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THE ROAD NOT TAKEN IN *BROWN*: RECOGNIZING THE DUAL HARM OF SEGREGATION

Kevin Brown[*]

INTRODUCTION

SUPREME Court opinions like *Brown v. Board of Education*[1] reveal their consequences and yield their secrets only with the passage of time. The Supreme Court candidly recognized this reality seventeen years after it delivered *Brown*: "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then."[2] Fifty years have now elapsed since May 17, 1954, and the passage of time allows us to put perspective into a reexamination of the opinion that launched American society into the desegregation era and became the catalyst for astonishing changes in race relations not only in public education, but throughout American society.

In 1954, the Supreme Court came to a fork in the road in its school segregation jurisprudence when *Brown* became the first case to force the Court to articulate the harm generated by segregation per se.[3] Chief Justice Warren defined the primary harm of segregation to be the negative psychological impact on African-

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[1] 347 U.S. 483 (1954).

[2] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

[3] Between 1938 and 1950, the Supreme Court addressed four cases dealing with segregation in graduate and professional schools: *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950). None of these cases, however, required the Court to abandon the "separate but equal" doctrine, which had been announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in order to grant the black plaintiffs their requested relief.

Americans alone, stating: "To separate [African-American youth] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[4]

The Court went on to quote approvingly from the Kansas district court:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[5]

In the Court's famous footnote eleven, Chief Justice Warren cited a number of authorities to support his conclusion that segregation had a negative psychological effect on African-Americans.[6] Although not cited by the Supreme Court, prominent social scientists also filed an amicus brief with the Court on the same subject.[7] A quote from this brief reveals the prevailing sentiment in the social sciences community about the effect of segregation on blacks:

> [T]he opinion stated by a large majority (90%) of social scientists who replied to a questionnaire concerning the probable effects of enforced segregation under conditions of equal facilities [is] . . . that, regardless of the facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group . . . . The available scientific evidence indicates

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[4] *Brown*, 347 U.S. at 494.

[5] Id.

[6] See id. at 494 n.11. Scholars expressed doubt about the actual influence of the social science evidence cited in *Brown* on the Court's decision from the very beginning. See Ralph Ross & Ernst Van Den Haag, The Fabric of Society 165–66 (1957); Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157–58 & n.16 (1955). It is not necessary, however, to take sides on that issue here. The fact is that the Court *did* choose to rely on psychological evidence.

[7] Brief for Appellant app. at 1–20, *Brown*, 347 U.S. 483, available at 1952 WL 47265.

> that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences.[8]

Whether as an empirical matter the Court was correct about the psychological state of Black America in 1954 (a point that has been contested by later psychological research),[9] the important point to note is that the psychological harm caused by segregation that the Court recognized was visited only upon African-Americans.

In striking down the deplorable institution of segregation, Chief Justice Warren's opinion in *Brown* stands as the ultimate icon for judicially declared equality. This iconic status, however, blinds many of us to the underlying acceptance of African-American inferiority embedded in the Court's opinion. In *Brown*, the Supreme Court declared that segregation had actually retarded the educational and mental development of black people. Since the Court indicated that the harms inflicted by segregation were unlikely ever to be undone,[10] presumably all blacks who had attended segregated schools prior to 1954 were already damaged beyond repair. In short, segregation had so infected the hearts and minds of African-Americans that black inferiority was a foregone conclusion.

The Court's conclusions about the harm of segregation was far-reaching and had profound effects upon both the Court's subsequent school desegregation jurisprudence and the public's perception about African-Americans. This rationale, that segregation was unconstitutional solely because of the harm it inflicted on African-Americans, created the impression that as a remedy for segregation, desegregation amounted to a social welfare program where whites were compelled to donate in-kind contributions to blacks in the form of interracial contact. In other words, if the harm occasioned by segregation was one-sided and fell only on blacks, as

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[8] Id. app. at 10, 12.

[9] The research by the psychologist purporting to show that African-Americans in public schools had lower self-esteem has been strenuously criticized. See, e.g., William E. Cross, Jr., Shades of Black: Diversity in African-American Identity 115–16, 128–34 (1990) (arguing that the psychologists in *Brown* confused racial group preference with self-esteem, assuming that racial group preference would automatically correspond with self-esteem, and going on to note that direct measures of self-esteem developed in the 1960s led to the conclusion that blacks did not suffer from low self-esteem even in 1954).

[10] 347 U.S. at 494.

Brown indicated, integration conferred benefits only on blacks, which necessarily were paid for by whites.

This social welfare notion was implicit in the Court's opinion fourteen years later in *Green v. New Kent County School Board.*[11] In striking down a "freedom of choice" school assignment plan and commanding public schools to pursue desegregation immediately, the Court said, "[t]he constitutional rights of *Negro school children* articulated in *Brown I* permit no less than [full integration]; and it was to this end that *Brown II* commanded school boards to bend their efforts."[12] The notion of desegregation as social welfare further encouraged opposition to desegregation and fostered greater resentment among the majority about the requirements imposed on them by desegregation than might otherwise have been the case.

But when the Supreme Court wrote the opinion in *Brown* there was another path open before it. The appendix to the appellant's brief in *Brown* described how prominent social scientists found that segregation also harmed white students:

> With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The culture permits and, at times, encourages them to direct their feelings of

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[11] 391 U.S. 430 (1968).

[12] Id. at 438 (emphasis added) (citations omitted). The Court never abandoned this view of the harm of segregation to blacks. In *Milliken v. Bradley*, 433 U.S. 267, 288 (1977), the Court approved educational remedies to combat the effects of de jure segregated schools. In justifying these remedies, the *Milliken* Court stated that "[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger." 433 U.S. at 287. Thus, the Court's reasoning rested upon the belief that racial isolation had damaged and would continue to damage only African-American children. See also Freeman v. Pitts, 503 U.S. 467, 485–86 (1992) (quoting *Brown* to support the proposition that desegregation is meant to remedy the psychological harm segregation inflicts on black children).

> hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. *They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups.*[13]

Explicit recognition of the dual harm of segregation is what I refer to here as the road not taken in *Brown*. In revisiting the Court's opinion on its Golden Anniversary, my strategy is to return to this historical crossroads to identify and clearly mark out a road indicated but not taken. I will explore some of the possible ramifications of the dual harm path that was not taken and, thereby, illuminate some of the consequences of the Court's choice to rely on social science opinion only insofar as the harm caused by segregation fell entirely to blacks.

As Part I will discuss, if the *Brown* Court had mentioned the psychological harm visited on whites by segregation, then the notion that desegregation is a social good for all children might have had sufficient impact to alter the outcomes in subsequent cases like *Keyes v. School District Number 1*[14] and *Milliken v. Bradley*[15] ("*Milliken I*"). Part II will discuss the implications of the road not taken in *Brown* for the Supreme Court's decision upholding the affirmative action program of the University of Michigan Law School in *Grutter v. Bollinger*.[16] Justice O'Connor's opinion for the five-Justice majority concluded that the educational and other benefits of diversity were significant enough to constitute a compelling state interest. These benefits are substantial and help increase the quality of all students' education. This diversity rationale is the flip side of the dual harm path that was open to the Supreme Court in its opinion in *Brown*: Arguing that segregation harmed all students implies that a racially and ethnically diverse education would benefit all students. While the diversity rationale in O'Connor's opinion is a significant step forward from the Court's rationale in *Brown*, it

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[13] Brief for Appellant app. at 6, *Brown*, 347 U.S. 483, available at 1952 WL 47265 (emphasis added).

[14] 413 U.S. 189 (1973).

[15] 418 U.S. 717 (1974).

[16] 539 U.S. 306 (2003).

did not completely reject the social welfare perspective. The treatment of affirmative action in Justice O'Connor's opinion does not call into question the assumption that the minority students who are deemed beneficiaries of affirmative action are less qualified to attend selective colleges, universities and graduate programs than their white (and now Asian-American) counterparts. Thus, affirmative action can be viewed as another social welfare program where whites are being asked to donate in-kind benefits—once again—this time by sacrificing places in selective higher educational institutions.

Justice O'Connor's opinion in *Grutter* strongly indicates that the Court will revisit the issue of affirmative action within the next twenty-five years.[17] At that point in time, the Court will once again face the same fork in the road that was presented to it fifty years ago in *Brown*. Will that future Supreme Court fully recognize the benefits of diversity to both black and white students, completely abandon any sense of a social welfare perspective, and finally choose the road not taken in *Brown*?

I. EFFECTS ON DESGREGATION: REVISITING *KEYES* AND *MILLIKEN I*

This Part provides a brief look at how the Supreme Court's school desegregation jurisprudence might have changed if the Court had recognized that segregation harmed both blacks and whites. This Part focuses on two major cases, *Keyes* and *Milliken I*, which significantly limited the imposition of school desegregation remedies. If the Court had noted the dual nature of the harm of segregation, the results in those cases might have been different, and federal courts might still be presiding over expanding integrative efforts in public schools, rather than over their demise.[18]

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[17] Id. at 343.

[18] Justice Ginsburg noted in her concurring opinion in *Grutter* that figures from 2000 to 2001 indicate that 71.6% of African-American children and 76.3% of Latino children attend majority-minority schools. 539 U.S. at 345 (Ginsburg, J., concurring) (citing Erica Frankenberg, Chungmei Lee, & Gary Orfield, A Multicultural Society with Segregated Schools: Are We Losing the Dream? 28 (2003), available at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf) (on file with the Virginia Law Review Association). Ginsburg did not note that this represents a trend of increasing racial and ethnic separation in the public schools. Over the past fifteen years the amount of segregation in public elementary and secondary schools has been increasing for African-Americans. The percentage of Afri-

Keyes was the first Supreme Court opinion addressing the issue of school segregation in a state (Colorado) where, in 1954, the public schools were not segregated pursuant to state statutory authority.[19] Thus, the Court was required to formulate a method for lower federal courts to use in order to distinguish segregated school systems operating in violation of the Equal Protection Clause from those that were not. The Supreme Court drew a distinction between de jure and de facto segregation. A de jure segregated school system was one where the current condition of segregation resulted from intentional state action intended to segregate the schools. This violated the Equal Protection Clause. Thus, if the plaintiffs challenging segregated schools could not establish that the segregation was not the result of intentional governmental conduct, then there was no constitutional violation.

The adoption of an intent standard to determine which school systems were unconstitutionally segregated, as opposed to a focus on the actual existence of racial and ethnic segregation, hampered the efforts to desegregate public schools. The standard made the effort of establishing a constitutional violation tedious, expensive, and protracted. "Six weeks of trial [producing] more than four thousand pages of testimony and nearly two thousand exhibits' [is] not uncommon in the search for constitutional violations."[20] The

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can-American students attending majority-minority schools increased from 62.9% in 1980–81 to 71.6% in 2000–01. Frankenberg, supra, at 77. The percentage of African-Americans in schools that are 90% or more minority has also been increasing. The percentage has increased from 32.5% for the 1986–87 school year to 37.4% in 2000–01. Id. Latinos actually experience higher rates of segregation than blacks. For Latinos segregation has been increasing since the 1968–69 school year. At that time 54.8% were in majority-minority schools and only 23.1% were in schools that were at least 90% minority. In 2000–01, the percentage of Latinos in predominately minority schools increased to 76.3% and the percent in schools that are over 90% minority increased to 37.4%. Id. As Professor Amy Stuart Wells pointed out, the research shows that "separate poor and all-black schools in highly segregated inner cities could never be equal to predominantly white and wealthy suburban schools." Amy Stuart Wells, The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale, 28 Hastings Const. L.Q. 771, 786 (2001).

[19] 413 U.S. 189. The Court in *Keyes* also addressed for the first time the issue of how to treat Hispanics for purposes of de jure segregation of public schools. Id. at 195–96. Because most of the Supreme Court's school desegregation jurisprudence was developed within the context of race relations between blacks and whites, this article focuses on de jure segregation of public schools within the context of that relationship.

[20] J. Harvie Wilkinson III, From Brown to Bakke 199 (1979).

cost of obtaining and introducing such evidence was no doubt enough to discourage many potential plaintiffs from going to court at all. Even though courts almost always found de jure segregation whenever litigation was "seriously pursued,"[21] many school districts were never found to be unconstitutionally segregated.

This line of cases also led to inconsistent results. For example, at the same time a federal judge in Grand Rapids, Michigan, ruled that optional attendance zones, construction of schools in segregated neighborhoods, and assignments of black teachers to black schools all had permissible explanations,[22] a different federal judge in nearby Kalamazoo, Michigan, held similar practices to be unconstitutional.[23] On appeal, the Sixth Circuit affirmed both of the lower court decisions.[24]

The state action requirement of the Equal Protection Clause created a need to draw a distinction between de jure segregation and de facto segregation. Viewing the harm of segregation as dual, however, would almost certainly have affected where the line between de jure and de facto segregation was drawn. If a court only looked to the immediate past, that line may have been difficult to find. But a court motivated by the desire to remedy a dual harm might have taken a broader view of de jure segregation. Such a court could have looked at the legacy of slavery, Jim Crow, and other forms of disenfranchisement that led to the creation of racial division and housing patterns, to find that the present state action maintaining the status quo constituted de jure segregation. Or, with the view that the harm of segregation was dual, courts might have been willing to lighten the evidentiary burden required to establish de jure segregation. Courts might have started with a rebuttable presumption that de facto segregation was the result of governmental conduct. Thus, the burden and expense of establishing that the segregation of the schools was not attributable to governmental conduct would be placed on the school system.

The point here is not that the courts would necessarily engage in such an exercise explicitly. But if the prevailing rationale was that

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[21] Gary Orfield, Must We Bus? 24 (1978).

[22] Higgins v. Bd. of Educ., 395 F. Supp. 444, 462–78 (W.D. Mich. 1973).

[23] Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 194–201 (W.D. Mich. 1973).

[24] Higgins v. Bd. of Educ., 508 F.2d 779 (6th Cir. 1974); Oliver v. Kalamazoo Bd. of Educ., 508 F.2d 178 (6th Cir. 1974).

remedies for de jure segregation, especially desegregation, benefited both white and black students, then judges would not be perceived to be coercing in-kind donations from whites for the benefit of blacks. Judges might then have been more willing to push the distinction between de jure and de facto segregation in favor of a finding of de jure segregation using various doctrinal tools. Even with the de jure/de facto distinction, over time the notion of a dual harm could have produced significantly more desegregated schools.

In addition to being more willing to find conditions that warrant a remedy, recognition of the dual harm of segregation might have allowed courts to apply broader remedies. In the 1974 *Milliken I* opinion, the Court addressed an interdistrict school desegregation remedy for the first time.[25] After concluding that the Detroit public schools were unconstitutionally segregated, the district court imposed an interdistrict desegregation plan that included the City of Detroit and fifty-three of its surrounding suburban school districts. White students comprised only 34.8% of Detroit's 1970 public school student body,[26] a number the district court felt was insufficient to allow for successful integration. In order for meaningful integration to occur, it was necessary to include the predominantly white suburban school systems in the desegregation decree. The district court felt justified in including the suburban school systems in the remedy because it viewed local school districts as creations of the State of Michigan. Since agencies of the state were also responsible for the segregated schools in Detroit, it seemed logical to include these state-created school districts in the remedial plan to cure the constitutional violation caused—in part—by the state.[27]

In *Milliken I* the Supreme Court rejected the inclusion of the suburban schools in the desegregation remedy, concluding that absent a showing that a constitutional violation within one district produced a significant segregating effect in another, there was no constitutional justification for cross-district remedies.[28] This decision was a full retreat from the efforts to integrate public schools.

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[25] 418 U.S. 717 (1974).

[26] Bradley v. Milliken, 338 F. Supp. 582, 586 (E.D. Mich. 1971), aff'd in part and vacated in part, 484 F.2d 215 (6th Cir. 1973), rev'd, 418 U.S. 717 (1974).

[27] Id. at 594–95. This is also an example of how a court might use its discretion to be more willing to find de jure segregation.

[28] 418 U.S. at 745.

Since the overwhelming majority of suburban school districts were of relatively recent origins, few of these school systems would be included in desegregation orders. Thus, after *Milliken I* the general rule was that a desegregation remedy would stop at the boundary of the offending school district. As a result many of the major urban school districts were never desegregated because there were too few white students in them.[29] The situation was exacerbated because the Court's decision in *Milliken I* provided an incentive for any white parent who wanted to avoid a school desegregation decree to simply move to a suburban school district. Many of these parents may have been motivated by invidious intent in deciding to avoid sending their children to integrated schools. Some, however, could rationally justify their decision by pointing to the Supreme Court's rationale in *Brown*. Since segregation had psychologically damaged black people, black school children were not the best classmates for their children. Given the understanding that desegregation was primarily for the benefit of black students, why then should these concerned parents sacrifice the interest of their beloved children for the welfare of others? If the *Brown* Court had recognized that segregation harms both minority and white students, perhaps the *Milliken I* Court would have been more willing to expand interdistrict remedies, along the lines suggested by the district court.

Of course, some line would still need to be drawn in order to limit interdistrict school desegregation remedies. For example, in *Swann v. Charlotte-Mecklenburg Board of Education* the Court addressed several practical issues relating to school desegregation

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[29] According to figures published by the United States Department of Education for 1984, nine of the ten largest school districts in the United States do not have as large a percentage of white students as there were in Detroit in 1970. These districts are:

1. New York City, NY 22.8%
2. Los Angeles, CA 19.7%
3. Chicago, IL 13.1%
4. Dade County (Miami), FL 26.6%
5. Philadelphia, PA 25.4%
6. Detroit, MI 10.4%
7. Houston, TX 19.0%
8. Hawaii, HI 23.1%
9. Dallas, TX 23.3%

Center for Education Statistics, Office of Education Research and Improvement, U.S. Dept. of Educ., The Condition of Education 179 (1987).

remedies.[30] In addressing the issue of the transportation of students in pursuit of an intradistrict desegregation remedy, the Court stated:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.... It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students.[31]

Thus, the limit of school desegregation remedies would not have been the boundary lines of urban school districts. Rather, the limit would be based entirely on convenience, not constitutional limits.

If the Court in *Brown* had recognized the dual harm inflicted by segregation, then it would not have made sense to draw the de jure and de facto line where it did, because encouraging school desegregation was beneficial to all public school students. In addition, since the Court would have been proclaiming the benefits of desegregation for all students, it is also unlikely that the Court would have allowed the artificial limit on school desegregation remedies by stopping them at the school district boundaries as in *Milliken I*. The Court more likely would have approved cross-district desegregation remedies when they were necessary to negate the existence of de facto segregated public schools. The probable result of recognizing the dual harm in *Brown* would have been that on its Golden Anniversary integration of public schools, rather than resegregation, would be increasing. In short, the argument in this Part is that recognizing a dual harm would have likely allowed the Court to justify broader remedial solutions in the subsequent school desegregation cases.

II. THE EFFECT OF THE DUAL HARM RATIONALE ON AFFIRMATIVE ACTION: *GRUTTER V. BOLLINGER*

The road not taken by the Court in *Brown* contemplated that segregation harmed both black and white students, albeit in different ways. On this view, remedies for de jure segregation were to

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[30] 402 U.S. 1 (1971).

[31] Id. at 30–31.

benefit all students, not just black students. The diversity rationale articulated in the summer of 2003 by the Supreme Court in the affirmative action case *Grutter v. Bollinger*[32] is arguably the flip side of that same coin: The state may use race-based admissions procedures because diversity (integration) *benefits* everyone, not only minorities. The Court's opinion in *Grutter* strongly indicates that the Court will revisit the issue of affirmative action within the next twenty-five years. At that point in time, the Court will once again face the same fork in the road that was presented to it fifty years ago in *Brown*. Will that future Court choose the road not taken in *Brown*?

Applying strict scrutiny, Justice O'Connor's opinion for the five-Justice majority in *Grutter* upheld the University of Michigan Law School's admissions policy. The policy provided for the use of racial and ethnic classifications as part of a holistic admissions process that sought to ensure the admission of a critical mass of students from groups that have been historically discriminated against, like African-Americans, Hispanics and Native Americans.[33] Without this commitment, these groups might not be represented in meaningful numbers.

Justice O'Connor noted that the educational benefits of enrolling a critical mass of minority students are substantial:

> [T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."[34]

Justice O'Connor also noted additional benefits that flow from diverse student bodies that are not directly related to improvements in the academic environment. For example, major American

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[32] 539 U.S. 306 (2003).

[33] Id. at 306.

[34] Id. at 330 (citations omitted). Justice O'Connor, however, also notes that "[t]he Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" Id. at 333 (citations omitted).

businesses have made it clear that the skills needed in the increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Quoting the brief filed by high-ranking retired officers and civilian leaders of the military, Justice O'Connor also noted that

> a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." . . . At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies."[35]

Finally, Justice O'Connor noted that universities, and in particular, law schools, represent the training ground for a large number of our nation's leaders, and in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.[36]

The aspect of Justice O'Connor's opinion noting the benefits of diversity is consistent with the road not traveled in *Brown*. Taking account of race to bring students together benefits all students in our society. Thus, affirmative action resting upon the justifications of the benefits of diversity, and school desegregation justified by the recognition of the dual harm of segregation, both point to the benefit for all students and all Americans of taking account of race and ethnicity to further integrate education. From the perspective of the road not taken in *Brown*, school desegregation based upon the recognition of the dual harm and affirmative action based on the benefits of diversity are not social welfare programs for minorities with a history of discrimination. Rather, they are educationally justified programs that benefit everyone.

But there is another aspect of Justice O'Connor's opinion that views affirmative action as another social welfare program, as school desegregation was cast by the Supreme Court in *Brown*. The justifications provided by Justice O'Connor for allowing selective colleges, universities, and graduate programs to consider race

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[35] Id. at 331 (quoting Brief of Amicus Curiae Julius W. Becton, Jr. et al., at 27).
[36] Id. at 330–33.

and ethnicity are compelling ones. But implicit in these justifications is the recognition that underrepresented minorities are not as qualified as their white and Asian-American counterparts. From this point of view, lowering admissions standards in order to ensure adequate numbers of blacks, Latinos, and Native Americans, means that the Court is once again sanctioning a situation where whites (and now Asian-Americans as well) are compelled to sacrifice for the benefit of these minority groups. In speaking of the gaps in what he called "academic credentials,"[37] Justice Thomas,

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[37] I see the primary problem with the affirmative action debate to be connected to different performance on standardized tests. For example, whites with equivalent undergraduate grade point averages ("UGPAs") are much more likely to be admitted to at least one law school than any other group: 72% for white applicants, 69% for Asian-Americans, 60% for Hispanics, 61% for Chicanos, 62% for Native Americans, and 46% for African-Americans. See William C. Kidder, Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education, 12 Yale J.L. & Feminism 1, 14 tbl.4 (2000). In addition, a Kidder study of applicants to Boalt Hall revealed some startling results. William C. Kidder, Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students, 89 Cal. L. Rec. 1055 (2001). He matched African-American, Chicano and Latino, Native American, and Asian-Pacific-American applicants with Caucasian applicants who possessed equivalent UGPAs from the same colleges during the same time period. Id. at 1058. What he found was that even when controlling for these factors, African-Americans scored 9.2 points lower on the Law School Admissions Test ("LSAT"), Chicano and Latino 6.8 points lower; Native Americans 4.0 points lower; and Asian-Pacific-Americans 2.5 points lower than white students. Id. at 1074 tbl.1. Kidder also found that when he adjusted for undergraduate major there was no significant difference. Id. at 1079–80. Thus, all major minority groups scored lower on the LSAT than whites even when holding their date of graduation, college or university attended, UGPA, and major constant.

National data also indicates that testing imposes a greater barrier than do other measures of performance. See, e.g., William T. Dickens & Thomas J. Kane, Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye, 38 Indus. Rel. 331, 338, 361–62 (1999) (indicating that data from the High School and Beyond survey, a nationally representative sample of youth, revealed a smaller black-white gap in high school grades than in Scholastic Aptitude Test ("SAT") scores). The percentage plans adopted in California, Florida, and Texas for determining admissions to their selective colleges are also based on this assumption. They point to a way to maintain minority admissions in undergraduate education, at least if race conscious admissions programs had been struck down, by placing more emphasis on grades. See id.; see also William D. Henderson, The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed 82 Tex. L. Rev. 975 (2004). "The LSAT is a univariate test designed to measure reason-

dissenting in *Grutter*, pointed to the fact that while African-Americans constitute 11.3% of those who take the Law School Admissions Test ("LSAT"), they constitute only 1.0% of those who score over 165.[38] Thomas goes on to note that this gap was essentially the same as it was seven years earlier. Thomas also noted that

> [w]hites scoring between 163 and 167 on the LSAT are routinely rejected by the Law School .... [I]n 2000, 209 out of 422 white applicants were rejected in this scoring range .... Blacks, on the other hand, are nearly guaranteed admission if they score above 155 .... 63 out of 77 black applicants are accepted with LSAT scores above 155.[39]

Though the *Grutter* opinion was about law school admissions, a quick look at the performance of different racial and ethnic groups on the Scholastic Aptitude Test ("SAT") and ACT tell us that these gaps in "academic credentials" exist in undergraduate admissions at selective colleges and universities. According to the College Board's 2003 National Report profiling SAT test takers, the gap between the SAT scores of African-Americans and that of

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ing ability. Test-taking speed is assumed to be an ancillary variable with a negligible effect on candidate scores." Henderson, supra, at 975. In reporting results from a study he conducted with data obtained from a national and a regional law school, Professor Henderson disaggregated law school grades into three distinct testing methods used in law schools with varying degrees of time pressure: (1) in-class exams, (2) take-home exams, and (3) papers. His data showed that "the LSAT was a relatively robust predictor of in-class exams and a relatively weak predictor of take-home exams and papers." Id. From this data Henderson argues that a part of the predictive ability of the LSAT for law school GPA is based not on reasoning ability, but on test-taking speed. Henderson also notes that

> when speed is used as a variable on law school exams, the type of testing method, independent of knowledge and preparation, can change the ordering (i.e., relative grades) of individual test takers. The current emphasis on time-pressured law school exams, therefore, may skew measures of merit in ways that have little theoretical connection to the actual practice of law. Finally, this study found some preliminary evidence that the performance gap between white and minority students may be smaller on less time-pressured testing methods, including blind-graded, take-home exams.

Id. at 976.

[38] Id. at 376 (Thomas, J., concurring in part and dissenting in part) (citing Law School Admission Council, National Statistical Report (2001)).

[39] Id. at 377 (Thomas, J., concurring in part and dissenting in part) (citing Law School Admission Council, National Statistical Report (2001)).

non-Hispanic whites is still 206 points (1063 and 857, respectively).[40] This racial gap has actually increased over the past ten years.[41] The increasing gaps in the performance of black students on the SAT parallels the abandonment of school desegregation that is leading to the resegregation of public schools.[42] The gaps are also increasing for all Latino groups as well, excluding Puerto Ricans.[43] There are also significant racial and ethnic gaps between the performance of blacks and non-Hispanic whites on the ACT where the average composite score of African-Americans is 16.9 compared to 21.7 for whites.[44] This gap held fairly consistently over the past seven years.[45]

Current gaps on standardized tests and increasing racial and ethnic segregation in public schools strongly suggest that racial and

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[40] The College Board, 2003 College-Bound Seniors: A Profile of SAT Test Takers 6 (2003), available at http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2003/pdf/2003_TOTALGRP_PRD.pdf (on file with the Virginia Law Review Association).

[41] For the 1990–91 assessment year the gap was only 187 points (1031 as opposed to 846). In the 1996–97 assessment year the gap had increased to 195 points (1052 as opposed to 857); in 1998–99 it was 199 (1055-856); and in 2000–01 it was 201 (1060-859). National Center for Education Statistics, Digest of Educ. Stat. 2002, at 154 tbl.133 (2002), available at http://nces.ed.gov/pubs2003/2003060.pdf (on file with the Virginia Law Review Association).

[42] See supra note 18 for the statistics.

[43] For Hispanics or Latinos, the 1990–91 assessment year gap was only 111 points (1031 as opposed to 920). In the 1996–97 assessment year the gap had increased to 118 points (1052-934); in 1998–99 it was 128 (1025-927); and in 2000–01 it was 135 (1060-925). For Mexican-Americans the 1990–91 assessment year gap was only 118 points (1031-913). In the 1996–97 assessment year the gap had increased to 143 points (1052-909); in 1998–99 it was 146 (1055-909); and in 2000–01 it was 151 (1060-909). But for Puerto Ricans in the 1990–91 assessment year, the gap was 166 (1031-865). In the 1996–97 assessment year the gap had decreased to 151 (1052-901); in 1998–99 it was 152 (1055-903); and in 2000–01 it was 152 (1060-908). See National Center for Education Statistics, supra note 41, at 154 tbl.133 (2002).

[44] ACT, Inc., 2003 ACT National and State Scores, tbl.1, at http://www.act.org/news/data/03/index.html (Aug. 20, 2003) (on file with the Virginia Law Review Association).

[45] For students graduating in 1997, for example, the average ACT score for blacks was 17.1 compared to 21.7 for whites. Most racial/ethnic groups—American Indian, Mexican-American, and other Hispanics—all scored lower on the ACT than Caucasians (19.0, 18.8, and 19.0, respectively, compared to 21.7), while Asian-Americans had the same average score as Caucasians (21.7). See ACT, Inc., The 1997 ACT High School Profile Report—National Normative Data, tbls.5–7, at http://www.act.org/news/data/97/97data.html (last accessed Aug. 20, 2004) (on file with the Virginia Law Review Association).

ethnic gaps on standardized tests are likely to continue for the foreseeable future. What makes the existence of these gaps so important is the time limit placed on the use of racial and ethnic preferences by Justice O'Connor's opinion in *Grutter*. Justice O'Connor concludes her opinion by stating: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[46] Justice Ginsburg's concurring opinion no doubt expressed the concern about racial gaps in academic credentials felt by many supporters of affirmative action more accurately: "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[47] But, as the above statistics about the persistence of the gaps on standardized tests suggest, Justice Thomas's more pessimistic interpretation of this problem may be the most accurate one: "No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years."[48]

These realities clearly indicate that, given Justice O'Connor's opinion, the Court will have to revisit the issue of affirmative action in the future. At that point in time the Court will have to squarely address the issue of the persistent racial and ethnic gaps in standardized test scores. Thus, the Court will once again reach the same fork in the road that was first presented to it fifty years ago in *Brown*. If the Court had recognized the existence of the dual harm of segregation then it would be obvious how assuming measures of academic qualifications are racially neutral generates the same dual harm today. Given the existence of significant racial and ethnic gaps on standardized tests such as the SAT, the ACT, and the LSAT, these tests are sending a message of black intellectual inferiority as well as providing the rationalizations and other mechanisms for the continued under representation of groups with a history of discrimination in positions of authority in our society.

For the future Supreme Court to completely reject the social welfare conception of affirmative action that is still embedded in

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[46] *Grutter*, 539 U.S. at 343.

[47] Id. at 346 (Ginsburg, J., concurring).

[48] Id. at 376 (Thomas, J., concurring in part and dissenting in part).

Justice O'Connor's opinion, it will have to recognize the dual harm of this society's history of racial oppression. The future Court will be compelled to question the embedded assumption that the criteria for merit are racially and ethnically neutral.[49] It would no doubt explode the fallacious reasoning that has become common fare for whites denied admission to selective colleges, universities, and graduate programs who often assert that if they had been black, their test scores would have been good enough for admission to the program of their choice. This fallacious reasoning fails to recognize the undeniable impact of race and racism that is still an aspect of everyday American life. If all of the blacks, Latinos, and Native Americans who were admitted with lower test scores had been white, their entire lives in America would have been different. Part of that difference would no doubt translate into significantly higher scores on standardized tests. Thus, the would-be white applicant would find him or herself in the same relative position with regard to academic credentials that they find themselves in now. To assume that the grades and standardized test scores of whites could be compared to those of African-Americans, Latinos, and Native Americans requires acceptance of the position that race and ethnicity have no more relevance in our society than would eye color in a society where all had access to color contact lenses. Simply put,

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[49] Justice Douglas did precisely this in his dissenting opinion from the dismissal as moot of the first affirmative action case that reached the Supreme Court in 1974. See DeFunis v. Odegaard, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). In his opinion, Douglas noted that the psychological harm of America's history of racial oppression had a dual nature: "The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race." Id. at 336. Douglas noted in his opinion that those who make the LSAT, and law schools that use it, point to a correlation between the test scores and first-year grades. He acknowledged that the test does seem to do better than chance at such predictions. Nevertheless, Douglas noted:

> "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." The Law School's admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogeneous society are taken into account. . . . The key to the problem is the consideration of each application *in a racially neutral way*. Since the LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian.

Id. at 334 (quoting Loving v. Virginia, 388 U.S. 1, 10 (1967)).

not only do race and ethnicity matter, but they are likely to continue to matter twenty-five years from now, and matter in particularly negative ways for underrepresented minority groups with a history of discrimination. After all, it is that history of discrimination that explains their underrepresentation in the pool of high standardized test scores in the first place.[50]

CONCLUSION

In revisiting the Court's opinion in *Brown* on its Golden Anniversary, my strategy has been to return to this historical crossroads with the aim of identifying and clearly marking out a road indicated but not taken. When the Supreme Court wrote the opinion in *Brown*, it rested its decision on the psychological harm segregation inflicted on blacks. According to the Court's pronouncement, segregation—with the sanction of law—had a tendency to retard the mental and educational development of blacks. But when the Court rendered its opinion in *Brown* there was another path open before it. The social science appendix in the appellant's brief submitted to the Court not only pointed out the harm of segregation inflicted upon black school children, but also noted that segregation caused psychological harm to the majority group. According to prevailing social science opinion, the majority children often develop patterns of guilt feelings, rationalizations, and other mechanisms that they must use in an attempt to protect themselves from

[50] I do not want to overstate the racial gap between whites and blacks (or other underrepresented minority groups) that exists on standardized tests or their experiences living in the United States. Standardized tests are used to measure the differences between people that take them. If 99% of the knowledge and understanding among people is the same, then this 99% would be excluded for purposes of standardized tests because it would tell us nothing about how those who take the test differ from one another. Only the differences among individuals matter for purposes of assessing their abilities through the use of standardized tests. Thus, if the average life experience of African-Americans and other minorities in this society is only slightly dissimilar from that of non-Hispanic whites, that slight dissimilarity will translate into huge divergences at the upper end of the test score range of standardized tests drafted only to measure the differences among people. In other words, the very reason that law schools recognize that students from underrepresented groups with a history of discrimination are likely to bring a different perspective to the table is also the very reason that they are not likely to do as well on culturally biased standardized examinations.

recognizing the essential injustice done to blacks.[51] Thus, the social science appendix pointed out that segregation produced a dual harm.

If the Supreme Court had mentioned the psychological harm visited on whites by segregation in its opinion in *Brown*, then it would have been clear that remedies for de jure segregation, especially desegregation, were for the benefit of all public school students. Viewing the harm of de jure segregation as a dual harm would have justified more extensive racial and ethnic desegregation in public schools than actually occurred during the past fifty years because courts would have been more able both to find de jure segregation and to allow more expansive remedies.

Recognition of the dual nature of the harm of de jure segregation would also have affected the discussion of affirmative action instituted by selective colleges, universities, and graduate programs. Justice O'Connor's majority opinion in *Grutter* noted the benefits of diversity. This aspect of her opinion was consistent with the road not traveled in *Brown*. School desegregation justified by the recognition of the dual harm of segregation and affirmative action resting upon the justifications of the benefits of diversity both point to the benefit to all students from taking account of race and ethnicity to further integrated education.

But Justice O'Connor's opinion in *Grutter* was not a complete endorsement of the road not taken in *Brown*. The Court's explanation in *Brown* that the harm of segregation was confined to the negative psychological impact on blacks turned remedies for de jure segregation, particularly desegregation, into a social welfare program for blacks. Whites were being compelled to donate in-kind benefits in the form of interracial contact to blacks. Another aspect of Justice O'Connor's opinion in *Grutter* casts affirmative action as being another social welfare program for minorities with a history of discrimination. Implicit in the articulations of the justifications for diversity is the proposition that underrepresented minorities are not as academically qualified as their non-Hispanic white and Asian-American counterparts. From this point of view, lowering admissions standards in order to assure adequate numbers of blacks, Latinos, and Native Americans means that the

[51] Brief for Appellant app. at 6, *Brown*, 347 U.S. 483, available at 1952 WL 47265.

Court is once again sanctioning a situation where whites, and now Asian-Americans, are compelled to sacrifice for the benefit of these minority groups. Whites and Asian-Americans are being asked to sacrifice in-kind benefits in the form of places of admissions in selective colleges, universities, and graduate programs to underrepresented minorities with a history of discrimination.

Given the twenty-five year grace period for affirmative action included in the Supreme Court's opinion in *Grutter*, the Court will be compelled to revisit the issue of affirmative action in the future. When the Court revisists this issue it will once again come to the same fork in the road that it came to fifty years ago when it rendered its opinion in *Brown*. When that time comes, I hope it will choose to send America down the road not taken in *Brown*.

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