years. While some issues involving Hispanic segregation are different from those that involve Blacks, most of the factors are the same. Everything written about the importance of the integration of African-American children applies with equal force to Hispanics.

This monograph begins with elementary and high school education. It concludes with the recently decided University of Michigan affirmative action cases. At all levels, from the beginning of school to graduate school, it is clear that the best education is one that integrates Black students into the mainstream. Our starting point is *Plessy v. Ferguson* (1896),[1] which held that a Louisiana law that required segregated railroad cars was constitutional. *Plessy* then became constitutional justification for segregated schools. From the beginning, many Blacks and others committed to racial equality bridled under its constraint. As early as 1899, they argued, albeit ineptly, in *Cumming v. Richmond County Board of Education*[2] that segregation was unconstitutional. They lost on procedural grounds. That segregation was unconstitutional was repeated in *Gong Lum v. Rice*[3] (1927), again ineffectually. The case involved a Chinese student who did not want to be segregated along with African Americans but had no quarrel with segregation beyond that. The U.S. Supreme Court decided that the issue was settled. But the simmering discontent expressed recognition

that equality and segregation simply could not co-exist.

Black leaders in 1935 considered what to do. They debated whether to follow W.E.B. Du Bois, who argued for equalizing buildings, libraries, teaching staff, and the like,[4] or to integrate, as urged by Charles Thompson, dean of the graduate school of education at Howard University. Du Bois argued that Black children would be unwelcome and ill treated by White teachers and classmates. He thought that Black schools would be more nurturing. Thompson disagreed. He believed that Black schools and White schools were equally capable of being hospitable or unfriendly. He argued that equalization, if ever achieved, could not be maintained because neither the resources nor the will to continuously equalize thousands of schools existed. More important, even if schools were equalized in physical facilities, segregation would isolate minorities from power and prestige and convey the message, absorbed by Blacks and Whites, that Blacks are inferior.

Black civil rights lawyers in the late 1930s wrestled with what to do. The NAACP commissioned a study, known as the Margold Report,[5] that argued equality would never be achieved without destroying the "heart of the evil" known as segregation. They considered a political approach to the problem, but politics would be ineffective so long as Blacks could not vote. Margold therefore proposed lawsuits as the only way to bring about a change. But with resources so limited, lawsuits could equalize only a few schools, which then would slip back into inequality. Separation had to end if Blacks ever were to enjoy the same education as Whites. The Margold Report led to the campaign that won *Brown v. Board of Education*.

Today, we can look back on a half-century during which segregation has been unconstitutional, when many schools have been desegregated, although often against strident opposition, and many schools have been integrated, of which a large proportion have returned to segregation. At the same time, a few majority-minority school districts have upgraded their budgets and physical facilities. While it has been difficult to maintain integration, it also has been difficult to impossible to achieve equality of funding and facilities between urban (mainly Black) and suburban (mainly White) schools.[6] This monograph will trace that evolution.

New terminology and concepts, mostly unheard of 50 years ago, have entered the dialogue: vouchers, charters, magnets, court-ordered and voluntary interdistrict integration, equal funding, adequate funding, "leave no child behind," and, of course, affirmative action, diversity, quotas, and standardized testing. Even a decade ago, who had heard of the terms "oppositional culture" or "stereotype threat" for explaining standardized test score performance? Within each category, scholars, politicians, and community leaders debate, and will continue to contest, sub-classifications and explanations. Doctrines that once were settled have again become unsettled.

PLESSY V. FERGUSON AND THE DESTRUCTION OF RECONSTRUCTION

Plessy upheld segregation in railroad cars but was expansive enough to encompass all of life, including education. In upholding a law that required segregation in railroad cars, the Supreme Court cited cases that upheld pre-Civil War

segregated schools in Boston as constitutional and spoke of the difference between so-called "social" and "political" rights. *Plessy* sealed into constitutional law the end of Reconstruction,[7] the post-Civil War effort to admit African Americans to full citizenship and participation in American society.

Plessy imbedded dominant political values of its time into the life of the nation. In an extremely close presidential election, Rutherford B. Hayes defeated Samuel J. Tilden, even though Tilden received more popular votes and should have been awarded most electoral votes. Hayes promised his Southern supporters that in exchange for their electoral votes, he would remove Northern troops from and direct federal funds toward the South. Historians believe that in the Compromise of 1877, Hayes' Southern supporters stole the election for him. He removed Northern troops and invested federal funds in the South as promised. Segregation, which had not been ubiquitous, spread throughout the South.[8] By the time *Plessy* was decided, the majority opinion expressed the standards of the White world in which the justices lived: The 14th Amendment "in the nature of things . . . could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguishable from political equality, or a commingling of two races upon terms unsatisfactory to either."[9]

Constitutional law derives from text, history, precedent, and other conventional legal sources. But, when the law is vague, as in a phrase susceptible to various meanings, such as "equal protection of the laws," the court often factors into decisions its assessment of the values of the times. *Plessy's* lawyers knew it and made futile, ineffectual moves to counteract the anti-egalitarian ethos of post-Reconstruction, such as starting a newspaper dedicated to changing public opinion, but predictably failed.[10] *Brown* was argued in times far more sympathetic to its aspirations than was *Plessy*. By the time of *Brown*, the world had been through World War II, segregation was compromising American foreign policy as it dealt with the Cold War and colonialism, and the Supreme Court already had struck down segregation in higher education, although nominally under the separate-but-equal rubric. African Americans had been moving northward. The Black vote had elected Harry Truman as president. He appointed a Committee on Civil Rights that advocated programs that would be adopted within 20 years. Demographics and politics disposed the court, if not yet the country, to aspire to end segregation. The lawyers who argued *Brown* made a compelling case based on precedent and conventional legal sources, but for all their persuasiveness would have lost *Plessy*. In the post-World War II era, the lawyers who represented *Plessy* could have won *Brown*. Nothing they might have done could have succeeded for them in *Plessy*.

BROWN V. BOARD OF EDUCATION: PLESSY OVERTHROWN

Brown was based on recognizing that segregation itself imposed inequality. The court held that segregated schooling affected the hearts and minds of Black children in a way unlikely ever to be undone. While it did not explicitly overrule *Plessy*, it held that *Plessy* had nothing to do with education. Nevertheless, notwithstanding its apparently limited scope, the court immediately applied *Brown* to situa-

tions in which education was not involved at all. It prohibited segregation in a park, a theater, and a golf course, citing *Brown*.[11] Not long afterward, it cited *Brown* in ordering a law school to admit a Black applicant.[12] Clearly, *Brown* amounted to declaring that all state-imposed segregation is unconstitutional. At the same time, the court did not, and could not, cut loose the baggage of the past. In a second *Brown* decision, often called *Brown II*, which addressed the method and timetable for desegregation, the court recognized that past. Decided in 1955, *Brown II* provided for desegregation "with all deliberate speed."[13]

Just as law caught up with the times in 1954, the world continued to change. Fifty years after *Brown*, the United States has become a very different place for African Americans and, indeed, everyone. *Brown* gave rise to the civil rights movement of the 1960s. In 1969, the court overruled *Brown II* in *Alexander v. Holmes County Board of Education*.[14] *Alexander* expunged "all deliberate speed" from constitutional law and implementation of desegregation. Taking a cue from *Brown I*, not *Brown II*, the 1970s was an era of expanding rights, not only for Blacks but for women, ethnic groups, the disabled, older persons, those of different sexual orientation, and other groups. Still, the world has not become *completely* different. The legacy of slavery and segregation hangs on and continues to work its influence on African Americans, not the least in education.

The similarity of our time to the *Plessy* era may be illustrated by considering the life of a Black boy or girl following Alexander. Born in 1964 in the South, where most Blacks lived, a child would have entered desegregated first grade in 1970 at age 6. (Indeed, this is an assumption; relatively few Blacks entered desegregated schools as early as 1970.) High school graduation would follow 12 years later, in 1982 at age 18. Four years of college and, say, three years of professional school later, that child would be 25 years old in 1989. Assume that our subject had a child two years later in 1991. That child now would be 13 years old in the sixth grade and not likely immune from his or her parent's formative past. This typical African American is not much more than one educational generation removed from when most Blacks lived under apartheid. In a palpable, personal sense, the closeness of the time became manifest to me when I met Plessy's grandnephew a few years ago in New Orleans.

WAS "ALL DELIBERATE SPEED" RESPONSIBLE FOR THE DELAY?

Southern opposition to *Brown* was so intense that, while it is impossible to know, had the court ordered immediate desegregation, the result would not have been very different. A small number of school districts did have token integration after 1954. A few others might have integrated if the court had said "immediate." But *Brown II* implicitly acknowledged what had become manifest in 1954. The range and bitterness of the attacks on the court were immense. Of the 104 Congressmen and Senators from the South, all but three signed the *Congressional Manifesto*, which denounced the Supreme Court. "Impeach Earl Warren" campaigns, resolutions of "interposition" and "nullification" that preceded the Civil War, creation of State Sovereignty Commissions, denunciations by state and even federal judges and state attorneys general, school closing and pupil assignment laws that raised impassable procedural obstacles to integration, prosecutions of civil rights

organizations and civil rights lawyers as well as efforts to disbar some of them—all challenged the legitimacy of the courts and the *Brown* decision. Notwithstanding this onslaught, when a Black person or the Black community demanded integration, as some did, there rarely was a way to achieve it. Southern school districts did not integrate voluntarily. Southern White lawyers would not file integration suits for fear of reprisals. Northern White lawyers were not interested. Black lawyers in any part of the country were few and far between. In some Southern states there was only one. In no Southern state was there more than a handful. The U.S. Department of Justice had no power to bring desegregation suits. Many Southern judges, federal and state, were racists. The Supreme Court was isolated. There was little effective national support. The NAACP Legal Defense Fund soldiered on with only half a dozen staff lawyers plus the few Southern Black lawyers who worked as cooperating attorneys.

Although he never issued a formal statement in opposition and indeed insisted that all of America must obey the law, President Dwight D. Eisenhower made clear his distaste for the *Brown* decision. The last gasp of physical resistance to elementary and high school desegregation occurred in 1957 in the Little Rock school case.[15] President Eisenhower, no friend of integration, called upon federal troops to quell armed opposition to the court order requiring Little Rock High School to admit (a number that ultimately was reduced to) nine Black children.[16] To him it was more important that the law be obeyed than for White Southern racial social mores to be upheld.

In 1960, President John F. Kennedy aligned himself with the Supreme Court and endorsed *Brown*. Yet, during his presidency, violent opposition flared up sporadically, as with resistance at the University of Mississippi to admit James Meredith as the first Black student in 1962 and at the University of Alabama in 1963.[17]

Historians and others debate whether the changes African Americans experienced would have occurred without *Brown*, how they might have been brought about, or whether they would have arrived later. But there is no question that without *Brown* the civil rights movement would not have occurred when it did and not in the form it took. The line of descent from *Brown* to the movement to the Civil Rights Acts is clear. Martin Luther King Jr. annually held a prayer pilgrimage on May 17, *Brown's* anniversary. The first Freedom Rides, starting in Memphis, scheduled their arrival in New Orleans on May 17. The first sit-in demonstrators cited *Brown* as their inspiration. Rosa Parks and her husband were NAACP officials, steeped in the significance of *Brown*, when she precipitated the Montgomery bus boycott.[18] King's support of the boycott invoked the Supreme Court. The boycott succeeded when a court order, based on *Brown*, prohibited enforcement of the bus segregation law that the boycott protested.[19] The boycott might not have succeeded without that court order.

The civil rights movement moved Congress to join President Lyndon B. Johnson and the Supreme Court by passing the Civil Rights Acts of 1964 and 1965. Then all three branches of the federal government spoke with a single voice on racial discrimination. The court expressed this national consensus by issuing orders in the late 1960s and early 1970s that implemented the precepts of 1954. *Alexander v. Holmes County Board of Education* overruled

Brown II, and although that decision may not have been responsible for the long delay in implementation, the overruling was a clear signal of the need for rapid change. The early 1970s saw a surge in school integration throughout the South.[20]

DESEGREGATION POST-*ALEXANDER*

In the 1970s, post-*Alexander,* the federal government promoted a substantial level of school integration through Title VI of the 1964 Civil Rights Act, which prohibits discrimination in activities that receive federal funds. Desegregation law evolved to set the stage for many of the dilemmas of public education that confront the country today. How to desegregate school systems in small towns and rural areas was not complicated. There were not many children and not many schools. In rural areas, residences were not severely segregated; in towns, there often was little distance between where Blacks and Whites lived and few schools. Integration often could be achieved simply by assigning children to schools nearest their homes, sometimes referred to as a neighborhood school policy. But in areas of residential segregation, typical of larger cities, a neighborhood school policy translated into school segregation. Something more would be necessary if Black and White children were to attend school together.

In 1971, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*[21] approved a model for integration in such situations—"pairing" or "clustering" schools. A school in a White residential area might be designated to contain, for example, grades one through three. A "paired" school in a Black residential area might contain grades four through six. Black children would attend grades one through three with White children who lived near the White neighborhood school; White children would attend grades four through six with Black children from the neighborhood of the Black school. All grades in both schools, therefore, would be integrated.

Other issues followed. Which schools and grades to pair? What proportion of Blacks and Whites should be assigned to each school? How would students travel to school? What if, despite pairing schools, the system ended up with some all-Black or all-White schools? What if an assignment scheme were to integrate schools but shifts in residential patterns were to re-segregate them? How long should such assignments and possible re-assignments continue?

The Supreme Court held that Charlotte had the affirmative duty to take whatever steps might be "necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[22] Using pairing as a means of integration, it prescribed a quota of Black and White children for each school, which would approximate the Black-White school population ratio. But the court made clear that the quota was not inexorable. It was merely a guideline:

> *"School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio*

of Negro to white students reflecting the proportion for the district as a whole."[23]

The court approved busing for children to attend schools outside of their neighborhoods, noting that, nationally, busing was a common way of traveling to school, although sometimes the trip might be onerous and would have to be limited. As a consequence, some all-Black or all-White schools might result, which would be tolerated. As populations shifted, plans might have to be rewritten to maintain desegregation.

In their conference following the *Swann* argument, a majority of the justices, Chief Justice Burger among them, at first disapproved of such affirmative action as a means of desegregation. But with further discussion, the justices other than Burger concluded that pairing, busing, and quotas were appropriate for desegregating schools. If Burger were to dissent, he would have been unable to assign the writing of the opinion. That power would pass to the senior justice among the majority. Burger joined the majority, creating unanimity and retaining the power as chief justice to assign the opinion, which he gave to himself. He therefore was able to write into the opinion the passages within which lie the seeds of returning desegregated systems to segregation.[24]

His opinion observed that someday systems would become unitary, and judicial supervision would come to an end. A unitary system would be one in which no vestiges of segregation remained, although the meaning of "vestiges" has not yet been well defined. But, in effect, it means that where a school system has integrated by pairing and busing, and segregated practices no longer exist, a court could conclude that vestiges of segregation no longer exist. Then, the court order may be dissolved and, should those who administer the system desire, busing would end. Unless housing also had become desegregated, of course, a neighborhood school system could return to segregation. But, since segregation at that point would not be attributable to the state (although realistically the state's influence surely was there), segregation would not be unconstitutional. Desegregation is now eroding in conformity with the final passages of *Swann*.

With some exceptions, school systems throughout the South instituted *Swann*-type plans. Not long after deciding *Swann*, the court made clear that *Brown* applied to Northern school systems even though they had not been segregated by statute. In *Keyes v. School District No. 1, Denver*,[25] it decided that while the equal protection clause applied only where the state had made racial distinctions, school board or administrative decisions that brought about segregation warranted the requirement to desegregate. Moreover, that a school board segregated in some part of its system created a presumption that it had produced racial segregation elsewhere. Based upon the "*Keyes* presumption," courts required the desegregation of many Northern school systems.

THE COURT CONFINES INTEGRATION WITHIN DISTRICT BOUNDARIES

In metropolitan areas, north and south, most Blacks are concentrated in separate neighborhoods in center-city school districts, while Whites live on the periphery or in suburban school districts. Although in some states, such as

Florida and North Carolina, a single school district may include city and suburbs, most district boundaries separate city and suburbs and Blacks from Whites. Ordinarily, urban children (often all or mainly Black) cannot be desegregated without busing between city and suburbs. But in 1974, the Supreme Court in *Milliken v. Bradley*[26] held that courts have no power to impose desegregation remedies across the dividing line between districts unless city and suburban districts had collaborated in creating or maintaining segregation. (An example would be that White suburbs allowed only White city students to transfer to suburban schools while allowing suburban Black students to transfer to city schools). Opponents of interdistrict desegregation objected that parents would have less influence with remote boards in a different political jurisdiction, distance would impede participation in school activities, and budgets would become difficult to allocate and administer. Agreeing with them and conforming to the desires of many suburban dwellers to insulate themselves from Blacks, the court confined desegregation within metropolitan districts. "Interdistrict violations" that justify "interdistrict remedies" have been rare. City schools, therefore, usually end up all or preponderantly Black.

Not long after *Milliken* was decided, in *Milliken II*,[27] the Supreme Court required the state to compensate city schools that had been segregated and had suffered from underfunding related to segregation to bring them to parity with Whites. This remedy did not require desegregation. It amounted to attempts to equalize where desegregation was not legally feasible. *Jenkins v. Missouri*[28] decided, similarly, that the Kansas City schools had suffered from state-imposed segregation but that the suburbs had not been complicit in bringing it about. Therefore, no interdistrict violation, no interdistrict remedy. But the trial court did order the state to increase funding for city schools to make up for inadequate state funding during years of segregation under a state segregation statute. The district court viewed increased funding as a way to enhance city schools so that they might attract suburban students, calling this "desegregative attractiveness." Pursuant to this order, the state spent $1.5 billion on city schools. But the Supreme Court in 1995 held that the federal courts had no power to promote "desegregative attractiveness."[29]

Conforming to the last paragraph in *Swann*, the court in *Oklahoma City School Board v. Dowell,*[30] decided in 1990, held that when "vestiges" of segregation no longer remain, a system has become "unitary" and its desegregation order should be dissolved. Of course the result would be to return to a system of separate schools. Since, nominally, the separation would not be as a result of state action, it would not be unconstitutional. Following the formula, resegregation has been setting in across the country in formerly desegregated school districts.

The ultimate outcome of the desegregation decisions, from *Brown* to the present, is that courts continue to require desegregation in fewer and fewer systems. As suburbs become whiter and cities become blacker, desegregation becomes less feasible. To the extent that desegregation has succeeded, systems may be declared "unitary," desegregation decrees may be dissolved, and systems may resegregate. In metropolitan areas, where housing segregation creates school segregation and there are separate city and suburban school districts, an increasing number of

Black children go to school only with Black children or with few White children. White children go to school mainly with White children. The city boundary has become a racial boundary for school assignment, except in rare instances where courts have found an "interdistrict violation."

On Martin Luther King Jr.'s birthday in January 2004, the Harvard Civil Rights Project described the decrease in integration, summarized and excerpted below:[31]

- In many districts where court-ordered desegregation ended in the past decade, there has been a major increase in segregation. The courts assumed that the forces that produced segregation and inequality had been cured. They have not been.
- Among the four districts included in the original *Brown* decision ...three of the four cases show considerable long-term success in realizing desegregated education.
- Rural and small-town school districts are, on average, the nation's most integrated for both African Americans and Latinos. Central cities of large metropolitan areas are the epicenter of segregation; segregation is also severe in smaller central cities and in the suburban rings of large metros.
- There has been a substantial slippage toward segregation in most of the states that were highly desegregated in 1991.
- The vast majority of intensely segregated minority schools face conditions of concentrated poverty, powerfully related to unequal educational opportunity.

WHY DESEGREGATE?

Studies over the years unanimously conclude that students in integrated schools do better academically and in other life activities than those in all-Black or nearly all-Black schools. The earliest study, the Coleman Report,[32] identified the socioeconomic status of classmates that corresponds with race, after the influence of a child's home, as the most important factor in determining quality of education. The period of greatest increase in Black standardized test scores occurred shortly after school integration took an upward leap following *Alexander* in 1969. Studies of school integration across Texas in recent years establish that "schools with higher concentrations of minority students lead to lower achievement for Black students with minimal effects on Whites or Hispanics."[33]

John Kain, a scholar who has studied the effects of integration on minority education, has advocated various measures to promote integration, including:[34]

> *(M)ore aggressive policies promoting housing desegregation as opposed to expensive compensatory strategies that left ghettos unaffected. Empirical analysis of segregation differences across metropolitan areas . . . finds direct impacts on educational attainment and other outcomes. More recently, the outcomes of the Gautreaux Program . . . and the Moving to Opportunity experiments . . . have reinforced the possibility of favorable outcomes from housing dispersal programs. Policies that support the continued subur-*

banization of black Americans and the slow, but steady decline in black-white segregation that has marked the last two decades . . . would, by the results of this paper, support improved schooling outcomes—particularly for higher achieving black students.

Other studies uniformly come to similar conclusions. Not only do Black students do better in course work in integrated schools, they are introduced to a wider variety of relationships that improve their opportunities to enter majority networks and learn how to deal with majority culture.

Nevertheless, integration has declined sharply in recent years.

Erika Frankenberg and Chungmei Lee, in a 2002 study of school desegregation, have written that:

"(T)he racial trend in the school districts studied is substantial and clear: virtually all school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend towards resegregation, and in some districts, these declines are sharp. As courts across the country end long-running desegregation plans and, in some states, have forbidden the use of any racially conscious student assignment plans, the last 10 to 15 years have seen a steady unraveling of almost 25 years worth of increased integration."[35]

WHAT TO DO WHERE IT IS DIFFICULT TO INTEGRATE

Assigning children on the basis of race for the purpose of integration has become controversial, legally and politically. Therefore, school administrators who want to desegregate have undertaken other measures not explicitly based on race to bring about racially mixed classes.

METCO: VOLUNTARY CROSS DISTRICT INTEGRATION

METCO is a voluntary program that has bused Black and some Hispanic children from Boston to White suburban schools for more than a generation. A few other city-suburban areas have similar programs. Participation is not limited on the basis of race, but the general understanding is that the program is for Blacks and Hispanics; enrollment locations are in minority neighborhoods. Although there has been no legal challenge to this arrangement, it would not be surprising if one were to emerge.

METCO students do better in school according to conventional measures of academic achievement than if they had attended all-Black schools in the city. But more than test scores improve. Susan Eaton, author of a book-length study of METCO, has described Hartford's Project Concern, a program like METCO, as follows: "Blacks who participated . . . are more likely than their segregated counterparts to have high aspirations, consistent career planning, and career patterns that would prepare them for their desired occupations."[36] "(They) were more likely than blacks from segregated schools to have a racially mixed social network of friends and acquaintances and to live in racially mixed

neighborhoods . . . (and) were more likely to enroll in college and work in occupations traditionally dominated by whites."[37] This is consistent with other studies of integrated education. It is not, as sometimes is said disparagingly, that a Black child has to sit next to a White child in order to learn. Rather, given the coincidence of race and poverty, children who come from homes with limited opportunity and aspirations see other children who have been encouraged to learn and to apply themselves academically as examples to emulate. Two other scholars, Crain and Mahard,[38] who have studied outcomes of integrated education, have written that Black children with an integrated education get jobs about which they may not have known, are informed about whether to pursue higher education and where, learn how to navigate about society, and are more versatile in social and economic relationships than if they had lacked integrated education.

METCO graduates, when they look back on the program as adults, enroll their children. In Boston, it is not uncommon for Black families to put their children on the METCO wait list when they are born. The waiting list is long.[39]

MAGNET SCHOOLS

Magnet schools, sometimes set up voluntarily, sometimes court-ordered, offer special curricula in mathematics, science, art, music, languages, vocational, technological, and other subjects. They enroll students from all over a school district, unconstrained by ordinary neighborhood limits. Integration would be impaired if too many Blacks or Whites chose to attend, leaving no room for members of the other group. Consequently, magnets sometimes have limited enrollment by race in order to maintain integration. Families whose children have been excluded sometimes object that the quota is unconstitutional. Where the magnet has been a remedial device for *de jure* segregation, courts have approved the quota, just as the Supreme Court approved quotas of students who were bused in *Swann*. Where the quota has been employed to maintain racial balance, not as a remedy for *de jure* segregation, lower courts generally but not always have struck it down.[40]

In the latest phase of *Swann*, Whites had been rejected to keep space available for Blacks in an integrated magnet school. The closely divided Fourth Circuit upheld the quota as a remedy for the period of time when the system was being desegregated to remedy *de jure* segregation. But it disapproved the quota for a subsequent period when the district had become "unitary."[41] Perhaps, since the Supreme Court has upheld affirmative action in higher education in the University of Michigan Law School case, the same principles may apply to lower levels of schooling.

CHARTER SCHOOLS

Approximately 700,000 students now attend charter schools, public schools that operate free from what their advocates term bureaucratic and labor union constraints. Instead of complying with inefficient, stifling regulation, supporters say, charters respond to the discipline of the market. If a charter's performance is unsatisfactory, it may not be renewed. But when charters succeed, they believe, ordinary public schools must improve in order to compete. Opponents view charters as a means of destroying public education and weakening teachers' unions. In any event, charters generally have not provided better education for African

Americans, although there are a few conspicuous exceptions.

Minority parents desperate for alternatives to ghetto school education have been among strong advocates of charters. Indeed, a few all-minority charters have been remarkably successful. Roxbury Prep of Roxbury, Massachusetts, with an 85% Black and 15% Latino student body admitted by lottery, has a dedicated administration and teaching staff, a 7:45 a.m. to 4:15 p.m. school day, a dress code, and strict rules of conduct. Its students have closed the achievement gap between Black, Latino, and White students. Charter schools with all-Black and Latino populations are at the top among schools in all Massachusetts urban centers. But there is no evidence that the Roxbury Prep success can be replicated widely.

To the contrary, Texas public schools outperformed charters by nearly two to one. About 25 of the 200 Texas charter schools have failed or have been closed for management abuses with millions of unaccounted dollars.[42] These scandals helped force enactment of the first serious fiscal controls over Texas charter schools two years ago.

The Harvard University Civil Rights Project has found that charter schools are more segregated than ordinary public schools and that "(s)egregation is worse for African-American than for Latino students, but is very high for both."[43] Rarely does a charter admit children who live outside its district and, therefore, they do not integrate across the city-suburb divide. Moreover, the project finds little convincing evidence that charters are superior to public schools. But the subject is one of great controversy, fueled by the underlying conflict over teachers unions and public versus private education. The Manhattan Institute,[44] a charter advocate, argues that charters serving the general student population outperform nearby regular public schools by 2 to 3 percent in math and reading. The difference is slight and its meaning would have to be evaluated in light of who constitutes the student bodies. For example, did the comparable public schools have to teach disadvantaged or handicapped children, and so forth? Were the charters free to accept or reject applicants?

Of course, charters may not discriminate on the basis of race, but if they set out deliberately to create an integrated student body, they would encounter the typical controversy over affirmative action. Now, of course, they could argue that the University of Michigan decision justifies affirmative action. Whether that decision applies at the elementary and high school levels has not been decided.

VOUCHERS

Vouchers are payments or credits, typically no more than $2,500 per year, taken from the public school budget and used by families to pay private schools some or all tuition charges. Voucher advocates tout them as a superior way to educational excellence but, like charters, vouchers are embroiled in controversy over other agendas. Opponents see them as undermining public education and breaching the barrier between church and state. Supporters say vouchers enable families to choose among schools and force public schools to compete in order to hold on to students and funding.

City children may not use vouchers in the suburbs, where the best public schools are, which immediately limits them as a vehicle for desegregation. If they could transfer

to out-of-district schools, poor families would be unlikely to afford upscale schools in or outside their districts, even with the voucher subsidy. But voucher-accepting city schools, not up to the level of elite private institutions, often are better than those their children attend. City children who use vouchers usually attend urban parochial schools that sometimes are more integrated than the general run of public schools but more likely are all White or all Black. In Cleveland, site of the schools involved in the recent Supreme Court voucher case, *Zelman v. Simmons-Harris*,[45] voucher recipients used their vouchers to attend Catholic religious schools. The Supreme Court held that because parents had the right to spend them anywhere, they were not grants to religious schools and rejected the church-state objection. But, the NAACP Legal Defense Fund, which vigorously supports school integration, filed a brief that argued vouchers are unconstitutional. In the opinion of an organization that is among the most knowledgeable on the subject, vouchers do not offer a way to desegregate.

Studies in Milwaukee and Indianapolis have concluded that vouchers do raise the educational level of their beneficiaries, but the reliability of these studies has been questioned.[46] Moreover, the claim that competition from voucher-accepting schools will spur public schools on to excellence has not been established. Where teachers and administrators are indolent and uncaring, it is not clear that competition will spur them to excellence. Perhaps they should be fired or inspired. At the same time, channeling public school funds into private schools will sap public schools of support, and all the competition-inspired motivation in the world will not enable them to do better.

Parochial schools are subsidized by cheap labor provided by teachers who are dedicated to promoting their religion. Consequently, they can afford to accept limited-value vouchers in lieu of tuition. But the supply of selfless teachers who will work for below-market pay is limited. Should voucher programs expand, parochial schools probably will have to pay more to teachers who are not motivated by religion. For vouchers to make a significant difference in education and integration, more funding would be required and their use allowed across district lines in suburban schools, which would be required to accept them. No one seriously believes this is likely to happen.

SCHOOL ASSIGNMENT BASED ON PARENTAL INCOME, CLASS, TEST SCORES

Assignment schemes based on social or economic criteria may accomplish results similar to race-based programs, since race and socioeconomic status (SES) overlap considerably. Accordingly, schools might be integrated without using race as a standard. A few small cities, including Cambridge, Massachusetts, use SES as a basis for school assignment. Low SES is identified by eligibility for free and reduced-price meals. Cambridge set as its goal for the 2002-2003 school year that each grade in each school be within 15 percentage points of the number of students eligible for free and reduced-price meals. Goals for subsequent years call for closer correlation, ultimately plus or minus 5 percentage points. Seats may be held open in an individual school in order to achieve socioeconomic diversity.[47] It remains to be seen if race would be upheld as a relevant assignment factor if challenged for use in this way.

A similar proposal is to assign children to schools according to their test scores. Schools would enroll a student body with approximately the same proportion of children at high, average, and low test-score levels as all other schools. This would effect an approximately equal racial distribution among schools. To my knowledge, this system is not in operation anywhere.

THE NO CHILD LEFT BEHIND ACT

The No Child Left Behind (NCLB) Act[48] was implemented to improve the performance of America's elementary and secondary schools. The act requires annual testing for students in grades three through eight and statewide progress toward objectives in order to guarantee that all students become proficient in 12 years. Results must be reported according to students' economic level, race, ethnicity, disability, and English proficiency. Schools that do not improve sufficiently will be subject to remedial action.

The NCLB Act would allow students in poor schools to transfer to better ones, with transportation at the district's expense. Until recently, parents in failing schools have been largely unaware of this. When children in failing schools have elected to transfer, their numbers have been so great that better schools have lacked space. But students have no right to transfer outside their district, and students may not move to better suburban schools. The NCLB Act also includes provisions for enhanced academic programs, particularly in reading. African-American and other minority children would, of course, benefit if the act were to fulfill its promise, but that would be difficult to accomplish for Black students who live in a segregated urban area, absent the right to transfer out.

If NCLB were amended to emulate the METCO program, allowing city students to transfer to the suburbs, the act would make a positive contribution to improving minority education. To anticipate objections, numbers could be limited to manageable size. The program would be voluntary-suburbs would have to agree. State and federal governments would have to pay for transportation and increased costs of instruction. In view of the fact that most suburbs could be expected to object to such an arrangement, is it likely to come about? Forceful national leadership that advocated advancing better education for minorities as a patriotic measure might over time be persuasive. It took from the 1950s until 1964 for Adam Clayton Powell's "Powell Amendment" to be adopted as part of the Civil Rights Act. A law permitting African-American students to transfer to suburban schools might take just as long to enact, but there would be no better way of improving their education, given the housing segregation that dominates most residential communities. Suburbs should know that by improving education for the least advantaged, the country becomes a better place where suburbanites prosper as well.

EQUAL OR ADEQUATE SCHOOL FUNDING AS A SUBSTITUTE FOR INTEGRATION

As school desegregation has run into dead ends, some have advocated a return to the separate-but-equal formula. In the first such case in modern times, the Supreme Court of California held that the equal protection clause of the 14th Amendment guaranteed equal school funding.[49] However, before the case could be heard by the Supreme

Court of the United States, that court by a vote of 5 to 4 rejected the claim in *San Antonio Independent School District v. Rodriguez*.[50]

The court decided that (1) wealth is not a "suspect class" as race is; and (2) education is not a "fundamental right." It observed also that the amount of money spent on education is not necessarily related to its quality and that poor children sometimes live in rich districts. The court noted that it is remote from local education and unfamiliar with what might be the consequences of an equalization order.

The Supreme Court of California then reiterated its earlier decision but based it on the California constitution, not the equal protection clause of the 14th Amendment. The Supreme Court of the United States has no power to review a state court 's implementation of its own constitution. The outcome remained as the Supreme Court of California originally decided it, although under a different constitutional rubric. About 20 state courts have come to similar results by interpreting equal protection or education clauses of their own state constitutions. Some make no reference to equal protection but require that the state establish an "efficient" and "thorough" system of education, a "sound basic education," or a similar formulation.

The most recent decision to address equal funding under state constitutional law has been the decision of the New York Court of Appeals in the *Campaign for Fiscal Equity v. New York*.[51] Chief Judge Kaye wrote for the court:

> *(A) sound basic education (which the state constitution guaranteed) back in 1894, when the Education Article was added, may well have consisted of an eighth- or ninth-grade education, which we unanimously reject. The definition of a sound basic education must serve the future as well as the case now before us. Finally, the remedy is hardly extraordinary or unprecedented. It is, rather, an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation. A case in point is the experience of our neighbor, the New Jersey Supreme Court, which in its landmark education decision 30 years ago simply specified the constitutional deficiencies, beginning more than a dozen trips to the Court . . . a process that led over time to more focused directives by that court. . . . In other jurisdictions, the process has generated considerably less litigation, possibly because courts there initially offered more detailed remedial directions, as we do. . . .*

But, notwithstanding favorable decisions, school finance litigation generally has not resulted in equal or even adequate funding, although it sometimes has brought about increased appropriations for Black schools. James Ryan and Michael Heise have summarized the experience:[52]

> *(T)he most remarkable feature of school finance litigation is that even successful*

challenges have not led to equal funding, nor have any of the suits done much to alter the basic structure of school finance schemes. . . .

The controversy stems from the fact that equalizing funding by controlling local spending requires a cap on local spending or the recapturing of some locally raised revenues. . . . (I)n places like Texas, Kansas, and Vermont, recapture plans-dubbed "Robin Hood" schemes-have provoked continued and intense political squabbling, public protests, and litigation.

(A)lmost no school finance systems—even those reformed in response to a court order—limit the amount that local districts can raise. Similarly, very few rely on explicit recapture provisions. States typically respond to court orders by increasing state aid to poorer districts. States usually hold aid to wealthier districts constant or increase it at a slower rate than aid to poorer districts, but wealthier districts are typically allowed to use their own revenues to spend more than the poorer districts can afford. Providing more state aid to poorer districts while holding such aid to wealthier districts constant is, of course, redistributive, and it is often controversial. Instead of seeking equal funding or equal access to resources, most school finance suits now seek sufficient resources to fund an adequate education. The progression of school finance suits has thus paralleled the progression of desegregation suits, in that both reforms have preserved the boundaries between urban and suburban districts. Indeed, the parallel between adequacy suits and Milliken II relief is quite striking. Both channel resources to poor, often urban, districts while protecting the independence and sanctity of wealthy, usually suburban districts.

Nevertheless, as important as equal funding or even adequate funding is, funding alone has not provided the answer to deficient ghetto education. Witness the experience in Kansas City, which spent $1.5 billion on all-Black schools, which was not applied to teaching, administration, and the environment in which the schools were located. Academic performance following the infusion of money was no better than before.

Integration and increased funding need be exclusive of each other. A recent case in the Connecticut Supreme Court, *Sheff v. O'Neill*,[53] has ordered the Hartford, Connecticut, school system to desegregate as a matter of state constitutional law. It was not required that plaintiffs demonstrate that there was intentional state action designed to separate on the basis of race. Limited desegregation followed—but the state legislature, instead of acting to desegregate more completely, appropriated more funds. It is too soon to judge what the decree will mean as a practical matter. But many

see *Sheff v. O'Neill* as a model for future desegregation litigation. It avoids the onerous task of establishing that there has been state action involved in creating segregation. It may be more acceptable to those who disagree with desegregation because it is a state court decision.

AFFIRMATIVE ACTION IN HIGHER EDUCATION

Education is a continuum. Students in elementary and high school prepare for higher education and the world of work. They cannot succeed beyond the extent to which their lower school education, and following that, their higher education, has equipped them. If their education has been deficient, they become stuck in unsatisfying work that offers few prospects and does not pay well. Increasing numbers of African-American young people seek admission to college and graduate schools. Quite often, their elementary and high school preparation impairs their ability to obtain adequate standardized test scores that most selective schools consult in making admissions decisions. Affirmative action in higher education has been an effective means of closing the gap. Happily, ghetto residents are not confined to ghetto higher education because, unlike elementary and high schools, higher education does not admit on the basis of neighborhood. But all Blacks face the standardized test obstacle.

The proportion of Blacks enrolled in higher education is slightly more than 70 percent of the proportion of Whites enrolled in higher education. In 1960, as the civil rights movement began, more than 8 percent of Whites had completed four years of college compared with 3.5 percent of Blacks. Now, 29 percent of Whites and 17 percent of Blacks have a college degree. The contribution that affirmative action has made in improving the Black-White higher education ratio, according to *The Journal of Blacks in Higher Education*, is as follows: "(O)ver the past 30 years at least 15,000 black students admitted under affirmative action guidelines have graduated from America's 25 highest-ranked universities. Another 15,000, also admitted under preferential admissions policies, have graduated from the nation's highest-ranked law schools. Some 10,000 more blacks have successfully entered the business world after admissions under the affirmative action policies that were established at our leading business schools. Another 3,500 young blacks have graduated from our most distinguished medical schools."[54] In some respects, 43,500 graduations over 30 years may not seem to be a large number. But it pertains to only the highest-ranked schools. Very selective and selective schools employ affirmative action, too. Moreover, the increase is probably proportionately higher in recent years since fewer Blacks were admitted in the early days of the programs.[55]

The rise in affirmative action has been reflected in the rise in the number of doctors, lawyers, MBAs, and other professionals. Authors William Bowen and Derek Bok in *The Shape of the River* report that "(b)y 1996, blacks made up 8.6 percent of all male professionals and 13.1 percent of all female professionals. They also accounted for 8.3 percent of all male executives, managers, and administrators and 9.6 percent of all females in such positions (up from 3 percent and 1.8 percent). From 1960 to 1990, blacks almost doubled their share of the nation's physicians and almost tripled

their share of attorneys and engineers."[56]

As the authors continue, "There is, indeed, a real wage premium associated with enrollment at an academically selective institution; (t)his premium is substantial (even at a fairly early stage in one's career); and (t)he premium is at least as high and probably higher for black students than for white students."[57] Among the affirmative action cohort admitted to college in 1976, Black women who graduated from selective schools on average earned $64,700 per year, compared with $66,000 for their White women classmates; Black males earned $85,000, compared with $101,900 for their White male classmates.[58] But "black women graduates of those selective schools earned $27,200 more than did all black women with BAs. Black male graduates of the selective schools earned $38,200 more than all black males with BAs."[59]

In 1954, the year of *Brown*, Black median income was $13,481 in 2001 dollars. By 2002 it had more than doubled to $29,026. During the same time, White median income increased from $24,206 to $46,900, somewhat less than double. Blacks who a half-century ago earned about 54 percent of White income now earn 62 percent. The Black-White income gap persists at around three-fifths; that is, Blacks earn about 60 percent of what Whites earn. (That percentage curiously suggests the three-fifths of a person provision in the U.S. Constitution, by which Southern states were able to increase their apportionment in Congress. Slaves counted as three-fifths of a person and, thereby, Southern states possessed enough power in Congress to assure the continuation of slavery). Black income (like White) is closely linked to education. The median income for a Black high school graduate is more than $17,000 and more than $35,000 for a Black college graduate, 94 percent of a White college graduate's earnings. But only 17.2 percent of adult Blacks have a college degree. The median Black college graduate income is 90 percent that of White college graduates, although Black male college graduates earn only 82 percent of comparable Whites' income. Black women college graduates earn more than White women graduates. Two-thirds of Black women, but only half of White women, work full time; adjusted for time worked, Black women earn 90 percent of White women's income. The typical American household has net worth (assets minus debt) of $71,700 (this includes all minorities, therefore it is higher for Whites alone). The typical Black household has net worth of $15,500. White wealth largely derives from GI Bill-supported higher education following World War II and the increase in the value of homes purchased during that period. Whites obtained, but Blacks were openly denied, government-guaranteed mortgages for buying homes in White areas, which is where the new homes were. Today, more than 74 percent of Whites own their homes, compared with only 47 percent of Blacks.[60]

The toll of inadequate, segregated elementary and high schools has made it difficult for those who have come through them to qualify, according to conventional standards, for the most advantageous higher education. Consistently, Blacks score substantially lower than Whites on standardized tests required for admission to selective schools. Those schools therefore have admitted Black applicants by affirmative action. The Supreme Court upheld affirmative action in 1978 in *Regents of the University of California v. Bakke*.[61] Justice Powell's opinion, widely accepted as the holding of the

court, held that affirmative action is constitutional as an exercise of academic freedom, protected by the First Amendment. Opponents mounted a pervasive attack on it, winning a number of cases that, they claimed, amounted to overruling *Bakke*. Without affirmative action, according to the *Journal of Blacks in Higher Education*, Black enrollment at very selective and highly selective colleges and graduate and professional schools would drop to about 2 percent, effectively excluding African Americans from the best opportunities following graduation.[62]

Many explanations have been offered for such test outcomes, but none have been accepted as fully persuasive. Of course, the inferior status of Black elementary and high school education must be a contributing factor. Perhaps the explanation most in favor today is that of the "oppositional culture" as elaborated by John Ogbu: Black students denigrate Black classmates who do well in school, charging that they emulate Whites. This places a premium on not striving to do well and results in poor academic performance.[63] Another theory, that of Claude Steele, is that of "stereotype threat," which causes Blacks to do less well on standard tests than they might do otherwise. He argues that experiments demonstrate that the best Black students freeze up when taking tests that are important in determining their futures.[64]

Following World War II, most Blacks lived in the South but were excluded from Southern White universities; Black schools did not have room for all who desired to study. Moreover, while Black state colleges and universities bravely struggled to furnish equal education, many offerings were remote from what anyone would call higher education today. Nowhere in the South could a Black person attend an accredited law or medical school apart from Howard University (law and medicine) and Meharry Medical School in Tennessee or obtain a PhD until, for all practical purposes, the 1960s—notwithstanding that in 1938 the Supreme Court made clear that Southern universities had to cease excluding students on the basis of race. Black unemployment persists at double the rate for Whites. In 2003, unemployment was 10.9 percent among Blacks and 5.2 percent among Whites. In 1960, the gap was virtually identical: 10.2 percent among Blacks and 5.0 percent among Whites.

The life longevity gap is five years between Whites (77.7 years) and Blacks (72.2 years). In 1954, it was 70.5 years compared with 63.4 years, respectively. The more than five-year gap has persisted for about 50 years. *The New England Journal of Medicine* reports that Black men in Harlem are less likely to live to age 65 than men in Bangladesh. As of 2001, the infant mortality gap remained enormous. In 1960, it was 22.9 per thousand live births for Whites and 44.3 per thousand lives births for Blacks. Now it is 5.7 for Whites and 14 for Blacks.

About half of the national prison population is Black. Almost one-third of young Black men are likely to be imprisoned at some time in their lives. Commitment of crime and victimization by crime are markedly higher among Blacks than Whites.

In 1959, 55.1 percent of Blacks lived in poverty. Today, the proportion has decreased to its lowest point at 24.1 percent. Among Whites, poverty today is at 8.0 percent. Just imagine: One-fourth of all Blacks live in poverty today![65]

Whatever the cause, opponents believed they had

affirmative action on the ropes and the next case would finish it off. But they lost. Now Black enrollment at the most selective schools is about 6 percent, with some schools at 10 percent and 12 percent.[66] The critical event for African-American higher education was the Supreme Court's 2003 decision in *Grutter v Bollinger*.[67] Under *Grutter*, affirmative action may continue for at least a generation. Substitutes for affirmative action need not be found, except where affirmative action has been abolished under state law, as in California. Justice Sandra Day O'Connor's opinion goes considerably beyond Justice Powell's argument in *Bakke*, which was based on diversity. Justice Powell wrote that academic freedom gave an institution the right to fashion admissions criteria based on race. Powell looked only at what occurred on campus, not in society. Justice O'Connor extended Powell's reasoning to take into account the consequences for society. She described how affirmative action, by enabling students to meet and learn with others from diverse backgrounds, equipped them to function in a multiracial society. People from a variety of backgrounds populate government, business, the military, and other institutions. To the extent that students learn with schoolmates from those backgrounds, they will work better with the range of Americans with whom they interact in the world of work.

Undoubtedly, Justice O'Connor was influenced by a friend-of-the-court brief filed by a group of former military officers, many of them former commanders who had extensive responsibilities. They pointed out that West Point and other service academies employ affirmative action in their admissions procedures because more than 20 percent of the military is comprised of minorities. For minorities to be commanded by White officers only, or almost only, would raise serious questions of morale and combat efficiency. Justice O'Connor's justification of affirmative action raises this question: If integration within a university makes institutions outside the university work better, might it not be justifiable to integrate outside the university in the first place?

The next battles over affirmative action will come from several different directions. Opponents will push ahead on the political front with referenda, legislation, trustee resolutions, and other efforts to scrap affirmative action policies. They also will resume their attack through the courts, attempting to persuade the Supreme Court that *Grutter* was wrongly decided. At the same time, affirmative action advocates will try to develop the implications of Justice O'Connor's rationale in *Grutter*. They will argue that integrating affirmative action into activities other than education is constitutional because that is another way to accomplish what *Grutter* identifies as highly desirable: an integrated society that is, to use Justice O'Connor's words, one nation indivisible, with liberty and justice for all.

NOTES

1. 163 U.S. 537 (1896).
2. 175 U.S. 528 (1899).
3. 275 U.S. 78 (1927).
4. *See* the debate between W.E.B. Du Bois and Charles Thompson in the 1935 Journal of Negro Education. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4(3) J. Negro Educ. 328 (July 1935); C.H. Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4(3) J. Negro Educ. 419 (July 1935).
5. The Report, completed in 1931, was financed by the Garland Fund and conducted by Nathan Ross Margold.
6. *See* Adam Cohen, *The Supreme Struggle*, N.Y. Times, Jan. 18, 2004.
7. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*

(Perennial) (2002).
8. See C. Vann Woodward, *The Strange Career of Jim Crow*, 2001; Lonnae O'Neal Parker, *Days of Jim Crow*, Washington Post, Feb. 9, 2002, at C01.
9. *Plessy*, 163 U.S. at 544.
10. Charles A. Lofgren, *The Plessy Case* (Oxford University Press) (1987).
11. *See City of New Orleans v. Barthe,* 376 U.S. 189 (1964) (parks and playgrounds); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf course); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (beach).
12. *Florida ex. rel. Hawkins v. Board of Control of Florida et. al,* 350 U.S. 413 (1956).
13. *Brown v. Board of Education*, 349 U.S. 294 (1955).
14. 396 U.S. 1218 (1969).
15. *Cooper v. Aaron,* 358 U.S. 1 (1958).
16. *Id.*
17. *See Meredith v. Fair,* 328 F.2d 586 (5th Cir. 1962); *Lucy v. Adams*, 8 Race Relations Law Reporter 452 (1963). E. Culpepper Clark, *Schoolhouse Door. Segregation's Last Stand at the University of Alabama* (Oxford University Press) (1993).
18. Jack Greenberg, *Crusaders in the Courts* (BasicBooks) (1994); *Eyes on the Prize*.
19. Gayle v. Browder, 352 U.S. 903 (1956).
20. *See, e.g., Green v. New Kent County School Board,* 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).
21. 402 U.S. 1 (1971).
22. *Green v. County School Board*, 391 U.S. 430 (1968).
23. 402 U.S. at 16.
24. *See Crusaders in the Court*, p.389 (BasicBooks) (1994).
25. 413 U.S. 189 (1973).
26. 418 U.S. 717 (1974).
27. *Milliken v. Bradley,* 433 U.S. 267 (1977).
28. 515 U.S. 70 (1995).
29. *Missouri et. al. v. Jenkins et. al.,* 515 U.S. 70 (1995).
30. 498 U.S. 237 (1990).
31. Gary Orfield & Chungmei Lee, Brown at 50: King's Dream or Plessy's Nightmare, The Civil Rights Project at Harvard University (2004) at http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04/php.
32. J.S. Coleman et. al., Equality of Educational Opportunity, Washington, D.C., U.S. Department of Health, Education and Welfare (1966).
33. Eric A. Hanushek et. al., Do Peers Affect Student Achievement, Prepared for the Conference on Empirics of Social Interactions at the Brookings Institution (1999).
34. John F. Kain et. al., *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement,* National Bureau of Economic Research, Working Paper No. 8741 (2002).
35. Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, The Civil Rights Project at Harvard University (2002) at http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools02.php.
36. *See* Susan Eaton, *The Other Boston Busing Story* (Yale University Press) (2001); R. Gable, D. Thompson, and E. Iwanicki, *The Effects of Voluntary School Desegregation on Occupational Outcomes,* Vocational Guidance Quarterly, 31(4), 230-239 (1983).
37. *See* Susan Eaton, *The Other Boston Busing Story* (Yale University Press) (2001); R.L. Crain, *Desegregated Schools and the Non-Academic Side of College Survival*, paper presented at the Annual Meeting of the American Educational Research Association (1984); R.L. Crain & Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment,* John Hopkins University, Center for Social Organization of Schools (1985).
38. R. Crain & R. Mahard, *The Consequences of School Desegregation* (Temple University Press) (1983).
39. *See* Susan Eaton, *The Other Boston Busing Story* (Yale University Press) (2001); Center for Educational Research & Policy at MassINC, *Mapping School Choice in Massachusetts, Data & Findings* (2003), at http://www.massinc.org/about/cerp/research/school_choice/schoolchoice_policybrief.pdf.
40. *See Comfort v. Lynn School Committee,* 263 F. Supp. 2d 209 (D. Mass. 2003); *Bradley v. School Board,* 325 F. Supp. 828 (E.D.Va. 1997); *San Francisco NAACP v. San Francisco Unified School District,* 576 F. Supp. 34 (N.D.Cal. 1983).
41. *Belk v. Charlotte-Mecklenburg Board of Education,* 269 F.3d 305 (4th Cir. 2001).
42. Francis X. Cline, *Re-Educating Voters About Texas Schools,* N.Y. Times, June 4, 2003, at A30.
43. Erika Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education,* The Civil Rights Project at Harvard University (2002) at http://www.civilrightsproject.harvard.edu/research/deseg/CharterSchools.php.
44. Jay P. Greene et. al., *Apples to Apples: An Evaluation of Charter Schools Serving General Student Populations,* Center for Civic Innovation at the Manhattan Institute, Education Working Paper 1 (July 2003).
46. 536 U.S. 639 (2002).
47. *See It's Still Too Early to Judge School Vouchers,* The N.Y. Times, May 17, 1997 at A-18.
48. Cambridge Public Schools, *Proposed Elementary Schools Consolidation and Improvement Plan*, Executive Summary: December, 2002, at http://cambridgepublic.us/cps/December%2004%20Plan%20Final.pdf.
49. No Child Left Behind Act, Pub. L. No. 107-110 (2002).
50. *Serrano v. Priest,* 487 P.2d 1241 (Cal. 1971).
51. 411 U.S. 1 (1973).
52. *Campaign for Fiscal Equity v. The State of New York,* 100 N.Y.2d 893 (2003).
53. James E. Ryan and Michael Heise, *The Political Economy of School Choice,* 111 Yale L.J. 2043, 2058-63 (2002).
54. 678 A.2d 1267 (Conn. 1996).
55. T.L.C., *Thomas Carlyle and Affirmative Action,* 24 JBHE 7 (Summer 1999). These statistics may include some double counting in that at least some of the professional school graduates were also among the college graduates. The number is impressive, nonetheless.
56. At these schools a student needs at least 1300 on the SAT (i.e. 650 verbal, 650 mathematics) to be considered for admission. Whites are

14 times as likely as Blacks to attain a score of 650 on the mathematics part of the exam and four times as likely to attain it on the verbal part. At law schools, in 1995-96, Harvard and Yale admits had a median LSAT score of 170. Only 17 Black students in the United States scored 170; 2300 others (Whites, Asians, and Hispanics) attained that score. A score of 165 was the median at the top 15 law schools. Of the White, Asian, and Hispanic test-takers 7,227 students had a score at or above that level; 70 Blacks nationwide reached that score. At a score of 160 or more, the median level of admits to the top 34 highest- ranked law schools, there were 267 Blacks in the country. There were 16,278 students of other groups at 160 or above. The third and fourth or lowest-tier law schools had a median score of 150. Only 1,745 Blacks in the entire country scored at that level. More than 36,000 Whites did. Whites outnumbered Blacks 20 to 1. There is, therefore, no reason to believe that most Black applicants, shunted from selective schools, would be admitted readily to even a nonselective law school if affirmative action were ended.

Medical schools confront a similar distribution of Black and overall scores. The median combined MCAT score of 25.2 for White students who were rejected for admission to medical schools nationwide was significantly higher than the 23.5 median score of Black students who were admitted.

57. William Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton University Press) (2000), p. 10.
58. *Id.* at 128.
59. *Id.* at 123. See pp. 122-125 on income comparisons generally.
60. *Ibid.*
61. The socioeconomic material in the foregoing paragraphs are from Jack Greenberg, *Crusaders in the Courts,* Second Ed. (2004), Par. 1.
62. 438 U.S. 912 (1978).
63. *See White Coats, White Faces: Calculating the Impact on Black Admissions to Medical School If Affirmative Action Were Eliminated,* Journal of Blacks in Higher Education (Autumn 1997); The Century Foundation, *Class-Based Affirmative Action in College Admissions* (May 2000), at http://www.ideas2000.org/Issues/Education/Affirmative_Action.pdf.
64. J.U. Ogbu, *Racial Stratification and Education in the United States: Why Inequality Persists,* Teachers College Record, 96, 264-298 (1994).
65. Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students,* The Atlantic Monthly, August 1999, p. 44-54.
66. *Number in Poverty and Poverty Rate by Race and Hispanic Origin: 2001 and 2002,* U.S. Census Bureau, Current Population Survey (2003), at http://www.census.gov/hhes/poverty/poverty02/table1.pdf.
67. *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education, National Trends in College Enrollment,* U.S. Commission on Civil Rights, at http://www.usccr.gov/pubs/percent2/ch4.htm.
68. 123 S. Ct. 2325 (2003).