

## From *Brown* to *Grutter*

Linda S. Greene\*

In this essay, I suggest that the doctrinal legacy of *Brown v. Board of Education*<sup>1</sup> must be assessed against the developments in equal protection since *Brown*. In this respect, although I contend that the *Brown* decision is one of the most important *race* decisions ever, its legacy as a doctrinal marker is an impoverished one. Here, I examine the core basis of the *Brown* decision and conclude that although ambiguous the decision had great potential.

The belated implementation of *Brown*, however, and its weak remedial counterpart *Brown II*<sup>2</sup> severely limited its potential as a vehicle for school desegregation. By the time that the Supreme Court demanded that states comply with *Brown*, many courts were already holding that *Brown* did not require integration but merely forbade the state enforcement of segregation, and coupled with various other theories of constitutional resistance to *Brown* were emerging.<sup>3</sup> Moreover, even as the Court articulated justifications for broad relief designed to produce unitary school districts, the Supreme Court also began to articulate constitutionally based arguments marking the limits of *Brown*.<sup>4</sup> *Brown's* legacy must also be measured by the degree to which its progeny provided constitutional cover to policies limiting

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\* Evjue Bascom Professor, University of Wisconsin Law School

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

3. See e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 751–52 (1975) (discussing *Brown*, and noting that in *Briggs v. Elliott*, 98 R. Supp. 776 (1955), Judge Parker held, “It does not forbid such discrimination as occurs as the result of voluntary action.”). In addition, a majority of the congressmen from eleven southern states signed a document called the Southern Manifesto, declaring that *Brown* was an illegitimate exercise of judicial power. *Id.* at 752. As late as 1982, Congress considered but did not adopt anti-busing and court jurisdiction legislation that would have barred school desegregation through pupil integration. GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 547–548 (3d ed. 1996).

4. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31–32 (1971) (cautioning that district courts, while having sweeping equitable powers to create unitary school districts, would not have authority to adjust remedies in the face of demographic changes, as proof of deliberate constitutional violation is a prerequisite to the deployment of authorized remedial measures).

inclusion and opportunity. Finally, *Brown's* legacy must be measured by the extent to which current doctrine fosters and demands policies promoting racial inclusion and opportunity. In the latter respect, I contend that the recent affirmative action cases, *Grutter v. Bollinger*<sup>5</sup> and *Gratz v. Bollinger*<sup>6</sup> are the most recent successors to *Brown's* legacy. Although these decisions clarify twenty-five years of doubt about the constitutional legitimacy of voluntary racial inclusion, they do not revisit or revise the impoverished post-*Brown* doctrinal landscape. Nevertheless, *Grutter's* premises are broad enough to support a rethinking of the meaning of *Brown* in the context of schools and beyond. The revitalization of that potential would be a fitting tribute to *Brown*.

Just over a century ago, the Supreme Court upheld racial segregation in *Plessy v. Ferguson*.<sup>7</sup> *Plessy's* hold on the scope of constitutional equality was tenacious. *Plessy* was possible because the Court distinguished an important precedent that arguably might have mandated a different result. In a prior case, *Strauder v. West Virginia*,<sup>8</sup> the Court considered the constitutionality of a state statute that excluded Blacks from juries.<sup>9</sup> In *Strauder*, the Court struck down the statute on the broad principle that laws inferring that the inferiority of Blacks in civil society were unconstitutional because they were steps backward in the direction of slavery.<sup>10</sup> In sweeping terms that are necessarily diminished when paraphrased, the Court spoke categorically about the constitutionality of racial distinctions:

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards

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

6. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

7. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding the constitutionality of racially segregated railroad cars and reaffirming the “separate but equal” doctrine).

8. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

9. *Id.* at 304.

10. *Id.* at 307.

reducing them to the condition of a subject race.<sup>11</sup>

Urged on by the State of Louisiana, the Court in *Plessy* distinguished the question of jury service from passage on intra-state trains, observing that the framers could not have intended such sweeping application of the *Strauder* principles.<sup>12</sup> Moreover, the Court rejected the assertion that state-mandated segregation imposed a racial stigma on Blacks affected by the law.<sup>13</sup> Shortly thereafter, the Court applied *Plessy* to an educational setting where a lesser degree of education was offered to Blacks than was offered to Whites.<sup>14</sup> These developments set the stage for over fifty years of constitutionally endorsed segregation and inequality.<sup>15</sup>

Between *Plessy* and *Brown*, a series of carefully litigated cases in the context of higher education exposed the true nature of the “separate but equal regime.”<sup>16</sup> What the truth revealed was that facilities for Blacks were either nonexistent<sup>17</sup> or patently unequal.<sup>18</sup> The resulting successful litigation was aimed at instances where states did not make any provisions for separate education.<sup>19</sup> The particular states that were the early targets of litigation adamantly defended their segregated institutions.<sup>20</sup> After the NAACP lawyers bested the states’ defenses of

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11. *Id.* at 307–08.

12. *Plessy*, 163 U.S. at 545.

13. *Id.* at 551 (arguing that if Blacks feel inferior, “it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it”).

14. *Cumming v. County Bd. of Educ.*, 175 U.S. 528 (1899).

15. KLUGER, *supra* note 3, at 169; see generally HORACE MANN BOND, *THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER* (1970) (chronicling the history of the economic state of the country from Reconstruction through *Brown*, and explaining how the economic conditions led to state-sponsored segregation in schools).

16. See generally KLUGER, *supra* note 3, 195–213, 256–284 (chronicling the law school and graduate education cases leading up to *Brown*).

17. See, e.g., *Pearson v. Murray*, 182 A. 590, 594 (1936) (holding that the exclusion of Blacks from the only law school in the state is unconstitutional). See generally GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 131–143 (1983) (discussing the legal campaign of the NAACP against state funded educational facilities for Whites only).

18. See KLUGER, *supra* note 3, at 282 (analyzing various cases in which educational facilities provided to Blacks were found to be substantially unequal to those facilities provided to Whites).

19. See *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (concluding that a Black student was deprived of equal protection when forced to receive his education under lesser conditions than White students); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (ruling that the denial of a Black student to the only state law school was in violation of the Equal Protection Clause of the Fourteenth Amendment); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (finding that refusing admission or mandating segregation of classrooms constituted a denial by the state of the equal protection of the law and was a violation of the Fourteenth Amendment).

20. See *McLaurin*, 339 U.S. at 641 (holding that Oklahoma’s statutes, which mandated

policies that categorically excluded Blacks from law schools,<sup>21</sup> the segregationist strategy morphed into a modified, though arguably more benign, version of apartheid. The new strategy consisted of two well-choreographed steps: (1) wait to be sued; and (2) after defeat, ask for time to establish separate institutions for Blacks.<sup>22</sup> This approach was arguably defensible under *Plessy*.<sup>23</sup> Upon close examination of the rather colorful cases of *Sipuel v. Oklahoma*<sup>24</sup> and *Sweatt v. Painter*,<sup>25</sup> arguments for the “equality” of these sham institutions seem silly and sophomoric. Yet, the history of the Court had been replete with “winks and nods” at the gap between formal equality and substantive equality.<sup>26</sup>

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institutions of higher education provide instruction on a segregated basis, deprived the petitioner of the right to equal protection of the law); *Sipuel*, 332 U.S. at 633 (reversing and remanding the district court’s and Oklahoma Supreme Court’s decisions to deny plaintiff access to a legal education at a state-sponsored school).

21. See *McLaurin*, 339 U.S. at 642 (holding that the Fourteenth Amendment prohibits the state from treating its citizens differently based on race); *Gaines*, 305 U.S. at 352 (holding that petitioner was entitled to be admitted into the state law school because there was no other place for him to get legal training in the state).

22. This approach was pioneered at the University of Missouri Law School which lost the *Gaines* case in 1938 yet avoided integration for almost two decades by offering legal education at Lincoln University, a law school established at the state university for Blacks. After *Sweatt v. Painter*, 339 U.S. 629 (1950), the University conceded that it could no longer maintain formal segregation at the University of Missouri Law School. See generally Linda Greene, *Gaines: The Litigation and the Legacy* (2003) (unpublished manuscript, on file with author).

23. KLUGER, *supra* note 3, at 73–82.

24. *Sipuel*, 332 U.S. at 631 (reversing the holding of the Supreme Court of Oklahoma, 180 P.2d 135 (Okla. 1947), which ruled that the state could not be accused of discrimination for failing to institute a law school for Blacks since the Black student did not make known her desire to attend such a school). I contend that these cases are colorful because of the creative performance of certain southern states in their efforts to evade *Plessy*’s “equal but separate” command. The cases are filled with material that would provide a brilliant opportunity for an ambitious production designer. In the case of *Sipuel*, after the Supreme Court ordered compliance under the ambiguous precedent of *Gaines ex rel Missouri*, the state of Oklahoma responded by creating a caricature of its state law school. “Oklahoma created a separate law school overnight by ordering a small section of the State Capitol roped off for colored students and assigning three law teachers to attend to instruction.” KLUGER, *supra* note 3, at 259–260. The plaintiff *Sipuel* refused to attend. *Id.* Thousands of students and faculty protested the university’s decision in 1948. *Id.* Texas competed for the absurdity prize. After a court decided that Texas could not maintain one law school for Whites only, initially the state rented a few rooms in Houston, forty miles away from the Blacks college, and hired two lawyers to serve on the faculty of the Prairie View Law School. *Id.* A Texas court quickly concluded that it was equal to the University of Texas at Austin, even though it had no student body, no faculty, and no library. *Id.* Later, Texas established a law school in downtown Austin in a facility encompassing three basement rooms, three part time teachers, and a fraction of the volumes available at the University of Texas. *Id.* at 261. The adjective colorful might well give way to a more cynical one such as “ludicrous” or “shameful.”

25. *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the law school for Blacks, which had no independent faculty or library and lacked accreditation, was not equal to the University of Texas Law School).

26. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT

Historically, the Court established broad rules that were at once circumvented via “sub-constitutional rules.”<sup>27</sup> In fairness to the states’ lawyers, it was not altogether clear that the Court would actually *acknowledge* constitutionally significant differences between the law school at the University of Texas at Austin, the University of Oklahoma, and the small, hastily created law schools established to evade integration.<sup>28</sup> But in time, by virtue of the careful and thorough litigation of these cases and the evidence presented of the schools’ tangible and intangible inequalities, there was no doubt that the candid defense of segregated institutions was doomed to fail.<sup>29</sup>

The rationale of the important pre-*Brown* cases was broader than the mere condemnation of racial segregation in the context of physically unequal facilities. Both *McLaurin v. Oklahoma*<sup>30</sup> and *Sweatt v. Painter*<sup>31</sup> questioned the assertion that an equal educational experience might be had within a racially-segregated environment. *McLaurin* held that a university could not admit a Black student into the graduate school and thereafter prevent him from having contact with White students.<sup>32</sup> Thus, *McLaurin* condemned state imposed intellectual racial isolation where a Black attended school in the same facility as non-Blacks.<sup>33</sup> In *Sweatt*, Texas sought to maintain segregation at the University of Texas Law School by quickly opening a small, minimally staffed, and scarcely equipped law school for Black students.<sup>34</sup> Declaring that the Separate but Equal Doctrine could not be satisfied with a sham effort, the Supreme Court explored and exposed the

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AND THE STRUGGLE FOR RACIAL EQUALITY 452–58 (2004) (noting that the Justices’ refusals to examine the legislative intent or the discriminatory exercise of administrative discretion made it possible for Whites to continually violate Blacks’ rights).

27. *Id.* at 457.

28. *See Sweatt*, 339 U.S. at 631–34 (noting the disparities between law schools, including library size, faculty size, and academic facilities).

29. *See generally Sipuel*, 332 U.S. at 632–33 (holding that the state must provide educational opportunities in conformity with the Equal Protection Clause, but failing to address how the state might satisfy such a requirement); *Sweatt*, 339 U.S. at 636 (finding that *Plessy v. Ferguson* did not need to be reexamined in “light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation”).

30. *McLaurin v. Oklahoma*, 339 U.S. 637, 642 (1950) (ruling that students of all races must receive the same treatment to avoid violation of equal protection).

31. *Sweatt*, 339 U.S. at 633 (concluding that there was not “substantial equality in the educational opportunities offered White and Negro law students by the State”).

32. *McLaurin*, 339 U.S. at 641–42 (arguing that “There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.”).

33. *Id.*

34. *Sweatt*, 339 U.S. at 633–34.

differences in the physical plant, the library, the classrooms and the budget.<sup>35</sup> Additionally, the Supreme Court emphasized the importance of having the opportunity to establish contacts and relationships with legal professionals while in law school, and indicated that these contacts and relationships were crucial to the successful practice of law.<sup>36</sup> Therefore, the *Sweatt* Court condemned Texas for its attempted complicity in the creation of an unequal bar.<sup>37</sup> Both *Sweatt* and *McLaurin* laid the foundation for *Brown*'s conclusion that separate educational institutions deprived Black students of equal protection by creating an educational environment that produced a disadvantaging educational result.

The evidence presented in *Brown* was multi-faceted. In some of the cases consolidated for argument before the Court in *Brown*, there was patent evidence of tangible inequality.<sup>38</sup> However, the ultimate question was whether segregation was per se unconstitutional.

In reaching the conclusion that segregation was per se unconstitutional, the Court concluded, quoting the District Court, that "[s]egregation with the sanction of law . . . has a tendency to (retard) the educational and mental development of Negro children and deprive them of some of the benefits they would receive in a racial(ly) integrated school system."<sup>39</sup> The Court relied on the conclusions of the lower courts both in the Kansas<sup>40</sup> and Delaware<sup>41</sup> cases. In addition, the Court also appears to have substantially relied on the appellant's brief's appendix, which contained studies authored by social scientists including Kenneth and Mamie Clark.<sup>42</sup> The Court, moreover, relied on

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35. *Id.*

36. *Id.* at 634–35.

37. *Id.* at 634.

38. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486–88 (1954) (noting that the district courts in Delaware, South Carolina, and Virginia found that African-American schools were inferior with respect to teacher training, pupil-teacher ratio and physical conditions).

39. *Id.* at 494 (stating that a similar finding was made in *Belton v. Gebhart*, 87 A.2d 862 (1952)).

40. *Brown v. Bd. of Educ.*, 98 F. Supp 797, 800 (1953) (finding that segregation in lower grades is a denial of Due Process, but denying relief due to substantially equal schools for Blacks and Whites).

41. *Belton v. Gebhart*, 87 A.2d 862, 865 (1952) (concluding that educational segregation results in Blacks "receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated").

42. See Appendix to Brief of Appellant, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 8) "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement" (detailing the findings of the Clarks studies which used dolls to determine the effects of segregation on Black children), reprinted in PREJUDICE AND YOUR CHILD 166–84 (Kenneth Clark, ed. 1955).

its prior precedents in *McLaurin* and *Sweatt* to reach the conclusion that *Plessy* must be overruled.<sup>43</sup>

Although some reduce this aspect of *Brown* to the raw assertion that Black children cannot learn apart from White children,<sup>44</sup> this characterization gives short shrift to the full import of *Brown*'s affirmation of the right of full citizenship for Black children. Before the Court cited this testimony, it spoke of the critical role of education as perhaps the most important function of state and local government, the foundation for a democratic society, and a prerequisite for "performance of our most basic public responsibilities . . . , the very foundation of good citizenship . . . [and] the principal instrument in awakening the child to cultural values . . . ."<sup>45</sup> Against the backdrop of these concerns, it was defensible for the Court to have resolved any doubt about the stigmatizing effect of state sponsored segregation in favor of the children the state subjected to the practice without necessarily implying that they felt the stigma was significant.<sup>46</sup>

However, the Court's reliance on the expert testimony and the importance of education in the 1950s fell far short of ringing condemnation of educational apartheid. Though path-breaking and threatening to certain American traditions, the *Brown* Court failed to acknowledge the detrimental effects that the judicial approval of public and school segregation had on the freedoms obtained during Reconstruction.<sup>47</sup> Nor did *Brown* place school segregation in the larger context of exclusion of Blacks from significant opportunity in employment, politics, housing, or economic and business affairs. *Brown* neither condemned these practices nor set forth any standard for

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43. *Brown*, 347 U.S. at 494–95.

44. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995) (discussing the implications of this premise of *Brown*). Justice Thomas expressed his concerns about racial isolation by stating that:

[It] is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based on a theory of black inferiority.

*Id.* at 122 (Thomas, J., concurring).

45. *Brown*, 347 U.S. at 493.

46. The Court could have simply dismissed the legitimacy of *Plessy*'s no-stigma conclusion as absurd when written. KLUGER, *supra* note 3, at 705–06. Such an approach would have required the Court as an institution to admit, if tacitly, complicity in the post-*Plessy* legacy, but that was not the path that would lead to the unanimity Chief Justice Warren desired. *See id.* at 694–99.

47. *See Brown*, 347 U.S. at 489 (refusing to acknowledge that the country had taken measures to deprive Blacks of freedoms obtained during the Reconstruction period).

the evaluation of America's myriad of subordinating structures.<sup>48</sup>

Although the Court did not discuss school segregation in the broader context of general segregation and racial subordination, it is difficult to speak candidly about the potential of *Brown* without placing the decision in this broader context. The matter of context may be persuasively illustrated by the brutal lynching of 15-year-old Emmett Till in 1955, for whistling at a White woman just one year after *Brown*.<sup>49</sup> This context was further illustrated in the same year by the famous Montgomery bus boycott, sparked by Rosa Parks's refusal to give up her bus seat to a White customer.<sup>50</sup> In addition, the murders of civil rights workers<sup>51</sup> and civil rights leaders<sup>52</sup> during the next decade affirmed the degree of controversy associated with *Brown*'s repudiation of *Plessy*. If the pre-*Brown* civil rights demonstrations,<sup>53</sup> coupled with the increased number of lynchings after World War II<sup>54</sup> were not sufficient proof for the necessity of *Brown*, then the direct resistance to the decision, both creative<sup>55</sup> and crass,<sup>56</sup> made it clear that whatever

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48. Nonetheless, after *Brown*, the Court did strike down statutes that mandated racial segregation in a variety of contexts. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (declaring statutes and ordinances requiring segregation on motor buses to be a violation of the Equal Protection Clause), *aff'g* 142 F. Supp. 707 (D. Ala. 1956); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (declaring enforcement of racial segregation of public beach and bathhouses maintained by public funds to be unconstitutional), *aff'g* 220 F.2d 386 (4th Cir. 1955).

49. See PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 422–32 (2002) (discussing the murder of Emmett Till in 1955). Fourteen year-old Emmett Till, who lived in Chicago and was visiting relatives in Mississippi, accompanied his friends to a general store. During the brief visit, he spoke to a White woman and may have flirted with her. Several days later, two men came to the home of the relatives to take Emmett Till away. After four days, his bloated body was pulled out of the Tallahatchie River. Till's mother brought his body back to Chicago for an open casket public funeral "so that others could see what they did to my boy." *Id.* at 423–25; See also M. MOBLEY AND C. BENSON, *DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA* (2003).

50. TAYLOR BRANCH, *PARTING THE WATERS* 128–30 (1988); DAVID GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 11–15 (1986).

51. See DRAY, *supra* note 49, at 446–48 (discussing the murders of Michael Schwerner, James Chaney, and Andrew Goodman in Mississippi in 1964); GARROW, *supra* note 50, at 342 (describing the disappearance of an interracial team of movement workers in Philadelphia and the steps taken to protect Martin Luther King, Jr. during his visit to the city).

52. See DRAY, *supra* note 49, at 458 (describing the assassinations and lynchings of civil rights activists); GARROW, *supra* note 50, at 623–24 (describing the murder of Martin Luther King, Jr.).

53. See DRAY, *supra* note 49, at 364–65 (discussing demonstrations and civil rights activity during World War II).

54. See DRAY, *supra* note 49, at 369–76 (discussing post-World War II violence and lynching of Black soldiers).

55. *Griffin v. Prince Edward Co.*, 377 U.S. 218, 223–25 (1964) (describing a county school board's efforts to undermine the desegregation decree by closing public schools and using public funds to support private segregated schools).



*Brown* may have said about dolls and stigma<sup>57</sup> it was—and is—much less important than *Brown*'s potential to disrupt the racial status quo. This much seems clear: in *Brown*, the Court ventured to the precipice of substantive racial equality.

Moreover, in *Brown II*,<sup>58</sup> the 1955 remedial decision, the Court retreated from that precipice. Chief Justice Warren entered a Faustian bargain in return for unanimity—“[a] pledge that the Court implementation decree would allow segregation to be dismantled gradually instead of being wrenched apart.”<sup>59</sup> The Court invited school boards and lower courts to balance the rights of Black children against a myriad of factors that militated against the immediate enforcement of *Brown*.<sup>60</sup> The Court did repudiate the most blatant examples of defiance, such as the closing of all public schools in Prince Edward County, Virginia and the Arkansas governor's deployment of state troops to block enforcement of *Brown*.<sup>61</sup> Nonetheless, more than twenty years passed before the beginning of meaningful desegregation.<sup>62</sup> By the time the Court aggressively addressed that task,<sup>63</sup> “White flight,”<sup>64</sup> also known as demographic change, made the

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56. *Cooper v. Aaron* 358 U.S. 1, 7–12 (1958) (describing the actions of the Arkansas Legislature and Governor to prevent desegregation, which included the Governor sending National Guard troops to block Black students from entering a public high school).

57. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (relying on the studies conducted by Kenneth Clark, during which he had shown Black and White dolls to children and asked a series of questions and ultimately concluded that racial segregation had a negative impact on Black children); *see also supra* note 42 and accompanying text (noting how the Court relied on the studies of Kenneth & Mamie Clark in deciding *Brown*).

58. *Brown II*, 349 U.S. 294 (1955).

59. KLUGER, *supra* note 3, at 698 (providing Chief Justice Earl Warren's pledge to Justice Reed).

60. *Brown II*, 349 U.S. at 300–01. “[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas. . . . revision of local laws and regulations . . . .” *Id.* “They will also consider the adequacy of any plans the defendants may propose . . . .” *Id.* at 301.

61. *Griffin v. Prince Edward Co.*, 377 U.S. 218, 232–34 (1964) (observing and criticizing some locales' tactics of avoiding desegregation by closing all district schools); *Cooper*, 358 U.S. at 7–13 (discussing gubernatorial defiance and violence). But a close reading of these decisions suggest that they may focus as much on the impermissibility of defiance of courts as they do on the repudiation of constitutional rights.

62. *See generally* James R. Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 42–44 (1967) (discussing the beginnings of desegregation).

63. *See, e.g.*, *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–32 (1971) (authorizing various remedies to comply with desegregation decrees including the use of minority-to-majority student ratios, attendance rezoning and minority-majority school transfer provisions); *Green v. Co. Sch. Bd.*, 391 U.S. 430, 438–42 (1968) (attacking school board's choice of school desegregation program for failing to satisfactorily comply with desegregation requirements of creating a non-race based admission program and ordering school board to revise

command of integration an empty mandate in some contexts.<sup>65</sup> In the context of these decisions, the Court signaled the limitation of *Brown's* language of opportunity and inclusion.<sup>66</sup> Over the next few years, the Court imposed limitations on the lower courts. Specifically, the lower courts were forbidden to order remedies addressing lagging Black academic achievement, unless proof was offered that any deficits were traceable to past de jure segregation.<sup>67</sup> This was the case despite evidence that what is labeled de facto segregation may be the product of myriad decisions including zoning, highway placement, and infrastructure.<sup>68</sup>

These limiting developments, coupled with the Court's willingness to authorize withdrawal of judicial supervision in whole or in part,<sup>69</sup> diminished the full potential of *Brown* by leaving untouched

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its plan immediately).

64. See generally GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968* 7–8 (1993) (showing a decreasing percentage of White students in schools attended by typically Black or Latino students during the years 1970–1991); ERICA FRANKENBERG & CHUNGMEI LEE, *THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS* 146 (Aug. 8, 2002), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Race\\_in\\_American\\_Public\\_Schools.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools.pdf) [hereinafter FRANKENBERG & LEE] (explaining the growing trend of White isolation from predominantly minority populated schools due to the small amount of Whites living in those districts).

65. See, e.g., *Milliken v. Bradley* 418 U.S. 717, 745–46 (1974) (refusing to enforce inter-district desegregation remedies where de jure segregation, in violation of the desegregation decree, only occurred in a single district).

66. See *Swann*, 402 U.S. at 31–32 (limiting the scope of desegregation remedies to correct present or past official actions causing segregation and holding that “[n]either the school authorities nor the district court are constitutionally required to make year-to-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished”).

67. See *Missouri v. Jenkins*, 515 U.S. 70, 96 (1995) (stating that segregation that is a concern of the law must have a causal link to the de jure violation of the desegregation decree); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (noting that for a desegregation remedy not to exceed the violation it must be tailored to cure de jure segregation); *Swann*, 402 U.S. at 28, 32 (noting limits to the court's authority to enforce desegregation to instances where a constitutional violation by the school district or other agency of the state deliberately causes racial segregation). “De facto segregation” is defined as segregation that occurs without state authority, usually based on socioeconomic factors. *BLACK'S LAW DICTIONARY* 1362 (7th ed. 1999). “De jure segregation” is segregation that is permitted by law. *Id.*

68. Anne Randall, Note, *Reclaiming Brown's Vision: A New Constitutional Framework for Mandating School Integration*, 10 *GEO. J. ON POVERTY L. & POL'Y* 363, 374–78 (2003).

69. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (allowing courts to “relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved”); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (determining school desegregation injunctions “are not intended to operate in perpetuity”); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976) (holding that once a school board implements a racially neutral attendance pattern in order to comply with a court order, the court is not entitled to require the

the issue of educational disadvantages disproportionately experienced by Black children.<sup>70</sup> These limitations of remedies dating back to nineteenth century state action doctrine,<sup>71</sup> with its accompanying distinctions between de jure and de facto racial discrimination,<sup>72</sup> have effectively limited *Brown*'s transformative potential in the context of school desegregation.

But the meaning of *Brown* should not be cabined by the context of desegregation. Returning to its full citizenship dimensions, *Brown* suggests that full equality should be measured by the extent to which the state provides children the necessary tools for the attainment of full citizenship. Just as the Court in *Brown* refused to determine the meaning of education with reference to nineteenth century standards, so too must Courts—and school boards—measure satisfying the demands of equal protection in twenty-first century terms. Whether measured by disproportionate drop out rates or college matriculation,<sup>73</sup> *Brown* requires an evaluation of the effects of educational practices on Black children, including racial segregation and isolation of students.<sup>74</sup> It is

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school board to ensure a racial mix in perpetuity).

70. See Diane Rado, Darnell Little & Grace Aduroja, *Still Separate, Unequal*, CHI. TRIB., May 9, 2004, at 1 (describing under-funding of minority schools in Illinois).

71. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (stating the Fourteenth Amendment “does not invest congress with power to legislate upon subjects which are within the domain of state legislation”); *United States v. Harris*, 106 U.S. 629, 637–39 (1883) (expounding that when a state has not violated any state law and state law recognizes and protects the rights of persons, the Fourteenth Amendment does not give Congress power to impose its own laws); *United States v. Cruikshank*, 92 U.S. 542 (1875) (explaining that the states possess their own sovereign powers—those powers which are not granted to the federal government in the Constitution—and thus are allowed to take their own remedial actions for legal violations so long as it is within the scope of their powers).

72. *Strauder v. West Virginia*, 100 U.S. 303, 310–12 (1879) (authorizing these distinctions between de facto and de jure discrimination). In *Williams v. Mississippi*, 170 U.S. 213 (1898), the Court refused to acknowledge the potential of “race neutral” rules to nullify constitutional protections. This doctrine was readopted in *Washington v. Davis*, 426 U.S. 229, 241 (1976). There, the Court noted that is not necessary for a

discriminatory racial purpose . . . [to] be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.

*Id.* See also *McCleskey v. Kemp*, 481 U.S. 279, 352 n. 5 (1987) (discussing permissible race neutral selection criteria).

73. GARY ORFIELD ET AL., *THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, LOSING OUR FUTURE: HOW MINORITY CHILDREN ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS* 7–10 (Feb. 25, 2004), available at <http://www.civilrightsproject.harvard.edu/research/dropouts/dropouts04.php> [hereinafter *LOSING OUR FUTURE*] (discussing more effective statistical methods of tracking high school drop-out and graduation rates among minorities).

74. See FRANKENBERG & LEE, *supra* note 64, at 22.

The isolation of blacks and Latinos has serious ramifications; this isolation is highly

not too late to reread *Brown* as a decision that establishes an equal protection right to an equally effective education. In fact, *Grutter's* endorsement of educational diversity on quality of education grounds<sup>75</sup> may reopen the debate about whether race, wealth and other factors may be taken into account in creating environments that foster, rather than retard, success. Such a reading of *Brown* would invite the application of *Brown's* concerns to twenty-first century conditions without assumptions about the disability of non-White and White students, without assumptions about the per se utility of integration, and without assumptions about the per se undesirability of single-race schools.

Beyond education, *Brown's* force as a principle empowering the racial transformation of America may also measure the case's long-term significance. In this regard, it is fair to note *Brown's* symbolic value in shoring up the legitimacy of political efforts to regain federal protection of civil rights lost following the collapse of Reconstruction.<sup>76</sup> The empowerment of the 1950s and 1960s civil rights movement, in turn, led to congressional passage of federal civil rights laws.<sup>77</sup> These statutes provide a foundation for equal opportunity in many contexts including housing, employment, public accommodations, and education. *Brown* laid the foundation for these advancements.

Ultimately, the key post-*Brown* question was whether the Court would extend *Brown* to condemn all racial segregation and exclusion

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correlated with poverty, which is often strongly related to striking inequalities in test scores, graduation rates, courses offered and college going rates. Virtually no attention is being paid to this troubling pattern in the current discussion of educational reform . . . .

*Id.*

75. In this respect, Justice O'Connor concluded that it was appropriate to defer to the academic judgments of universities as to whether diversity was necessary for the operation of their institutions. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). Justice O'Connor's *Grutter* opinion agreed that the law school and its amici had substantiated the educational benefits of diversity. *Id.* at 328–30. Diversity, Justice O'Connor agreed, contributed to the breakdown of stereotypes as well as to a livelier and more interesting classroom discussion. *Id.* at 330.

76. See BRANCH, *supra* note 50, at 124 (observing that the "*Brown* case had brought fresh excitement to the NAACP"); *Id.* at 217 (noting that the *Brown* third anniversary was the occasion for the May 17, 1957 Lincoln Memorial Prayer Pilgrimage seeking voting rights); *Id.* at 285 (stating that the *Brown* decision inspired civil rights leaders Wyatt Tee Walker and Vernon Johns); GARROW, *supra* note 50, at 59 (pointing out the *Brown* decision encouraged Montgomery Alabama activists and civil rights lawyers to challenge the segregated bus system).

77. See Title IV of the 1964 Civil Rights Act, 42 U.S.C. § 2000(a) (2000) (prohibiting discrimination in public accommodations); Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d) (2000) (prohibiting discrimination in programs receiving federal financial assistance); Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e) (2000) (prohibiting discrimination in employment); The 1965 Voting Rights Act, 42 U.S.C. § 1973 (2002) (prohibiting discrimination in voting); The 1968 Fair Housing Act, 42 U.S.C. §§ 3601–3606 (2000) (prohibiting discrimination in sale, rental, lease, and financing of housing).

from opportunity. Although *Brown* focused on the effect of segregation in the context of education, its principles are broad enough to support a constitutional principle of full and equal citizenship, and repudiate the limited vision of national citizenship contained in *Slaughter-House*.<sup>78</sup> If fully implemented, opportunity and inclusion would become fundamental American constitutional values. *Brown* was rapidly extended to other contexts in which policies of racial exclusion were overt and blatant.

In this post-*Brown* phase of constitutional history, the question was once again—and predictably so—framed in terms of distinctions between de jure segregation and exclusion on the one hand, and de facto segregation and exclusion on the other. As in the nineteenth century, the twentieth-century Court decided that de facto segregation was beyond the reach of judicial correction. After *Brown*, and beyond the context of school segregation, the Supreme Court considered whether policies with disproportionate negative effects on minorities should be strictly scrutinized for their validity and necessity. For example, in *Washington v. Davis*,<sup>79</sup> the precise question was whether the Court should strictly scrutinize procedures and/or criteria that disproportionately disqualified minorities from jobs. In that case, the Court decided that no such scrutiny was required unless minorities could prove that the procedures or criteria were adopted with the intent of excluding Blacks.<sup>80</sup> As a result, post-*Brown* constitutional equality principles operated as a weak weapon against disadvantages produced by a four-century legacy of American slavery. Furthermore, in an extension of *Washington*, the Court in *McCleskey v. Kemp* declined to strictly scrutinize Georgia's death penalty system, which resulted in more death sentences for Blacks than for Whites.<sup>81</sup> In language that remains puzzling, the Court required that the death-sentenced inmate demonstrate that Georgia adopted the death penalty system “because of its effects” not “in spite of its effects.”<sup>82</sup>

The *Washington-McCleskey* rule severely limits the realization of *Brown's* promise of full citizenship. *Washington-McCleskey* restricts the scope of equal protection claims as well as increases the costs and

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78. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1872).

79. *Washington v. Davis*, 426 U.S. 229 (1976).

80. *Id.* at 242.

81. *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (finding a legitimate reason for the Georgia legislature to adopt a specific law).

82. *Id.* at 298 (suggesting that a disproportionate impact of an act upon one racial group over another, without a showing of discriminatory intent on the part of the decision maker, is not alone sufficient to qualify as an equal protection violation).

risks of litigating those claims. In the absence of a vigorous constitutional principle that casts doubt on practices that perpetuate the past segregation and discrimination, rules and practices that produce these outcomes, even if not squarely endorsed, acquire a gloss of constitutional legitimacy. In this legal environment, constitutional doctrine immunizes from judicial inquiry the cumulative effects of private and public decision-making, as well as the influence of wealth and poverty. As a result, the opportunity and inclusion aspirations of minorities are delegitimized. On the contrary, if constitutional doctrine condemned, or at a minimum, rendered suspicious facially-neutral rules with disproportionate disadvantageous effects, the gloss of meritocracy that shores up these disparities would be undermined.

Typically, the legacy of *Brown* has been linked to the controversy over the constitutionality of race-conscious programs of inclusion, also known as affirmative action, and more derisively, as preferential treatment. The consequences of the *Washington-McCleskey* rule provide constitutional cover to the status quo, lending legitimacy to policies that disproportionately and cumulatively disadvantage minority groups, especially the poor. The immunization of race-neutral policies from constitutional challenges lends credence to the assumption that the racial and economic stratification of society should be attributed to the failures of the disadvantaged rather than the unfairness of societal institutions and rules. In turn, the constitutional legitimacy of policies resulting in substantial exclusion of minorities lend weight and credence to the charges that programs of inclusion involve special treatment for allegedly less qualified individuals. In this constitutional environment, the rhetoric of “special treatment” is a new stigma that exacerbates the results of the inequities left standing by weak constitutional equality principles. Coupled with the charge that those who have historically enjoyed exclusive entitlement and privilege are now innocent victims of invidious discrimination, this rhetoric is the new, post-*Brown* iteration of the classic and historic charge of minority inferiority, a charge traceable to *Dred Scott*.<sup>83</sup>

The full scope of status quo protection is not evident until the passive indifference of *Washington-McCleskey*, justified by concerns about inappropriate judicial activism and judicial role,<sup>84</sup> is compared to the

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83. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

84. *McCleskey*, 481 U.S. at 319 (“It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes.”); *Washington*, 426 U.S. at 245–46 (“We [the court] have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and ‘denies any person . . . equal protection of the laws’ simply because a greater proportion of Negroes fail to

rule authorizing aggressive oversight of voluntary programs of inclusion. After *Bakke*,<sup>85</sup> in which the Court could not agree on a standard of review for voluntary programs, almost twenty years elapsed before the Court settled on a rigorous strict scrutiny standard.<sup>86</sup> In *Adarand Constructors, Inc. v. Peña*,<sup>87</sup> the Court adopted an activist posture *vis-à-vis* programs of racial inclusion, concluding that judicial skepticism was appropriate whenever race was utilized to accomplish governmental aims.<sup>88</sup> By doing so, the Court increased the risks associated with voluntary programs. The more strict and rigorous the standard, the more legal risk institutions assume when they undertake voluntary programs of racial inclusion. Given these risks, *de facto* exclusion is more likely to thrive because voluntary efforts are expensive to defend. Simultaneously, *de facto* exclusion is also resilient due to the limitations of the *Washington-McCleskey* rule.

After *Adarand*, the key question was whether government interests might justify race as a factor in the university admissions. The Supreme Court addressed this question last term in *Grutter v. Bollinger* and *Gratz v. Bollinger*.<sup>89</sup> In *Grutter*, six members of the Court clearly embraced educational diversity as a compelling interest,<sup>90</sup> and a close reading of the case suggests that one additional Justice may have also acquiesced in this view.<sup>91</sup> But what does diversity mean? Is the meaning of

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qualify than members of other racial or ethnic groups.”).

85. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

86. *Compare* *Bakke*, 438 U.S. 265 (eliciting no standard to which a majority adhered) *with* *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny for state and local programs); *and* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564 (1990) (applying mid-level scrutiny for federal programs), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *and* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny for state and federal programs).

87. *Adarand*, 515 U.S. at 200.

88. *Id.* at 227–28.

89. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

90. *Grutter*, 539 U.S. at 324–25 (holding that the law school’s interest in diversity constitutes a compelling state interest); *Id.* at 387–88 (Kennedy, J., dissenting) (accepting racial diversity as a compelling interest which furthers the educational task but disagreeing with the Court’s application of strict scrutiny).

91. Chief Justice Rehnquist may have embraced diversity as a compelling interest, although he did not do so explicitly in *Gratz* or *Grutter*. Rather, Rehnquist did not challenge the legitimacy of diversity as an interest in his dissent. *Id.* at 378–87 (Rehnquist, C.J., dissenting). Nor did he join the opinion of Justices Thomas or Scalia, both of whom categorically rejected educational diversity as a compelling interest. *Id.* at 349 (Scalia, J., dissenting); *Id.* at 350 (Thomas, J., dissenting). In contrast, the Chief Justice joined Justice O’Connor’s dissent in *Metro Broadcasting*, where she argued that limiting compelling interests to identifiable institutional discrimination on the ground that other interests such as diversity and societal discrimination and role models were “too amorphous” to limit the use of race. *Metro Broad.*, 497 U.S. at 612 (O’Connor, J., dissenting).

diversity broad enough to authorize efforts that might begin to address the 350-year legacy of exclusion and segregation? Was the *Grutter* decision's embrace of diversity broad enough to resurrect *Brown's* promise of opportunity and inclusion?

Although Justice O'Connor does not specifically embrace the elimination of societal discrimination as a justification for the University of Michigan programs,<sup>92</sup> her *Grutter* opinion recognized the extent to which race matters, implicitly infusing the interest of diversity with remedial content. Justice O'Connor stated, "[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>93</sup> The Court also approved Michigan's interest in a non-token inclusion, accepting Michigan's argument that the opportunity for meaningful individuality and participation required a critical mass of minorities.<sup>94</sup>

Justice Ginsburg strengthened the link between the end of racial discrimination and the compelling interest of diversity.<sup>95</sup> For Justice Ginsburg, the diversity rationale was more than a means to the important goals of a diverse law school environment and a diverse legal profession. Her recognition of diversity as a compelling interest was also grounded in the objective of the elimination of past discrimination.

Additionally, Justice O'Connor's opinion developed another theme, the interest of institutional regime *legitimacy*—an interest in the legitimacy of authoritative structures. In this respect, she linked the legitimacy of leadership structures to the opportunity of minorities to participate as both peers and authority figures in society's institutions.<sup>96</sup> O'Connor spoke of the importance of "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry," stating that "it is necessary that

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92. Such a statement would be clearly inconsistent with her prior opinions. See, e.g., *Metro Broad.*, 497 U.S. at 612 (O'Connor, J., dissenting) (arguing that limiting compelling interests to identifiable institutional discrimination on the ground that other interests such as diversity and societal discrimination and role models were "too amorphous" to limit the use of race).

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

94. *Id.*

95. See *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) ("The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital."); *Id.* at 305 n.11 (Ginsburg, J., dissenting) ("In my view, the constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race . . ."); *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remains alive in our land impeding realization of our highest values and ideals.")

96. *Grutter*, 539 U.S. at 332–33.



the path of leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>97</sup> This language not only links diversity to institutional legitimacy, but also suggests that a diverse cadre of leadership role models is an important factor in the development of respect for all citizens within every institution. *Grutter* clearly conferred constitutional legitimacy on the principle that non-token integration of a law school’s environment is a compelling interest. *Grutter* was decided without any proof that Michigan had intentionally or consciously excluded Blacks and other minorities from its law school. However, *Grutter* is only relevant where law schools voluntarily decide to pursue programs of racial inclusion, making the holding a limited one.

Moreover, the Court’s precedents still confer constitutional legitimacy on race-neutral rules without regard to their impact on opportunity, even under circumstances where it is entirely predictable that racial inclusion will be lost in the pursuit of so-called race-neutral rules. Though important, *Grutter* was decided without a re-examination of these aspects of constitutional doctrine. The fact that the Court decided *Grutter* without a re-examination of equal protection speaks volumes about the Court’s deep ambivalence concerning a transformative role of the Equal Protection Clause. Examined closely, *Grutter* also reveals the Court’s ambivalence over the project of constitutionally mandated equality. *Grutter* sanctions voluntary inclusion efforts but requires all such efforts to run the expensive gauntlet of strict scrutiny and its inevitable accompanying litigation. At the same time, no constitutionally mandated restructuring of opportunity is possible without an equally onerous burden of intentional discrimination.

Read narrowly, *Grutter* encourages, but does not require, minority inclusion in the nation’s elite public universities. *Grutter* also does not require that law schools or other public universities eliminate the de facto segregation that may result from the usual and customary admissions criteria, nor does *Grutter* require that these institutions rethink their policies to provide greater opportunity to minorities. Moreover, *Grutter* does not condemn the narrow conceptions of merit that produce segregated educational institutions.

Nevertheless, *Grutter* suggests an opportunity to link the doctrine governing the constitutionality of programs of inclusion to *Brown*’s impoverished legacy both within and without education. *Grutter*’s linkage of the diversity rationale to the elimination of past and current

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97. *Id.* at 332.

discrimination with respect to opportunity, citizenship, power, and leaderships suggests powerful themes that have been absent from equal protection jurisprudence.

A broader reading of *Grutter* is also possible. The University of Michigan successfully urged the Court to consider *Grutter's* implications for *Brown's* legacy. The *Grutter* opinion draws on the civic and citizenship dimensions of constitutional equality articulated in *McLaurin*, *Sweatt* and *Brown*. *Grutter* links these citizenship dimensions to the Court's approval of racial inclusion policies in law schools and in undergraduate programs of the university.<sup>98</sup> Justice O'Connor reminds us that the fabric of education is important to the fabric of society because it fosters the promotion of citizenship and it furthers "the dream of one [indivisible] Nation."<sup>99</sup>

*Grutter's* focus on opportunity is at odds with the search for de jure violations that limited the force of *Brown*. In respect of violation as well as remedy, the question of whether minority children receive an effective education has been subordinated to the questions of whether de jure violations exist or whether existing segregation is traceable to state action. *Grutter's* concerns are broader and inexorably closer to the core of *Brown's* rationale. Specifically, *Grutter* supports the rationale that minority children must have an equal educational opportunity if they are to be effective participants in American society.

*Grutter* also invites a different view of the scope of post-*Brown* remedies in the context of segregated and re-segregated schools. In the current violation and remediation framework, the conclusion that private decisions have led to segregation ends the equal protection inquiry. However, *Grutter's* focus on opportunity and inclusion suggests that we rethink our limited approach to the identification of constitutional violations. The notion that de jure segregation is the sole post-*Brown* violation of equal protection does not go far enough to meet the spirit of opportunity and inclusion that underlie both *Brown* and *Grutter*. Instead, we must measure the achievement of constitutional equality by an examination of all measures relevant to educational achievement. If contemporary benchmarks of what it means to have equality are to be meaningful, then racial disparities in test scores, dropout rates, and progress in courses of study, such as reading,

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98. *Grutter*, 539 U.S. at 332 (holding that "[i]n 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").

99. *Id.*

mathematics, and writing achievement should also be addressed.<sup>100</sup> If the objective of diversity may be considered a compelling interest in both the college and professional school context under *Grutter*, arguably a broader array of interests may be addressed in primary and secondary education. In some contexts, researchers may demonstrate that great racial and ethnic diversity may contribute to better achievement, or that at-risk children, who are disproportionately minority, require an environment less dominated by at-risk children. In any event, the assertion that *Grutter's* deference to the educational judgments of universities ought to be extended to circumstances where districts argue that the pursuit of diversity or other policies may enhance educational outcomes for Black and minority students, as well other students. For those who remain unsure about the stigmatic implications of arguments for integration per se, *Grutter* may make possible more palatable arguments for integration that emphasize benefits for all students, an argument far removed from the proposition that only minority students stand to benefit when racial isolation is decreased.

*Grutter* suggests a departure from the emphasis on segregation and its causes, and a move towards educational outcomes as the measure of *Brown's* satisfaction. Moreover, where there are differentials in achievement, the language of *Grutter* should signal the rejection of any constitutional equality standard that immunizes this result from constitutional scrutiny. The Court has signaled its approval of a wide range of efforts to close the achievement gaps including efforts that specifically target the concerns of racial minorities. It would be ironic if the goal of creating a bright future for minority children could not find shelter under a post-*Brown* interpretation of the Equal Protection Clause.

On the occasion of the fiftieth anniversary of the *Brown* decision, it is

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100. See LOSING OUR FUTURE, *supra* note 73, at 2 (showing substantially lower high school graduation rates nationwide among Blacks, Latinos, and Native Americans as compared with Whites). Minority children who have more risk factors for lower achievement (such as another without a high school education or a single parent household) perform less well in reading and mathematics skills than other children without risk factors. Nearly three quarters of entering kindergartners from Black families have one or more risk factors as compared to Whites. The proportion of children with two or more risk factors is four times larger among Blacks than Whites. U.S. DEPT. OF EDUC., NAT'L CENTER FOR EDUCATIONAL STATISTICS, THE CONDITION OF EDUCATION xxix-xxxvi (May 31, 2001), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2001072>.

Reading scores of Blacks lag behind Whites at the third, fourth, and eighth grade level. *Id.* at 119–21. Black writing performance also lags behind Whites at grades four, eight, and twelve. *Id.* Mathematics performance also lagged behind Whites at grades four and eight. *Id.* at 22. Black children also had smaller gains in reading and mathematics than White children, and the achievement gap widened from the start of first grade to the end of the third grade. *Id.* at 123–25.

fitting that celebrations ensue, for *Brown* was a powerful break with America's apartheid past and its importance is not merely symbolic. Yet, the Court has limited the legacy of *Brown* by focusing on questions of causation and intent within and without the school context. The argument that the government must be held responsible for equal educational outcomes is a strong one. This is more so the case in a society that now places greater importance on education than when *Brown* was decided. If the full citizenship underpinnings of *Brown* are linked to the lofty ideals of *Grutter*, the Court might craft a vision of equality robust enough for an increasingly diverse America. *Grutter* should prompt us to rethink passive approaches to constitutional equality that make broad minority participation in every aspect of our institutions an optional endeavor. Read broadly, *Grutter* encourages us to undertake the unfinished inclusionary work of *Brown*.