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Brown v. Board of Education: Reexamination of the Desegregation of Public Education from the Perspective of the Post-Desegregation Era

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SUPREME Court opinions like *Brown v. Board of Education*[1] reveal their consequences and yield their secrets only with the passage of time and the development of American society The Supreme Court candidly recognized this reality seventeen years after that opinion. "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 the Supreme Court rendered its historic opinion. The passage of that time allows us to put into perspective a reexamination of the opinion that launched American society into the Desegregation Era and became the catalyst for astonishing changes not only in public education but also in race and ethnic relations throughout American society With the Golden Anniversary of *Brown* upon us, we can now reflect on that decision and the desegregation of public schools that it generated.

As the twenty-first century unfolds, it is clear that American public education has moved into the Post-Desegregation Era. The assimilation vision forged during the turbulent 1950s and 1960s in the aftermath of the Supreme Court's decision in *Brown*—with its emphasis on racial balancing—has run its course. Over the past seventeen years, a number of school desegregation decrees originating in the 1960s, 1970s, and 1980s have terminated. In addition, a number of lower federal courts have recently struck down the use of racial classifications to foster integrated student bodies.[3] Nothing demonstrates more cogently the end of the Desegregation Era of public education than federal courts, which had encouraged the use of race and ethnicity to foster integration of public schools, finding desegregation plans as violations of the very provision of the Constitution that use to require them.

The impact of these changes can be seen in increasing rates of racial and ethnic segregation in the public schools. The percentage of African-American school children attending majority white schools has decreased from its peak of 37.1% in the 1980-81 school year to 31.2% in 1996-97 to the current 28.4% in 2000. The percentage of African-Americans in schools that are 90% or more minority has also

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1. 347 U.S. 483 (1954) (*Brown I*).

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

3. *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 125, 127 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 700, 704 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); Wessmann v. Gittens, 160 F.3d 790, 793-94, 800 (1st Cir. 1998).

been increasing. This percentage has gone from its lowest figure of 32.5% in the 1986-87 school year to 35% in 1996-97 to 37.4% in 2000.[4] 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 23.1% were in schools that were at least 90% minority. The percentage of Latinos currently in predominately minority schools is 76% and the percent in schools that are over 90% minority is 37%.[5]

This reexamination of *Brown* is made even more timely due to what Justice Scalia called the Supreme Court's "split double header" in the summer of 2003 in the University of Michigan affirmative action cases. In *Grutter v Bollinger*,[6] the Supreme Court upheld the affirmative action plan adopted by the University of Michigan Law School. *Grutter* held that racial classifications could be used in an individualized admissions process as a means to pursue a critical mass of minority students from groups with a history of discrimination that would not be represented in significant numbers without such considerations. Justice O'Connor's opinion for the Court in *Grutter* noted that the benefits of enrolling a critical mass of underrepresented minority students are substantial.[7]

> [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."[8]

Thus, a majority of the justices on the Supreme Court for the first time recognized as a fundamental constitutional principle that the different perspectives presented in education, especially those of students from groups with a history of discrimination, are so valuable that their inclusion amounts to a compelling state interest. In *Gratz v Bollinger*,[9] however, the Supreme Court struck down the plan adopted by the University of Michigan's College of Literature, Science and Arts. The Court concluded that this plan was not narrowly tailored because it did not provide for enough individualized consideration that must be the core of a race-conscious admissions policy. Thus, on one hand, the Court stressed that interpretations of constitutional rights derived from the Equal Protection Clause are firmly based on the recognition that government should treat people as individuals, not as members of racial or ethnic groups. On the other hand, the Supreme Court recognized that there is tremendous educational value flowing from diverse points

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4. Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 31, 33 fig. 8 (Jan. 2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

5. *Id.*

6. 539 U.S. 306 (2003).

7. *Id.* at 333.

8. *Id.* But O'Connor also notes: "The 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 335.

9. 539 U.S. 244 (2003).

of view on important social phenomena. In other words, interpretations of the Equal Protection Clause are based on a point of view centered around respect for individuality Even though this perspective is decisive for determining constitutional rights, it is not the only educationally valid understanding of a given social phenomenon, including racial phenomena.

This article reexamines the Supreme Court's opinion in *Brown v. Board of Education* and the desegregation of public schools that it spawned, but it will do so with an awareness that public education has moved into a Post-Desegregation Era. The Post-Desegregation Awareness takes into account the lessons that have been learned about race, racial issues, and racial conflicts over the past fifty years. When it comes to reexamining the Supreme Court's opinion in *Brown v. Board of Education* with a Post-Desegregation Awareness, it must be acknowledged initially that the opinion and the desegregation of public schools it brought about do not provide only one objective meaning, but multiple meanings. How to comprehend the effect of *Brown v. Board of Education* will largely be a function of the implicit values and beliefs upon which the comprehension is based.

The central objective of the article—and thus the primary objective of the reexamination of *Brown v. Board of Education* and the desegregation of public education it made possible from the perspective of the Post-Desegregation Awareness—is to demonstrate that the search for the one correct perception of any given racial issue is misguided from the very beginning. Simply put, Americans conceive of racial and ethnic phenomena in radically and fundamentally different ways. What Abraham Lincoln said almost one hundred and fifty years ago about liberty could be paraphrased to apply to our discussions today about the Supreme Court's opinion in *Brown v Board of Education* or other racial issues. We all declare for the Court's decision in *Brown v. Board of Education*; but in discussing the same decision we do not all mean the same thing.[10] Fifty years of desegregation has revealed that racial and ethnic phenomena are comprehended against a *sub silentio* background of a larger set of ideas about race, ethnicity, and the place in American society for various minority groups. There are not as many different sets of ideas used to comprehend racial phenomena as there are individual perceivers, but a limited number of sets of background ideas about race which are used to comprehend all sorts of racial phenomena and discuss various racial issues including the Court's decision in *Brown* and the desegregation of public education. Not only will there not be one valid interpretation of *Brown v Board of Education* and the desegregation of American society it helped to bring about, but this basic inability to develop one valid interpretation exists for all racial phenomena. There can be no final end to the discussions about racial issues in American society that does not take into account the existence of multiple perspectives or points of view

Despite the demographic changes in American society over the past fifty years, this article will focus primarily upon interpreting *Brown* with a view to its impact on the African-American community There are a number of reasons for this

10. Lincoln actually stated: "We all declare for liberty; but in using the same *word* we do not all mean the same *thing*." Abraham Lincoln, Speech at Sanitary Fair, Maryland (Apr. 18, 1864), *reprinted in* THIS FIERY TRIAL. THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 196 (William E. Gienapp ed., 2002).

limitation. At the time that the Court rendered its decision in *Brown*, African-Americans were presumed to be the primary beneficiaries of the Court's opinion. In addition, African-Americans have been the paradigmatic group in which so many of American society's perceptions and treatments of other minorities has been modeled upon. When dealing with the interests of other racial and ethnic minority groups, the issue is often how similar to or different from African-Americans is a particular minority group.[11] Finally and most importantly, one of the significant realizations of the Post-Desegregation Awareness is that diverse racial/ethnic groups perceive their situation in American society from different points of view centered around that group's particular historical experiences. There are numerous racial/ethnic groups in the United States. All of the broadly recognized racial or ethnic groups in America—African-Americans, Asian-Americans, non-Hispanic whites, Hispanic/Latino-Americans or Native Americans—can be further subdivided. For example, Asian descendants in America are not a monolithic group. The experiences of Chinese in America, Hawaiians in America, South Asians in America, Japanese in America, Koreans in America, Vietnamese in America and so on are very different. The same is true of the experiences of groups in America that speak Spanish. The experience of Mexicans in America, Puerto Ricans in America, Cubans in America, Panamanians in America, Dominicans in America, Hondurans in America, Nicaraguans in America, Salvadoreans in America and so on are different. While discussing the interpretation of *Brown v. Board of Education* for blacks will yield insights for other racial/ethnic groups, it is not a substitute. Such a detailed treatment of the meaning of *Brown v. Board of Education* for so many diverse racial/ethnic groups is, however, beyond the scope of this article.

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11. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857) (noting Chief Justice Taney's opinion drew a distinction between the situation with Native Americans on the one hand and descendants of Africa on the other). *See also* Gong Lum v. Rice, 275 U.S. 78 (1927). This was the Court's other major education opinion of the segregation era. Martha Lum, a nine-year-old girl, was denied admission into the local school for whites because of her Chinese ancestry. When the Supreme Court of Mississippi heard this case, it directed its attention towards the proper construction of a provision in the state's constitution which provided that "[s]eparate schools shall be maintained for the children of the white and colored races." Rice v. Gong Lum, 104 So. 105, 105 (Miss. 1925). The Mississippi Supreme Court concluded that this provision had divided educable children into those of pure white or Caucasian race and those of colored races of brown, yellow, and black. Therefore, Martha Lum could not insist on being classified as white. *Id.* at 107 Since the Legislature was not compelled to provide separate schools for each of the colored races, all were given the benefit of a unified colored school. *Id.* The Mississippi Supreme Court, therefore, denied Martha Lum admission to the white school. *Id.* at 110. The Supreme Court noted that the ability of the state to segregate had been decided many times. *Gong Lum*, 275 U.S. at 86. Though the issue had generally arisen in the establishment of separate schools between white and black pupils, the Court did not think that the question was any different between white and yellow pupils. *Id.* at 87 Accordingly, the Court upheld the decision to prevent Martha Lum from being admitted to the white school.

In *School District No. 1 v. Keyes*, the Supreme Court discussed Latinos and determined that they should be treated like blacks. 498 U.S. 1082 (1991). See also its discussion in the recent gender case about how women were treated like Blacks. This may have also been in the early gender case. *See also* Lyndon B. Johnson, *Running Against the Twelfth Man of History*, N.Y TIMES, Dec. 26, 1972, at L33 ("When I say 'black' I also mean 'brown' and 'yellow' and 'red' and all other people who suffer discrimination because of their color ....").

Section I discusses how American society and the role and condition of African-Americans has changed over the past fifty years. Race is currently less of a factor in limiting the opportunities of African-Americans than at any other time in this country's collective past. Despite the recent success of so many individual African-Americans, however, as a group blacks continue to lag far behind non-Hispanic whites in virtually all aggregate measures related to social welfare.

Section II will revisit the Supreme Court's opinion in *Brown v. Board of Education* to discuss the justifications provided by the Court for its decision to strike down segregation statutes applied to public education. It will also examine some of the other effects on public education of the Court's decision. Chief Justice Warren's unanimous opinion for the Court in *Brown v. Board of Education* justified the decision to strike down segregation based on the psychological harm segregation inflicted upon African-Americans. Segregation was viewed as damaging the hearts and minds of black children in ways unlikely to ever be undone. Desegregation involved more than desegregating students, it also impacted on staff, administrators and teachers. Striking down segregation statutes led to the need to consolidate black and white schools. African-American educators were often the ones who were sacrificed in the process of consolidation and integration. In addition, the Court's opinion in *Brown* set off an educational reform movement outside of the legal system. Educational reforms incorporated many of the assumptions about African-Americans that formed the basis of the *Brown* opinion. Thus, educational reforms of the 1960s and 1970s were dominated by a "cultural deprivation paradigm."

Despite the Court's expressed rationale for striking down segregation in public schools, commentators, judges, and scholars have long provided many different interpretations of *Brown*. Some have argued that *Brown* should be understood as a decision embracing an anti-subordination principle, others have argued that *Brown* should be understood as a decision that declared the simple proposition that it is wrong for government to treat people as members of racial and ethnic groups instead of as individuals. Still other commentators, particularly Professor Derrick Bell, have asserted that *Brown* should be understood as a utilitarian opinion seeking to advance the collective interest of American society He views desegregation as particularly helpful in assisting America in its struggle against the Soviet Union during the Cold War.

Section III expands on the implications behind Warren's opinion and these three other interpretations of *Brown*. Comprehension of any particular racial phenomenon is not done in isolation, but it is always done against a *sub silentio* background of a much larger set of ideas about race and ethnicity This larger set of ideas structures and limits the perception of a given racial phenomenon and thus the discussion of a given racial issue. These various *sub silentio* backgrounds could be called diverse perspectives or points of view This article, however, will refer to these larger diverse sets of ideas used to view given racial phenomenon as the following: "discourses," "patterns of understanding," "systems of meaning," or "cognitive frameworks." The Post-Desegregation Awareness is a conscious awareness that there are always a limited set of alternative and contradictory discourses in which to perceive any racial or ethnic phenomenon and then to discuss any given racial or ethnic issue. These patterns of understanding do not provide a

definitive resolution of a given racial conflict. Rather, they structure and limit the perception of and thus discussions about a given racial issue. Section III discusses four different discourses for comprehending racial phenomena and discussing racial issues: Traditional Americanism, African-American Centralism, Colorblind Individualism, and American Collectivism.

Section IV then interprets the Supreme Court's decision in *Brown* and the desegregation of public schools that it spawned within the conceptual boundaries of the four different cognitive frameworks from section III. In so doing, it provides four different understandings of *Brown* that reflect its meaning against the background of these larger sets of ideas about race in American society

The Post-Desegregation Awareness does not attempt to determine the one correct meaning or interpretation of an important racial phenomenon, like *Brown v. Board of Education*. Rather, it anticipates that there are always a number of valid discourses in which racial phenomena will be conceptualized and understood. These discourses are based upon certain foundational beliefs which must first be accepted as valid. Once the foundational belief is accepted, the discourse derived from it structures and limits the perception of a given racial phenomenon. While the given discourse does not provide a definitive solution for a given racial issue, it does dictate the type of arguments that can be advanced in support of or in opposition to a solution to a given racial conflict.

What the Post-Desegregation Awareness tries to do is to reveal how these limited number of discourses, which we use over and over to comprehend racial phenomena and discuss racial issues, structures and circumscribes the perception of such phenomena and the discussion of such racial issues. When they are so revealed and understood, then we come to know that many of our disagreements about the meaning of racial phenomena, the type of arguments that are considered persuasive in discussing various racial issues and resolutions to racial conflicts are actually embedded in fundamentally different assumptions which generate alternative systems of meaning for comprehending a given racial phenomenon. It is in this way that, as Justice O'Connor noted in her opinion in *Grutter*, diversity in the classroom can produce discussions that are more enlightening and interesting.

I. THE CHANGING ROLE AND CONDITION OF AFRICAN-AMERICANS SINCE THE COURT'S DECISION IN *BROWN V BOARD OF EDUCATION*

At the time the Supreme Court delivered its opinion in *Brown v. Board of Education*, conditions were very different for African-Americans. People of African descent were called Negroes, or colored out of respect, and were called coon, darkie, and even black as an insult.

In 1954, most Negroes in the South had been disenfranchised for the entire twentieth century Segregation and conscious racial discrimination were not only the explicit law of the land but standard American business, educational, political, and social practice. To discriminate based on race in merchandising stores, eating establishments, places of entertainment, and hotels and motels was generally accepted as a fact of life. Negroes seldom occupied positions in American businesses and corporations above the most menial levels. Even lower level management positions were, for the most part, unobtainable. In 1954, only a

handful of Negroes attended the prestigious colleges and universities of this country and almost none taught there. A colored man had not been elected mayor of a major U.S. city in the twentieth century There were only four Negroes serving in Congress, none of whom had been elected to Congress from any of the eleven states that made up the former Confederacy since 1900. In 1954, many places in the country maintained separate water fountains, waiting rooms, transportation facilities, rest rooms, schools, hospitals, and cemeteries for whites and coloreds.

But America has now lived with the Court's opinion in *Brown* for fifty years. Many of the people who were called "Negroes" as a term of respect in 1954 would be offended to be called a "Negro" today To call such a person "Black" is not an insult but a sign of respect. And in most circles, the term used is "African-American," a term no one considered using in 1954.

Conscious racial discrimination is illegal in merchandising stores, eating establishments, places of entertainment, and hotel and motels. African-Americans Robert Johnson and Oprah Winfrey are on the Forbes list of the wealthiest Americans.[12] African-Americans such as Richard Parsons of AOL Time Warner and Stanley O'Neal of Merrill Lynch have run, and currently run, some of America's most powerful corporations. Blacks like Tiger Woods, Michael Jordan, and LeBron James are among the highest paid marketing personalities in American history African-Americans not only attend prestigious colleges and universities,[13] but they are well-respected members of the faculty and administration at almost all of America's elite educational institutions. In January 1999, there were over 9,000 African-American elected officials, including 451 mayors of major U.S. cities.[14] Even though there are no blacks in the upper house of Congress, there are thirty-seven blacks serving in the House of Representatives.[15] President George W Bush appointed five African-Americans to powerful posts in his administration: Rod Paige, Secretary of Education; Colin Powell, Secretary of State; Condeleeza Rice, National Security Advisor; Michael Powell, Federal Trade Commission Chairman; and Alphonso Jackson, Secretary of Housing & Urban Development. Since Bush received only 8% of the vote from African-Americans, these appointments cannot be *quid pro quo* for African-American electoral support but represent appointments of the best person for the position.[16] Americans no longer live with white only and

12. *The Richest People in America: The Forbes 400, available at* http://www.forbes.com/richlist2003/rich400land.html (Sept. 18, 2003).

13. In the 2001-2002 academic year, African-Americans constituted 8% of the undergraduate students at Harvard, 7% at Yale and Princeton. *See Some Facts & Statistics about Yale University, at* www.yale.edu/oir/factsheet.html (Feb. 23, 2004); *Degree Student Enrollment by Ethnicity: Fall 2002, at* http://vpf-web.harvard.edu/factbook/current_facts/enroll_ethnicity_7.html (last updated Mar. 10, 2003).

14. *See* Number of Black Elected Officials in the United States, by State and Office, January 1999, *at* http://www.jointcenter.org/DB/table/graphs/beo_99.pdf.

15. African-Americans constitute nearly 8.5% of the members of the lower house of Congress. U.S. Census Bureau, Statistical Abstract of the United States: 2002, *Members of Congress—Selected Characteristics 1983 2002* at 247 tbl 382 *available at* http://www.census.gov/prod/2003pubs/02statab/election.pdf (last visited Mar. 2, 2004). The number reported is 39, but that includes District of Columbia and Virgin Islands delegates.

16. Marjorie Connelly, *The Election: Who Voted: A Portrait of American Politics, 1976-2000,* N.Y TIMES, Nov. 12, 2000, at D4.

colored only signs etched above water fountains, waiting rooms, transportation facilities, rest rooms, schools, hospitals, and cemeteries. It is at least thirty years after their removal. Even in contexts where it is not against the law to use race to consciously discriminate, the general American ethos makes it clear that it is at least considered wrong or in bad taste to openly discriminate against blacks solely on the basis of race.[17]

Nevertheless, African-Americans still lag far behind non-Hispanic whites in terms of political, economic, educational and social status, and health conditions. For example, when adjusted for inflation, the per capita income of African-Americans increased by 250% from 1967 to 2000. Yet, it was only 65% of that of non-Hispanic white per capita income in 2000.[18] According to the U.S. Census in 1966, 40.9% of the black population,[19] 50.6% of children under the age of 18, and 55.1% of those over the age of 65 lived below the poverty line.[20] In 2001, these percentages were down to 22.7%,[21] 30.2%, and 21.9%, respectively [22] Yet, for non-Hispanic whites the figures were 7.8%,[23] 9.5%, and 8.1%,[24] respectively

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17 Professional baseball player John Rocker commented: "Imagine having to take the [number] 7 train to the ballpark, looking like you're [riding through] Beirut next to some kid with purple hair next to some queer with AIDS right next to some dude who just got out of jail for the fourth time right next to some 20-year-old mom with four kids. It's depressing." Jeff Pearlman, *At Full Blast*, SPORTS ILLUSTRATED, Dec. 27 1999, at 62. "The biggest thing I don't like about New York are the foreigners. I'm not a very big fan of foreigners." *Id.* In the article, Rocker "calls an overweight black teammate 'a fat monkey'" and states, "I'm not a racist or prejudiced person, but certain people bother me." *Id.* at 64.

Jimmy "The Greek" Snyder says black athletes "have 'been bred' to be better athletes than whites. This goes all the way to the Civil War, when ... the slave owner would breed his big black to his big woman so that he would have a big black kid.'" *Scorecard: An Oddsmaker s Odd Views*, SPORTS ILLUSTRATED, Jan. 25, 1988, at 7

Golfer Fuzzy Zoeller, commenting on Tiger Woods after Tiger's Masters win (the winner of the Masters chooses the menu for the Champion's Dinner the following year), "pat him [Woods] on the back, and, say 'Congratulations, enjoy, and tell him not to serve fried chicken ... or collard greens or whatever the hell they serve." *Scorecard: The Ripple Effect*, SPORTS ILLUSTRATED, Apr. 28, 1997 at 24.

18. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES: PEOPLE, *available at* www.census.gov/hhes/income/histinc/p01b.html (last visited Feb. 26, 2004) (for blacks) and www.census.gov/hhes/income/histinc/p01a.html (last visited Feb. 26, 2004) (for whites).

19. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES, 2001 Table 2: People (Sept. 2002), *available at* http://www.census.gov/hhes/poverty/histpov/hstpov02.html (last visited Feb. 26, 2004).

20. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES, 2001 Table 3: People (Sept. 2002), *available at* http://www.census.gov.hhes/poverty/histpov/hstpov03.html (last visited Feb. 26, 2004) (for those under the age of 18 and over the age of 65).

21. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES, 2001 Table 2: Poverty Status of People by Family Relationship, Race, and Hispanic Origin: 1959 to 2001 (Sept. 2002), *available at* http://www.census.gov/hhes/poverty/histpov/hstpov02.html (last visited Feb. 26, 2004).

22. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES, 2001 Table 3 (Sept. 2002), *available at* http://www.census.gov/hhes/poverty/histpov/hstpov03.html (last visited Feb. 26, 2004).

23. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES, 2001 Table 2: Poverty Status of People by Family Relationship, Race, and Hispanic Origin: 1959 to 2001 (Sept. 2002), *available at* http://www.census.gov/hhes/histpov/hstpov02.html (last visited Feb. 26, 2004).

24. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES, 2001 Table

The SAT scores of black children improved from 686 in the 1975-76 school year to 857 in 2001-02.[25] Despite this improvement, the gap between the average score on the SAT of non-Hispanic whites and blacks only fell from 258 to 203.[26] After falling through the 1970s and 1980s,[27] the disheartening aspect is that this racial gap has actually increased over the past ten years.[28]

The percentage of blacks age 18-24 enrolled in higher education increased from 13% in 1967 to 31.3% in 2001.[29] The college completion rate for blacks over the age of 25 has increased from 4.5% in 1970 to 16.1% in 2000.[30] But the percentage of non-Hispanic whites enrolled in college increased over the same period from 26.9% to 39.3%,[31] and the percentage over the age of 25 that had completed college increased from 11.6% to 28.1%.[32] In addition, African-Americans continue to earn significantly less than their non-Hispanic white counterparts with the same levels of educational attainment. For example, blacks who are high school graduates, have a bachelors degree, or have a professional degree earn only 83.1%, 79.8%, and 73% of their non-Hispanic white counterparts, respectively [33] In 1965, barely 1% of all law students were black, and over one third of them were enrolled in the historically black law schools. Barely 2% of all medical students were black, with 75% of them

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3 (Sept. 2002) *available at* http://www.census.gov/hhes/poverty/histpov/hstpov03.html (last visited Feb. 26, 2004).

25. BLACK AMERICANS: A STATISTICAL SOURCEBOOK 104 (Manthi Nguyen ed., 2003) [hereinafter BLACK AMERICANS]. *See also* SAT Averages Rose for Almost All Racial/Ethnic Groups Between 1991 and 2001, *available at* http://www.collegeboard.com/press/senior01/html/pdf/table9.pdf (last visited Feb. 26, 2004) [hereinafter SAT Averages]; NAT'L CTR. FOR EDUC. STATISTICS 2002, Table 133: Scholastic Assessment Test (SAT) Averages, by Race/Ethnicity 1986-87 to 2001-02, *available at* http://nces.ed.gov/programs/digest/d02/tables/dt133.asp (last visited Feb. 26, 2004).

26. BLACK AMERICANS, *supra* note 25, at 104 (1975-76 scores). *See also* SAT Averages, *supra* note 25 (2001 scores); NAT'L CTR. FOR EDUC. STATISTICS 2002, Table 133: Scholastic Assessment Test (SAT) Averages, by Race/Ethnicity 1986-87 to 2001-02, *supra* note 25.

27. BLACK AMERICANS, *supra* note 25, at 104. In 1975-76, the gap between the average SAT score of African-Americans and whites was 257, comparing the African-American score of 687 to the average white score of 944. *Id.*

28. NAT'L CTR. FOR EDUC. STATISTICS 2002, Table 133: Scholastic Assessment Test (SAT) Averages, by Race/Ethnicity 1986-87 to 2001-02, *supra* note 25. In the 1990-91 assessment year, the gap was only 187 points (846 versus 1031); in the 1996-97 assessment year, the gap had increased to 195 points (857 versus 1052); in 1998-99, the gap was 199 (856 versus 1055); and in 2000-01, it was 201 (859 versus 1060). *Id.*

29. NAT'L CTR. FOR EDUC. STATISTICS 2002, Table 186: Enrollment Rates 18-24 Year Olds in Degree Granting Institutions by Sex, Race/Ethnicity 1967-2001, *available at* http://nces.ed.gov/programs/digest/d02/tables/dt186.asp (last visited Feb. 26, 2004).

30. BLACK AMERICANS, *supra* note 25, at 118 (1970 figures); U.S. CENSUS BUREAU CURRENT POPULATION SURVEY, MARCH 2000, *available at* www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt (Feb. 22, 2001) (2000 figures).

31. NAT'L CTR. FOR EDUC. STATISTICS 2002, Table 186: Enrollment Rates 18-24 Year Olds in Degree Granting Institutions by Sex, Race/Ethnicity 1967-2001, *supra* note 29.

32. BLACK AMERICANS, *supra* note 25, at 118 (1970 figures); U.S. CENSUS BUREAU CURRENT POPULATION SURVEY, MARCH 2000 (Feb. 22, 2001), *supra* note 30.

33. 2002 STATISTICAL ABSTRACT, Table 211. Mean Earnings by Highest Degree Earned 1999, *available at* http://qrc.depaul.edu/Excel_Files/StatisticalAbstract/Education/02S0211.xls (last visited Feb. 26, 2004). African-Americans who are high school graduates only, with bachelor's degree, and with professional degree earn $20,991, $37 422, and $75,509, respectively. Their non-Hispanic white counterparts earn $25,270, $46,894, and $103,450, respectively. *Id.*

enrolled in either Howard University or Meharry Medical College.[34] Figures from 2001 reveal that 5.3% of lawyers and judges, and 5.6% of physicians are black.[35] However, these percentages are still far short of the corresponding percentage of African-Americans in the population.

The life expectancy of black males increased by over eight years from 1970 to 2000, and that of black females by nearly seven years.[36] Yet, figures compiled in 2000 still indicate that black males live six-and-one-half years less than non-Hispanic white males (68.3 and 74.8, respectively) and black females live five years less than non-Hispanic white females (75.0 and 80.0, respectively).[37] Finally in 2002, blacks constituted 43.9% of the 1,848,700 persons in state or federal prisons and local jails.[38] Nearly 13% of African-American men between the ages of 25 and 29 were incarcerated at midyear 2002, in contrast to only 1.6% of non-Hispanic white men in the same age group.[39]

In brief, Americans today live in a society that has been fundamentally altered by changes in society sparked by *Brown*. Many of the changes in race relations that have occurred since 1954 can accurately be described as stunning. It is clear to even the most obstinate observer that significant improvement in the social, political, economic, educational, and health conditions of African-Americans can be seen. Race is currently less of a factor in limiting the opportunities of blacks than at any other time in this country's collective past. However, despite the successes of so many individual African-Americans, blacks as a group continue to lag far behind non-Hispanic whites in virtually all aggregate statistics related to social welfare. America is torn between congratulating itself over the obvious

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34. WILLIAM BOWEN & DERRICK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 1-10 (1998).

35. BLACK AMERICANS, *supra* note 25, at 200.

36. *Id.* at 50 (indicating that the life expectancy of black males increased from 60.0 years to 68.2 and that the life expectancy of black females increased from 68.3 to 74.9 years over this period).

37 Arialdi M. Minino & Betty L. Smith, *Deaths: Preliminary Data for 2000*, NAT'L VITAL STAT. REP., Oct. 9, 2001, at 12.

38. According to the U.S. Department of Justice, the race breakdown in state and federal prisons and local jails is as follows:

Total inmate population: 2,014,500
Black inmate population: 884,500 (43.9%)
White inmate population: 699,500 (34.7%)

PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2002, at 10 tbl. 13 (Apr. 2003).

39. *Id.* at tbl. 14. Statistics indicate that African-Americans have a 1 in 6 chance of going to prison in their lifetime. BLACK AMERICANS, *supra* note 25, at 158. For every 100,000 people in the United States, 2,489 blacks were locked up, compared with only 378 whites and 922 Hispanics. Human Rights Watch, *Press Backgrounder: Race and Incarceration in the United States* Table 1, *available at* www.hrw.org/backgrounder/usa/race/ (Feb. 22, 2002). But if the focus is on males, almost 8% of black males between the ages of 18 and 64 are incarcerated in comparison to only 1.1% of white men and 2.7% of Hispanic men. *Id.* at tbl. 3. In twelve states over 10% of black males are behind bars. The twelve states are Colorado (10.7%), Iowa (11%), Kansas (11%), Kentucky (10.3%), Oklahoma (12.2%), Oregon (10.1%), Pennsylvania (10.5%), South Dakota (13.9%), Texas (11%), West Virginia (15.2%), Wisconsin (13%), and Wyoming (14%). *Id.*

progress on race relations over the past fifty years and being demoralized over the lack of success.

II. THE SUPREME COURT'S RATIONALE FOR STRIKING DOWN SEGREGATION STATUTES IN *BROWN V BOARD OF EDUCATION* AND SOME OF ITS EFFECTS ON PUBLIC EDUCATION

The Supreme Court decision in *Brown* was part of a coordinated legal strategy to attack segregation in public schools by the NAACP and, later, the NAACP Legal Defense and Educational Fund, Inc.[40] Between 1938 and 1950, the Supreme Court addressed four cases dealing with segregation in graduate and professional schools.[41] Despite the doctrine of "separate but equal" announced in *Plessy v. Ferguson*,[42] prior to the NAACP's campaign, African-Americans experienced numerous disadvantages in seeking higher education opportunities.[43] Black public colleges were unequal to white public colleges in numbers, facilities, faculty training, and breadth and depth of curriculum.[44] In the graduate and professional

40. In 1939, the NAACP established the NAACP Legal Defense and Educational Fund, Inc., known later as the "LDF" or the "Inc. Fund." After 1939, the LDF became responsible for the legal work while the NAACP concentrated its efforts on lobbying efforts. MARK V TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 27 (1994). For an excellent discussion of the history of the litigation leading up to *Brown v. Board of Education*, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 261 (Vantage Books 1977) (1976).

41. 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. Oklahoma State Regents, 339 U.S. 637 (1950). The Supreme Court cases addressing segregation in graduate and professional schools was actually preceded by *Pearson v. Murray*, 182 A. 590 (Md. 1936). Donald Murray, an African-American graduate of Amherst College, applied to the University of Maryland Law School, but was denied admission because of his race. *Id.* at 590-91. While Maryland did not provide any legal training for African-Americans, it appropriated $10,000 to fund an out-of-state scholarship program. *Id.* at 593. The Maryland Court of Appeals ruled that the program was insufficient to provide Murray with equal educational opportunities. *Id.* at 594.

42. 163 U.S. 537 (1896).

43. In the 1930s, a white student desiring to attend college had five times as many colleges to choose from as his African-American counterpart. Those colleges also offered the white student with a richer and more diverse curriculum. DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-1980, at 121 (1983). In 1956, the Supreme Court confirmed that *Brown I* applied to colleges and universities by affirming the lower court's judgment to that effect. Board of Trustees v. Frasier, 350 U.S. 979 (1956) (per curiam). Professor Kujovich, in an insightful article, discusses the history of the systematic underfunding of African-American institutions of higher education. *See generally* Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV 29 (1987).

44. In *Brown I*, the Court mentioned that its decisions in *Sweatt* and *McLaurin* also rested on the recognition of intangibles. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 493-94 (1954). Yet in *Sweatt*, the Court also focused on the objectively measurable differences between the University of Texas Law School and the Texas Law School for Negroes. *Sweatt*, 339 U.S. at 632-34. At the time *Sweatt* applied, no law school existed in Texas that admitted African-Americans. *Id.* at 631. While Sweatt's appeal was pending, however, the Texas legislature appropriated enough money to establish a law school for African-Americans. *Id.* at 632. In comparing the newly-created Texas Law School of Negroes with the University of Texas Law School, the Court noted that the University of Texas Law School had a student body of 850 students, a library with over 65,000 volumes, and a faculty of sixteen

school cases, the Court did not need to consider whether segregation *per se* had a negative impact on African-Americans in order to grant the black plaintiffs their requested relief. The denial of equal educational opportunities was unquestionable.

The Court's analysis in *Brown*, however, required it to address the previously unarticulated harm associated with segregation *per se*. *Brown* started with an assumption not present in the graduate and professional school cases—that the physical facilities and other tangible factors of the public schools attended by black and white students in Topeka, Kansas were equal.[45] Given the objectively measurable equality of segregation *per se* in this context, the Court was forced to identify the harm resulting from segregation for the first time.[46] In one of the most quoted phrases from *Brown I*, the Court noted, "[t]o 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."[47] The Court went on to quote approvingly from the district court in Kansas:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children ... 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 ....[48]

The Court never abandoned this formulation of the harm of segregation.[49] In reading the Court's rationale for invalidating segregation statutes for public schools

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full-time and three part-time professors. *Sweatt*, 339 U.S. at 632. Also available at the University of Texas Law School "were a law review, moot court facilities ... and Order of the Coif affiliation." *Id.* at 632-33. In contrast, by the time the case reached the Supreme Court, the law school for African-Americans had only 23 students, a faculty of five full-time professors, and a library of approximately 16,500 volumes. *Id.* at 633.

45. *Brown I*, 347 U.S. at 492.

46. *Id.*

47 *Id.* at 494.

48. *Id.* (quoting a finding of the Kansas district court that initially ruled against the plaintiffs).

49 *See* Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (placing upon school boards an obligation to affirmatively mix the races in public schools and justifying this imposition by stating that the constitutional rights of African-American school children noted in *Brown I* and *Brown II* required it). *See also* Milliken v. Bradley, 433 U.S. 267, 288 (1977) (approving educational remedies to combat the effects of the operation of *de jure* segregated schools). In justifying these remedies the 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 ...." *Id.* at 287 Thus, the Court's reasoning rests 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, 492 (1992) (agreeing that a school system that was under federal court supervision for formerly operating a dual school system could terminate federal court control over an aspect of the system, such as student assignment, while maintaining control over other aspects, such as teacher and administrator assignment). In discussing the harm which school desegregation remedies were directed at eradicating, the majority opinion in *Freeman*, written by Justice Kennedy, quoted the above passages from *Brown* to point to the psychological harm segregation inflicted on black children. *Id.* at 485-86.

with the cold reflection that results from the lapse of fifty years, what stands out is that the Court's justification for striking down segregation did not reject the fundamental belief in the inferiority of black people. Segregation in public schools was struck down because of, and not in spite of, the fact that blacks were not the equals of whites. What made *Brown* such an historic break from the dominant racial attitudes about African-Americans at that time was that the inferiority was attributed not to ontological distinctions between blacks and whites, but to differences in their respective social environments. This change in the cause of the "less than" nature of blacks was optimistic and hopeful when compared to the previous dominant beliefs about blacks. If the problem with blacks was their deficient social environment, it was not necessary to abandon all hope about the darker-hued race; it was possible to improve black people by improving their social environment.

The Supreme Court's decision in *Brown* set the wheels of desegregation in motion. More was involved in desegregation than just the physical mixing of black and white school children in public schools. The desegregation of public schools also involved the integration of staff, teachers, and administrators. Desegregation, however, proved to have negative consequences for the largest professional class of African-Americans at the time, public educators. In the 1950s, half of all black professionals were public school teachers.[50] Many scholars have pointed to the disproportionately high price that African-American educators paid for desegregation.[51] For example, Samuel Ethridge reported that between 1954 and

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50. Sabrina Hope King, *The Limited Presence of African-American Teachers*, 63 REV EDUC. RES. 115, 124 (1993) (citing M. Foster, Recruiting Teachers of Color: Problems, Programs and Possibilities (Oct. 1989) (presented at the Fall Conference of the Far West Holmes Group, Reno, Nev.)).

51. *See, e.g.*, ALVIS V ADAIR, DESEGREGATION: THE ILLUSION OF BLACK PROGRESS (1984); HARRELL R. RODGERS JR. & CHARLES S. BULLOCK, III, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 94-97 (1972); David G. Carter, *Second-Generation School Integration Problems for Blacks*, 13 J. BLACK STUD. 175, 179-83 (1982). *See also* Derrick Bell, *Neither Separate Schools Nor Mixed Schools: The Chronicle of the Sacrificed Black Schoolchildren, in* AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102, 109 n.3 (1987) (citing amicus curiae brief for the National Educational Association in *United States v. Georgia*, 445 F.2d 303 (5th Cir. 1971) (No. 30-338), for empirical data on burden borne by black teachers, administrators, and students due to school integration); JAMES E. BLACKWELL, THE BLACK COMMUNITY: DIVERSITY AND UNITY 158-60 (2d ed. 1985); HAROLD CRUSE, PLURAL BUT EQUAL. A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY 22 (1987).

Not all courts were oblivious to this situation. The Fifth Circuit, for example, in *Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211 (5th Cir. 1970), *cert. denied*, 396 U.S. 1032 (1970), specified criteria to use in the event it was necessary to reduce the number of principals, teachers, teachers aides or other professional staff employed by a school district. The Fifth Circuit stated that any dismissal or demotions must be based upon objective and reasonable nondiscriminatory standards:

> In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Id. at 1218.

1972 over 31,000 black teachers lost their jobs in the Southern and border states.[52] In addition, testimony before the United States Senate revealed that 96% of African-American principals lost their jobs in North Carolina, 90% in Kentucky and Arkansas, 80% in Alabama, 78% in Virginia, and 77% in South Carolina and Tennessee.[53] Given the Court's pronouncement that segregation affected the hearts and minds of black children in ways unlikely ever to be undone, black adults who had obviously attended segregated schools—including educators—must also suffer from psychological damage. Thus, closing black schools, terminating African-American teachers, and demoting black principals could be perceived as reasonable sacrifices to increase the quality of education for all students, especially the black ones.[54]

The Supreme Court's opinion in *Brown* also ignited an educational reform movement directed at assisting African-American school children. Educational reforms incorporated the same assumptions about African-Americans that formed the basis of the Supreme Court's opinion. Accepting the Court's view as gospel, educational reforms for African-Americans were dominated by a "cultural deprivation paradigm."[55] The popular notion of "cultural deprivation" viewed black children as imprisoned in a deviant culture and a deficit social environment.[56] One review of the studies through the mid-1960s, for example, concerning the need to make changes to address the educational problems of disadvantaged and minority children found that 82% of these studies stressed the need to make changes in the children. Only 8% of the studies saw a need to make changes in the schools.[57] As a result, the premises and structures of public education remained intact and were not seriously questioned.[58]

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52. Samuel B. Ethridge, *Impact of the 1954* Brown vs. Topeka Board of Education *Decision on Black Educators*, 30 NEGRO EDUC. REV. 213, 223-24 (1979) (noting that two years later, this number had increased to nearly 40,000); John Smith & Bette M. Smith, *Desegregation in the South and the Demise of the Black Educator* 20 J. SOC. & BEHAV. SCI. 33, 34 (1974).

53. *Displacement and Present Status of Black School Principals in Desegregated School Districts: Hearings Before the U.S. Senate Select Comm. on Equal Educational Opportunity*, 92d Cong. (1971) (statement of Benjamin Epstein). In addition, Epstein also testified that 50% of African-American principals lost their jobs in Georgia and 30% did so in Maryland. *Id.*

54. In some ways what happened to African-American schools was a repeat of the events of 100 years earlier when the Massachusetts state legislature attempted to desegregate the Boston public schools. Because whites would not send their children to black teachers, black school teachers and assistants were fired. For a discussion of the desegregation of the Boston schools in the 1850s, see generally Arthur O. White, *The Black Leadership Class and Education in Antebellum Boston*, 42 J. NEGRO EDUC. 504 (1973).

55. *See* CARL BEREITER & SIEGFRIED ENGELMANN, TEACHING DISADVANTAGED CHILDREN IN THE PRESCHOOL 24-25 (1966).

56. James M. Jones, *The Concept of Racism and its Changing Reality, in* IMPACTS OF RACISM ON WHITE AMERICANS 27, 40-41 (Benjamin P Bowser & Raymond G. Hunt eds., 1981).

57 Doxey A. Wilkerson, *Prevailing and Needed Emphases in Research on the Education of Disadvantaged Children and Youth, in* THE DISADVANTAGED CHILD: ISSUES AND INNOVATIONS 275, 278 (Joe L. Frost & Glenn R. Hawkes eds., 1966).

58. James A. Banks, *Race, Ethnicity and Schooling in the United States: Past, Present and Future, in* MULTICULTURAL EDUCATION IN WESTERN SOCIETIES 31 (James A. Banks & James Lynch eds., 1986).

Professor Banks, a leading advocate for multicultural education, has pointed out that the two major goals of educators during this movement were to raise the self-concepts of ethnic minority youths and to increase their racial pride.[59] Educators assumed that students with healthy self-concepts were better learners and thus would fare better in school.[60] However, the movement embodied the notion that the self-concept of black children would improve by a portrayal of them as essentially colored whites. For example, the changes made by commercial textbook publishers were not substantive, but biological. Dick and Jane retained all of their usual white middle-class social and behavioral traits, but were given black and brown faces.[61] Traditional instructional programs underwent revision to recognize previously neglected contributions of individual ethnic minorities. To be acknowledged, however, the individuals had to satisfy the mainstream norms of what was considered acceptable. Thus, attempts to include African-Americans in the curricular material resulted in ethnic content grafted onto the white instruction typified by the standard educational programs.[62] Professor Banks also noted that even the later focus on multicultural education did not eliminate the Anglo-American cultural bias of the traditional educational program.[63]

The establishment of a number of cultural enrichment programs followed these changes in the curriculum. Trips to concerts, art galleries, scientific laboratories, and museums became part of the educational system. The purpose of these programs was to expose minority children to the artifacts and traditions of America's mainstream. No corresponding programs exposed white children to important social institutions in the African-American community [64] The underlying message of this one-way exposure was that racial minorities would improve by simply dropping their deviant cultural traits and adopting the requisite mainstream personality traits and characteristics.[65]

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59. *Id.* at 46.

60. *See* DONALD H. BOUMA & JAMES HOFFMAN, THE DYNAMICS OF SCHOOL INTEGRATION: PROBLEMS AND APPROACHES IN A NORTHERN CITY 72-81 (1968).

61. Geneva Gay, *Achieving Educational Equality Through Curriculum Desegregation*, 72 PHI DELTA KAPPAN 56, 59 (1990) (citing Mildred Dickeman, *Teaching Cultural Pluralism, in* TEACHING ETHNIC STUDIES: CONCEPTS AND STRATEGIES 17, 19 (James A. Banks ed., 1973)).

62. Larry Cuban, *Ethnic Content and "White" Instruction, in* TEACHING ETHNIC STUDIES, *supra* note 61, at 103, 104.

63. *See* JAMES A. BANKS, MULTIETHNIC EDUCATION: THEORY AND PRACTICE 12 (2d ed. 1988). *See also* Grimes v Sobol, 832 F Supp. 704 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2d Cir. 1994). In this case, African-American plaintiffs brought an action alleging that the New York City public schools used a culturally biased curriculum in violation of the equal protection clause and the implementing regulations of Title VI of the 1964 Civil Rights Act. The plaintiffs argued that the curriculum systematically distorted and demeaned the role of African-Americans and excluded the existence, contributions, and participation of blacks in various aspects of the world, American culture, sciences, history, arts, and other areas of human endeavor. The District Court rejected the claim, concluding that the plaintiffs failed to establish that the curriculum was adopted because of, and not in spite of, its harmful effects on African-American school children.

64. *See* CARL A. GRANT & CHRISTINE E. SLEETER, AFTER THE SCHOOL BELL RINGS 130-33 (1986). White students attending desegregated schools are seldom exposed to the histories and cultures of their minority classmates.

65. Mildred Dickeman, *Teaching Cultural Pluralism, in* TEACHING ETHNIC STUDIES, *supra* note 61, at 5, 19.

III. FOUR DIFFERENT DISCOURSES FOR COMPREHENDING RACIAL PHENOMENA AND DISCUSSING RACIAL ISSUES

Chief Justice Earl Warren's opinion for the Court in *Brown* based the decision to strike down segregation statutes on the belief that segregation caused psychological damage to African-Americans. Despite his clear statement of the harm created by segregation, for the past fifty years scholars and judges have interpreted *Brown* in many different ways. Some have argued that *Brown* should be understood as an anti-subordination opinion. Recently, Justice Ginsburg, in her dissenting opinion in *Gratz*, adopted this point of view She argued that in implementing the Equal Protection Clause, "government decision makers may properly distinguish between policies of exclusion and inclusion."[66] Thus, "[a]ctions designed to burden groups [like African-Americans] long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated."[67] Ginsburg goes on to quote Professor Stephen Carter:

> [T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in [*Regents of Univ. of Cal. v.*] *Bakke*, was the same as the issue in *Brown* [*v. Board of Education*], is to pretend that history never happened and that the present doesn't exist.

At the other end of the spectrum it has been argued that *Brown* is nothing more than an opinion that declares the simple proposition that it is wrong for a government to classify and treat individuals as members of racial and ethnic groups. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people."[68] As a result, what was wrong with segregation statutes was not that they produced psychological harms for African-Americans, but that government was wrong to classify and treat people differently based on an involuntary

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66. Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting). *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986) (Stevens, J., dissenting) ("There is, however, a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority ... for that reason. The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. The inclusion ... inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.").

67 *Gratz*, 539 U.S. at 301 (quoting Stephen Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 433-34 (1988)).

68. Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Clarence Thomas made this interpretation of *Brown* in his concurring opinion in *Miller v. Johnson*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring). *See generally* LINO GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

characteristic like race.[69] Another interpretation of *Brown* is suggested by Professor Derrick Bell. Bell has long argued that the Court's opinion in *Brown* was justified by a utilitarian analysis. He sees *Brown* as justified within a long line of judicial and political actions that have helped African-Americans only when their interest converges with that of the white elite.[70] Striking down segregation statutes was principally justified as an aspect of America's Cold War efforts.[71]

The Post-Desegregation Awareness does not attempt to determine the one correct meaning or interpretation of an important racial phenomenon, like *Brown v. Board of Education*. Rather, it anticipates that there are always a limited number of valid discourses in which racial phenomena will be conceptualized and understood. The reason this is the case is because the comprehension of any particular racial phenomenon is never done in a vacuum, but always done against a *sub silentio* background of a much larger set of ideas about race, ethnicity, and the role of African-Americans in society· and there are always a limited number of different *sub silentio* backgrounds. As mentioned earlier, these *sub silentio* background sets of ideas could be called perspectives or points of view This article, however, will refer interchangeably to these larger diverse sets of ideas as "discourses," "patterns of understanding," "systems of meaning," or "cognitive frameworks."

These discourses are based upon certain foundational beliefs which must first be accepted as valid. Once the foundational belief is accepted, the discourse derived from it structures and limits the perception of a given racial phenomenon. While the given discourse does not provide a definitive solution for a given racial issue, it does dictate the type of arguments that can be advanced in support of or in opposition to a solution to a given racial conflict.

What the Post-Desegregation Awareness tries to do is to reveal how these systems of meaning that we use over and over to comprehend racial phenomena and discuss racial issues structures and limits the perception of such phenomena and the discussion of such issues. When those discourses are so revealed and understood, then we come to know that many of our disagreements about the meaning of racial phenomena, the type of arguments that are considered persuasive in discussing various racial issues and resolutions to racial conflicts are actually embedded in

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69. Justice Clarence Thomas noted in his concurring opinion in *Missouri v. Jenkins* that the Court's opinion in *Brown v. Board of Education* has been misread. 515 U.S. 70, 118-19 (1995) (Thomas, J., concurring). According to Thomas, *Brown I* did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Psychological injury or benefit is irrelevant to the harm generated by the state's treatment of individuals as members or racial or ethnic groups. *Id.*

70. Professor Derrick Bell has long suggested that when examining the desegregation of American society, one should not overlook the position of America in an international context. *See, e.g.*, Derrick Bell, Brown v Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV 518 (1980), *reprinted in* DERRICK BELL, SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 90-106 (1980). Professor Mary Dudziak expanded on this theme in a Stanford Law Review article she wrote. *See* Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV 61 (1988).

71. *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS (2000) (discussing the impact of the Cold War on America's civil rights agenda).

fundamentally different assumptions which generate alternative systems of meaning for comprehending a given racial phenomena. It is in this way that, as Justice O'Connor noted in her opinion in *Grutter*, diversity in the classroom can produce discussions that are more enlightening and interesting.

This section will discuss four different discourses which can generate the alternative and contradictory interpretations of the Supreme Court's opinion in *Brown* discussed above: Traditional Americanism, African-American Centralism, Colorblind Individualism, and American Collectivism. Each of these cognitive frameworks has its own fundamental view of the social world, its own view of the role of government, and its own particular conception of moral and ethical behavior. Thus, each framework will yield a different understanding of a given racial phenomenon and will provide different types of arguments for or against a particular solution to a given racial conflict.

These four different discourses do not just provide an interpretation of a racial issue like the Supreme Court's opinion in *Brown* and the school desegregation it generated, but they provide alternative interpretations of various racial phenomena of all kinds including the racial gaps noted earlier in measures of political, economic, educational, and health conditions. To limit the presentation to four discourses is, in a sense, arbitrary But to reveal the understanding of racial phenomena produced by the Post-Desegregation Awareness (that there are always a limited number of competing and different ways in which to interpret any given racial phenomena) and make it intelligible, some arbitrary limitation must be imposed. In addition, the discussion of these four cognitive frameworks is intended to capture a general sense of the ways in which Americans constantly think about racial issues. Thus, each of these discourses should be familiar to most Americans. There is nothing intrinsic or inevitable about these four systems of meaning. But it must be stressed that Traditional Americanism for a long time dominated discussions about racial issues for the purpose of determining the legal rights (or lack thereof) of blacks through out much of American history Over the past thirty years, however, the Supreme Court's equal protection jurisprudence has come to increasingly embrace Colorblind Individualism.

A. Traditional Americanism

Historically the dominant beliefs in American society have not been the progressive individualist attitudes that began to emerge in the 1950s and 1960s. The roots of America's traditional beliefs, "Traditional Americanism," are driven deep in the history of American society These beliefs took for granted the conquest and extermination of the indigenous peoples found here, the exclusion and subordination of women, the repression of the immigrant European working class, and the closeting of homosexuals. These beliefs were developed primarily from the perspective of able-bodied Protestant heterosexual white males of Anglo-Saxon descent with a degree of financial resources. When this traditional thinking was applied to people of African descent and their place in American society blacks were considered to be members of a substandard racial group. Blacks were classified first as non-citizens and then as second-class citizens for more than 300 years.

This pattern of understanding is not always conscious of the race of non-Hispanic whites as a group or as individuals. Thus, non-Hispanic whites can be conceptualized as individuals without regard to their race or as a superior racial/ethnic group. But, the amalgamation of their characteristics, traits, actions, behaviors, attitudes, opinions, or beliefs constitute the explicit or implicit norm from which deviations that require an explanation are recognized. The salient feature and abiding aspect of this cognitive framework when perceiving racial phenomena involving African-Americans, however, is its perception of blacks as less than the applicable norm.

The cause of the inferiority of blacks has had different explanations throughout history Prior to the Court's opinion in *Brown*, there was a long history of legal, open and conscious discrimination against African-Americans in this country The dominant American beliefs about blacks around which the legal interpretation of their rights (or lack thereof) had historically been construed was the belief in their ontological inferiority From the American colonial period until 1954, blacks were legally viewed as substandard beings. It was this view that legally rationalized oppression of blacks in the form of slavery and later segregation.[72] One manifestation of this belief before *Brown* was the development and maintenance of legally separate and unequal public educational systems.

Up until the twentieth century, this discourse based the inferiority of blacks on either the divine will of God, the effects of having developed in the inhospitable climate of Africa, or defective biology When the substandard nature of blacks was attributable to causes that were essentially immutable to human engineering, it was difficult to find good reasons for integrating society or education. During the 1930s and onward, the argument that the cause of the inferiority of blacks could be traced to black cultural and social environmental factors became the dominant explanation for the inadequacies of blacks. African-Americans were suffering from both an impoverished social environment and a degenerate culture that retarded their intellectual and psychological development. As these twin factors became accepted as the cause of the inferiority of blacks, there was reason to be optimistic that African-Americans could be elevated through changing their environment. The cure for the disease that afflicted them was to enrich their social environment by increasing their contact with whites and assisting them in shedding a degenerate culture. As is obvious now, this is the view of blacks that was accepted by the Supreme Court in its opinion in *Brown v. Board of Education*.

Just because blacks are regarded as substandard beings does not mean that they should be treated with contempt or animosity While the belief that the "less than"

72. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 407 (1857). In concluding that the slave and would-be free man, Dred Scott, could not sue in federal court to obtain his freedom, Chief Justice Taney stated: "[Blacks] had for more than a century before [the Declaration of Independence] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; ...." *Id.*, Plessy v. Ferguson, 163 U.S. 537, 552 (1896). In upholding a statute that segregated railroad passengers, the Court stated: "[i]f one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane." *Id.* Segregation policies and practices instituted by government were normally understood as reasonable regulations that recognized the second-rate nature of blacks.

nature of blacks justifies oppressive structures such as slavery and segregation, at other times it justifies paternalistic attitudes and behaviors toward blacks aimed at helping them overcome their deficiencies. As Rudyard Kipling described in a poem written in 1899, *The White Man s Burden*, the superior races have an obligation to help the inferior races to the extent possible.[73] Thus, it is appropriate to confine inferior groups to their accustomed position in the social order, but it is also appropriate to treat blacks with paternalistic compassion and provide them with the assistance and guidance they are presumed to lack.

Within this cognitive framework, when government performs its assigned functions, it should take into account the built-in limitations of blacks. There is a long history of governmental action based on that premise. Until the Civil War, governments in states in which slavery was permitted incorporated the institution into their governing legal codes. State militias and the federal government troops were used to suppress slave insurrections. Runaway slaves were returned to their masters when caught by peace officers. As slaves, blacks were not only denied their personal liberty but were also denied even basic legal rights. They could not sue nor be sued; testify in court; buy, sell, lease or rent property; enter into contracts; exercise the franchise; or hold political office.

After the Civil War three Amendments, the Thirteenth, Fourteenth, and Fifteenth (the "Reconstruction Amendments"), were added to the Constitution. The Reconstruction Amendments not only abolished slavery but granted blacks certain civil and political rights. Yet, not long after the Reconstruction Amendments were ratified, government policies and practices were employed to disenfranchise and segregate blacks. Due to the constitutional protections which prevented discrimination based on race, color or previous condition of servitude, schemes employed to disenfranchise African-Americans were required to be thinly veiled in racially neutral terms. One important method was the poll tax. Since blacks left slavery as landless, penniless peasants, few of them could afford the payment of a tax as a prerequisite to being allowed to vote. Mandating literacy requirements also proved to be an effective means in which to disenfranchise black male voters. Voting registrars responsible for certifying qualified voters would refuse to certify black males. For purposes of determining constitutional violations, their refusal was not based on race, but the racially neutral criteria that the black person seeking to register failed to demonstrate an ability to read or understand the political process. Nevertheless, excluding blacks from the political process was viewed as elevating the electorate and thus providing for better political decisions.

While the Reconstruction Amendments were viewed as granting civil and political equality to blacks, they were viewed as non-applicable to social rights. Social rights were distinguishable from civil and political rights. Where civil and political rights were asserted against government, social rights were asserted against fellow citizens. Thus, denying a black person the right to sit on a jury involved an infringement on his civil right. But governmental laws requiring segregation on railway cars, omnibuses, stagecoaches, steamboats, waiting rooms, restrooms, lecture halls, theaters, and schools involved social rights. The justification for

73. *See* Rudyard Kipling, *The White Man's Burden, in* RUDYARD KIPLING'S VERSE: INCLUSIVE EDITION 1885-1926, at 373-74 (1931).

social segregation was based upon a realization that even if under the Reconstruction Amendments blacks were entitled to civil and political equality, that did not require social equality As the Court stated in *Plessy v. Ferguson*, "[i]f one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane."[74] Thus, segregation policies and practices instituted by government were normally understood as reasonable regulations that recognized the second-rate nature of blacks.

B. African-American Centralism

During the long struggle against racial oppression, African-Americans and those whites and others sympathetic to their cause created a counter discourse to that of Traditional Americanism. The Africans who came to America were members of a hundred different ethnic groups from a thousand different villages. In the American melting pot, these diverse people were melded into one people, African-Americans. Against the background of more than 380 years of racial domination, the descendants of the soil of Africa formulated a counter system of meaning, "African-American Centralism," to Traditional Americanism. This pattern of understanding provided an alternative explanation of the role and condition of blacks in American society

African-American Centralism sees the social world in terms of one major purpose, goal, and objective: the liberation of black people from racial domination. Rather than viewing African-Americans as inferior, this counter discourse sees African-Americans as oppressed. The liberation sought is not abstract. It is liberation from domination in the material, spiritual, and psychological conditions of the lives of black people. This system of meaning views racial or ethnic groups as having ontological primacy Thus, racial or ethnic groups have a life of their own. These groups are not limited to current racial or ethnic group members in being. Rather, these groups include all of those nameless and faceless ancestors from the past and the unnamed and unknown progeny of the future. The current members of a given racial or ethnic group occupy the center stage in the human drama, but they are obligated to the past and obliged to the future. The benefits and the obligations of the grandparents are passed on to the parents, who in turn pass them on to the children.

Individuals are not viewed as discrete, distinct, autonomous, or living a separate isolated existence, but as members of their respective racial or ethnic communities. As a result, within this discourse, liberation of individual blacks is irrelevant. Final victory over racial oppression can only occur when the African-American community is liberated from the clutches of racial oppression. Even though individual African-Americans may obtain material, spiritual, or psychological success, their success does not obscure the oppression of the African-American community Conversely, though individual non-Hispanic whites might be disadvantaged by a lack of money, education, intelligence, or social prestige, as a group non-Hispanic whites are viewed as possessing undue advantages derived from the privilege of their racial membership. These advantages exist regardless of a

74. 163 U.S. 537, 552 (1896).

given non-Hispanic white individual's failure to recognize such benefits or, if recognized, the non-Hispanic white person's sincere desire to disassociate him or herself from such benefits.

As implied by the discussion of Justice Ginsburg's dissent in *Gratz*, anyone, regardless of their race or ethnicity, can perceive racial phenomena within African-American Centralism. But this system of meaning ascribes special moral obligations to those who are black. Regardless of personal predilections, every black individual is viewed as always linked to the struggle against racial oppression. Thus, the success of black intellectuals, black athletes, black entrepreneurs, black politicians, black movie stars, black professionals or black administrators is viewed as the success of the black community Conversely, their failures and the failures of other African-Americans, including black criminals, the poor academic performance of black students, and the inadequate job productivity of black employees are viewed as the failures of the African-American community As a result, every black person, regardless of religious creed, social, or economic status, level of education, gender, region of the country from which they come, sexual orientation or associational or political affiliations, is under a never ceasing obligation to accord him or herself consistent with the best interest of the black community Blacks also have a responsibility to fight for the liberation of the African-American community This responsibility, however, is not a function of merely assisting someone with black skin. It is triggered only when it is necessary to aid in the struggle against one of the multitudinous forms of racial oppression. A black person who contributes to the political campaign of a black politician should do so because the success of the politician furthers the struggle for the liberation of the black community. If the black politician, however, consistently takes positions antithetical to the liberation of the black community, then other blacks should work for his or her defeat. A black person might have a moral obligation to patronize a black business establishment, even if the prices are higher than at a comparable non-black business establishment. Circulating money in the black community strengths the community But if the black business discriminates against black customers and does not employ black individuals, then the obligation would be to avoid patronizing that business establishment.

Liberating the black community from racial subordination probably requires sustained and costly governmental action. In addition, governments at all levels have participated in the oppression of black people. Thus, one of the functions of government should be to right the historical wrongs inflicted upon African-Americans. Designing and implementing policies and procedures that help dismantle the continued oppression of the African-American community would be consistent with this function.

C. Colorblind Individualism

American culture has always had a strong belief in the sacredness of individual self-determination.[75] The essence of this pattern of understanding has been

75. For most purposes, this system of meaning reflects the traditional practice of liberal justification. David Boaz's book, LIBERTARIANISM: A PRIMER (1997), is a good introduction to many

articulated by many thinkers with many variations. Generally speaking, this system of meaning was not applied to people of African descendant until the 1960s. "Colorblind Individualism" is adequately summarized by Reverend Martin Luther King Jr.'s dream that people "not be judged by the color of their skin, but by the content of their character."[76]

The primary objective of this pattern of understanding is the advancement of individual self-determination. Colorblind Individualism views the social world as a collection of "Knowing Individuals." Knowing Individuals are viewed as autonomous, self-directed, and free-willed people who know what they want in life and are capable of pursuing their self-determined goals and objectives.[77] They are capable of obtaining a self-reflective position separate from all of their beliefs, aims, and attachments.[78] From this position, Knowing Individuals can assess and revise their beliefs, aims, and attachments.[79] This capacity for self-reflection not only means that the attitudes of Knowing Individuals are products of self-realization, but that their objectives are self-formulated and their attachments in life are self-determined. Because Knowing Individuals are capable of self-reflection, it also follows that there is a split in their personality While there is a manifest self present to the outside world, Knowing Individuals also possess a hidden, deep, and essential self. This part of the self is prior to all the manifest characteristics of the Knowing Individual, including race, ethnicity, gender, sexual orientation, and socio-economic class.[80] This part of the self is the "real," "true" or "subject" self. It is the source of the motivations and drives that propel the individual to express opinions, hold beliefs, pursue actions, and generate attachments.

This system of meaning is built upon the ontological presupposition that the true self originates, within each person, as a separate, unique, and distinct entity Under this pattern of understanding any given person should seek to uncover his/her true self, decipher its predilections, separate it from that which might obscure or alienate it, and then structure the remaining aspects of life so as to be consistent with its

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of the concepts that are presented in the system of ideas contained within the system of ideas of Secular Individualism. Pierre Schlag provides a recent critique of the practice of liberal justifications that reveals the common conceptual structures of a number of disparate liberal thinkers like John Rawls, Ronald Dworkin, Frank Michelman and Bruce Ackerman. *See generally* Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV 1 (1997) (arguing that these diverse liberal thinkers actually employ a similar structure of justifications for their versions of liberal values).

76. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217 219 (James Melvin Washington ed., 1986) ("I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.").

77 ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 143 (Perennial Library 1986) (1985).

78. *See, e.g.*, Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 181 (1990); *See generally*, Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory*, 11 CARDOZO L. REV 1435 (1990). One can see this concept of the individual as what is produced when we look at the individual behind John Rawls' veil of ignorance. JOHN RAWLS, POLITICAL LIBERALISM 26 (1993).

79 Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice*, 1989 UTAH L. REV 597 598.

80. *See* BELLAH ET AL., *supra* note 77, at 76. *See also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1-11 (1982).

prescriptions.[81] The only constraint placed on these individual choices is that each Knowing Individual exercise self-restraint over his or her inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others' ability to pursue their self-determined goals and objectives.

The need to foster the self-determination of Knowing Individuals is the foundation of the moral and ethical beliefs of Colorblind Individualism. Knowing Individuals have the right to pursue any lifestyle they choose, so long as it respects the right of others to do the same. Thus, the choices that Knowing Individuals make are constrained by the obligation not to interfere with the ability of their fellow Knowing Individuals to do the same. Murder, rape, assault, battery, robbery, and deception are wrong because they interfere with the victims' ability to pursue their self-determined objectives.

Once the respective relations to the material world have been determined, Knowing Individuals will find it beneficial to interact with one another to advance their own self-determined desires. The baker may find it helpful to provide bread to the cobbler in exchange for the cobbler providing shoes for the baker's family These voluntary interactions in furtherance of Knowing Individuals' self-determined interest create mutual obligations between contracting parties. Knowing Individuals must perform the duties required by their voluntary agreement with others. Thus violating voluntarily entered into agreements is also immoral.

According to this discourse, society and government come into existence as a result of the free willed, self-determined choices of Knowing Individuals. Knowing Individuals voluntarily give up their isolation and join society because it is the best way to advance the pursuit of their self-determined goals and objectives. The benefits derived by Knowing Individuals from joining society are the pursuit of their goals and objectives without undue interference by others, and the security and firm establishment of the rights to enjoy and use their accumulated property These benefits assure for each person a sphere which is immune from interference by others. In order to maximize these benefits, all Knowing Individuals must accept burdens. These burdens require that each Knowing Individual exercise restraint over their inclinations that, if satisfied, would directly interfere or create a substantial risk of interfering with the ability of others to pursue their goals and objectives.

The benefits derived from, and the burdens imposed by, joining society provide the explanation for the primary roles and purposes of government. Government should have a limited purpose and character. The principal functions of government flow from its obligation to help ensure a society where people enjoy the liberty to pursue their self-determined goals and objectives without undue interference by others. Government should also provide, through universal and impersonal laws, the means to resolve disputes that arise among Knowing Individuals in pursuit of their self-determined goals and objectives. But, beyond ensuring that Knowing Individuals do not unjustly interfere with the rights of self-determination of other Knowing Individuals, government should be neutral with regard to competing conceptions of a good life. It is generally inconsistent with the role of government

81. HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 245 (2d ed. 1983).

for it to formulate a certain morality for citizens or to direct society along a certain path in order to advance a given vision of the good society. Each Knowing Individual should be left to make the decision regarding what a good life is for him or herself subject to the constraint of respecting the rights of others to do the same. Thus, there are very few circumstances where government should sacrifice the interest of Knowing Individuals for the common good. Such a compelled sacrifice is normally inconsistent with the limited nature of government.

Recent Supreme Court opinions resolving the rights of individuals based on racial or ethnic group membership reflect this pattern of understanding. Much of the Supreme Court's explanation of the harm of government use of racial classifications contained in the controlling opinions of cases like *Regents of the University of California v. Bakke*,[82] *Wygant v. Jackson Board of Education*,[83] *City of Richmond v. J.A. Croson Co.*,[84] *Miller v. Johnson*,[85] *Adarand Constructors, Inc. v. Pena*,[86] and to a large extent the decisions in both *Grutter* and *Gratz*, rest upon the conception of the social world as a collection of Knowing Individuals.

D. American Collectivism

The fourth and final cognitive framework conceptualizes the social world as populated by one group, Americans. As Justice Scalia put it, "we are just one race here. It is American."[87] Americans, regardless of race, color, creed, national origin, gender, sexual orientation, condition of mental or physical disability, wealth, social status, education, or region of the country are united into one great people. The motto is accurately captured in the phrase "E Pluribus Unum"—out of many one. For "American Collectivism," the maintenance of the nation is the paramount concern. Beyond that, the one other goal, objective, and concern is the advancement of the best interest of the American collective.

Moral and ethical beliefs within this discourse are a function of the solicitude about advancing the best interest of the American collective. Within this system of meaning, being an American carries with it an obligation to protect the vital interest of the country. America, love it or leave it! Thus, the individual may be called upon to sacrifice his or her personal interest for the benefit of the collective. For example, during times of prolonged military conflict individuals may be subjected to compulsory military service if not enough enlistments can be obtained through voluntary measures. Despite objections that many individuals may have about their tax dollars being used to fund the military, provide transfer payments to the elderly or the poor, provide funds for the operations of national parks, or provide financial assistance to foreign countries, because of the advantages to the collective, these objections are outweighed by the benefits to the collective interest that such funding provides.

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82. 438 U.S. 265 (1978).
83. 476 U.S. 267 (1986).
84. 488 U.S. 469 (1989).
85. 515 U.S. 900 (1995).
86. 515 U.S. 200 (1995).
87. *Id.* at 239 (Scalia, J., concurring).

The principal function for government is the advancement of the collective interest. Government must "insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty"[88] In advancing or protecting the common good, government should also regulate certain personal liberties and economic activities for the benefit of the public good, ban certain drugs and other products that are too dangerous for public consumption, prohibit the performance of certain injurious practices to society and disseminate useful information that will benefit Americans.

Since the focus of this cognitive framework is on the collective good, it discounts the problems and sufferings of any particular racial or ethnic group. For example, African-Americans have certainly suffered discrimination while in the United States. But within this discourse a discussion about the discrimination against blacks cannot be confined to harms inflicted on that group alone. While it is true that blacks have been victims of discrimination, so have Native Americans and, to a lesser extent, Latinos and Asian Americans. If, as Justice Powell wrote in his opinion in *Bakke*, the facade of a monolithic white group is pierced, it becomes obvious that some white ethnic groups were also exploited and victimized when they came to America. These white ethnics had to struggle—and to some extent struggle still—to overcome the prejudices not of a monolithic majority, but of a majority composed of various minority groups.[89] In addition, a discussion about instituting ameliorative measures to attack the suffering of a particular racial or ethnic group will not be limited to the beneficial impact on that particular group. Rather, such beneficial impact must be balanced against the detriment inflicted on the collective good by such measures.

E. Conclusion

It is important to understand that these systems of meaning can and do structure the thoughts of any individual, at any given place and at any given time. For example, Jesse Jackson is reported to have said, "[t]here is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved."[90] In making this statement, Jackson is viewing African-Americans in terms of Traditional Americanism. Justice Ginsburg, in her dissenting opinion in *Gratz*, firmly roots her view in terms of African-American Centralism's fundamental desire to eradicate the continued oppression of minority groups. In addition, the comprehension of racial phenomena by any one person is not limited to just one of these discourses at a given time. The human mind is far more flexible than that. Individuals can comprehend a given racial phenomenon in more than one discourse. Thus, our minds are used to multiple comprehensions of racial phenomena.

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88. U.S. CONST. pmbl.

89. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978).

90. *See* Paul Glastris & Jeannye Thornton, *A New Civil Rights Frontier* U.S. NEWS & WORLD REP., Jan. 17, 1994, at 38.

To provide a brief view into the use of these different cognitive frameworks for comprehending racial phenomena, consider again the social statistics regarding the current condition of the African-American community noted in section I.[91] Those statistics reveal that despite the success of many individual African-Americans, as a group, blacks continue to lag far behind non-Hispanic whites in virtually every important measure of social welfare. Traditional Americanism would comprehend the continuing racial gap in the social statistics in terms of some inadequacy of blacks. Thus, the failure of a disproportionate number of African-Americans to earn a decent living, their poor performance in educational institutions, the propensity of black males to be involved in the criminal justice system, and the failure of blacks to be more cognizant of their health concerns are understood as evidence of the continued existence of some defect in the being, biology, or culture of African-Americans. Thus, those social statistics reinforce the belief that in some relevant way blacks are inferior.

Within the conceptual boundaries of the cognitive framework of African-American Centralism, the deficit conditions of blacks revealed by the socio-economic statistics are understood as evidence of the continued oppressive aspect of racial domination. The disproportionate numbers of blacks consigned to poverty, the lack of educational opportunities, the disproportionate numbers of black males incarcerated, and the poor health conditions of the black community are all understood as the consequences and material manifestations of the continued racial oppression of black people in American society

Colorblind Individualism would seek to minimize the focus on racial aspects of a given phenomenon. People should be judged and understood as individuals and not as members of involuntary racial or ethnic groups. Colorblind Individualism would attribute as much to the differences in the socio-economic condition of blacks and non-Hispanic whites as to many non-racial factors such as the differences in age, family structure, region of the country education, and other considerations as possible. Colorblind Individualism would interpret any racial differences remaining as of minimal importance because the real concerns are generally related to individuals, not to racial and ethnic groups. Group-based statistics tell us nothing about the particular individual in a given situation being dealt with at a given time.

For American Collectivism the concern is about the best interest of American society The social statistics regarding the racial gap between African-Americans and non-Hispanic whites would have to be placed in the context of what these gaps mean for the collective American interests. The statistics, by themselves, do not convey any important information about the collective interest.

IV *BROWN V BOARD OF EDUCATION* AS INTERPRETED WITHIN THE CONCEPTUAL BOUNDARIES OF THE FOUR DIFFERENT COGNITIVE FRAMEWORKS

This section reviews the Court's school desegregation jurisprudence through each of the four different discourses—Traditional Americanism, African-American Centralism, Colorblind Individualism, and American Collectivism. As indicated

91. *See supra* notes 18-39 and accompanying text.

before, these discourses only structure and limit the perception of a given racial phenomenon and thus, structure and limit the type of arguments that are deemed persuasive for resolving a given racial conflict. Arguments could be made that would criticize *Brown* and the desegregation of American society it spawned. Since America is celebrating, not lamenting, the Golden Anniversary of *Brown v Board of Education*, this section will only present the arguments within each cognitive framework that would find favor with the Supreme Court's decision to strike down segregation statutes and later decisions compelling mandatory desegregation.

A. Traditional Americanism

As indicated earlier, this interpretation is closest to the explanation that Chief Justice Warren included in his opinion discussing the harm derived from segregation. The only harm of segregation recognized by Chief Justice Warren's opinion was the negative psychological impact on African-Americans. This position was consistent with the historical "less than" thinking about African-Americans that is the fundamental belief of this pattern of understanding. Thus, striking down segregation statutes and the subsequent desegregation of public schools is largely viewed in terms of the benefit that it provided for black school children.

Within the conceptual boundaries of this discourse, black school children suffered from being confined to a deficit social environment and being imprisoned within a deviant culture. Striking down segregation statutes paved the way for desegregated education in public schools. Desegregrated education improved the social environment of black students by both bringing them into contact with more non-Hispanic whites and reducing the time that they spent in deficient all black social settings. Desegregrated education increased their exposure to more intelligent and better behaved non-Hispanic white children and more qualified non-Hispanic white teachers. Non-Hispanic white teachers and students who black children came into contact with were able to function as role models and demonstrate to some of the black children the appropriate attitudes and forms of behavior they should emulate. Desegregrated education also helped some African-American children repudiate a portion of their deficient and pathological culture and its associated ideas. Some of the black children listened to how the white children and teachers spoke and learned proper diction and the correct use of the English language.

B. African-American Centralism

In response to living with racial oppression, one aspect of this system of meaning imposes an obligation on every black person to assist in the struggle to liberate African-American people from oppression. While the black community suffered disproportionately as a result of school desegregation, that suffering was redeemed by the greater progress towards eradicating racial subordination that was made possible by striking down segregation statutes and desegregrating public schools and American society Thus, part of what justified the sacrifice of so many blacks

during desegregation was the benefit derived by the black community through the end of segregation.[92]

White southern legislators during the segregation period demonstrated that they were not adverse to reducing educational expenditures for both black and white students. Even so, they would go as far as possible in cutting the funds for the black schools before trimming the budgets of the white schools.[93] For example, in 1910, South Carolina and Louisiana spent five times as much on the education of white children as black children; in Florida and Mississippi the ratio was approximately four to one; Alabama and Georgia three to one; two to one in Arkansas, Virginia, and North Carolina; and 50% more was spent on the education of white children compared to black in Maryland, Tennessee, and Texas.[94] Disparities in per pupil expenditures were reduced during the middle part of the twentieth century as southern school systems faced the possibility of court-ordered integration, but the disparities continued up to the Court's opinion in *Brown*. The district court that addressed segregation in Topeka, Kansas concluded that the physical facilities and other tangible factors between the white schools and the black schools were equal.[95] However, in the three other state companion cases in *Brown* from Delaware, Virginia, and South Carolina, the lower courts concluded that the money spent for the education of the black students was significantly less than that spent on the

92. *See* GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 103-06 (1996).

93. John Hope Franklin, *Jim Crow Goes to School: The Genesis of Legal Segregation in Southern Schools*, 58 S. ATLANTIC Q. 225, 234-35 (1959).

94. ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 21-22 (1990). In 1917 the U.S. Bureau of Education published *Negro Education: A Study of the Private and Higher Schools for Colored People in the United States*. This report was the most comprehensive survey of segregated schools for its time. It reported that only 29% of what was spent on the education of white students was spent on the education of black ones, and even less was spent on the education of blacks in the South. *Id.* at 18-19. Federal funds allocated to the states for vocational education and teacher training were also apportioned inequitably. While blacks constituted 21.4% of the population in the states with segregated schools, they only received 9.8% of the federal dollars in the mid-1930s. *See* DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-1980, at 121 (1983). *See also* Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV 728, 776 (1986) (noting that money always follows white students).

95. Brown v Bd. of Educ., 98 F Supp. 797, 798 (1951).

white students.[96] Desegregrated education helped to make it harder to systematically deprive African-Americans of adequate educational resources.[97]

Desegregrated education also assisted in the eradication of racial subordination in a number of other ways. Desegregrated education allowed black children to demonstrate to non-Hispanic whites that the negative stereotypes about all blacks, and thus, the rationalizations of the continued oppression of blacks, were not true. By learning with non-Hispanic white students, some black youth demonstrated their intelligence, diligence, hard work, and leadership capabilities. From their exposure to non-Hispanic white children, black children learned through their own personal experience that supposedly enduring truths about presumed inferiority of blacks were false. Desegregrated education helped to teach non-Hispanic whites that they should treat blacks as individuals and not as members of an oppressed group. As non-Hispanic white students came to know black students as individuals instead of as members of different racial groups, they came to look at blacks less in terms of race and more in terms of being individuals. Desegregrated education helped blacks to overcome their oppression by increasing the sense of commonality that non-Hispanic whites have with blacks. Desegregrated education helped non-Hispanic whites to see that all people in America are part of a more important American collective. Non-Hispanic whites learned that all Americans share a common core culture which all Americans can celebrate. Racial differences are now understood as less important because of the common interest of Americans as one people.

In order to succeed in mainstream employment and take advantage of business opportunities in the mainstream, a black person must be able to operate effectively in a white corporate world. Integrated education provided black children the ability to understand non-Hispanic whites and feel comfortable in surroundings where non-Hispanic whites are in the majority Thus, desegregrated public education assisted

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96. In 1951, when the complaint in *Briggs v. Elliott*, 98 F Supp. 529 (E.D.S.C. 1951), *rev d sub nom.* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), was filed, Clarendon County spent $43 on the education of each black student as compared to $166 for each white student. I.A. NEWBY, CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966, at 29 (1967). A three-judge federal district court had denied relief in this case but ordered the defendants to take steps to equalize the public schools promptly and to report back in six months. *Briggs*, 98 F Supp. at 537-38. Subsequently, the court found that the county was equalizing the schools "as rapidly as was humanly possible." Briggs v. Elliott, 103 F Supp. 920, 922 (E.D.S.C. 1952), *rev d sub nom.* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

In *Davis v. County School Board*, 103 F Supp. 337 (E.D. Va. 1952), *rev d sub nom.* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), a three-judge district court admitted the inadequacy of the Negro school in Prince Edward County, Virginia. *Id.* at 340. The panel simply ordered the School Board to "pursue with diligence and dispatch" the building program it had already commenced. *Id.* at 340-31.

In *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), the Supreme Court of Delaware affirmed a decision by the Court of Chancery that ordered the admission of Negro students to previously white-only schools. The court ordered the desegregation remedy because the schools attended by blacks were not physically equal to those attended by whites. *Id.* at 152. The Supreme Court of Delaware, however, implied that segregation laws might be enforced once the school facilities were equalized. *Id.*

97. Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV 1041, 1093-95 (1984) (arguing that segregation harmed African-Americans because they were powerless to partake of an educational program that was not hostile to them).

many African-Americans in becoming successful in corporate America. This helped to improve the economic situation for the black community

Non-Hispanic whites generally come from households that make more money and possess greater wealth than black households. Thus, many African-Americans that attended desegregrated schools were able to develop contacts and friendships with more affluent students, which provided them with greater access to employment and business opportunities and political and social contacts they could use during their lives. In the long run, this also helped to increase their material and economic well-being, as well as political and social power, of the black community

C. *Colorblind Individualism*

There are two different aspects of school desegregation that are often conflated into one, but which for purposes of this discourse need to be separated. A year after the Court's opinion in *Brown I*, the Court issued its implementing decision in *Brown II*.[98] In *Brown II*, the Court required public schools to effectuate a transition to a "racially nondiscriminatory school system."[99] The Court noted that the full implementation of the constitutional principles require varied solutions to local school problems. The precise parameters of what was meant by a racially nondiscriminatory school system was left originally to the discretion of school authorities who had the primary responsibility for elucidating, assessing and solving this problem. Chief Justice Warren went on to note that orders and decrees should be entered to admit the plaintiffs to public schools on a racially nondiscriminatory basis "with all deliberate speed."[100]

The Court's decision in *Brown I* and *Brown II* stopped short of directing school districts to take account of race in order to produce integrated schools. In fact, on remand, the three-judge federal district court panel in the South Carolina companion case of *Briggs v. Elliott*[101] interpreted the Court's obligation placed on school systems as follows:

> [The Supreme Court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains.... The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.[102]

98. 349 U.S. 294 (1955) (*Brown II*).
99. *Id.* at 300.
100. *Id.*
101. 132 F Supp. 776 (E.D.S.C. 1955).
102. 132 F Supp. at 777

It was not until its 1968 decision in *Green v. County School Board*[103] that the Supreme Court rejected race-neutral measures if they did not produce substantial integration. The Court placed an affirmative obligation on school officials to treat students as members of racial and ethnic groups in order to pursue the remedies for the prior operation of a dual school system. Thus, in *Green* the court compelled public schools to take account of race and ethnicity in order to bring about desegregrated public education.

According to this discourse, government is to protect the rights of Knowing Individuals to pursue their self-determined goals and objectives. Government should thus be neutral on the question of the type of goals and objectives individuals should pursue or what constitutes a good society Government must both respect the individuality of its citizens and mediate their conduct so as to allow them to pursue their own desires and to prevent them from unjustly interfering with the rights of their fellow persons to do likewise. By doing this, government allows individuals to choose their own goals for themselves consistent with a similar liberty for others.[104]

Minors, however, are not Knowing Individuals. Minors lack experience, cognitive development, maturity, and judgment of adults. Children cannot critically evaluate what is being presented to them. Children must go through a maturation process during which they will develop perspectives that will indelibly affect their view of themselves, their fellow citizens, and their world. Public schools are institutions that acculturate America s youth. It is the one place where government is supposed to be actively involved in the socialization of the next generation of adult citizens. In the institution of public education, government exerts a tremendous influence on learners in order to produce the kind of choosers that possess the values necessary for the maintenance of a democratic society dedicated to self-determination. But public education, like other governmental functions, must maintain the neutrality that flows from the concept of society as a collection of Knowing Individuals.[105] In order for government to maintain its neutrality with respect to children, government should provide an educational environment where minors can be acculturated to become constrained choosers.

Schools help students become choosers by assisting in their cognitive development. Schools disseminate useful information and teach academic skills such as reading, writing, and math. Schools foster the self-determination of students by providing children the opportunity to equip themselves with the vocational knowledge and skills necessary for them to become self-sufficient and self-reliant adults. Schools seek to broaden the sensibilities of children, to kindle their imagination, and to foster a spirit of free inquiry But schools have to teach students to constrain their choices so that their fellow citizens are also afforded the right to self-determination. Schools need to teach students to respect the rights of

103. 391 U.S. 430 (1968).

104. *See, e.g.*, Sandel, *supra* note 79, at 598.

105. The Equal Protection Clause's acceptance of society as a collection of knowing individuals provides an implicit model of public education. This implicit model recognizes the constraint of governmental neutrality For a discussion of that implicit model of education see Kevin Brown, *Do African-Americans Need Immersion Schools? The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV 813, 858-67 (1993).

others, tolerance for political and religious diversity,[106] belief in racial equality,[107] and a commitment to faithfully discharge the duties imposed upon them by citizenship.

The process of educating youth is not confined to books and curricular materials. Schools also teach shared values through administrative rules and regulations governing the operation of the schools, including policies that determine admission to various schools in a given school district.[108] Statutes that segregate individuals based on involuntary characteristics like race and ethnicity are the antithesis of the primary goal that animates this pattern of understanding.

Within this cognitive framework, striking down segregation statutes in *Brown v. Board of Education* was justified because segregation statutes violated respect for individuality in three different ways.[109] First, public schools were not treating students, teachers, and administrators as individuals but rather as members of involuntary racial groups. Hence, individuals were being confined and segregated not based upon individual characteristics, qualifications, or results of constrained choice, but upon accidents of birth. In effect, the government was imprisoning individuals within racial traditions and not providing protection to allow them to be self-determining. Second, despite Chief Justice Warren's assertion in *Brown* that the white and black schools in Topeka, Kansas were equal with regard to the physical facilities and other tangible factors, students who happened to be white

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106. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (stating that public schools must inculcate habits and manners of civility which are "fundamental values necessary to the maintenance of a democratic political system"). The Court noted that "[t]hese ... values of 'habits and manners of civility' essential to a democratic society must ... include tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Id. Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), can also be thought of as a situation where the schools attempted to suppress nondisruptive political speech. As a result, the school officials sent the message that one need not tolerate even nondisruptive unpopular political speech. The liberal construction of the phrase "tolerance for political diversity" conflicts with the inculcation of certain political values, such as patriotism, respect for formal authority, and the values enshrined in democracy However, the phrase has a more narrow meaning. The narrow construction allows schools to satisfy the goal of inculcating tolerance for political diversity by preventing schools from engaging in "narrow political or partisan indoctrination." Board of Educ. v. Pico, 457 U.S. 853, 879 (1982).

107 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954).

108. Mary H. Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 BOSTON L. REV 603, 684 (1987). For example, rules prohibiting fighting on school premises attempt to inculcate a belief that violence is not a legitimate means to resolve a dispute. Rules requiring all students to attend the same classes and to start school at the same time attempt to produce patriotic sentiment.

109. Justice Clarence Thomas noted in his concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70, 118-19 (1995) (Thomas, J., concurring), that the Court's opinion in *Brown v. Bd. of Educ.* has been misread. According to Thomas, *Brown I* did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Psychological injury or benefit is irrelevant to the harm generated by the state's treatment of individuals as members or racial or ethnic groups. The studies cited in *Brown I* have received harsh criticism. *See, e.g.*, Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57, 70. *See generally* GRAGLIA, *supra* note 68, at 27-28.

were provided with better equipped and better funded schools than students who happened to be black. Finally, segregation was stigmatizing to those who happened to be African-American because the government was conveying the message that these individuals were not the equals of those who happen to be white. *A fortiori*, government was also inappropriately praising those who happened to be white because segregation implied that they were superior to those who happened to be black. The dissemination of these twin messages was also a violation of the constraint of governmental neutrality

Striking down a segregation statute obviously advances individual self-determination. But when government treats people as members of racial and ethnic groups, even for such laudable purposes as promoting desegregrated education, government is infringing upon individuality The only way such an infringement of individuality could be justified is by creating more capacity for individual self-determination than what is lost by treating people as members of racial and ethnic groups. In other words, the use by government of an involuntary trait to determine which students, teachers, and administrators are assigned to which schools is contrary to the limited role of government within this cognitive framework. This system of meaning can only justify the use of racial classifications by government to foster integrated education if it promotes individual self-determination more than it deters it. As Justice Blackmun stated so well in *Regents of California v. Bakke*, "[i]n order to get beyond racism, we first must take account of race."[110]

Even though forced desegregation required government to treat people as members of racial and ethnic groups, it still promoted individuality and self-determination more than it harmed it. There were many justifications within this cognitive framework for using racial classifications to promote desegregrated education among the youth.[111] Many people judged others, especially those who happen to be black, with reference to stereotypes attached to skin color. When people's acts toward others are based upon stereotypes, they deny that person their individuality and interfere with their ability to be self-determining. Under the right conditions, desegregrated education could help the young to overcome racial stereotyping of those who happen to be black. Desegregrated education exposes children to the diversity of people who happen to share the same involuntary characteristics. Students gain first-hand experience of the reality that the various general rules and stereotypes attached to different racial and ethnic groups do not apply to all individuals of that particular group. Children who happen to be red, white, black, brown, or yellow come to realize that some people who happen to be red, white, black, brown, or yellow will be intelligent, diligent, hard working, law abiding, and honest, and others will not.

Desegregrated education also helps to further the conversion of racial and ethnic affiliations into mere voluntary associations in a number of different ways. Some Knowing Individuals who happen to be black, white, Asian, or Latino will choose to celebrate their racial or ethnic heritage, making it a salient part of their individual identity, or choose to associate primarily with others who share their racial or ethnic

110. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

111. *See, e.g.*, Gewirtz, *supra* note 94, at 728.

backgrounds. Others, however, will find none of this appealing. Desegregrated education allows students to see that members of their own racial or ethnic group can choose to primarily associate with racial or ethnic group members or non-group members. Thus, students who happen to be black see other black students choosing either to associate primarily with other students of the same color or with students who are not black. Students who happen to be white get to see other white students choose to associate primarily with other white students as well as those who choose to associate primarily with non-white students. This experience provides students with an understanding that they have some control over whether they primarily associate with members of their own racial or ethnic group.

Desegregrated student bodies provide students with a better opportunity to learn tolerance for racial and ethnic differences. Those who choose to make their race and ethnicity a significant part of their individuality need to be able to make such choices without having their desires unduly infringed upon. Thus, desegregrated education exposes students to people from different racial and ethnic backgrounds who may choose to celebrate their racial or ethnic heritage or make their race or ethnicity a salient part of their identity Through this exposure, all students can learn to tolerate the choices of others, even if they do not agree with them.

D. American Collectivism

Like Traditional Americanism and African-American Centralism, this pattern of understanding would view the striking down of statutes requiring segregated public education in *Brown* and the use of racial classifications to foster integrated education approved in *Green v. New Kent County* as differing only in degree, and not in kind. All of these methods are intended to foster integrated education.

Universal and free public education provides many advantages for American society Thomas Jefferson wrote "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education."[112] John Adams, James Madison, and others also made similar pleas for an expanded commitment to learning as a safeguard for the republic.[113]

In a country with such widespread racial, ethnic, and religious diversity, it is necessary to focus on generating and maintaining cultural cohesion. As Emile Durkheim pointed out, "society can survive only if there exists among its members a sufficient degree of homogeneity "[114] The concept of the melting pot is the principal idea developed in the United States to pursue the creation of "E Pluribus Unum." The melting pot ideology expresses the core belief that the cultural distinctiveness of various racial, ethnic, and religious groups is to meld into an American cultural soup. Thus, the cultures of all those who have arrived here

112. DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 23 (1987).

113. *Id.*

114. EMILE DURKHEIM, EDUCATION AND SOCIOLOGY 70 (1956).

should lose some of their distinctiveness in the process of absorbing the American national culture.

The development of the importance of public education for promoting social cohesion in American society was a result of the tremendous immigration that America experienced in the latter part of the nineteenth century and the early part of the twentieth century As America moved into the latter part of the nineteenth century, it experienced the industrial revolution. The rapid industrialization of American urban areas created an economic need for labor of immigrating white European ethnics. The character of American immigration changed drastically around 1880. A principally Protestant nation with immigrants from northern and western Europe began to receive large numbers of Catholic and Jewish immigrants, as well as immigrants from southern and eastern Europe.[115]

In a country with such widespread ethnic and religious diversity, it was necessary for the government to establish a social institution to ensure the proper acculturation of the young. Schools became the celebrated arsenal of the moral crusade to assimilate the children of immigrating cultural minorities. The expansion of the common schools in the 19th and 20th centuries was, in part, a response to the need for a certain degree of cultural homogeneity in the face of widespread ethnic and religious diversity that resulted from new waves of immigration. American schools had to socialize successive generations of immigrants with different customs, languages, and cultural traditions to help formulate a sense of an American people. This sense of cultural commonality also helps reduce the danger of conflict between different racial, ethnic, and religious groups that has flared up so often in other places in the world.

In public schools, a common language is taught. Students develop a sense of nationhood by learning about U.S. history, observing patriotic holidays, and being involved in patriotic rituals such as the pledge of allegiance and the *Star Spangled Banner* Public schools provide a mechanism to ensure that the overwhelming majority of children receive a uniform moral and social education regardless of their family background. Inculcation of these values to the young is too important for the American collective to leave to the happenstance of individual guardians and parents.

Separating children along racial and ethnic lines usually means virtual separation throughout much of their lives. The result is misunderstanding, friction, and racial hatred. Children who attend integrated public education have experiences with students from different racial and ethnic backgrounds than their own. By fostering these types of interactions, the knowledge that people from different racial and ethnic groups have about each other is increased. A greater sense of understanding can reduce potentially destructive racial and ethnic tensions, which are a product of fear and ignorance. Integrated education, therefore, furthers assimilation of all

115. Between 1900 and 1930 the Catholic population doubled to 24 million. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 49 (1996). Between 1850 and 1900, the number of Catholics increased from 1.7 million to 12 million. The number doubled again between 1900 and 1930. *See id.* The massive increase in the numbers of Catholics was replicated by the number of Jews. Their population increased from 229,000 in 1887 to over 4,228,000 forty years later. This represented an increase from 0.5% of the nation's population to 3%. *See id.*

immigrant and minority groups, including African-Americans. Integrated education reduces racial intolerance and prejudice. It also helps to break down barriers between different racial and ethnic groups in American society Children can come to learn to see the commonalities in diverse people and thereby help to appreciate the fact that we are all part of one American people.

In addition to the above advantages of integrated education within this cognitive framework, Professors Derrick Bell and Mary Dudziak have pointed to a version of how attacking segregation advanced the best interests of American society They have argued that the understanding of the Court's decision in *Brown* and the subsequent desegregation of American society that it fostered should not be separated from America's engagement in the Cold War.[116] With the end of World War II, the importance of the status and condition of blacks became a major concern for the country In fighting the Germans, America had fought a war against a country whose national policy was based on the dogma of racial superiority with its own racially segregated armed forces. Shortly after the end of World War II, the United States also found itself engaged in a seemingly inevitable struggle against communism. As American foreign policy came to view the matter, the world was bipolar: Soviet Union and America. The Soviet Union was animated by a fanatic faith that was antithetical to our own and sought the ultimate elimination of any effective opposition to it.[117]

Desegregation of American society was a part of the strategy to win the Cold War The ability of the United States to advance democracy abroad was compromised by internal racial policies and practices of segregation at home.[118] In the late 1940s and early 1950s, America's Cold War rhetoric of commitment to democracy, freedom, and equality stood in sharp contradiction to its disenfranchisement and segregation of African-Americans. International perceptions of American democracy affected the nation's ability to maintain its leadership, particularly among newly independent nations in Asia, Africa, and Latin America.[119] Soviet propaganda focused the world's attention on America's internal racial practices. Newspapers throughout the world carried stories about the

116. Professor Derrick Bell has long suggested that when examining the desegregation of American society, one should not overlook the position of America in an international context. *See generally* Bell, *supra* note 70, at 518. Professor Mary Dudziak expanded on this theme in a Stanford Law Review article she wrote. *See generally* Dudziak, *supra* note 70, at 61.

117 In early 1950 President Truman instructed the National Security Council to perform a fundamental reappraisal of the U.S. Cold War position. The document produced, NSC-68, was not declassified until the 1970s. It had a formative influence on the way America waged the Cold War. *See* MARTIN MCCAULEY, RUSSIA, AMERICA & THE COLD WAR 1949-1991, at 15-16 (1998).

118. With the filing by the Truman Administration of its brief in the 1948 case of *Shelley v. Kraemer* the federal government began to place in front of the United States Supreme Court the damage done in the international arena by America's internal racial situation. 334 U.S. 1 (1948) (determining that the enforcement of racially restrictive covenants placed on real estate was state action and therefore striking their enforcement as a violation of the Fourteenth Amendment). The brief stated that "the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country." Brief of the United States as Amicus Curiae at 19, Shelley v. Kraemer, 334 U.S. 1 (1948) (quoting letter from Ernest A. Gross, Legal Adviser to the Secretary of State, to the Attorney General (Nov 4, 1947)).

119 *See generally* DUDZIAK, *supra* note 71 (discussing the impact of the Cold War on America's civil rights agenda).

discrimination faced by non-white visiting foreigners and black Americans.[120] The Soviets made effective arguments about the exploitation inherent in the American form of society by pointing to the racial failings of the United States.[121]

The Justice Department of the Truman Administration joined the legal battle to end segregation. In the 1948 case of *Shelley v Kraemer*,[122] the federal government filed a brief repudiating racially restrictive covenants. The Justice Department's brief specifically pointed to the fact that "the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country "[123] The Justice Department also filed a brief in *Brown* calling for an end of segregation. Proof that the Court's opinion striking down segregation was important in the Cold War is evidenced by the State Department's use of the decision. An hour after the decision was handed down, the Voice of America was broadcasting it to Eastern Europe. Newspapers in Africa also provided extensive favorable coverage of the Court's decision.

CONCLUSION

This article has reexamined the Supreme Court's opinion in *Brown v Board of Education* and the desegregation of public schools that it spawned with an awareness that public education has moved into a Post-Desegregation Era. As the twenty-first century unfolds, racial and ethnic segregation have been increasing in public education for the past fifteen years. The Post-Desegregation Awareness also takes into account the lessons that have been learned about race, racial issues, and racial conflicts over the past fifty years. When it comes to reexamining the Supreme Court's opinion in *Brown* and the desegregation of public schools it spawned with a Post-Desegregation Awareness, it must be acknowledged initially that the opinion and the desegregation of public schools it brought about do not provide only one objective meaning, but multiple meanings.

Fifty years of desegregation have revealed that the comprehension of any particular racial phenomenon, such as the *Brown* opinion and the desegregation of public schools it generated, is not done in isolation or as a representation of an objective truth. Rather, racial phenomena are always comprehended against a *sub silentio* background of a much larger set of ideas about race, ethnicity and the place in American society for various minority groups. There are not as many different sets of ideas used to comprehend a given racial phenomenon as there are individual perceivers, but a limited number of sets of background ideas. These larger sets of ideas structure and limit the perception of a given racial phenomenon and thus the discussion of a given racial issue. These various *sub silentio* backgrounds could be called diverse perspectives or points of view This article, however, referred to

120. Dudziak, *supra* note 70, at 62 (discussing the appearance of stories in foreign presses such as the *Fiji Times Herald*, *Ceylon Observer*, *Shanghai Ta Kung Pao*, the *Chinese Daily Tribune*, newspapers in India and the Soviet periodical *Trud* on American internal racial problems).

121. *Id.* at 80.

122. 334 U.S. 1 (1948) (determining that the enforcement of racially restrictive covenants placed on real estate was state action and therefore striking their enforcement as a violation of the Fourteenth Amendment).

123. Brief of the United States as Amicus Curiae at 19, Shelley v. Kraemer, 334 U.S. 1 (1948) (quoting letter from Ernest A. Gross, Legal Adviser to the Secretary of State, to the Attorney General (Nov. 4, 1947)).

them as "discourses," "patterns of understanding," "systems of meaning," or "cognitive frameworks." Thus, what *Brown* and the desegregation of public schools means when perceived with the Post-Desegregation Awareness depends upon the discourse used to comprehend these developments.

This article presented four different interpretations of *Brown* and the desegregation of public schools it generated within four different discourses: Traditional Americanism, African-American Centralism, Colorblind Individualism, and American Collectivism. These discourses are based upon certain foundational beliefs which must first be accepted as valid. Once the foundational belief is accepted, the discourse derived from it structures and limits the perception of a given racial phenomenon. Each of these cognitive frameworks has its own fundamental view of the social world, its own view of the role of government, and its own particular conception of moral and ethical behavior. Thus, each framework will yield a different understanding of a given racial phenomenon like the Court's opinion in *Brown* and will provide different types of arguments for or against a particular solution to a given racial conflict.

The Post-Desegregation Awareness does not attempt to determine the one correct meaning or interpretation of an important racial phenomenon, like *Brown* or the resulting desegregation of public schools. What the Post-Desegregation Awareness tries to do is reveal how these limited number of discourses that we use over and over to comprehend racial phenomena and discuss racial issues structures and circumscribes the perception of such phenomena and the discussion of racial issues. When they are so revealed and understood, then we come to know that many of our disagreements about the meaning of racial phenomena, the type of arguments that are considered persuasive in discussing various racial issues and resolution to racial conflicts are actually embedded in fundamentally different assumptions which generate alternative systems of meaning for comprehending a given racial phenomenon. It is in this way that, as Justice O'Connor noted in her opinion in *Grutter* diversity in the classroom can produce discussions that are more enlightening and interesting.

The primary objective of this article—as thus the primary purpose of the reexamination of *Brown* and the desegregation of public education it made possible from the perspective of the Post-Desegregation Awareness—is to demonstrate that the search for the one correct perception of any given racial issue is misguided from the very beginning. Simply put, Americans conceive of racial and ethnic phenomena in radically and fundamentally different ways. Thus, not only will there not be one valid interpretation of *Brown* and the desegregation of American society it helped to bring about, but this basic inability to develop one valid interpretation exists for all racial phenomena. There can be no final end to the discussions about racial issues in American society that does not take into account the existence of multiple perspectives or points of view