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Articles

RACIAL INCLUSION, EXCLUSION AND SEGREGATION IN CONSTITUTIONAL LAW

*Michelle Adams**

"Racial isolation" itself is not a harm; only state-enforced segregation is.[1]

A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.[2]

INTRODUCTION

For more than a generation, much of the legal scholarship concerning the underpinnings and aims of the equal protection clause has centered on a debate between "anti-subordination" and "anti-classification" or "anti-differentiation." For some time, these twin themes have animated the discussion about equal protection law. On the anti-classification or anti-differentiation view, the equal protection clause protects against government action that classifies on the basis of race or that otherwise differentiates on the basis of race.[3] An anti-classification view emphasizes discrimination, and is primarily concerned with individual versus group rights, and the particular motivations of

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1. Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

2. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

3. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 963 (5th ed. 2006) (the 'anti-classification' approach "prohibits certain kinds of classifications, which are assumed by their nature to be invidious."); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986) (arguing that under the "anti-differentiation perspective, it is inappropriate to treat individuals differently on the basis of a particular normative view about race or sex").

the government actor in taking the complained-of action.[4] The anti-classification or anti-differentiation perspective has largely been associated with a narrower interpretation of the equal protection clause, one that would tend to reject affirmative action programs.

On the other hand, the anti-subordination view emphasizes that the equal protection clause protects against government action which "helps sustain or reinforce unjust forms of social hierarchy or social subordination."[5] The anti-subordination view emphasizes groups rather than individuals, is concerned with social status and racial hierarchies and argues that the equal protection clause should be interpreted to prevent an unjust social structure.[6] The anti-subordination view has largely been associated with a broader interpretation of the scope of the equal protection clause, one that would countenance affirmative action schemes.

However, the Court has never explicitly articulated its acceptance of the anti-subordination approach. On the other hand, the Court has expressly adopted the anti-classification view and it refers to the need to root out racial classification schemes routinely in equal protection cases.[7] To be sure, many of the Court's cases can be explained by reference to anti-subordination values.[8] But only in the few instances where the Court has spoken directly to the evils of "white supremacy"[9] or explained how racially separate public schools create feelings "of inferiority as to their status in the community"[10] do we have more direct evidence of the Court's adoption of an anti-subordination approach.

Conversely, the Court has often spoken explicitly about the evils of racial segregation as distinct from the harms associated with racial classification schemes. In some contexts, the Court

4. Colker, *supra* note 3, at 1005 (describing the anti-differentiation view as an individual rights perspective because it "focuses on the motivation of the individual institution that has allegedly discriminated, without attention to the larger societal context in which the institution operates," and, second, because it "focuses on the specific effect of the alleged discrimination on discrete individuals, rather than on groups").

5. BREST ET AL., *supra* note 3.

6. *See id*.

7. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anti-Classification or Anti-Subordination?*, 58 U. MIAMI L. REV. 9, 13 (2003) (arguing that "antisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice").

8. *See id*. at 11–12.

9. Loving v. Virginia, 388 U.S. 1, 6 (1967).

10. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

has acknowledged that segregation operates as a particularly effective mechanism of exclusion, separating individuals on the basis of race and preventing them from having access to opportunity. Supreme Court doctrine suggests that the Court "cares" about racial segregation because it is a strong marker for exclusion. Has the Court *always* displayed concern about segregation as a mechanism of exclusion? No. Segregation's status and constitutional relevance is the subject of great debate on the Court. But the Court's view of segregation has not been monolithic. This Article argues that the Court has evidenced far more concern about de facto segregation as an exclusionary and stigmatizing mechanism than many scholars and commentators recognize. As it turns out, a very specific type of anti-subordination value often animates the Court's equal protection jurisprudence: a concern about the corrosive effects of de facto racial segregation.

This argument is not just of historical import. Instead, the Court's perception of the harms of segregation will play a large role in determining the continuing constitutional vitality of affirmative action in higher education. Indeed, the Court is poised to revisit its decision in *Grutter v. Bollinger*,[11] which upheld the University of Michigan Law School's affirmative action program. In a recent and widely followed case, *Fisher v. University of Texas*,[12] the United States Court of Appeals for the Fifth Circuit relied upon *Grutter* to uphold the University of Texas' affirmative action program against a constitutional challenge.[13] But in a special concurrence, Judge Emilio M. Garza urged the Supreme Court to overturn its decision in *Grutter v. Bollinger*.[14] The Court has granted certiorari in *Fisher* and the ultimate outcome will almost certainly hinge on whether the Court still believes that affirmative action programs serve broadly inclusive, non-segregative ends or whether such programs are simply so divisive that they cannot comport with the equal protection clause.

In Part I of the Article, I examine early cases in which the Court described segregation as a form of resource "lock-up." In several cases leading up to *Brown*, the Court detailed how racial segregation allows a more dominant group to hoard substantial

11. 539 U.S. 306 (2003).

12. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012) (No. 11-345).

13. *Id.* at 217.

14. *Id.* at 247 (Garza, J., concurring).

societal resources. In these early cases, the Court's focus was on segregation as a mechanism for excluding individuals from valuable benefits on the basis of race; it did not speak explicitly to the harms associated with racial classification schemes. In this Part of the Article, I also return to *Brown v. Board of Education* and explore the Court's discussion of segregation and its link to psychological harm and status diminution. As in several of the cases leading up to *Brown*, the Court does not speak explicitly to the evils of racial classification schemes. *Brown* still stands as a sharp critique of the evils of segregation.

In Part II, I explore how the Court has sometimes used de facto segregation as evidence of de jure discrimination in school districts that had been (but were no longer) segregated by law. In the South at least, the *fact* of segregation in the public schools triggered an affirmative duty to desegregate even when the public school districts were not necessarily responsible for that segregation. In this Part, I also trace *Brown's* journey North. I offer an interpretation of *Milliken v. Bradley II*,[15] which emphasizes the Court's deep discomfort with segregation and links its dismay with the social stratification and racial stigma associated with segregation. This Part ends with a reading of the Court's later *Brown* implementation cases, which refused to adopt Justice Thomas' narrow view of the meaning of "segregation."

In Part III, I shift to the voting rights context and discuss how the Court in *Shaw v. Reno*[16] viewed a districting scheme which explicitly segregated voters by race into separate electoral districts as a particularly virulent form of racial classification. In *Shaw*, the Court is concerned not just with racial classification schemes that infect the political process, but it is also concerned with how racial segregation undermines the political process. As I explain, *Shaw's* central claim is that segregation, not just racial classification schemes, harms the polity. The lesson of Parts I, II and III of this Article is that while the Court's understanding and concern about segregation is often contradictory and dismissive, it is also far more nuanced than commonly appreciated. Segregation can "move" the Court when it explicitly stands as a marker of exclusion.

15. Milliken v. Bradley, 433 U.S. 267 (1977).
16. 509 U.S. 630 (1993).

Finally, in Part IV, I discuss *Grutter v. Bollinger*.[17] In *Grutter*, the Court held that the government could use racial classifications to enhance racial diversity. *Grutter* embraced racial integration as a mode of facilitating racial inclusion. *Grutter* has links to previous cases in which the Court demonstrated a deep and abiding concern about the stigmatizing and racially exclusionary aspects of segregation. But in *Parents Involved*, the Court appeared to step back from *Grutter's* more enthusiastic endorsement of racial integration. *Grutter's* continuing viability will turn on whether the Court views affirmative action as playing a divisive, balkanizing and exclusionary role in American life or instead on whether the Court sees affirmative action as playing a broad inclusionary and desegregative role in American life.[18]

I. SEGREGATION AND RESOURCE "LOCK-UPS"

At various points, the Court has characterized segregation as a form of exclusion. In several cases decided prior to *Brown*, the Court described the harm associated with segregation as a type of "resource lock-up." Take *McLaurin v. Oklahoma State Regents for Higher Education*.[19] In *McLaurin*, a student was admitted to a state graduate program in education, but segregated from his peers within the school.[20] Rather than focus on the harm created by the state's classification scheme which required intra-school segregation, the Court focused on how segregation harmed McLaurin's ability to study and learn his profession.[21] The Court noted that the segregation requirement "sets McLaurin apart from the other students,"[22] which had the effect of preventing him from gaining access to a valuable resource on the same terms as white students, a doctorate in education.

17. 539 U.S. 306 (2003).

18. *See* Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1284 (2011) (arguing that a "framework attentive to concerns of balkanization captures concerns moving the center of the Court more faithfully than one focused solely on the conventional distinction between anticlassification and antisubordination.").

19. 339 U.S. 637 (1950).

20. *Id*. at 640. At the time the case was decided, McLaurin was "assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table." *Id.*

21. *Id*. at 641.

22. *Id*.

Another way of stating this is to suggest that a valuable resource, graduate study, was being reserved to members of the dominant group and members of the disfavored group were excluded from equal access to that resource; *McLaurin* suggests that that resource must be shared.[23] Indeed, the Court previewed a theme that was to become dominant in *Grutter* almost three generations later: the relationship between higher education and societal leadership. The Court observed that as our society grows increasingly complex, the "need for trained leaders increases correspondingly."[24] The Court asserted that individuals attaining advanced degrees would become leaders in their communities and trainers of others.[25] But McLaurin's ability to perform this vital leadership function would be fatally undermined by a racially segregated education.[26]

That resource lock-up theme was even more pronounced in *Sweatt v. Painter*.[27] In *Sweatt*, the state of Texas created a separate law school for blacks in order to come into compliance with the equal protection clause as then interpreted.[28] The question for the Court was whether the separate black law school was "substantially equal" to the all-white University of Texas Law School.[29] The Court said no, but not just because the two schools lacked substantial equality based on the difference in the number of books in the library or credentials of the teaching staff. To be sure, the Court compared the two educational programs with respect to the baseline requirements necessary for an adequate legal education: competent faculty, course offerings, law library, law review and other extra-curricular activities. Based upon its comparison of these tangible factors alone the Court found that the "University of Texas Law

23. Along these lines, Daria Roithmayr has described historical racial discrimination from an anti-competitive perspective. *See* Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 48 (2010) (arguing that under a Jim Crow régime all-white groups often functioned as racial cartels and "gained significant social, economic and political profit—higher wages, higher property values, greater political power—from excluding on the basis of race").

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

25. *Id*.

26. *Id*.

27. 339 U.S. 629 (1950).

28. *Id*. at 632. The narrow issue decided by the Court was whether the legal education offered to blacks within the state of Texas was "equivalent to that offered by the State to students of other races." *Id*. at 635.

29. *Id*. at 633–34.

School is superior"[30] and thus it could have ended its substantial equality analysis there.

But the Court's analysis continued. Instead, the Court measured equality in a more nuanced way. As many commentators have noted, the Court emphasized the "intangible" differences between the University of Texas Law School and the "new law school for Negroes."[31] The Court's analysis focused on the structural differences between the two educational programs. The Court discussed those qualities that "make for greatness in a law school."[32] Those qualities were prestige, influence, reputation, and traditions, "intangibles" in the sense that they resist standard empirical measurement. Stated another way, the Court's analysis focused on how the University of Texas Law School provided certain resource and status benefits to white students that simply were not available to black students, notwithstanding the adequacy of any parallel legal program open to them. What is perhaps most important about this line of analysis is that the Court had no trouble with the idea that status benefits and resources are real rather than imagined, and that they provide enormous benefits to white students.[33]

Prior to *Sweatt*, of course, such status benefits had been the subject of a "lockup," meaning that they were reserved solely to white students. Again, there is no discussion in the case of the harms associated with the state's racial classification scheme which mandated separate education for blacks and whites in higher education. Instead, the Court engages in a dissertation on the harms associated with segregation, of what happens when a dominant group reserves to itself certain kinds of resources and benefits solely to individuals on the basis of their race. One argument is that those benefits, particularly as the Court discussed them in connection with reputation and the strength of the school's alumni, have a "feedback loop" effect. The longer the benefit is reserved to white students, the greater the value of the benefit, the more societal power is accreted to the dominant

30. *Id*.
31. *Id*. at 633.
32. *Id*. at 634.
33. Along these lines, see Amy Stuart Wells, *The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771, 775 (2001) ("The Sweatt and McLaurin decisions rested on the negative effect of black students' exclusion from white institutions not simply because of the resources or facilities in these institutions, but also because of their status in society as well as the social networks of faculty and students within them.").

group and the more that dominant group becomes identified with that benefit.[34]

And indeed a secondary theme in *Sweatt* is the Court's discussion of the negative effects of racial exclusion, the core of the harm of segregation. Exclusion from the University of Texas Law School harmed black students not just because that exclusion is mandated under a scheme that classifies individuals on the basis of a phenotypical characteristic. Instead, the black law school sets prospective black lawyers apart and is conducted in a legal vacuum. It is "removed from the interplay of ideas and the exchange of views with which the law is concerned,"[35] and thus could not adequately prepare black lawyers to function in a professional world where interaction with white clients and judges was expected. This line of argumentation, of course, anticipated the Court's later discussion of the importance of viewpoint diversity in both *Bakke* and *Grutter*, but with one key difference. In *Bakke* and *Grutter*, the Court was willing to look at the totality of the law school experience for *all* law students; those cases opined that homogeneity undermines the law school experience for everyone. In *Sweatt*, the Court's discussion of racial exclusion is more specific; how segregated professional education harms the ability of black lawyers to do their job.

Indeed, the Court has made the connection between segregation and resource lock-ups outside of the race context. In *United States v. Virginia*,[36] the Court considered an equal protection challenge to the Virginia Military Institute's male-only admissions policy. As in *Sweatt*, the state created a separate program for women in an attempt to come into compliance with the equal protection clause.[37] But the Court ruled that the parallel program, the Virginia Women's Institute for Leadership, did not provide a comparable single-gender educational experience and thus it did not provide an adequate remedy for the underlying constitutional violation.[38] The Court's heavy reliance on *Sweatt* is notable. In analyzing why the VMIL was

34. For an analysis of how negative feedback loops shape current residential segregation, *see* Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 197 (2004) "[During Jim Crow,] white racial cartels . . . engaged in anti-competitive conduct to exclude blacks and monopolize access to good neighborhoods." Roithmayr asserts that that advantage has become "locked-in via certain self-reinforcing neighborhoods effects, namely through public school finance and neighborhood job referral networks.").

35. *Sweatt*, 339 U.S. at 634.

36. 518 U.S. 515 (1996).

37. *Id*. at 525–26.

38. *Id*. at 552–54.

not comparable to VMI, the Court reviewed *Sweatt* in detail, and reiterated the importance of the intangibles in the comparability analysis. The entire thrust of the Court's discussion of VMIL centers on the harms associated with exclusion, that is segregation not the gender classification scheme itself. The problem with the VMIL was that it was not equal to VMI in terms of tangibles (course offerings and curricular choices). But more importantly VMIL lacked the "faculty stature, funding, prestige, alumni support and influence,"[39] those things incapable of objective measurement.[40]

A. SEGREGATION, PSYCHOLOGICAL HARM AND STATUS DIMINUTION

The basis of the Court's holding in *Brown v. Board of Education*[41] has been much debated. The standard and widely accepted view is that *Brown* is open to several varying and potentially inconsistent interpretations.[42] But there can be little doubt that *Brown* stands for the proposition, at least in part, that state-mandated racial segregation violates the equal protection clause because it causes psychological harm and sends the message that blacks are inferior to whites. The debate, of course, centers on the question of whether it is the segregation itself that created such harms or the fact that such segregation was required by state law.

My argument here will not end this debate. I will simply observe that there is no discussion in *Brown* of racial classification schemes or of the harms that such schemes might cause. Instead, the Court explained explicitly how segregation creates psychological damage (separation "generates a feeling of inferiority" which affects black students' "hearts and minds"),[43] facilitates status diminution (separation "denot[es] the inferiority of the negro group"),[44] and excludes blacks from educational opportunities afforded only to white students (education is the "very foundation of good citizenship" and thus "must be made available to all on equal terms").[45] Indeed, the

39. *Id*. at 553.
40. *Id*. at 554 (citing *Sweatt*, 359 U.S. at 634).
41. 347 U.S. 483 (1954).
42. *See*, *e.g*., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 508–09 (17th ed. 2010) (noting four possible interpretations of *Brow*n: color-blindness, caste, white supremacy and integration).
43. *Brown*, 347 U.S. at 494.
44. *Id*.
45. *Id*. at 493.

Court implied that racial segregation even in the absence of state compunction causes harm, "'segregation of white and colored children in public schools has a detrimental effect upon the colored children. The *impact is greater when it has the sanction of the law*; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[46]

Bolling v. Sharpe[47] dealt with the constitutionality of racial segregation in the District of Columbia public schools, therefore the equal protection clause did not apply.[48] In *Bolling*, the Court articulated a theme that had been absent in *Brown* and which was to take on increasing importance: that racial classification schemes are inherently suspect and thus should receive some form of heightened scrutiny.[49] But while *Bolling* articulated the idea that a heightened level of judicial review ought to apply to racial classification schemes, it is not clear that the Court actually applied that standard to the race-based segregation scheme at issue. Instead, the Court stated that segregation "in public education is not reasonably related to any proper governmental objective, and thus imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty . . . ."[50] This wording is strange if what the Court was doing was applying something approaching strict scrutiny review to a racial classification scheme. The language instead seems to be more consistent with the application of "rational basis" or a more deferential standard of review.

If that is the case, why was segregation not reasonably related to any proper governmental objective? Surely the government could argue that the need to segregate the races is rationally related to some legitimate government objective, such as protecting the public health or welfare.[51] It is not clear exactly why the Court rejects this view, but one answer seems to lie in *Brown*. In *Bolling*, the Court simply says it would be "unthinkable that the same Constitution would impose a lesser

46. *Id*. at 494 (emphasis supplied).

47. 347 U.S. 497 (1954).

48. *Id*. at 499. *Bolling* has typically been explained as an example of "reverse incorporation" with the Court incorporating the obligations of the equal protection clause as against the federal government through the due process clause of the Fifth Amendment. *See* BREST ET AL., *supra* note 3, at 915.

49. *Bolling*, 347 U.S. at 499 ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.").

50. *Id*. at 500.

51. *See* Plessey v. Ferguson, 163 U.S. 537 (1896).

duty on the Federal Government."[52] If we are to assume that the due process and equal protection clauses impose similar duties on the states and the federal government, the Court's primary explication of that duty comes out of *Brown*. And as discussed above, there is good reason to believe that the *Brown* Court was independently concerned about the harms of segregation and its negative impact on African-Americans. In this sense, the *Bolling* Court incorporates *Brown's* reasoning as against the federal government as well.

II. DE FACTO SEGREGATION AS EVIDENCE OF DE JURE DISCRIMINATION

The Court has also used segregation as evidence of de jure discrimination. Take *Green v. New Kent County School Board*.[53] That case concerned the question of whether a formerly de jure segregated school system's adoption of a freedom of choice plan allowing black and white students to choose which school to attend impermissibly perpetuated an unconstitutional dual school system.[54] In *Green*, the Court ruled that school districts formerly operating dual school systems have an 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."[55] The Court found that the freedom of choice plan was ineffective because even after three years of operation "85% of the Negro children in the system still attend the all-Negro Watkins school."[56] The thrust of the Court's ruling was that New Kent County was still operating a dual school system and thus was in violation of *Brown* because the schools were racially monolithic. This was the case even though the state law no longer required that the schools be racially segregated.

Green is famous for the "affirmative duty" doctrine and it put to rest the idea that school districts had no obligation to take affirmative steps to desegregate their school systems. Under *Green*, *Brown I* plus *Brown II* equals the requirement to transition to a "racially nondiscriminatory school system."[57] But under the logic of *Green*, a racially nondiscriminatory school system could not include a system where 85% of the black

52. *Bolling*, 347 U.S. at 500.
53. 391 U.S. 430 (1968).
54. *Id*. at 431–32.
55. *Id*. at 437–38.
56. *Id*. at 441.
57. *Id*. at 437.

children still attended the same school they had attended prior to the *Brown* decision. Under *Green*, the remedy for state imposed segregation is desegregation, and the evidence of whether the school district had come into compliance with *Brown* is continuing racial segregation in the school district. In *Green*, there is no discussion of "racial identifiability" or of the "racially monolithic" nature of the schools. Instead, *Green* considered the schools "segregated" on a continuing violation theory even in the absence of a racial classification scheme, just as the schools were "segregated" in *Brown*.

Similarly in *Swann v. Charlotte-Mecklenburg Board of Education*,[58] the Court ruled that in a public school system with a history of de jure segregation there is a "presumption against schools that are substantially disproportionate in their racial composition."[59] Segregation was a form of proof that the underlying constitutional violation had not been remedied. *Swann* firmly placed the burden on school districts to demonstrate why substantial disproportionality in racial composition was not the result of prior de jure segregation.[60] Of course, at the same time the Court articulated the *de facto-de jure* distinction; the obligations of the equal protection clause only extended to segregation that could be traced to state law or other purposeful, official action.[61] De facto segregation, segregation that could be attributed to other more remote factors or private action, was not within the purview of the equal protection clause.[62]

To be sure, the *de facto-de jure* distinction was (and is) a huge impediment to desegregation.[63] As some members of the Court recognized, de facto segregation was often caused by state actors and the difficulty of ascertaining causation or assigning responsibility to a specific state actor should not constrain the reach of the equal protection clause.[64] Justice Douglas' blunt

58. 402 U.S. 1 (1971).

59. *Id*. at 26.

60. *Id*.

61. *Id*. at 17–18; *see also* Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 208 (1973) ("[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate.").

62. *Swann*, 402 U.S. at 31–32 (1971).

63. BREST ET AL., *supra* note 3, at 936 (noting that "as the South began to integrate after 1968, Northern schools still remained largely segregated, leading to charges of unfairness by Southern politicians who felt that the federal courts were singling them out. Northern segregation was often the result of what was described as 'de facto' rather than 'de jure' segregation").

64. *See*, *e.g*., *Keyes*, 413 U.S. at 216 (Douglas, J., concurring) ("If a 'neighborhood'

assessment still holds true: "there is no constitutional difference between de jure and de facto segregation, for each is the product of state actions or policies."[65] The Court simply refused to acknowledge this fact. But one point bears mentioning that might suggest a more nuanced approach to the Court's understanding of segregation. The *de facto-de jure* distinction was largely a regional dichotomy. As Justice Powell observed in his concurring opinion in *Keyes*, the Court had little interest in policing the *de facto-de jure* distinction in the South.[66] By 1973, it was hard to argue that 100% of the racial identifiability in public schools in large, metropolitan areas of the South was attributable solely to discriminatory state laws that had been invalidated by *Brown* a generation before. Many of those schools were racially monolithic, but not necessarily for reasons that could be clearly traced to state laws requiring racial segregation.

Moreover, some of the racial identifiability in those schools was clearly attributable to private action.[67] The schools in the metropolitan South were racially monolithic for the same reasons that they were racially monolithic in the metropolitan North: "segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities."[68] Yet under the affirmative duty doctrine, Southern school authorities had a duty to ameliorate this kind of segregation, too. But absent a showing of discriminatory purpose underlying racially identifiable schools, Northern school authorities bore no such affirmative duty to desegregate. In the South, segregation was *both* evidence of an ongoing violation of the equal protection clause *and* signaled an affirmative duty to cure even though some of that segregation was not caused by

or 'geographical' unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to 'the elite,' leaving the 'undesirables' to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants.").

65. *Id*.

66. *Id.* at 222 (Powell, J., concurring) ("In imposing on metropolitan southern school districts an affirmative duty, entailing large scale transportation of pupils, to eliminate segregation in the schools, the Court required these districts to alleviate conditions which in large part did not result from historic, state-imposed de jure segregation.").

67. *Id*. at 222–23 (Powell, J. concurring) (asserting that "the familiar root cause of segregated schools in all the biracial metropolitan areas of our country is essentially the same: one of segregated residential *and migratory patterns* the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities") (emphasis supplied).

68. *Id*. at 222–23 (Powell, J., concurring).

discriminatory state laws and could be attributed to private action.

The standard narrative about the *de facto-de jure* distinction as a regional dichotomy is that the Court was punishing the "guilty" South, while allowing an often virulently racist North to go free.[69] To be sure, this amounted to a double standard and desegregation in the North was far harder to achieve because of it.[70] But it is worth remembering that at least in the Southern context, the Court was willing to place significant obligations on school authorities for segregation that they may not have caused, even as racial classification schemes mandating segregation receded into history. *Green* converted *Brown's* injunction against discrimination into an "affirmative duty to integrate,"[71] in situations where all of the observable segregation could not be attributed to school authorities. In the South, the Court's concern about the harms of segregation transcended at least for a time its commitment to a pure anti-classification view of the equal protection clause.

A. SEGREGATION AS A FORM OF EXCLUSION

Brown's journey North was indeed troubled. First in *Keyes*[72] and then in a series of later cases, the Court significantly constrained *Brown* remedies in the North[73] and ultimately curtailed federal district courts' ongoing jurisdiction over desegregation cases.[74] In these cases, the Court balked at the invitation to extend the *Brown* mandate nationally and lost patience with aggressive federal court enforcement of desegregation decrees, particularly if those courts sought to retain jurisdiction in perpetuity. These two drivers, combined with the Court's renewed emphasis on federalism and its own institutional legitimacy, drove the Court's increasing sense of desegregation exhaustion. And yet even in this line of cases, the

69. BREST ET AL., *supra* note 3, at 936.

70. *See id*.

71. *Keyes*, 413 U.S. at 258 (Rehnquist, J., dissenting) (describing *Green* as a "drastic expansion" of *Brown*).

72. *Id.* at 208–09 (reifying the *de facto-de jure* distinction and absolving school authorities from any obligation to come into compliance with *Brown* in the North and West absent a finding of discriminatory purpose).

73. *See* Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*).

74. *See* Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

Court's view of segregation was more nuanced than commonly appreciated.

Take the *Milliken v. Bradley* cases,[75] which are generally considered to be the low watermark in terms of the Court's commitment to integration.[76] In *Milliken I*, there was no dispute that the state of Michigan had engaged in de jure segregation in the City of Detroit.[77] The question in *Milliken I* was what was the appropriate remedy for that constitutional violation.[78] Because the City of Detroit was overwhelmingly black, the lower federal courts instituted an interdistrict desegregation plan, which used the predominantly white suburban schools as a desegregation resource in order to cure the constitutional violation.[79] In *Milliken I*, the Court ruled interdistrict busing was impermissible to achieve integration unless the defendant committed an interdistrict violation: "where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race."[80] The outcome in *Milliken I* was simple yet devastating: no interdistrict violation, no interdistrict remedy. Because of the largely racially segregated nature of large metropolitan areas in the North and West and the difficulty of proving an interdistrict violation, this typically meant that no meaningful desegregation plan could be ordered by a federal court.[81]

The Michigan case returned to the Court a second time to answer the following question: what was the permissible scope of an intradistrict remedy.[82] On the state of Michigan's view, it could not be required to remediate segregation's deleterious effects on the Detroit public school system except to the extent

75. *See supra* note 73, and accompanying text.

76. *See*, *e.g.*, Gary Orfield, *Turning Back to Segregation in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (GARY ORFIELD & SUSAN E. EATON EDS., 1996) 1, 10, 12 (arguing that desegregation in American schools "hit a stone wall with the 1974 *Milliken v. Bradley* [I] decision" and describing *Milliken II* as providing a "limited form of reparations" that has "not been implemented successfully").

77. *Milliken I,* 418 U.S. at 723.

78. *Id*. at 721.

79. *Id*. at 739.

80. *Id*. at 745.

81. *See* Susan E. Eaton, Joseph Feldman & Edward Kirby, *Still Separate, Still Unequal: The Limits of Milliken II's Monetary Compensation to Segregated Schools in* ORFIELD ET AL., *supra* note 76, at 143, 143–44 (arguing that in "coming years, Milliken I would make it all but impossible to achieve racial integration within predominantly minority school districts").

82. *Milliken II*, 433 U.S. at 269.

that they involved pupil placement.[83] Thus, the state took the narrowest possible view of its remedial responsibility: a finding of an intradistrict violation against the state qualified the plaintiffs only for a Detroit-only pupil reassignment plan.[84]

This argument, that the state's responsibility was limited to student assignment, makes sense if one views *Brown* as solely concerned with racial classifications and as agnostic with respect to the harms associated with segregation. If the constitutional violation is segregating Detroit public school students "on the basis of race as a result of the official policies and actions of"[85] the State of Michigan, then an appropriate remedy would be a student assignment plan that provides for the maximum feasible amount of school desegregation within the city of Detroit.

But the Court rejected this view. It held instead that Michigan could be forced to pay for remedial and compensatory programs, magnet schools, additional training for teachers, administrators, guidance counselors, and for counseling programs and augmented testing procedures.[86] All of these elements of the remedial plan were intended to ameliorate the effects of the underlying constitutional violation.[87] *Milliken II* stands for the proposition that "federal courts can order remedial education programs as part of a school desegregation decree."[88]

Milliken II represents a huge retreat from aggressive desegregation enforcement and is rightly viewed as a significant defeat for racial integration.[89] But what is perhaps less commonly appreciated is that the Court in *Milliken II* was still deeply concerned about the harmful effects of segregation. Indeed, in a striking passage, the Court expressly detailed how exclusion from the larger more dominant group can create extreme harm,

83. *Id*. at 281.

84. *Id.* at 271. Indeed, the State of Michigan took the position that the 11th Amendment barred the federal courts from ordering the state to pay the costs of any compensatory remedial educational programs intended to overcome the effects of de jure segregation. *Id*. at 288–89.

85. *Milliken I*, 418 U.S. at 723.

86. *Milliken II*, 433 U.S. at 286–87.

87. *Id*. at 287.

88. *Id.* at 279.

89. *See* Eaton et al., *supra* note 81, at 145 (arguing that *Milliken II* remedies "have evolved not as permanent changes in opportunity structure, but as temporary, supplemental add-ons that are not linked to any systemic effort to redress harms of segregation").

and offered a structural analysis of the role that segregation plays in creating inequality:

> On this record, however, we are bound to conclude that the decree before us was aptly tailored to remedy the consequences of the constitutional violation. Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.[90]

The Court's view of segregation in *Milliken II* is surprisingly nuanced and complex. The Court understands segregation and exclusion to be one in the same, and suggests that exclusion from the mainstream is an independent and perhaps special kind of harm. For the Court, segregation simultaneously stigmatizes and deprives because it sets children "educationally and culturally" apart from the larger group and inculcates different "habits of speech, conduct, and attitudes" that reflect cultural isolation. Segregation also handicaps children in their ability to compete with other Americans for jobs and other social benefits. The Court recognizes that this exclusion has a functional, structural component: when individuals are separated out from the larger group harm occurs. This exclusionary harm is that much more amplified when it has the force of race. Indeed, in *Milliken II*, the Court comes close to explicitly acknowledging the role that segregation plays in creating social stratification and perpetuating a caste system. For the Court, this harm had to be remediated through a compensatory regime; a Detroit-only student assignment plan would not do.[91] This remedy vastly undercompensated the harm, but the Court recognized that harm nonetheless.

There is no question that plaintiffs in *Milliken I* had the better of the argument about the appropriate of remedy for de jure segregation: only an interdistrict remedy could guarantee meaningful desegregation given the racial composition of the

90. *Milliken II*, 433 U.S. at 287.

91. Eaton et al., *supra* note 81, at 144 ("Perhaps the most far-reaching aspect of *Milliken II* was its declaration that states found guilty of prior discrimination must pay for remedial educational programs.").

City of Detroit and surrounding areas. The Court rejected this view and blessed a Detroit-only remedy. In a sense, the *Milliken* cases expose the duality of the Court's understanding of segregation. In the *Milliken* cases, the Court correctly and powerfully diagnosed the harm: segregation is a powerful mode of exclusion. But at the same time, it refused to countenance a meaningful desegregative remedy that would have functioned as a powerful engine of inclusion. In other contexts, however, the Court has upheld integrative remedies that transverse local jurisdictional limits.[92]

B. SEGREGATION AS A SOCIAL PROBLEM

In some respects, the *Milliken* cases are emblematic of how the Court has often viewed segregation. A majority of the Court views segregation as a significant social problem and as distinct from the harms associated with racial classifications, but its concern about segregation manifests in divergent and sometimes schizophrenic ways. On the one hand, the Court's later *Brown* implementation cases display a deep desire to draw bright-line distinctions between constitutionally actionable *de jure* segregation and constitutionally irrelevant racial imbalances. So for instance, in *Freeman v. Pitts*,[93] the Court limited the ability of federal courts to address racial imbalances not causally linked to state action:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.[94]

In *Freeman*, the Court articulated a bright-line rule: demographic and residential changes leading to racial imbalances were outside of federal court authority, but racial imbalances that could be linked to prior *de jure* discrimination, that is

92. *See*, *e.g.*, Hills v. Gautreaux, 425 U.S. 284, 298 (1976) (ruling that *Milliken I* did not establish "a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries" and upholding a remedial plan that required the Department of Housing and Urban Development to take action beyond the boundaries of the City of Chicago).

93. 503 U.S. 467 (1992).

94. *Id*. at 495.

"segregation" were within federal court authority.[95] And just a few years later, in *Missouri v. Jenkins*,[96] the Court ruled that a district court exceeded its remedial authority when it authorized a desegregation order including major capital improvements, quality education programs and teacher salary increases for the purposes of attracting non-minority suburban students to an urban school district in order to ameliorate an intradistrict rather than an interdistrict constitutional violation.[97] In so doing, the Court sounded a similar theme: just "as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of the [defendants] affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus."[98] Thus, in both cases, the Court drew a broad distinction between racial imbalances (non-constitutionally actionable predominantly single-race spaces) and segregation (constitutionally relevant predominantly single-race spaces).

And yet even where the Court issued rulings such as *Freeman* and *Jenkins* which clearly retarded the desegregation process, it refrained from adopting the view championed by Justice Thomas that racial imbalances are socially net neutral or even socially valuable. Consider Justice Thomas' concurrence in *Jenkins*. Justice Thomas' quarrel was with the district court's initial liability determination. On Justice Thomas' view, in order for the district court to conclude that the constitution was violated in the absence of a fresh showing of *de jure* segregation, it must have equated the racially isolated nature of the KSMSD with some sort of harm. But if there was no state action which created the racially identifiable school district, then the district court must have assumed that there was something problematic about the predominantly black composition of the schools *themselves*. How else could one explain the district court's initial finding of liability when the possibility of *de jure* segregation was so remote. Justice Thomas argued, "in effect, the court found that racial imbalances constituted an ongoing constitutional violation that continued to inflict harm on black students. This

95. *Id*. at 496 ("The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied.").

96. 515 U.S. 70 (1995).

97. *Id*. at 100.

98. *Id*. at 102 (citations omitted).

position appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites."[99] Thus, Justice Thomas asserted that the only way the district court could have concluded that the defendants violated the constitution was because it equated majority-black schools with inferiority.

Justice Thomas reasoned that racial imbalances cannot justify far-ranging desegregation orders, an assumption that is largely echoed in the majority opinion. But Justice Thomas' concurrence goes further and captures the essence of the on-going conversation about segregation on the Court. Justice Thomas' point is that courts *must draw no negative inference at all* about significant racial imbalances. On Justice Thomas' view, in the absence of *de jure* segregation to make a negative assumption about racial imbalances employs a "Jim Crow" mode of thinking. Justice Thomas opined: it "never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."[100] Thus, Justice Thomas' implication is clear: if *de facto* segregation is largely the product of private choice or other voluntary action there is no reason to believe that racial imbalance is problematic unless, of course, one is a racist. Justice Thomas would have the Court hold that racial imbalances are not just constitutionally irrelevant, but are constitutionally invisible.

But a majority of the Court has not taken this view. Notwithstanding the Court's attempt to draw bright-line rules it is still engaged in a debate about the constitutional implications of de facto racial segregation. Perhaps this is because segregation can create harm even without the sanction of state law. That is, segregation reifies and strengthens the underlying processes of social categorization, unequal allocation of resources and racial stigma. Segregation is an extraordinarily effective mechanism for perpetuating racial and social hierarchy.

Douglas Massey has recently argued that the process of stratification explains much of the social inequality we currently observe in American society.[101] Massey defines stratification as the "unequal distribution of people across social categories that are characterized by differential access to scarce [material,

99. *Id*. at 118–19 (Thomas, J., concurring).

100. *Id*. at 114.

101. DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM (2007).

symbolic, and emotional] resources."[102] Various stratification systems or processes exist which order people hierarchically in our society, with those at the top of the social order having more access to these scarce resources.[103] For Massey, while stratification processes vary they "boil down to a combination of two simple but powerful mechanisms: the allocation of people to social categories, and the institutionalization of practices that allocate resources unequally across those categories."[104]

The first component necessary for stratification is social categorization. In our society, one very powerful way that people are socially categorized is by race. Historically dark skin—a highly visible yet morally irrelevant characteristic—is associated with systematic social disadvantages that are very real.[105] Black Americans are systematically below white Americans across a variety of important social welfare and economic indicia.[106] Thus, dark skin *signals* social disadvantage. But at the same time, dark skin also *creates* caste-based harm, such as racial stigma and injury to self-respect. This is the case because when "someone is a member of a group that is systematically subordinate to others, and when the group characteristic is highly visible, insults to self-respect are likely to occur nearly every day."[107] Indeed, individuals possessing the particular characteristic—dark skin—become defined not as individuals who "happen to be black," but as members of a subordinated group where that characteristic predominates, "black people." The stigma associated with such group membership is "what it means to be a member of a lower caste."[108]

As Robin Lenhardt has explained, racial stigma refers to the negative meanings that we as a society associate with dark skin.[109] Lenhardt argues that people with dark skin are viewed as less than fully human and that they are cloaked with a negative "virtual social identity" they do not choose.[110] The virtual social identity widely ascribed to black people—of criminality, impetuousness, promiscuity, stupidity, sloth—obscures and

102. *Id*. at 1.
103. *Id*. at 2.
104. *Id*. at 5–6.
105. Cass R. Sunstein, *The AntiCaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994).
106. *Id*.
107. *Id*.
108. *Id*. at 2432.
109. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004).
110. *Id*. at 816–21.

sublimates black individuals' actual identity, undermining individuality. For Lenhardt, "[r]ace becomes a sort of a mask, a barrier that both makes it impossible for the stigmatized person's true self to be seen and fixes the range of responses that others will have to that person."[111] Thus, negative social meaning attaches to those with dark skin in an automatic and unconscious fashion.[112] Widely shared dehumanizing meanings associated with race operate at a pre-conscious level in ways which trigger racially discriminatory conduct and racial microaggressions; exacerbate racial disparities; erode self-esteem; undercut the ability of black persons to participate fully in community and governmental processes, and "distort perception and spoil social interactions between racially stigmatized and nonstigmatized individuals."[113] Race is an essential component in social stratification because it provides the mechanism for categorizing people into in and out groups, of distinguishing between the dominant and the subordinate in our social structure.

The second component necessary for stratification is the unequal allocation of resources between social groups. Unequal allocation of resources occurs through the processes of competition, exploitation and opportunity hoarding. In any social structure, groups will compete for dominance with respect not only to political power and material resources, but also for social status, that is "social approval, respect, and admiration for one's self and one's style of life . . . ."[114] This is the case because status correlates with and often produces wealth, political power and other social goods,[115] and because of the limited pool of status benefits.[116] Because status is a relative good, in order for one group to have more another must have less.[117] When social groups interact—economically, politically, socially—they play an endless number of interactive "games" with the winning group achieving status benefits at the losing group's expense. The natural outcome to such competition will be status hierarchies, the most extreme of which is a system of race-based caste.[118] Exploitation "occurs when people in one social group

111. *Id*. at 819.
112. *Id*. at 825.
113. *Id*. at 836–47.
114. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2327 (1997).
115. *Id*. at 2328 ("Status capital can be converted, though often imperfectly and unpredictably, into other forms of capital and economic and social power.").
116. *Id*.
117. *Id*. at 2328–29.
118. *Id*. at 2323, 2358.

expropriate a resource produced by members of another social group and prevent them from realizing the full value of their effort in producing it."[119]

Finally, opportunity hoarding is classic monopolistic behavior. Opportunity hoarding "occurs when one social group restricts access to a scarce resource, either through outright denial or by exercising monopoly control that requires out-group members to pay rent in return for access. Either way, opportunity hoarding is enabled through a *socially defined process of exclusion*."[120] Now we can appreciate the relationship among segregation, the mechanics of stratification and the social meaning of race. Race is socially constructed; it is both a signal of lower status and a cognitive heuristic triggering negative social meanings. At the same time, groups endlessly compete for social status, exploiting resources and exacting monopoly rents from out-groups. The result is stratification and inequality: segregation facilitates this entire process.

From this perspective, Justice Thomas' constitutional invisibility approach is unpersuasive precisely because it is woefully underinclusive. One way that segregation harms is when the state imposes racial separation. But that is not the *only way* that segregation creates harm. If segregation is the binding agent of inequality, then government should be applauded rather than condemned for attempting to address it. A constitutional vision which requires state actors to ignore the harm that de facto segregation can create demands a kind of constitutional blindness that a majority of the Court has not countenanced. As discussed in the next Part, the Court often responds to racial classification schemes that explicitly segregate as a particularly virulent and problematic form of racial classification.

III. RACIAL CLASSIFICATION SCHEMES, SEGREGATION OR BOTH: TWO READINGS OF *SHAW V. RENO*

The harms associated with segregation are not necessarily the same as the harms associated with racial classification schemes. *Shaw v. Reno*[121] is illustrative of this view. In *Shaw*, the Court considered the constitutionality of a North Carolina

119. MASSEY, *supra* note 101, at 6 (italics in original).
120. *Id*.
121. 509 U.S. 630 (1993).

reapportionment plan that created two majority-black districts with irregular district boundary lines.[122] The governmental action at issue, drawing boundary lines "of dramatically irregular shape"[123] was facially race neutral. Typically, facially race-neutral government actions do not violate the equal protection clause.[124] However, the Court ruled that the redistricting plan was so bizarre and irregular that it was "unexplainable on grounds other than race,"[125] and thus it "demands the same close scrutiny that we give other state laws that classify citizens by race."[126] Ultimately, the Court held that the districting plan could only be viewed "as an effort to segregate voters into separate voting districts because of their race" and thus presumptively violated the equal protection clause.[127]

Of course, one might understand *Shaw* as a racial classification case. On this view, the reason why the districting scheme violated the equal protection clause was because the government action classified individuals on the basis of their race by separating them into racially identifiable electoral districts. In *Shaw*, the bizarre nature of the district lines themselves expressed an impermissible and very public racial message.[128] Thus, the Court inferred from the shape of the districts that the purpose of the redistricting plan was to "segregate voters on the basis of race . . . ."[129] Once the Court made that inference the redistricting scheme was tantamount to a racial classification and strict scrutiny automatically applied.[130] On this view, when the Court says there is a right to participate in a "'color-blind' electoral process"[131] it means the political process should not be tainted with racial classification schemes.

But it would be a mistake to view *Shaw* as solely concerned with rooting out racial classifications schemes that infect the political process. In *Shaw*, the Court also speaks to the harms associated with segregation in the political process. The

122. *Id*. at 633–34.
123. *Id*. at 633.
124. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977); Washington v. Davis, 426 U.S. 229, 240–41 (1976).
125. *Shaw*, 509 U.S. at 644.
126. *Id*.
127. *Id*. at 658.
128. *Id.* at 630, 647 ("[W]e believe that reapportionment is one area in which appearances do matter.") (quoting *Arlington Heights*, 429 U.S. at 266).
129. *Id*. at 669.
130. *Id*. at 658.
131. *Id*. at 641–42.

government's action was facially race neutral. Thus, the question was whether that action was animated by a discriminatory purpose.[132] *Shaw* holds that intent to segregate is a discriminatory purpose, whether the government's motive is to perpetuate white supremacy or to eradicate past discriminatory harm. *Shaw* ruled that even government action designed to benefit members of historically disadvantaged groups could not be justified because of the harms associated with segregation. But as I discuss below, the Court has taken exactly the opposite position with respect to government action intended to integrate: sometimes the government *may* take otherwise constitutionally impermissible (or at least constitutionally questionable) action into account in an effort to promote racial integration.

Indeed, *Shaw* condemns racial segregation in the strongest possible terms. The Court's discussion of the harms of the reapportionment plan focused on the problems of separation and exclusion in the political process. For instance, the Court in *Shaw* opined that majority-minority districts, created from geographically and politically disparate communities run the risk of creating "political apartheid."[133] The Court stated that such electoral districts reinforce "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[134] Thus, the Court condemned such districts as creating "impermissible racial stereotypes."[135]

But the Court did not stop there. In addition, such districts also artificially balkanize citizens into conflicting polities, exacerbate racial block voting and erode the democratic representative process by signaling to elected representative that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[136] *Shaw's* central claim is that segregation, not just racial classification schemes, harms the polity. *Shaw* argues that segregation creates profound systemic problems that are cognitive, process-based and deliberative in nature. These harms transcend any particular white plaintiff's entitlement to a specific benefit or vested right, the kinds of harms the Court is most concerned with in the

132. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).
133. *Shaw*, 509 U.S. at 647.
134. *Id*. at 647.
135. *Id*.
136. *Id*. at 648.

traditional affirmative action context. *Shaw* takes place outside of any merits-based determination; it speaks of the democracy-based harms created by segregation. Moreover, *Shaw* suggests that the gravity of those harms are so great that the normal elements of Art. III standing, including the "injury in fact" requirement is relaxed. Along these lines, consider Justice White's view in dissent that the claim recognized in *Shaw* (the right to participate in a "colorblind" electoral process) did not require that any particular voter demonstrate a constitutionally cognizable injury.[137]

Even if one takes the position that *Shaw* and *Miller* were wrongly decided either because the cases unnecessarily hamstring government's ability to protect minority rights in a winner take all political process and vindicate the aims of the Voting Rights Act and/or because they relax normal standing requirements, one must still acknowledge the harms associated with segregation in the electoral districting context. As Elizabeth Anderson has argued, racial segregation creates democracy-based harms.[138] The touchstone of democratic self-government is reciprocal claim-making based on discussion and deliberation among equal citizens.[139] But spatial segregation, "exacerbated by racial and partisan gerrymandering of legislative districts,"[140] undermines collective self-governance by manufacturing real differences between people rather than a sense of unity. Under conditions of segregation, people of different races really are from different walks of life, with different and often adverse political interests.[141]

137. *Id*. at 659 (White, J., dissenting). Moreover, a dramatically irregular shape is not a necessary prerequisite for finding a *Shaw* violation. In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court ruled that the government's intent to segregate voters rather than district shape was the essence of the harm recognized in *Shaw*. To be sure, like *Shaw*, *Miller* is open to competing interpretations. It speaks to the impermissibility of race-based government action, but it also speaks to the separation that flows from such action. *Id*. at 911 ("[T]he essence of the equal protection claim recognized in Shaw is that the State has used race as a basis for separating voters into districts.").

138. Elizabeth Anderson, *The Future of Racial Integration* 229, 235–36 *in* CONTEMPORARY DEBATES IN SOCIAL PHILOSOPHY (LAURENCE THOMAS ed., 2008).

139. *Id*. at 235.

140. *Id*.

141. *Id*. As Anderson puts it, since

> the residents of the overwhelmingly white districts don't benefit from public spending in the other districts, the ordinary competition among districts for public goods acquires a racial cast. The same lack of benefits means that segregated blacks are less able to find coalition partners of other races. . . . A politician in an overwhelmingly white district is free to advance policies that have a grossly differential negative impact on disadvantaged racial groups, without being held to account for the costs imposed on other racial groups, and

The state's motive in drawing the district boundary lines in *Shaw* was not integrative. Instead, the state drew the lines to come into compliance with the Voting Rights Act, and more specifically to facilitate the "election of a member of a group that lacks" electoral power.[142] To be sure, Justice White is correct that a "state's compliance with the Voting Rights Act clearly constitutes a compelling interest."[143] The fact that the Court did not affirm that understanding is deeply problematic. But *Shaw* can also be read to stand for the proposition that segregation itself poses special societal harms.

IV. SOLVING THE EXCLUSION/INCLUSION RIDDLE: THE CONSTITUTIONAL VISIBILITY OF DE FACTO SEGREGATION

The Court is deeply divided about what segregation "means" and/or whether de facto segregation has any constitutional relevance at all. Perhaps because of this uncertainty, the question of the constitutionality of the use of racial preferences continues to percolate through the lower federal courts. In *Fisher v. University of Texas*,[144] the United States Court of Appeals for the Fifth Circuit ruled that the University of Texas' affirmative action plan did not violate the equal protection clause.[145] The affirmative action plan at issue in *Fisher* was patterned largely on the affirmative action plan the Court upheld in *Grutter v. Bollinger*.[146] The Fifth Circuit explicitly relied on *Grutter* in reaching its conclusion to uphold the University of Texas affirmative action plan against constitutional challenge.[147] But in a special concurrence, Judge Emilio Garza urged the Supreme Court to overturn *Grutter*. The

possibly without even knowing the costs.

Id. at 235–36. *But see* Heather Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102–05 (2005) (arguing that "democracy sometimes benefits from having decisionmaking bodies that do not mirror the underlying population." In the context of electoral districting, Gerken highlights three benefits to electoral minorities of majority-minority districting: the ability to exert power normally reserved for the dominant group, creation of a political space where the members of the majority experience the loss of "comfort . . associated with their majority status," and increased visibility "showcas[ing] division and dissent within [the minority] groups").

142. *Shaw*, 509 U.S. at 678 (Stevens, J., dissenting).

143. *Id.* at 674 (White, J., dissenting).

144. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012) (No. 11-345).

145. *Id*. at 217

146. 539 U.S. 306 (2003); 631 F.3d at 217–18.

147. *Fisher*, 631 F.3d at 218.

special concurrence displays a judge struggling to apply binding precedent that he believes is profoundly inconsistent with "fundamental principles of constitutional law,"[148] while simultaneously urging the high court to correct its profound error.[149] The Court's recent decision to review the *Fisher* case suggests that it is poised to address Judge Garza's concerns.[150]

In *Grutter v. Bollinger*,[151] the Court took a permissive view of the government's ability to take account of racial imbalances and a hostile view of segregation. At issue in *Grutter* was the constitutionality of the University of Michigan Law School's affirmative action plan, which used race as a factor in making admissions determinations.[152] One of the purposes of the Law School's admissions plan was to achieve a "critical mass" of minority law students so that "racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."[153] Under the Law School's affirmative action plan, "critical mass" was never precisely defined. And evidence adduced at trial indicated that there was a tight correlation "between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups,"[154] suggesting a "carefully managed program

148. *Id*. at 247 (Garza, J., concurring).

149. Judge Garza's concurrence reads much more like a dissent than a concurrence. First, Judge Garza argued that *Grutter* is out of step with previously prevailing equal protection doctrine, because it allowed for deferential rather than skeptical application of strict scrutiny review. *Id*. at 249 (arguing that *Grutter* incorrectly redefined strict scrutiny review). Thus, he asserted that *Grutter* is erroneous and fosters "a regime that encourages opacity and is incapable of meaningful judicial review under any level of scrutiny." *Id*. But Judge Garza did not just focus on the Court's relaxed application of strict scrutiny review; he also attacked the Court's holding that racial diversity is a compelling interest in the higher education setting. *Id*. at 254–59. On Judge Garza's view, the Court was profoundly mistaken in finding that racial diversity amounts to a compelling interest in the higher education context at least in part because some of the benefits of such diversity were not education-specific. *Id*. at 257–58.

150. *See Fisher*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012) (No. 11-345), available at http://www.supremecourt.gov/qp/11-00345qp.pdf (certifying the Question Presented as "[w]hether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, *including Grutter v. Bollinger*, permit the University of Texas at Austin's use of race in undergraduate admissions decisions") (emphasis added) (citation omitted).

151. *Grutter*, 539 U.S. 306 (2003).

152. *Id*. at 311.

153. *Id*. at 318, 320.

154. *Id*. at 383 (Rehnquist, C.J., dissenting).

designed to ensure proportionate representation of applicants from selected minority groups."[155]

Thus, there were two possible ways to view the Law School's attempt to achieve critical mass: as an impermissible attempt to achieve some preconceived notion of racial balance in the Law School for its own sake, which is "patently unconstitutional"[156] or as the Court held, as an effort to achieve the educational benefits of racial diversity in higher education.[157] For the Court, the reason why the Law School was not engaging in racial balancing was because its use of race was intended to achieve a variety of benefits, some that were specific to the educational process and others that were external to that process and which contribute to the greater good of society more generally.

For instance, the Court described three interrelated types of benefits provided by racial diversity. First, the Court explained that racial diversity is a means of enhancing cross-racial understanding and better educational outcomes within the Law School.[158] Next, the Court opined that racial diversity at the Law School is a critical means of enhancing students' ability to work and thrive as citizens in a multi-racial environment after graduation.[159] Finally, the Court took the position that the Law School is a leadership incubator; only a racially diverse law school class can produce the multi-racial leadership necessary to maintain a legitimate democracy in the 21st century.[160] Only opening up the Law School to students of different races and backgrounds could provide these benefits. But however those benefits were defined, the Court's meta-focus was on accessibility and inclusion: that the "diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."[161]

155. *Id*. at 386.
156. *Id*. at 330.
157. *Id*.
158. *Id*.
159. *Id*. at 330–32.
160. *Id*. at 332–33.
161. *Id*. at 331; *see also* Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 951–52 (2008) (asserting that *Grutter* emphasizes the importance of inclusion of minorities in higher education both because historically excluded minorities should have access to the benefits of higher education as a form of remediation for past discrimination, and because their inclusion serves "to undercut the ugly message communicated about society generally by their exclusion from prominent public institutions: that of a society still hopelessly rent by racial division, segregation and animosity").

If racial balance is sought for its own sake, it is unconstitutional. But if the government's goal is broadly inclusionary, as the Law School's was in *Grutter*, then the Court is willing to dismiss the suggestion of impermissible racial balancing. The trouble is that it is hard to tell the difference between the two, and in *Grutter* the Court deferred to the Law School that its underlying goal was racial diversity rather than racial balancing.[162] The Court allowed the government to use an otherwise impermissible racial classification scheme to achieve the result of racial inclusion. And, the Court deferred to the Law School as to the importance and centrality of racial diversity to its underlying educational goals. As I have written elsewhere, the best explanation for the Court's holding in *Grutter* is as an embrace of integration.[163] Stated differently, *Grutter* is about undermining the exclusionary aspects of racial segregation. It suggests that government may use racial classifications to open-up previously closed racial hierarchies.

More recent precedent may undermine *Grutter's* enthusiastic embrace of racial integration and inclusion. Consider *Parents Involved in Community Schools v. Seattle School District*.[164] At issue in *Parents Involved*, were two student assignment plans that used race in an effort to racially diversify the Seattle and Louisville public school districts.[165] Writing for the Court, Chief Justice Roberts ruled that the two student assignment plans were not narrowly tailored to achieve a compelling governmental purpose and thus were unconstitutional.[166] In an opinion for a plurality of the Court, Chief Justice Roberts went even further and attacked the anti-segregative rationale for the school districts' plans as efforts to achieve racial balancing.[167] For Chief Justice Roberts, racial diversity, avoidance of racial isolation and racial integration all amounted to the very same thing: impermissible racial balancing.[168] Chief Justice Roberts' argument attempted to equate all efforts to achieve racial integration and to overcome the effects of racial isolation (otherwise known as segregation) with racial balancing.

162. *Grutter*, 539 U.S. at 328.
163. Michelle Adams, *Radical Integration*, 94 CALF. L. REV. 261, 286 (2006).
164. 551 U.S. 701 (2007).
165. *Id*. at 711.
166. *Id*. at 747–48.
167. *Id*. at 726.
168. *Id*.

It is important to understand Chief Justice Roberts' rhetorical maneuver. There is constitutional clarity about racial balancing: it is impermissible. But, as discussed above, the Court has taken differing and sometimes inconsistent views on racial segregation. Thus, there is constitutional uncertainty about what government can do to ameliorate racial segregation. Sometimes government *can* use race to achieve racial diversity and enhance racial integration. Sometimes the Court views racial classification schemes that are obviously segregative as particularly virulent. At other times, the Court has acknowledged the profound harms of segregation even as it has refused to countenance integration-oriented remedies. There is an ongoing debate within the Court about the meaning of racial segregation and about what steps the government may take to eradicate it.

Indeed, this was the very essence of Justice Breyer's *Parents Involved* dissent, which emphasized the almost existential difficulty posed by attempting to disentangle de jure from de facto segregation. In particular, Justice Breyer attacked the plurality's position that because there had never been a judicial finding of de jure segregation in Seattle, that any racial imbalance in the Seattle public schools could not provide the necessary predicate for a race-conscious student assignment plan.[169] On this view, racial concentrations untied to a court ordered desegregation decree simply could not justify a race-based student assignment plan intended to remedy past intentional discrimination.[170]

Justice Breyer began from an entirely different premise: the schools were segregated *in fact* and the Seattle school district had been the defendant in a lawsuit alleging unconstitutional segregation.[171] Thus, for Justice Breyer, the presence of a court ordered finding of de jure segregation was not necessary to support the student assignment plan.[172] Justice Breyer argued that a court order should not take on talismanic significance because government can facilitate, encourage, authorize or otherwise take responsibility for segregation even where the judiciary fails to affirm that fact. On this view, a court order does the "work" of creating an artificial line demarcating de facto

169. *Id*. at 830 (Breyer, J., dissenting).
170. *Id*. at 720–21.
171. *Id*. at 808. That litigation ultimately settled. *Id*. at 810.
172. *Id*. at 844.

from de jure segregation, but the distinction between the two is far more elusive.

> No one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto? De jure?* A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated, just as in 1956 a memo for the school board admitted? The plurality does not seem confident as to the answer.
>
> A court finding of *de jure* segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did.[173]

This argument is animated by the assertion that there is a constitutional difference between governmental actions designed to include versus those designed to exclude.[174] Thus, strict scrutiny review should not be fatal when a governmental entity like the Seattle school district takes race-conscious steps to "bring the races together," rather than to "keep the races apart."[175] Justice Breyer's dissent supports the view that the Court's understanding of racial segregation is more nuanced and unsettled than the *Parents Involved* plurality suggests.

Indeed, Chief Justice Roberts' plurality opinion attempts to fill that constitutional void by reducing racial integration and/or attempts to address racial segregation to the status of impermissible racial balancing. From this perspective, "racial balancing" is an ad hominem attack; a rhetorical trope that can be used to eviscerate the most recent precedent affirming racial integration: *Grutter*. Surely, the Law School's action in *Grutter* could have been ascribed to a desire to achieve racial balance for its own sake.[176] But the *Grutter* Court rejected that conclusion. If Chief Justice Roberts' view equating racial integration with

173. *Id.* at 821–22 (citations omitted).

174. *Id*. at 830 ("I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to exclude and that which seeks to *include* members of minority races.").

175. *Id*. at 829.

176. Indeed, that was the core of Justice Thomas' argument in dissent. *See* Grutter v. Bollinger, 539 U.S. 306, 355 (2003) ("How, then, is the Law School's interest in these allegedly unique educational 'benefits' not simply the forbidden interest in 'racial balancing,' that the majority expressly rejects?") (citation omitted).

racial balancing were to command a majority of the Court, *Grutter v. Bollinger* would almost certainly cease to be good law.

But *Parents Involved* can also be read to affirm *Grutter*. Justice Kennedy did not join Chief Justice Roberts for crucial parts of his analysis, robbing the Court of a majority for the most far-reaching of his assertions. Instead, in a concurring opinion, Justice Kennedy explained that government *may* take race into account in order to ensure that "all people have equal opportunity regardless of their race."[177] Justice Kennedy opined that the Constitution does not require public school districts to "ignore the problem of de facto resegregation in schooling."[178] He then outlined a wide variety of facially race-neutral actions that school districts could take with the overt race-conscious goal of ameliorating racial segregation in the public schools.[179] None of these actions would trigger strict scrutiny review.[180] But why not? If the government were to take facially race-neutral actions with an intent to segregate, there is little question that strict scrutiny would not only apply but that such actions would be struck down as a violation of the Equal Protection clause.[181]

The answer has to be that segregation of whatever stripe *matters*. In *Parents Involved*, neither school district was attempting to take account of the effects of de jure segregation. There was no de jure segregation to remedy. The central question in the case turned on the constitutional status of segregation: whether and to what extent public school districts could take account of race in order to enhance racial diversity and whether public school districts may use racial classifications to "reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools."[182]

Even after *Parents Involved*, school districts may take overtly race-conscious steps—short of classifying individual students by race—to ameliorate the harms of segregation for which they are not legally responsible. Justice Kennedy characterized the compelling interest at stake in perhaps the

177. *Parents Involved*, 551 U.S. at 788.
178. *Id*.
179. *Id*. at 789.
180. *Id*.
181. *See*, *e.g*., Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964) (holding that closing county public schools while at the same time providing tuition grants and tax credits for children to attend private segregated schools violated the Equal Protection Clause).
182. *Parents Involved*, 551 U.S. at 725.

most far-reaching way possible: a "compelling interest exists *in avoiding racial isolation*, an interest that a school district, in its discretion and expertise, may choose to pursue."[183] When Justice Kennedy speaks of "avoiding racial isolation" it is hard to believe that he is referring to Chief Justice Robert's vision of "racial imbalances." And, at another point in his concurrence, Justice Kennedy's suggests that there is indeed a compelling interest in remedying the harms that flow from de facto segregation.[184] Clearly, Chief Justice Roberts, Justice Thomas and several members of the Court see this issue very differently. For those justices, there is no "segregation" of which to take account.

CONCLUSION

This Article began with two quotes. The first suggested that de facto segregation was constitutionally irrelevant.[185] The second suggested that government has a constitutionally compelling interest in avoiding racial isolation, that is, in addressing racial segregation.[186] While much of the Court's doctrine can be read to comport with the first view, the Court has often spoken explicitly about the evils of de facto racial segregation as distinct from the harms associated with racial classification schemes. In some contexts, the Court has acknowledged that de facto segregation operates as a particularly effective mechanism of exclusion, separating individuals on the basis of race and preventing them from having access to opportunity. This Article has argued that the Court has evidenced far more concern about segregation as an exclusionary and stigmatizing mechanism than many scholars and commentators recognize. Thus, a very specific type of anti-subordination value often animates the Court's equal protection jurisprudence: a concern about the corrosive effects of racial segregation.

Of course, current Courts are not always sensitive to the concerns of past Courts, particularly if those concerns failed to

183. *Id*. at 797 (emphasis supplied).

184. *Id*. at 788 ("The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.").

185. *See supra* note 1.

186. *See supra* note 2.

consistently command five votes. Moreover, four (and at times five) members of the current Court are on record as rejecting the view that de facto segregation is constitutionally salient. For those members of the Court, an Article such as this is unlikely to affect their views.

But at the same time, this Article has demonstrated that the Court's view of segregation has not been monolithic; its view of de facto segregation has been less static and more nuanced that is commonly appreciated. As I have demonstrated, the Court has often viewed de facto segregation with deep suspicion. This theme or stand of equal protection jurisprudence is present, even if it does not represent the Court's holding in every case. Given that, one argument is that the current Court should respect this skeptical approach to de facto segregation. That is, the Court should pay fealty to this tradition in equal protection, even if the Court is not strickly bound by it as a matter of stare decisis. At the very least, that Court should acknowledge this tradition before it discards it. Moreover, Justice Kennedy's concurrence in *Parents Involved* suggests that he may be open to this line of reasoning. Finally, this argument also provides ammunition for other members of the Court to attempt to persuade their colleagues when the Court revisits the question of affirmative action in higher education next term in *Fisher v. University of Texas*.[187]

187. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012) (No. 11-345).