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Recommended Citation

Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 *J.L. & Educ.* 431 (2002).

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Beyond *Brown v. Board of Education*: The Need to Remedy the Achievement Gap

DORA W. KLEIN*

INTRODUCTION

On December 6, 2001, the Sixth Circuit Court of Appeals convened en banc to hear oral arguments in the consolidated cases of *Gratz v. Bollinger* and *Grutter v. Bollinger*.¹ While every en banc hearing is something of an unusual event,² this particular en banc hearing was especially unusual because the circuit judges had voted to proceed directly from the district courts' decisions to a review by the full appellate court,³ bypassing the usual three-judge panel review.⁴ More judges than usual presided inside the courthouse, joined by more bystanders than usual gathered outside the courthouse.⁵ Various newspapers, including the *New York Times* and *Washington Post*, reported on the proceedings,⁶ as did the major television networks.⁷

The intense interest, although atypical for an appeals court proceeding, was not surprising given that the cases under review involve two issues of utmost social and individual importance: education and race. The plaintiffs in both *Gratz* and *Grutter* are challenging race-conscious admissions policies of the

*J.D., Vanderbilt University Law School. Thanks to Professor Suzanna Sherry for helpful comments on an earlier draft; to Matthew Festa and Kristin Solomon for peer review; and to Dean Kent Syverud for guidance beyond the call of duty.

1. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

2. Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 29–30 (1988) (“On rare occasions . . . amounting to less than one percent of cases decided on the merits, all of the judges sitting on the court hear cases en banc.” (footnote omitted)).

3. See *Gratz v. Bollinger*, 277 F.3d 803, 803 (6th Cir. 2001) (granting petition for initial hearing en banc). The en banc court has issued an opinion in *Grutter v. Bollinger*, upholding the University of Michigan Law School's use of race in admissions as narrowly tailored to meet a compelling state interest, 288 F.3d 732 (6th Cir. 2002). The court explicitly withheld judgment on the University of Michigan's undergraduate admissions program; a separate ruling is pending in *Gratz*. *Id.* at 735 n.2.

4. See Solimine, *supra* note 2, at 29 (“Normally courts of appeals sit and decide cases in three-judge panels, the decisions of which are deemed to be those of the entire court.”).

5. See *Nation in Brief*, WASH. POST, Dec. 7, 2001, at A6 (“Hundreds of activists rallied outside an appeals court.”).

6. *Id.*; Jacques Steinberg, *U.S. Appeals Court Hears Debate on Race-Based Admissions*, N.Y. TIMES, Dec. 7, 2001, at A27.

7. E.g., *Students and Colleges Awaiting Federal Appeals Ruling in Landmark Affirmative Action Battle in Michigan* (CBS television broadcast, Dec. 9, 2001).

University of Michigan⁸ on the grounds that granting admission to black applicants in part because they are black violates the equal protection rights of white applicants.⁹

Although courts have heard challenges to race-conscious policies for everything from awarding construction contracts¹⁰ to promoting police officers,¹¹ it is cases involving education that inspire impassioned demonstrations and garner national media coverage. Education is, after all, not just another government program; it is a means of creating personal wealth of the greatest intrinsic as well as instrumental value.¹²

The importance of education means that race-conscious admissions policies are particularly valuable to those who benefit from them and particularly costly to those who do not.¹³ The importance of education also means that the Sixth Circuit's decisions in the University of Michigan cases are unlikely to effect

8. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 824 (E.D. Mich. 2001) (challenging law school admissions policy); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000) (challenging undergraduate admissions policy).

9. See *Grutter*, 137 F. Supp. 2d at 824 (describing plaintiffs' claims that the University's law school admissions policy violated both the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act); *Gratz*, 122 F. Supp. 2d at 814 (same for undergraduate admissions).

10. E.g., *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996) (invalidating policy).

11. E.g., *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13 (1st Cir. 1998) (upholding policy).

12. As the Supreme Court observed in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. 483, 493 (1954); see also *Plyler v. Doe*, 457 U.S. 202, 212 (1982) ("Public education is not . . . merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 715 (1975) ("Interest in the schools is universal, and it is an interest that directly involves not only the taxpayer but his family, and therefore his emotions. Those who are indifferent to all other community affairs tend to take a proprietary interest in the schools their children attend, or will attend, or have attended." (quoting Harry Ashmore, editor of the *Arkansas Gazette* at the time *Brown* was decided)); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 863 (2000) ("Education is today a prerequisite for social and economic success in most areas of life.").

13. The cost to those who are not eligible to be admitted under a race-conscious admissions policy has been the subject of much debate (and statistical comparison). E.g., compare *Grutter v. Bollinger*, 288 F.3d 732, 766 (6th Cir. 2002) (Clay, J., concurring) ("[T]here is nothing to indicate that the law school's admission's policy has 'taken' anything 'from the Barbara Grutters of our society.' . . . [T]he idea that an admissions policy which provides minority applicants with an advantage does so at the expense of white applicants is simply a myth." (citation omitted)) with *id.* at 809 n.40 (Boggs, J. dissenting) ("To say that Grutter's claims are to be ignored because the whole system that she has challenged has a relatively small discriminatory impact or because the magnitude of the violation as to her is small is to say that she has no rights that this court is bound to respect. I decline to take that attitude.").

any real resolution, either within the judiciary or among the general public, about either the legality¹⁴ or the broader desirability¹⁵ of race-conscious admissions policies.

While the Sixth Circuit was deciding whether public universities can, without violating the Constitution, grant admission to black students with test scores lower than those of white applicants denied admission,¹⁶ other courts were deciding whether those lower test scores might themselves be a violation of the Constitution. In 1954, a unanimous Supreme Court held in *Brown v. Board of Education* that the segregation of public schools according to race violated the Equal Protection Clause of the Fourteenth Amendment.¹⁷ A year later in *Brown II*, the remedial phase of *Brown*, the Court directed district courts to take whatever actions were “necessary and proper” to achieve nondiscriminatory school systems.¹⁸ To fulfill their obligations as the supervisors of school desegregation, district courts have issued remedial decrees, which require not only that school districts abandon “separate but equal” systems of

Clearly, the elimination of race-conscious admissions policies would not greatly improve, on average, white applicants' chances of being admitted to a university such as Michigan, because the University receives so many more applications than it has spaces in an entering class. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 36 (1998) (estimating that eliminating race as a factor in admissions decisions would, on average, increase a white applicant's chances of admission from 25% to 26.5%).

On the other hand, comparisons of average likelihoods of admission under race-conscious and non-race-conscious policies do not change the reality that when a university admits some applicants because of a race-conscious policy, it necessarily rejects other applicants because of the policy.

14. The decisions will resolve the division within the Sixth Circuit (indeed, within the eastern district of Michigan). The Sixth Circuit's decisions will not, however, resolve the division among the circuits. See *infra* notes 72-76 and accompanying text (discussing conflicting decisions regarding the constitutionality of universities' race-conscious admissions policies). Rather, the fractured decision in *Grutter* (a 5 to 4 ruling, with seven separate opinions) only highlights the controversy. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

15. Policy arguments both in support and in opposition are formidable:

Almost every move and countermove in the colorblindness debate is by now well known. One camp says that affirmative action is racial discrimination all over again. The other replies that offering a long-oppressed group special opportunities cannot be regarded as the moral equivalent of the racism it seeks to redress. On the one hand, racial classifications are said to be divisive and inconsistent with the ideal of equality under law. On the other, colorblindness is said to be a deceptive and unjust neutrality given the facts, past and present, of race discrimination in America. One side says that affirmative action stigmatizes, entrenches invidious stereotypes, and threatens to undermine minority success in the long run. The other replies that minorities are already stigmatized, stereotyped and undermined, and that affirmative action at least attempts to do something about it.

Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427, 445 (1997) (footnotes omitted).

16. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 825-43 (E.D. Mich. 2001) (describing consideration of race in law school admissions decisions); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000) (describing consideration of race in undergraduate admissions decisions).

17. 347 U.S. 483, 493 (1954).

18. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955).

de jure segregation, but also that they take affirmative steps to eliminate all vestiges¹⁹ of those prior systems.²⁰

Identifying vestiges of *de jure* segregation is, however, becoming an increasingly difficult task. School districts have, by now, eliminated those racial disparities that were most readily traceable to *de jure* segregation,²¹ such as the assignment of students to separate schools on the basis of race.²² Determining whether remaining disparities, such as scores on standardized tests,²³ are vestiges of *de jure* segregation is more difficult because the relationship between present disparities and the prior system of segregation is less clear. While the cause of a present racial disparity might be a prior system of *de jure* segregation, the cause might also be social or economic factors over which the school district has no control.

19. "A vestige of *de jure* segregation is a current or latent racial imbalance that is 'traceable, in a proximate way, to [a] prior violation' of the Fourteenth Amendment." *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 361 (W.D. Ky. 2000) (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

20. *See Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985) ("[T]he goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation"). The Supreme Court held in *Green v. County School Board* that simply repealing laws mandating segregated schools and allowing parents to choose the schools their children would attend was an insufficient remedy because it was unlikely to result in a unitary system. 391 U.S. 430, 441 (1968) ("[I]f there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable").

21. Although racial disparities certainly still exist, not all instances of racial disparity result from segregation. "Segregation is the conscious, deliberate act of separating people by race." *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 371 (W.D. Ky. 2000); *see also* Lisa Frazier, *Busing is Hurting Black Children, Some in P.G. Say*, WASH. POST, Oct. 30, 1995, at A1 ("'Apartmentness has never been unconstitutional,' said school board member Alvin Thornton . . . who is African American and the chairman of the committee set up by the board to draft the neighborhood schools plan. 'It is the state-enforced separation of people to disadvantage them that is unconstitutional'").

22. Even this issue becomes complicated, however, when an elementary or secondary school uses race as a basis for admitting students to a particularly desirable program. Absent either the compelling governmental interest in remedying past *de jure* segregation or an assignment system narrowly tailored to achieving such a remedy, some courts have found race-conscious systems—even those intended to benefit minorities—to be unconstitutional. *See, e.g., Wessmann v. Gittens*, 160 F.3d 790, 801 (1st Cir. 1998) (holding unconstitutional the use of race to admit students to a prestigious public high school, when the school system had already been declared unitary with respect to student assignments); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 366 (W.D. Ky. 2000) (same for magnet school). Other courts, however, have found at least the possibility that racial diversity is a compelling governmental interest, when the school to which a student has been assigned because of his race is similar to the school to which he is seeking to be assigned. *See, e.g., Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (vacating grant of preliminary injunction against the school system, and noting the possibility that "a compelling interest can be found in a program that has as its object the reduction of racial isolation and what appears to be de facto segregation"); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 60 (D. Mass. 2000) (denying preliminary injunction to parents, in part because the school district could succeed on the merits: "Although courts have become increasingly suspect of programs and policies that involve racial classifications, it cannot be said—as the plaintiffs do—that any government consideration of race in devising school assignment policies is unconstitutional").

23. *See infra* note 52 (providing data).

This distinction between a racial disparity caused by prior *de jure* segregation and one caused by general societal factors is the difference between a disparity that is a constitutional violation and one that is not. If a disparity is the result of a prior *de jure* system of segregation, then the school district is engaged in a continuing violation of the Fourteenth Amendment, and therefore a court may order the school district to eliminate the disparity.²⁴ On the other hand, if the disparity is the result of past or present social and economic forces that are beyond the control of the school district, then the school district is not engaged in the kind of constitutional violation identified in *Brown*. Thus, a court may not, at least on this particular basis,²⁵ order the school district to eliminate the disparity.²⁶

This essay addresses the need to remedy the disparity in academic achievement of black and white students²⁷ and examines why this disparity continues to exist in spite of the desegregation decrees issued under *Brown v. Board of Education*. Part II reviews how a court decides whether a school district has

24. “[F]ederal courts should employ their equitable powers ‘to eliminate from the public schools all vestiges of state-imposed segregation.’” *Hampton*, 102 F. Supp. 2d at 360 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

25. Desegregation orders issued under *Brown v. Board of Education* are not the only means by which courts can ensure that school districts do not violate the rights of black students. For example, recent cases have challenged inequalities in school financing policies. Most of these cases, however, have been brought under state constitutions. *See, e.g.*, *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994) (holding that Arizona’s school funding policy resulted in “gross disparities in school facilities” and therefore violated the “general and uniform” clause of the Arizona Constitution). *Compare San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973) (holding that disparities resulting from Texas’s reliance on property taxes to fund local school districts did not violate the equal protection clause of the Fourteenth Amendment). For a discussion of the school finance issue, see generally James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).

26. *See infra* note 57 (indicating that school districts are not obligated to remedy disparities that they did not cause).

27. *See infra* note 52 (presenting data on the achievement gap). This essay accepts that, in general, test scores are reasonable markers for academic achievement. Certainly, better markers for academic achievement may well be possible, at least for small programs that can make individualized assessments. For the foreseeable future, however, scores on standardized tests are likely to continue to be regarded, by teachers, college admissions counselors, and the general public, as at least reasonably related to levels of academic achievement. *Cf.* Stephen J. Ceci, *So Near and Yet So Far: Lingering Questions About the Use of Measures of General Intelligence for College Admission and Employment Screening*, 6 PSYCH. PUB. POL. & L. 233, 237 (2000) (“Clearly some problems exist conceptually with standardized scores, but alternatives are not obvious.”).

Although a thorough discussion of the relationship between race and test scores is beyond the scope of this essay, several additional issues deserve at least brief mention. First, although this essay focuses on the disparity between the test scores of black and white students (because desegregation cases focus on these two groups), disparities also exist in the test scores of other groups. . . . Much of what is said in this essay about the need to remedy the disparate scores of black students may apply to some other minorities, whose test scores are lower than the scores of the majority. *See* Diana Jean Schemo, *National Briefing Education: Campaign for Black and Latino Parents*, N.Y. TIMES, Aug. 22, 2001, at A17 (noting “the achievement gap separating black and Latino students from whites”). Further, disparities in achievement exist as much if not more between poor and affluent students as between black and white students. *See* Evan Osnos, *Schools Find New Route to Diversity; New Integration Plans Use Income to Place Pupils*, CHIC. TRIB., Jan. 28, 2002, at N7 (“Confronting a chronic achievement gap between rich and poor pupils, a growing number of American school systems are aiming for a new vision of diversity: desegregation by income rather than race.”).

complied with a desegregation decree and therefore should no longer be subject to supervision by the court. Part III explains why schools are being released from desegregation decrees despite the existence of disparities in the academic achievement of black and white students. This part also discusses several strategies for reducing disparities in achievement, and highlights the need to reduce these disparities with a brief review of the present controversy regarding the use of race-conscious admissions policies by public universities. Part IV considers how the termination of desegregation decrees can affect school districts' ability to pursue the ideal of educational equality expressed in *Brown*.

In general, desegregation decrees issued under *Brown v. Board of Education* are incapable of addressing adequately the problem of disparate academic achievement. Under *Brown*, desegregation cases have focused on balancing the distribution of resources, such as students of different races, among schools in a given district.²⁸ This focus made sense when the goal of desegregation cases was to dismantle systems of *de jure* segregation, which were intended precisely to create racial imbalances.²⁹ Today, as many desegregation cases are coming to an end, the ultimate goal of *Brown*—the creation of public schools that prepare all children to succeed in life³⁰—can perhaps best be served not by

Additionally, some may argue that lower tests scores of blacks should be interpreted not as reflecting lower academic achievement but as reflecting culturally biased tests. The consensus of researchers who have examined this issue, however, is that most standardized tests are not culturally biased:

For the past 30 years, civil rights lawyers, journalists, and others have alleged that cognitive ability and educational achievement tests are predictively biased against minorities Thousands of test bias studies have been conducted, and these studies have disconfirmed that hypothesis. The National Academy of Sciences appointed two blue ribbon committees to study the data from these studies, and both committees concluded that professionally developed tests are not predictively biased.

John E. Hunter and Frank L. Schmidt, *The Dilemma of Group Differences: Racial and Gender Bias in Ability and Achievement Tests: Resolving the Apparent Paradox*, 6 PSYCH. PUB. POL. & L. 151, 151 (2000) (citations omitted); see also BOWEN & BOK, *supra* note 13, at 262 n.10 ("What is clear is that the evidence cited here shows that, far from being biased against minority students, standardized admissions tests consistently predict higher levels of academic performance than most blacks actually achieve.").

A completely separate question from the issue of cultural bias is whether what standardized tests predict (such as grades) is valuable enough to justify the continued use of these tests in, for example, college admissions decisions, when the consequence is that few minority students will be admitted. This, however, is a question of policy, not of test design.

28. See *infra* note 38 and accompanying text (discussing racial imbalances that a court will presume to be vestiges of *de jure* discrimination).

29. As one court recently observed:

Uniformity in the racial composition of a given school was the hallmark of official discrimination, "for under the former *de jure* regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race." Court-ordered desegregation was designed to meet the enemy head-on; the long-term stability of attempts at racial balancing in student assignment is often seen as the most conspicuous indication of the courts' success (or lack thereof) in combating the underlying societal evil.

Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 384 (4th Cir. 2001) (quoting *Freeman v. Pitts*, 503 U.S. 467, 474 (1992)).

30. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

seeking to create racially balanced schools, but by seeking to eliminate racial disparities in academic achievement.

I. PRESENT RACIAL DISPARITIES AND THE JURISPRUDENCE OF *BROWN V. BOARD OF EDUCATION*

A. A Brief Background: Desegregation Decrees, from Beginning to End

In *Brown*, the Supreme Court held that state laws mandating the segregation of public schools by race violated the Equal Protection Clause of the Fourteenth Amendment.³¹ In *Brown II*, the Court prescribed the remedy for segregated school systems: district courts were to issue desegregation decrees and were to maintain jurisdiction over school districts until the districts had complied with the terms of those decrees.³² This compliance was achieved primarily by replacing the old, racially segregated educational system with a new, "unitary," racially integrated one.³³

In recent years, many school districts have sought to demonstrate that they have created such a unitary system, and should therefore be released from judicial supervision.³⁴ Deciding whether to declare a school system unitary involves two primary tasks: determining what vestiges of prior *de jure* segre-

31. *Id.* Of the four states whose laws were the subject of *Brown*, three (South Carolina, Virginia, and Delaware) required that black and white students attend separate schools, while the fourth (Kansas) permitted cities to maintain separate schools. *Id.* at 486 n.1.

32. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

33. *E.g.*, *Manning v. Sch. Bd.*, 244 F.3d 927, 929 (11th Cir. 2001); *NAACP v. Duval County Sch.*, 273 F.3d 960, 962 (11th Cir. 2001); *Reed v. Rhodes*, 179 F.3d 453, 456 (6th Cir. 1999); *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 972 (W.D. Mich. 2002); *Lee v. Butler County Bd. of Educ.*, 183 F. Supp. 2d 1359, 1360 (M.D. Ala. 2002); *Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 579 (W.D. Pa. 2000).

In several cases, parties other than the original school system defendant sought unitary status, while the school system argued in favor of maintaining judicial supervision. *E.g.*, *Davis v. Sch. Dist.*, 95 F. Supp. 2d 688, 690 (E.D. Mich. 2000) ("After conducting a 'show cause' hearing on the District's requested relief . . . the Court ordered the District to submit evidentiary support for its request that the Court retain jurisdiction over this action."); *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 232 (W.D.N.C. 1999) ("CMS takes a bizarre posture in this late phase of the case, arguing that it has not complied with the Court's orders.").

In still other cases, one of the parties sought to modify rather than dissolve the decree directing desegregation within a school system. *See, e.g.*, *People Who Care v. Rockford Bd. of Educ.*, 2000 WL 1855107 at *1 (N.D. Ill. Aug. 11, 2000) ("This matter comes before the court on cross-motions by the plaintiff class and the defendant school board to modify the Comprehensive Remedial Order in certain respects."); *Lee v. Autauga County Bd. of Educ.*, 59 F. Supp. 2d 1199, 1205 (M.D. Ala. 1999) ("The first question the court must address is what standards will govern its decision. The parties seemingly agree, as does the court, that the applicable standard is that for modification of a consent decree.").

34. *Manning v. Sch. Bd.*, 244 F.3d 927, 929 (11th Cir. 2001); *NAACP v. Duval County Sch.*, 273 F.3d 960, 962 (11th Cir. 2001); *Reed v. Rhodes*, 179 F.3d 453, 456 (6th Cir. 1999); *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 972 (W.D. Mich. 2002); *Lee v. Butler County Bd. of Educ.*, 183 F. Supp. 2d 1359, 1360 (M.D. Ala. 2002); *Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 579 (W.D. Pa. 2000).

gation remain and then determining whether a school district can “practically”³⁵ eliminate those vestiges.³⁶

B. Identifying Vestiges of *De Jure* Segregation

1. The Presumptions

Not every racial disparity within a school system is a constitutional violation.³⁷ When deciding whether a particular racial inequality violates equal protection under *Brown*, courts first consider whether the inequality involves one of the six factors identified in *Green v. County School Board* (students, faculty, staff, transportation, extracurricular activities or facilities)³⁸ or involves a factor that a particular desegregation decree has identified as a vestige of *de jure* segregation. If the disparity does involve one of these factors, a court typically will presume the disparity is causally related to the prior system of *de*

35. “Practicable” has become a veritable term of art in desegregation cases, ever since it was used by the Supreme Court in *Dowell. Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (“The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.”).

36. *See id.* (stating that a school district will be released from a desegregation decree when the district has “complied in good faith with the desegregation decree since it was entered” and when “the vestiges of past discrimination [have] been eliminated to the extent practicable”).

Many courts analyze “good faith” compliance as an additional requirement, separate from compliance itself, that a school district must satisfy before a desegregation decree will be terminated. In practice, though, that a court would refuse to terminate a decree because a school district had failed to comply enthusiastically with a decree, rather than simply to comply, is doubtful. More likely, “good faith” compliance means only the absence of attempts to evade compliance:

The plaintiffs’ principal argument for the indefinite continuation of the decree is that the school board has not been complying with it in good faith. The difference between technical compliance and compliance in good faith is that the latter form of compliance does not exploit loopholes and ambiguities. It is not, as the plaintiffs would have it, that the school board must “actively” support the decree, must express “commitment” to it, and, above all, must not criticize it. The undemocratic implications of this position leave us almost speechless.

People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073, 1077 (7th Cir. 2001) (citations omitted). Courts also have used the concept of good faith compliance to excuse less than complete compliance. *See, e.g., Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 991 (W.D. Mich. 2002) (“[T]he BHASD [Benton Harbor Area School District] did not fully comply with the requirements of the order. . . . That failure to comply, however, does not itself demonstrate bad faith that necessarily bars a grant of unitary status. . . . The evidence uniformly suggests that the BHASD has complied fully and in good faith with most of the components of the remedial order.”).

37. *See supra* note 21 (discussing the difference between a racial imbalance that results from state action and one that results from private choices).

38. *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968) (“Racial identification of the system’s schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.”); *see also Hoots v. Pennsylvania.*, 118 F. Supp. 2d 577, 584 (W.D. Pa. 2000) (noting that “compliance with *Green* factors is a condition precedent to unitary status” (quoting *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 757 (3d Cir. 1996))).

jure segregation and therefore is a continuing violation of the Fourteenth Amendment.³⁹ The party claiming the disparity is not a vestige of prior constitutional violations then bears the burden of proving the cause of the disparity is either nondiscriminatory policies or practices of the school district, or conditions beyond the control of the school district.⁴⁰ If, however, the disparity does not involve one of these factors, a court typically will not presume the disparity is a vestige of *de jure* segregation.⁴¹ The party claiming the disparity is a vestige of *de jure* segregation then bears the burden of proving the cause of the disparity is prior constitutional violations by the school district.⁴²

2. Proving Causation

In some recent cases, the issue of causation has been key to deciding to declare a school system unitary. Although disparities in *Green* factors still exist in many of the school districts that have sought a declaration of unitary status, these school districts have argued, with much success, they were not responsible for causing those disparities. For example, many courts have found the cause of a racial disparity in student assignments, a *Green* factor, is not a prior system of *de jure* segregation but rather social and economic forces, especially housing patterns, that are beyond the control of school officials.⁴³ Similarly,

39. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 363 n.5 (W.D. Ky. 2000) (“The Court will presume causation when the imbalance is one of the six *Green* factors or a practice found specifically discriminatory by the original Decree.”).

40. See *Hoots*, 118 F. Supp. 2d at 584 (“Once a constitutional violation has been established, the defendant ‘bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.’ (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992))). The court in *Hoots* further explained that “the defendants may offer proof that any current racial disparity in the areas encompassed by either the *Green* factors or the court-ordered ancillary relief is caused by variables outside the school district’s control and thus is not a vestige of the prior constitutional violation.” *Id.* at 584.

41. See *Hampton*, 102 F. Supp. 2d at 362 (“[T]he presumption of causation will only be applied to [non-*Green*-factor] disparities if the court has already specifically found . . . that the district has suffered [the disparities] as a result of the dual system.” (quoting *Jenkins v. Missouri*, 122 F.3d 588, 594 (8th Cir. 1997) (alterations in original) (internal quotation marks omitted)); see also *id.* at 368 n.21 (“Because Advanced Placement courses are neither *Green* factors nor elements of the desegregation Decree, racial disparities in those courses . . . are [] not entitled to the causation presumption.”); cf. *People Who Care v. Rockford Bd. of Educ.*, 2000 WL 1855107 at *21 (N.D. Ill. Aug. 11, 2001) (“If there are salient, non-discriminatory variables that would explain this systematic and system-wide return to segregated classrooms, the District has not offered them.”).

42. This is likely to be difficult. See *infra* notes 43-46 and accompanying text (indicating that courts often find that school districts are not the cause of racial imbalances).

43. *E.g.*, *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 979 (W.D. Mich. 2002) (“The current racial composition of the BHASD [Benton Harbor Area School District] enrollment is not causally related to the earlier Constitutional violations found by this court, but rather is the result of demographic and economic forces that are not unique to Benton Harbor and that both predated and continued through this litigation.”); *Hampton*, 102 F. Supp. 2d at 373 (“[T]his community’s racial housing patterns are probably a complex result of pre-1917 racial zoning restrictions, pre-*Shelley* racially restrictive covenants, decisions about geographic placement of public housing, ‘white flight’ after the school’s initial 1956 desegregation, numerous socioeconomic factors,

courts have accepted socioeconomic explanations for racial disparities in other *Green* factors, such as extracurricular activities⁴⁴ and faculty and staff assignments.⁴⁵

In general, courts are increasingly asserting that schools operate within a larger social and economic environment, and that a school system cannot be held responsible for causing all instances of racial disparity within the school system.⁴⁶ Consequently, presumptions about causation are becoming less important for determining which present racial disparities are vestiges of *de jure* segregation. Even when causation is presumed, a school district's burden⁴⁷ of proving that it did not cause the disparity, and that the disparity is therefore not a vestige of segregation, is becoming easier to satisfy.

C. The Practicability Factor

Even when a court finds a school system has not eliminated all vestiges of *de jure* segregation, the court may nevertheless find the school system has done everything practicable to eliminate the remaining vestiges, and therefore should be released from judicial supervision.⁴⁸ Especially when a school system has been operating for a lengthy period under a desegregation decree, a court is quite likely to find the school system has done everything practicable

and personal choice.”); *Dowell v. Bd. of Educ.*, 778 F. Supp. 1144, 1167 (W.D. Okla. 1991) (“[C]urrent residential segregation in Oklahoma City . . . is caused by the private choices of blacks and whites, based on such factors as economic status, housing affordability, job location, personal preferences, and social and neighborhood relationships.”).

44. *E.g.*, *Hoots*, 118 F. Supp. 2d at 590 (“[S]tudents may choose not to participate in extracurricular activities for various reasons, including responsibilities and pressures outside of school.”); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 768 (3d Cir. 1996) (“We cannot, however, expect a school district to compel or deny student participation in non-compulsory extracurricular activities merely to effect a racial balance.”).

45. *E.g.*, *Coalition to Save Our Children*, 90 F.3d at 767 (“[T]he shortage of minority teachers in the four school districts is not a vestige of *de jure* segregation in Northern New Castle County, but rather a manifestation of an unfortunate contemporary national trend. Indeed, even Appellant’s expert testified that there is a critical shortage of black teachers in the public schools.”); *Id.* at 768 (finding that “it would be impractical” to reassign support staff “in order to attain greater racial balance” because “forced reassignment of these part-time, low-wage employees could create hardships on these workers with respect to child care, commuting time, distance from work and expenses”).

46. *E.g.*, *Hampton*, 102 F. Supp. 2d at 362 (“[F]ederal courts should hold school boards accountable for their own bad conduct and its consequences, but not for all society’s other racial, economic, and educational ills.”).

47. Usually, the burden is the school district’s because usually the school district is the party claiming that it did not cause the disparity; occasionally, however, a school district claims that it did cause the disparity. *See, e.g.*, *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 232 (W.D.N.C. 1999) (“CMS takes a bizarre posture in this late phase of the case, arguing that it has not complied with the Court’s orders.”).

48. *See Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (“The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.”).

to eliminate those racial inequalities that are vestiges of *de jure* segregation.⁴⁹ If five or ten or twenty-five years of judicial supervision pass without the reconciliation of an acknowledged racial disparity, courts may assume that the disparity is not susceptible to being remedied by judicial supervision.⁵⁰

The likelihood that a court will find a disparity is not a vestige of *de jure* segregation or that it is a vestige but cannot practicably be eliminated, means that desegregation decrees issued under *Brown v. Board of Education* are unlikely to be effective tools for remedying present racial disparities in the academic achievement of black and white students.⁵¹

II. REMEDYING THE ACHIEVEMENT GAP

A. Why Most Desegregation Decrees Cannot Remedy an Achievement Gap

Numerous studies document the disparate academic achievement of black and white students.⁵² Academic achievement, however, is not one of the factors

49. See, e.g., *Coalition to Save Our Children*, 90 F.3d at 756 (“It is beyond dispute that racism and bigotry continue to tear at the fragile social fabric of our national and local communities, and that our best efforts as citizens are needed to address this problem at many levels. However . . . court-supervised school desegregation alone cannot eliminate racial discrimination”); *Hampton*, 102 F. Supp. 2d at 374 (“[N]o one has suggested that continuation of the Decree has a realistic chance of achieving demographic integration. Kentucky school boards may be powerful, but they cannot move people within the county.”); *Hoots*, 118 F. Supp. 2d at 584 (“To state the obvious, ‘court-ordered desegregation alone cannot eliminate racial discrimination.’” (quoting *Coalition to Save Our Children*, 90 F.3d at 756)); *Dowell*, 778 F. Supp. at 1171 (“[N]either the Board nor this court, after all, has any authority over housing”).

50. See *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537 (7th Cir. 1997) (asserting that “were there a feasible means, decreable by a court, of closing the gap in educational achievement between white and black students, the gap would have been closed by now”).

51. The limited effectiveness of desegregation decrees as a means of remedying racial disparities is reflected in the absence, in the past decade, of any new decrees being issued:

Federal court litigation concerning school desegregation today is exclusively concerned with pending school desegregation cases. Although significant, new school desegregation remedies were ordered in the 1980’s, the 1990’s saw no new school desegregation remedies in federal court.

Federal school desegregation litigation today involves exclusively outstanding remedial orders.

Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 564 n.399 (1999) (internal citation omitted).

52. See, e.g., Anemona Hartocollis, *Racial Gap in Test Scores Found Across New York*, N.Y. TIMES, Mar. 28, 2002, at A1 (describing standardized test scores from New York State, which “show that black and Hispanic students continue to lag as they go through school and that in many cases the gap worsens. The achievement gap by race and ethnicity, which mirrors similar findings nationwide, exists across the board, from affluent suburbs to large cities, but it is most striking in urban areas with high concentrations of poverty, like New York City.”); Kate Zernike, *Test Results From States Reveal Gaps in Learning*, N.Y. TIMES, Apr. 9, 2001, at A14 (reporting findings of a ten-year, nationwide study that “only two states, Georgia and Massachusetts, reduced the gap between white students and black or Hispanic students in fourth-grade math. No state did so in eighth grade, leaving gaps as wide as 56 points in Washington, D.C., and 35 points in New

listed in *Green* as a presumed vestige of *de jure* segregation.⁵³ Further, most courts did not specifically find, in their desegregation decrees, that disparate achievement was causally related to *de jure* segregation.⁵⁴ Given that disparate achievement is a factor identified neither in *Green* nor in most desegregation decrees, most courts today will all but refuse to consider the possibility that an achievement gap is a vestige of *de jure* segregation.⁵⁵ Additionally, even if a court does consider the possibility, it is likely to find that factors beyond the school district's control have caused the gap.⁵⁶ If the school district did not cause the gap, then the school district is not legally obligated to remedy the gap.⁵⁷

Jersey. In reading, only Delaware reduced that same gap."); Anjetta McQueen, *U.S. Kids' Math Scores Rise; Reading Slips; Federal Report Says Blacks Remain 4 Years Behind Whites in Literacy*, CHIC. TRIB., Aug. 25, 2000, at 10 ("The government's 1999 National Assessment of Education Progress also shows a widening gap in the test performance of white and black elementary school students on reading, math and science.").

53. See text accompanying *supra* note 38 (listing *Green* factors).

54. The importance of what was and was not included in an original desegregation decree was highlighted in a recent decision by the Eighth Circuit in *Jenkins v. Missouri*. 216 F.3d 720 (8th Cir. 2000) (*en banc*). This decision upheld the district judge's finding that an achievement gap was within the scope of the desegregation decree. *Id.* at 725. A group of three dissenting judges forcefully argued that it was not: "My point is that not only does *Green v. County School Board of New Kent County* omit student achievement as a factor for consideration for unitary status, *Jenkins III* specifically excludes this factor because it is controlled, as the Supreme Court noted, by circumstances wholly independent of unlawful discrimination." *Id.* at 736 (Beam, J., dissenting, joined by Bowman & Loken, JJ.) (citations omitted). The dissenters also noted that most courts considering the question have found that an achievement gap is not a vestige of segregation. *Id.* (citing *United States v. City of Yonkers*, 197 F.3d 41, 54-55 (2d Cir. 1999); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 776-77 (3d Cir. 1996)).

55. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 366 (W.D. Ky. 2000) ("Most federal courts looking at the achievement gap issue have declined to even consider it as a vestige." (citing *United States v. City of Yonkers*, 197 F.3d 41, 55 (2d Cir. 1999); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 776-78 (3d Cir. 1996); *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 272 (W.D.N.C. 1999); *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1282 (D. Colo. 1995)).

56. See, e.g., *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1076 (7th Cir. 2001) ("[I]t is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents' education and employment, family size, parental attitudes and behavior, prenatal, neonatal, and child health care, peer-group pressures, and ethnic culture."); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 766 n.17 (3d Cir. 1996) ("That African-American children may achieve at sub-standard levels in school is indeed the product of many complex socio-economic factors."); *Hampton*, 102 F. Supp. 2d at 366 ("It seems likely that numerous external factors—including high poverty incidence, lower levels of parental education, higher incidence of families without two active parents, frequent moves, and less access to quality pre-school education—produce the disparity [in achievement].").

57. *People Who Care*, 246 F.3d at 1076 ("The board has no legal duty to remove those vestiges of societal discrimination for which it is not responsible."); *NAACP v. Duval County Sch.*, 273 F.3d 960, 975 (11th Cir. 2001) ("The Constitution does not require a school board to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control." (citing *Freeman v. Pitts*, 503 U.S. 467, 495 (1992))). Further, courts can order school districts to remedy only those racial disparities that are vestiges of past *de jure* discrimination. If a present racial disparity is not the result of prior segregation, then *Brown* does not authorize courts to order that the disparity be remedied: "Federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 282 (1977).

Several additional factors make it increasingly difficult for a court to find that an achievement gap is grounds for maintaining jurisdiction over a school district that has otherwise complied with the requirements of a desegregation decree. First, the mere passage of time diminishes the likelihood that a court will find a present racial inequality to be causally related to a prior system of *de jure* segregation.⁵⁸ Also, the Supreme Court has explicitly indicated that judicial supervision of school districts under *Brown* should be temporary.⁵⁹ In most cases, then, the existence of an achievement gap will not prevent a court from finding that a school district has done everything practicable to eliminate vestiges of prior segregation, and thus has achieved unitary status and should be released from judicial supervision.

B. How to Remedy an Achievement Gap: Some Successful Strategies

Although school districts have a legal duty to remedy only those racial disparities they have caused,⁶⁰ school districts nonetheless do have the ability to diminish racial disparities they have not caused. A growing body of research has identified strategies schools can use to reduce an achievement gap between black and white students, regardless of the cause(s) of the gap.⁶¹ Reducing class

58. See *Freeman v. Pitts*, 503 U.S. 467, 491-92 (1992) ("As the *de jure* violation becomes more remote in time . . . it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.")

59. *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." (footnotes omitted)); *Freeman*, 503 U.S. at 490 ("[R]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our system of government."); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (noting that desegregation decrees "are not intended to operate in perpetuity"); see also *Davis v. Sch. Dist.*, 95 F. Supp. 2d 688, 695 (E.D. Mich. 2000) ("Federal court involvement in our local schools through injunctive supervision and monitoring was never intended to be without limit or end.")

The lower federal courts seem to be following the Supreme Court's directive to bring supervision of local school districts to an end as quickly as possible. See Wendy Parker, *The Future of School Desegregation*, 94 Nw. U. L. REV. 1157, 1157-58 (2000) ("In the last ten years, courts have closed school desegregation cases for Buffalo, Denver, Savannah, Oklahoma City, and Wilmington. 'Exit plans' govern the school districts in Dallas, Kansas City, Missouri, and Little Rock so that these desegregation cases can be dismissed as well." (footnotes omitted)). Parker cautions against concluding that "desegregation is dead," especially in the southern school districts she examined in detail. *Id.* at 1159-60. However, she also concludes that while "pending school desegregation litigation offers the possibility of providing meaningful remedies today . . . that possibility wanes with the passage of time. For this reason, if plaintiffs are to use school desegregation litigation as a tool to redress educational inequities, the time to is now." *Id.* at 1220. This essay suggests that even though Parker may be correct that litigation is still a viable means of achieving a racial balance in terms of the *Green* factors or factors identified in a desegregation decree, such litigation is in most school districts not a viable means of remedying a gap in academic achievement between black and white students.

60. See *supra* note 57 (noting that if a school district is not the cause of a racial disparity, then the school district is not under a legal duty to remedy the disparity).

61. Various theories have been proposed to explain the test score gap. In addition to those offered by the courts, see cases cited *supra* note 56, are those offered by social scientists. For example, one theory currently receiving attention is that the cause of at least some portion of the lower academic achievement of black students is "stereotype threat," which is "the fear of being viewed through the lens of a negative stereotype, or the

size is perhaps the most promising strategy; results from Tennessee's Project STAR (Student-Teacher Achievement Ratio), for example, consistently demonstrate that reducing class size not only improves the academic achievement of all students, but also narrows the achievement gap by benefitting most those who are achieving at the lowest levels.⁶² Similarly, studies of a structured reading program developed at Johns Hopkins, called Success for All, reported the program "not only increases overall performance—it also helps low-scoring students the most."⁶³ Several other strategies for improving the academic achievement of black students, such as emphasizing cognitive skills in preschool⁶⁴ and strengthening the academic abilities of teachers, show promising initial results.⁶⁵ The overall implication of these programs is that a school system can reduce an achievement gap regardless of whether the school system, parents' lack of education, or residential housing patterns caused the achievement gap.

Of course, no single strategy is likely to work in all school districts. The success some schools have had in reducing an achievement gap should, however, place pressure on any school district claiming that it cannot produce greater equality in achievement. To justify its claim of inability, the school district should be able to demonstrate that its achievement gap is somehow different from achievement gaps that have been reduced by other school districts.

fear of doing something that would inadvertently confirm that stereotype." Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1, 1999, at 44.

Deciding which theory best describes the cause(s) of the achievement gap is not, however, necessary for diminishing the gap. Many phenomena can be altered without being understood. Aspirin, for example, can alleviate the pain of a headache even though the cause of the headache is unknown. Similarly, decreasing class size, for example, can decrease an achievement gap, even while the cause of the gap remains unknown. *See infra* notes 62-65 & accompanying text (discussing several programs demonstrated to reduce an achievement gap). Even when the cause of a certain condition is known, eliminating the condition does not necessarily require eliminating the cause; a school system might not be able to remedy the factors that cause a child to arrive at school hungry, but the school can feed the child breakfast. Finally, while knowing how a remedy works can assist in refining the remedy and developing even more effective new remedies, the costs of waiting until we understand why an achievement gap exists weigh in favor of implementing programs demonstrated to reduce the gap, even absent agreement about why these programs are effective.

62. "Tennessee's Project STAR showed that students in smaller classes tended to achieve higher grades, had better high school graduation rates and were more likely to attend college." Bob Herbert, *In America: Fewer Students, Greater Gains*, N.Y. TIMES, Mar. 12, 2001, at A15. Additionally, this study found, "While students were in small classes, the black-white academic achievement gap narrowed by 38 percent. Some of this improvement was lost when the youngsters returned to normal-size classes, but not all of it." *Id.*; *see also* Ronald F. Ferguson, *Can Schools Narrow the Test Score Gap?*, in THE BLACK-WHITE TEST SCORE GAP 360-62 (Christopher Jencks & Meredith Phillips, eds. 1998) (discussing earlier, similar results from Project STAR).

63. Ferguson, *supra* note 62, at 346.

64. Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 46 (Christopher Jencks & Meredith Phillips, eds. 1998) (describing one study which "strongly suggests that cognitively oriented preschool programs can improve black children's achievement scores").

65. Ferguson, *supra* note 62, at 351 (noting that "initial certification for teachers is probably helping to narrow the test score gap between black and white students").

The idea that a school system in which an achievement gap exists ought to explain, if not to the parents of students who are spending their childhoods in ineffective schools then to the taxpayers who are funding those ineffective schools, why it has not implemented programs to increase the academic achievement of black students is not meant to suggest either that the school system has a legal obligation to remedy the gap or that any legal cause of action could be brought to compel the school system to remedy the gap. A school system is not legally obligated to remedy an achievement gap it did not cause,⁶⁶ and no legal course of action exists for compelling the school district to remedy the gap.⁶⁷ School systems are required, by the Fourteenth Amendment and

66. See *supra* note 57.

67. A claim that disparate academic achievement is a present violation of either the Fourteenth Amendment or a federal civil rights statute such as Title VI (rather than a vestige of past discrimination) is unlikely to succeed, for several reasons. First, a racial disparity is a violation only if it is caused by conduct of the government. See *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 523-24 (6th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000)) (indicating that a disparity must be "fairly traceable" to defendant's conduct); *N.Y. City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (stating "the plaintiffs did not, in our view, submit adequate proof of causation to show a likelihood of success on the merits of their disparate impact claim"). Courts' findings that general societal factors are the cause of disparate achievement, see *supra* note 56, would thus foreclose a finding that an achievement gap is evidence of present discrimination. A court presented with a claim that an achievement gap is a violation of Title VI, for example, would likely say what the court said in *African American Legal Defense Fund, Inc. v. New York State Department of Education*:

[W]ith respect to plaintiffs' claim that the [state's policy for funding schools] has a disparate impact on minorities because of such factors as single parenting, poor housing, and medical problems, which contribute to absenteeism among inner-city students, I note that one cannot look to Title VI's regulations for remedy for any alleged disparate impact of this nature, however real and distressing. 8 F. Supp.2d 330, 338 (S.D.N.Y. 1998). Although the Supreme Court recently held that private individuals do not have a right to enforce disparate impact regulations enacted by government agencies under Title VI, *Alexander v. Sandoval*, 532 U.S. 275 (2001), claims of disparate impact violations of Title VI might still be brought under 42 U.S.C. 1983. See *White v. Engler*, 188 F. Supp. 2d 730, 743 (E.D. Mich. 2001) (ruling that plaintiffs could "bring a private action under § 1983 to enforce rights contained in Title VI's disparate impact regulations.").

Further, a racial disparity is not a violation of either the Fourteenth Amendment or Title VI unless the state intended to discriminate. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that a discriminatory purpose is necessary for establishing a Fourteenth Amendment violation); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (suggesting same for a Title VI claim).

Intent to discriminate likely requires more than a school district's decision not to implement programs to reduce an achievement gap. Absent evidence that its decision was motivated by a desire to disadvantage black students, a school district that has simply ignored the existence of an achievement gap might be guilty of incompetence, but probably not of discrimination:

Most often courts also insist that there be an additional showing that the disparate or different treatment is the product of deliberate or conscious decisionmaking, to satisfy the requirement that the discrimination was "intentional." Most notably, in constitutional adjudication since *Washington v. Davis*, the Court has been strict in demanding proof of discriminatory intent, cutting off many potential claims in which unequal treatment stems from indifference, neglect, or structural inequities.

Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 748-49 (2001) (footnotes omitted).

by federal civil rights statutes, to remedy those racial inequalities they are responsible for causing.⁶⁸

On the other hand, the primary reason schools exist is to educate.⁶⁹ If factors beyond the control of a school district have caused the school district to fail to educate black children adequately⁷⁰ yet the school district has chosen not to implement programs that could educate black children more effectively, it is difficult to understand why the school district continues to receive funding to pay for the ineffective programs it has chosen. Continuing to pay for educational programs known to be ineffective is like continuing to pay for penicillin to treat cancer. A better, although not legally mandated, policy would seem to be for legislatures to require schools to implement programs shown to be effective, or else use the resources presently funding the schools' ineffective programs to try to remedy the factors responsible for the schools' failure to educate black students.⁷¹

C. Why to Remedy an Achievement Gap: One Example from Higher Education

The importance of remedying the achievement gap is highlighted by recent court decisions concerning the constitutionality of considering race as a factor in the admissions decisions of public universities.⁷² In Texas and Georgia, federal courts have held that admissions policies that give an advantage to black applicants, as compared to white applicants with higher grades and test scores, violate the equal protection rights of white applicants.⁷³ In Michigan, two district courts reached opposite conclusions in separate cases against the University of Michigan.⁷⁴ The Sixth Circuit Court of Appeals recently reversed the decision that found the University's race-conscious law school admissions

68. *Hampton v. Jefferson County v. Bd. of Educ.*, 102 F. Supp. 2d 358, 362 (W.D. Ky. 2000) (“[F]ederal courts should hold school boards accountable for their own bad conduct and its consequences, but not for all society’s other racial, economic, and educational ills.”). School districts may, however, have additional obligations under state law. *See supra* note 25.

69. “Promoting and achieving academic progress for all students, irrespective of race, is the central purpose of a public school system.” *Hampton*, 102 F. Supp. 2d at 367.

70. *See cases cited supra* note 56 (finding that school systems are not the cause of racial disparities in academic achievement).

71. For example, based on courts’ findings that such factors as inadequate prenatal care and parental employment are responsible for causing an achievement gap, see cases cited *supra* note 55, legislatures could contribute to reducing the gap by providing prenatal care and employment assistance.

72. These decisions follow decisions regarding race-conscious assignment policies in elementary and secondary schools. *See supra* note 22.

73. *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1368-69 (S.D. Ga. 2000), *aff’d*, 263 F.3d 1234 (11th Cir. 2001). *But see* *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (upholding race-conscious admissions policy).

74. *Gruiter v. Bollinger*, 137 F. Supp. 2d 821, 824 (E.D. Mich. 2001) (invalidating the consideration of race as a factor in law school admissions decisions); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000) (upholding the University’s present policy of considering race in undergraduate admissions).

policy to be unconstitutional.⁷⁵ This circuit split has inspired many commentators to predict that the next decision regarding race-conscious admissions policies will be handed down by the Supreme Court.⁷⁶

Some who believe in the importance of ensuring the presence of black students in higher education classrooms will likely continue to argue that courts should allow race-conscious admissions policies for the purpose of promoting an effective learning environment.⁷⁷ Whether these advocates will ultimately succeed in convincing the Court that racial diversity is a compelling governmental interest, and that consideration of race in admissions decisions can be narrowly tailored to furthering that interest, remains uncertain.⁷⁸ Arguably, a more certain way⁷⁹ to ensure that black applicants gain admission to colleges

75. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

76. Courts have reached these varying results even though they all have claimed to be following the Supreme Court's decision in *Bakke*. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Predictions abound that the Supreme Court will soon agree to hear a race-conscious admissions policy case, perhaps even one of the University of Michigan cases, to resolve the disputed question of whether *Bakke* in particular, and the Constitution in general, allow the use of race-conscious admissions policies to achieve the benefits of racial diversity. See, e.g., Tony Mauro, *The Next Great Affirmative Action Fight*, LEGAL TIMES, Oct. 22, 2001, at 6 (“[A]dvocates on both sides of the racial preferences issue are looking to a pair of cases involving affirmative action programs at the University of Michigan as the ones with the most staying power and the highest likelihood of attracting Supreme Court attention.”); Jodi Wilgoren, *Affirmative Action Plan is Upheld at Michigan*, N.Y. TIMES, Dec. 14, 2000, at A16 (“The twin opinions [in the University of Michigan and the University of Washington cases] contradict a 1996 appellate decision that eliminated affirmative action at the University of Texas Law School, laying the groundwork for review of the issue—and, most likely, the Michigan case—by the United States Supreme Court.”). Two Supreme Court justices have stated expressly that they are waiting for the right case that will allow them to decide the constitutionality of race-conscious admissions policies:

Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. . . . Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.

Texas v. Hopwood, 518 U.S. 1033, 1033-34 (1996) (Ginsburg, J., joined by Stevens, J., concurring in the denial of certiorari).

77. See, e.g., Kronman, *supra* note 12, at 876 (“The diverse classroom is a natural laboratory for the kind of experimentation in judgment and outlook that is essential to the growth of a student's imaginative powers.”); Kent D. Syverud, *Expert Report: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 451, 452 (1999) (“I have come to believe that all law students receive an immeasurably better legal education, and become immeasurably better lawyers, in law schools and law school classes where the student body is racially heterogeneous.”).

78. The need to prove both that diversity is a compelling governmental interest and that consideration of race in admissions decisions is narrowly tailored to furthering that interest comes from the Supreme Court's decisions in *City of Richmond v. J.A. Croson Co.* and *Adarand Constructors, Inc. v. Peña*. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) (plurality opinion) (invalidating a program that considered race in awarding government contracts because “the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race”).

and graduate schools is to narrow the gap between their test scores and the test scores of white applicants.⁸⁰

Even if the Supreme Court does decide that creating a diverse educational environment justifies race-conscious admissions policies, the number of black students that such policies will help will remain uncertain. To distinguish present policies from a quota system of the sort that the Supreme Court found unconstitutional in *Bakke*,⁸¹ those who argue in support of race-conscious admissions policies now speak in terms of wanting to admit a "critical mass" of black students.⁸² The express purpose of admitting a critical mass is to create a certain kind of learning environment rather than to provide black students with educational opportunities. Thus, presumably only whatever number of black students is necessary to create this learning environment can expect to gain admission under these current policies. Perhaps the uncertainty associated with this approach is an acceptable price to pay for the admission of some black students who otherwise would not be admitted. On the other hand, this uncertainty could be avoided if the achievement gap were diminished and a sufficient number (or more) of black students for creating an effective learning environment could be admitted on the basis of their test scores.

Finally, although the Supreme Court might find race-conscious admissions policies to be constitutional, states and their universities will remain free to

79. Although not a mutually exclusive way, at least in the short term. In the long run, eliminating the achievement gap could eliminate the need for race-conscious admissions policies. See *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002) ("The record indicates that the Law School intends to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means.").

80. Schools could also eliminate or reduce their reliance on standardized test scores in making admissions decisions. This suggestion has been advanced recently, for example, by the president of the University of California. See Michael A. Fletcher, *Key SAT Test Under Fire in Calif.: University President Proposes New Admissions Criteria*, WASH. POST, Feb. 17, 2001, at A1 (noting that "the president of the University of California is calling for the elimination of the venerable SAT as a factor in selecting students there"); see also Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 945-46 (2001) (arguing against the continued reliance on standardized test scores).

This approach, however, is also controversial. See Jack E. White, *Why Dropping the SAT is Bad for Blacks*, TIME, Mar. 12, 2001, at 76 (quoting the president of Howard University as opposing "any abandonment of standardized tests that would carry with it the implication that [black students] just can't meet the mark," and adding, "If I had my way, the University of California would keep using the SAT until black students catch up with whites, Asians and immigrants from the Caribbean. It's a matter of ethnic pride.").

81. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271-72 (1978).

82. See, e.g., Richard O. Lempert, *Activist Scholarship*, 35 LAW & SOC'Y REV. 25, 31 (2001) (stating that after testifying in the *Grutter* case, "I was disappointed and angry [upon reading the opinion] because my remarks were taken out of context to support the judge's finding that the use of the term 'critical mass' in the admissions policy was designed to establish a quota.").

decline to adopt such policies.⁸³ Voters in Washington⁸⁴ and California⁸⁵ have gone so far as to approve legislative initiatives that ban the use of race-conscious admissions policies by state universities. Thus, those who believe diversity is a compelling governmental interest might win the constitutional battle over race-conscious admissions policies, but those who believe diversity is nothing more than reverse discrimination⁸⁶ might win the larger legislative (majoritarian) struggle over affirmative action.⁸⁷

83. Presently, most universities do not consider race in admissions: "The vast majority of undergraduate institutions accept all qualified candidates and thus do not award special status to any group of applicants, defined by race or on the basis of any other criterion." BOWEN & BOK, *supra* note 13, at 15.

84. Legislation prohibiting the use of race-based admissions policies was enacted following voter approval of Initiative Measure 200, which mandates that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Smith v. Univ. of Wash.* Law Sch., 233 F.3d 1188, 1192 (9th Cir. 2000) (quoting Wash. Rev. Code § 49.60.400(1)).

85. In 1996, voters in California approved Proposition 209, which prohibits any state body from using race, as well as ethnicity or gender, in hiring or admissions decisions. See Rebecca Trounson & Kenneth R. Weiss, *Minorities Up 42.5% in UCI's Fall Admissions*, L.A. TIMES, Apr. 4, 2001, at B1; see also Jodi Wilgoren, *U.S. Court Bars Race as Factor In School Entry*, N.Y. TIMES, Mar. 28, 2001, at A1 ("The current push against affirmative action began in 1995, when the Regents of the University of California banned the use of race in admissions.").

86. Judge Posner, for example, has called racial preferences in hiring "reverse discrimination." Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (stating that "the Supreme Court has rejected the 'role model' argument for reverse discrimination"). Alexander Bickel offered a more impassioned statement of this position:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.

ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975). For an equally impassioned statement of the opposite position, consider Judge Higginbotham's reaction to the Fifth Circuit's decision invalidating the University of Texas Law School's race-conscious admissions policy: "I sometimes feel as if I am watching justice die." A. Leon Higginbotham, *Breaking Thurgood Marshall's Promise*, N.Y. TIMES, Jan. 18, 1998, § 6, at 28, quoted in Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1916 (1999).

87. Public opinion regarding race-conscious policies is difficult to assess precisely, because so much depends upon how questions are presented. See Carol M. Swain et al., *Life After Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities*, 16 HARV. BLACKLETTER L.J. 147, 161-62 (2000) ("A great deal of research has demonstrated that how a person responds to survey questions on affirmative action issues depends to a large degree on how the question is framed and the context of the question." (footnote omitted)). Still, a majority of whites, and perhaps a majority of blacks as well, seem to oppose preferences based on race. One study reported: "Almost a majority of African Americans (49% to 45%) joined with the overwhelming majority of white Americans (83% to 15%) to oppose preferential treatment of blacks as a means of improving the group's societal position." *Id.* at 163. Similarly, according to one scholar:

[I]t is hard to know the precise division of opinion. No researcher in this field doubts, however, that the public's opinion remains decidedly and intensely negative, pretty much regardless of how the questions are formulated. . . . Indeed, simply mentioning affirmative action generates much less favorable responses to a range of other questions related to blacks.

Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 56 (2002) (footnotes omitted).

III. HARD QUESTIONS: HOW BEST TO PROMOTE RACIAL EQUALITY?

A. Now What?

One of the harms identified in *Brown v. Board of Education* as resulting from state-enforced segregation was a “badge of inferiority” inflicted upon black children.⁸⁸ As commentators have pointed out, the Court may have placed too much emphasis on the stigmatizing effects of the system of *de jure* segregation; the laws invalidated in *Brown* should have been found to violate the Fourteenth Amendment regardless of their stigmatizing effects.⁸⁹ Even though stigmatization was perhaps inappropriate as a basis for its decision, the *Brown* Court was nonetheless correct in its assessment that providing an inferior education to black children is stigmatizing, both directly (in terms of the lower educational achievement of these children, in a society that values educational achievement)⁹⁰ and indirectly (in terms of denying to these children the social and economic opportunities for which educational achievement is a prerequisite).⁹¹

Under *Brown*, courts sought to end racial discrimination in public schools by ensuring that black children were attending the same schools as white children.⁹² Many courts are now deciding the job is done, at least to the extent that it can be, and are thus terminating their jurisdiction over local school districts. This leaves parents, teachers, administrators and policymakers to decide

88. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate [black children] 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.”); see also *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 375 (W.D. Ky. 2000) (“*Brown* and the post-*Brown* cases said that state-imposed segregation created a badge of inferiority and degradation.” (citing *Brown*, 347 U.S. at 494)).

89. As Professor Charles Black observed:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description. Here I must confess to a tendency to start laughing all over again.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960). Justice Thomas has made the point more succinctly: “Segregation was not unconstitutional because it might have caused psychological feelings of inferiority.” *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring); see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 185 (1995) (“We can argue for another four decades about whether *Brown v. Board of Education* was correctly reasoned or adequately enforced, but its conclusion was unequivocally right.”).

90. See White, *supra* note 80, at 76 (“The sad truth is that as long as we’re lagging behind academically, we can’t call ourselves equal.”).

91. See *supra* note 12.

92. See *supra* notes 29-30 and accompanying text.

whether the pursuit of racial diversity is still the best way to pursue the broader goal of promoting racial equality.

B. Which is Worse: A Lack of Racial Diversity or Disparate Academic Achievement?

In an ideal world, states would seek to achieve both racially diverse schools and high levels of academic achievement for all students. In the real world, however, limited resources force states to choose which among numerous worthy goals to pursue, and how to pursue them. If a school system or a state legislature wants to promote racial equality, it can pursue this goal in several ways. One possibility is to develop a magnet program to attract white students to a predominantly black school,⁹³ or simply bus children of the appropriate races to the appropriate schools, with the goal of increasing racial diversity. Another possibility is to hire more teachers and reduce class size, or create a preschool program focused on developing cognitive skills, with the goal of increasing academic performance.

What should a state do when facing a choice between devoting resources to increasing racial diversity and devoting those resources to increasing academic achievement? The answer depends in part upon how the value of racial diversity is defined.

1. What Value Does Racial Diversity Achieve?

a. Fostering Nondiscriminatory Attitudes

For some, what racial diversity contributes to efforts to achieve racial equality is the possibility of fostering nondiscriminatory attitudes, by providing opportunities for interacting with people of different races.⁹⁴ Few people, either

93. Any school district that is really considering such a plan might also want to consider the very expensive but altogether unsuccessful experience of the Kansas City Missouri School District:

The key aspect of the desegregation plan—a highly touted and extraordinarily expensive magnet school program—has also failed to lure a significant number of white students to the KCMSD. Although more than \$500 million has been spent to date on construction of new magnet schools and remodeling of existing schools, the KCMSD has attracted fewer than 750 new white students, less than 3% of the district's total enrollment. Numerically, the district is in about the same position it occupied before the desegregation plan was implemented.

Deborah E. Beck, Casenote: *Jenkins v. Missouri: School Choice as a Method for Desegregating an Inner-City School District*, 81 CALIF. L. REV. 1029, 1035-36 (1993).

94. See Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 745 (1998) ("A number of studies examine the effects of desegregation on students' racial attitudes and social behavior. This research is fairly consistent in reporting that black and white students in desegregated schools are less racially prejudiced than those in segregated schools."). The problem, however, with this kind of research, which does not randomly assign children to diverse and nondiverse schools, is that it cannot rule out the possibility that a third variable (such as parents who value diversity) explains both why certain children are enrolled in diverse schools and why these same children are less racially prejudiced than

black or white, are likely to disagree with this idea that exposure to racially diverse environments can foster nondiscriminatory attitudes: Even the plaintiffs in the University of Michigan cases, who are challenging the constitutionality of admissions policies,⁹⁵ have conceded, at least *arguendo*, that a racially diverse learning environment is “good, important, and valuable.”⁹⁶

Most likely, racially diverse schools can foster nondiscriminatory attitudes. And, certainly, fostering nondiscriminatory attitudes is a worthy goal. On the other hand, no matter how nondiscriminatory attitudes may become, some racial inequalities—and the accompanying harms of psychological stigma⁹⁷ and disparate opportunities⁹⁸—will remain. The academic achievement of black students will not be improved by diminishing the discriminatory attitudes of white students. Given that nondiscriminatory attitudes are not a panacea for racial disparities, the possibility exists that seeking to eliminate these disparities might be a more promising route to achieving racial equality than seeking to foster such attitudes.⁹⁹

children enrolled in nondiverse schools. Nonetheless, it remains likely that some causal connection exists between exposure to diverse environments and diminished racial prejudice. Discussing some of the implications of exposing children only to environments that are racially isolated, Yale Law School Dean Anthony Kronman has observed:

Children growing up in a racially segregated environment, white or black, have a set of early experiences unlike those of children on the other side of the color line. And these differences of experience in turn shape attitudes, producing characteristically different beliefs and judgments about society as a whole, and contrasting impressions of the relation between the two races. Moreover, these differences of judgment and outlook, formed in childhood, often persist into later life and retain their influence despite constant exposure to America's polyglot culture and adult employment in a more integrated work environment.

Kronman, *supra* note 12, at 879.

95. See *supra* note 8 and accompanying text.

96. According to the district court in *Gratz*:

Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is “good, important, and valuable.”

Gratz v. Bollinger, 122 F. Supp. 2d 811, 823 (E.D. Mich. 2000); see also Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 54 (2001) (noting that “the plaintiffs in the Michigan litigation have submitted no expert reports contesting the value of diversity in education”).

97. See text accompanying *supra* note 90.

98. See *supra* note 12; see also *supra* notes 72-87 and accompanying text (discussing the need to reduce the achievement gap to ensure black students' access to higher education).

99. Two prominent social scientists who have studied the achievement gap in detail suggest:

Reducing the test score gap is probably both necessary and sufficient for substantially reducing racial inequality in educational attainment and earnings. Changes in education and earnings would in turn help reduce racial differences in crime, health, and family structure, although we do not know how large these effects would be.

Jencks & Phillips, *supra* note 64, at 3-4.

b. Avoiding Stigma

While most people would agree that racial diversity can foster nondiscriminatory attitudes, some see an additional value: the avoidance of the stigma that they suppose is inherent in a lack of racial diversity.¹⁰⁰ Many blacks, however, would disagree with the premise that the absence of racial diversity is inherently stigmatizing.¹⁰¹ In some cases, blacks may even seek what courts might call “racial imbalance” or “racial isolation” but blacks might more likely describe it as “afrocentric.”¹⁰² For example, in *Hampton v. Jefferson County Board of Education*, black parents sued to dissolve a desegregation decree so that their children could attend neighborhood schools even though those schools would probably lack racial diversity.¹⁰³

100. See, e.g., John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1794 (2000) (“[W]e risk a rapid return to a time when each school child could, and did, identify ‘white schools’ and ‘black schools’ simply by reference to the predominant race of the children attending them. . . . [T]his *de facto* resegregation of our schools will re-create the conditions condemned in *Brown* in 1954.”); Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725, 726 (1993) (asserting that “even if racial segregation of blacks is voluntary, as it is in AMBSs [all-male black schools], it is still harmful”); Lisa M. Fairfax, *The Silent Resurrection of Plessy: the Supreme Court’s Acquiescence in the Resegregation of America’s Schools.* 9 TEMP. POL. & CIV. RTS. L. REV. 1, 49 (1999) (“By allowing racially separate schools to persist, the Court [in *San Antonio Independent School District v. Rodriguez*] also ignored the danger of resurrecting *Plessy*’s view that such separation does not impart sociological harm on blacks. Even though racially separate schools may still impart stigmatic injury, most Justices fail to address the states’ duty to alleviate this injury.”); cf. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 259-60 (1991) (“This focus on ‘achieving and preserving an integrated school system,’ stems from the recognition that the reemergence of racial separation in such schools may revive the message of racial inferiority implicit in the former policy of state-enforced segregation.” (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 251 n.31 (1973) (Powell, J., concurring in part and dissenting in part)) (Marshall, J., dissenting).

101. See *Missouri v. Jenkins*, 515 U.S. 70, 120 (1995) (Thomas, J., concurring) (“It is clear that the District Court misunderstood the meaning of *Brown I*. *Brown I* did not say that ‘racially isolated’ schools were inherently inferior”); Liza Mundy, *Court-Ordered Busing Helped Remake Prince George’s County a Generation Ago*, WASH. POST, Jan. 30, 2000, at W6 (quoting the black superintendent of a Maryland school system: “We’ve been stigmatized by the concept that when a system is predominantly African American or predominantly minority, that it can’t be an excellent system. Americans need to wake up and get a grip and know that that’s not true.”); Parker, *supra* note 38, at 1159 (“More and more African-American leaders and parents are curtailing their support of desegregation litigation, on the grounds that the remedies are insulting, ineffective, or too burdensome.”).

Further, when blacks do support continued efforts to achieve racial diversity, their motivation usually, and quite logically, seems to relate as much to resource allocation as to racial balance:

The board’s reluctance to seek freedom from the court order, the only one in the Washington area, has little to do with ideology. For the most part, the board agrees with critics of busing that mandatory busing for racial balance must end and that children should be returned to educationally enriched neighborhood schools, even if that plan results in schools that are practically all one race.

The current conflict between the board, the county and the governor is about power and money.

Frazier, *supra* note 21, at A1.

102. See, e.g., Ronald Smothers, *Newark School to Offer Shelter with Education*, N.Y. TIMES, Mar. 26, 2000, at 14NJ-6 (quoting the headmaster of St. Benedict’s Prep: “[W]e are clear that we are an urban prep school serving an Afro-centric, Latin-centric student body.”).

103. 102 F. Supp. 2d 358, 359 (W.D. Ky. 2000).

Additionally, intervenors in *Hampton*, including the NAACP along with several other groups, sought to have a black teacher assigned to every school in the district, to serve as a role model for black students.¹⁰⁴ The district court found, however, that this kind of race-based assignment of teachers would be indistinguishable from the segregation that the Supreme Court in *Brown* had intended to remedy.¹⁰⁵ Clearly, though, a great moral difference exists between assigning black teachers to serve as role models for black students and refusing to allow black teachers to teach white students. The court's holding in *Hampton* might be understood simply as an application of the Supreme Court's "color-blind" equal protection jurisprudence;¹⁰⁶ the court's reasoning, however, suggests a failure to appreciate the difference between state-enforced segregation, which cannot help but be stigmatizing,¹⁰⁷ and voluntary separation, which perhaps cannot be stigmatizing at all.

2. Is Increasing Racial Diversity a Means of Equalizing Academic Achievement?

Perhaps choosing between racial diversity and academic achievement is not necessary; perhaps schools could increase the academic achievement of black students by increasing racial diversity. Several reasons exist, however, for questioning both the likely success and the implicit message of a plan to use racial diversity to reduce an achievement gap.

One problem is practical: in some districts, achieving racial diversity is presently a near impossibility. As some critics of desegregation cases—especially of the Supreme Court's decision in the case of *Milliken v. Bradley*—have pointed out, many school systems are racially isolated.¹⁰⁸ Districts that as a

104. *Id.* at 369 n.26 (discussing “[i]ntervenors’ suggestion that each school must have an African-American to serve as a role model”).

105. *See id.* (“Carried to its logical extreme, the ideal that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*.” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986))).

106. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (plurality opinion) (“Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause.”); *Wygant*, 476 U.S. 267, 282 (1986) (“The constitutional problem remains: the decision that petitioners would be laid off was based on their race.”).

107. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”); *Id.* at 495 (“Separate educational facilities are inherently unequal.”).

108. *See, e.g., Ryan, supra* note 25, at 281 (“As a result of *Milliken I* [which ruled that courts could not order busing between school districts], and in light of existing patterns of residential segregation, desegregation plans confined to urban areas could not achieve significant levels of integration because, as mentioned earlier, there simply were not enough white students left in most urban school systems.” (footnote omitted)); *cf. Milliken v. Bradley*, 418 U.S. 717, 757 (1974) (“By approving a remedy that would reach beyond the limits of the city of Detroit to correct a constitutional violation found to have occurred solely within that city the Court of Appeals thus went beyond the governing equitable principles established in this Court’s decisions.”).

whole lack racial diversity will simply be unable to create individual schools that are racially diverse.¹⁰⁹

A school district that holds out for racial diversity can find itself in the absurd position of neither achieving racial diversity nor increasing academic achievement. In North Carolina, for example, parents of black children protested when the state threatened to close Healthy Start, an unusually successful preschool program, because the program enrolled, depending on one's perspective, too many black children or not enough white children.¹¹⁰ Similarly, a program for gifted elementary school students in Maryland had spaces to admit additional students as well as a list of students waiting to be admitted, but, because the students on the waiting list were black and the available spaces were reserved for students who were white, the spaces for the white children remained unfilled while the black children remained on the waiting list.¹¹¹

Aside from the obstacles to creating racially diverse schools, two additional considerations caution against pursuing an increase in racial diversity as a means of increasing the academic achievement of black students. First, and more importantly, studies designed to determine the effects of racially diverse schools on the academic achievement of black students have produced evidence that is unclear,¹¹² and methodological difficulties hinder attempts to produce evidence that is more clear.¹¹³ While the available evidence does not establish conclusively that increasing racial diversity will not reduce an achievement

109. The possibility of creating racially diverse schools by transferring students across districts was foreclosed by the Supreme Court's decision in *Milliken v. Bradley*. See *supra* note 108.

110. See David J. Dent, *Diversity Rules Threaten North Carolina Charter Schools that Aid Blacks*, N.Y. TIMES, Dec. 23, 1998, at B8.

111. See Frazier, *supra* note 21, at A1. Recent desegregation cases describe instances of the same problem in reverse: programs in which spaces for black children remained unfilled while white children remained on a waiting list. See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 316-17 (4th Cir. 2001).

112. Some research has found that the academic achievement of black students is not substantially improved by attending racially diverse schools. See, e.g., Jencks & Phillips, *supra* note 64 (reporting that "large racial differences in reading skills persist even in desegregated schools, and a school's racial mix does not seem to have much effect on changes in reading scores after the sixth grade or on math scores at any age"); David J. Armor, *The End of School Desegregation and the Achievement Gap*, 28 HASTINGS CONST. L.Q. 629, 644 (2001) (reviewing data from various sources and concluding that "desegregation has little impact on closing [the achievement gap]"). Other researchers report different results. See, e.g., Ryan, *supra* note 25, at 257 ("A fairly recent and still-growing body of research consistently shows strong long-term benefits of desegregation.")

113. The question whether racial diversity meaningfully improves the academic achievement of black students is unlikely ever to be resolved to anyone's complete satisfaction, given that the only way to study the effects of diversity on academic achievement is through correlational studies, rather than controlled experiments: [Academics] have been too fascinated by what is intellectually the most interesting question: All else being equal, will the mixing of races alone result in higher black achievement? That question cannot be answered because in the real world, desegregation is never an "all else being equal" situation.

Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROBS. 17 (1978), quoted in Amy Stuart Wells, *The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771, 782 (2001).

gap between black and white students, neither does it offer much assurance that it will.

Additionally, the use of racial diversity as a tool to increase the academic achievement of black students conveys a different kind of message than does the use of diversity as a tool to foster nondiscriminatory attitudes among all students. The idea that black students who want to achieve at the same levels as white students must attend schools with white students seems hardly less degrading than the ideas underlying the former practice of segregation in schools.¹¹⁴

CONCLUSION

The school systems declared unconstitutional in *Brown v. Board of Education* were both segregated and unequal. Although states have eliminated the *de jure* segregation of public schools, a variety of harmful racial inequalities continue to exist. The present racial inequality perhaps most harmful to black students is lower academic achievement than white students. Most desegregation cases decided under *Brown*, however, are incapable of addressing the disparities that exist between the academic achievement of black and white stu-

Additionally, results of studies designed to determine the effects of diversity on one group of subjects, such as college students who are attending an elite university, might not provide information that is useful for understanding the effects of diversity on another group of subjects, such as elementary school children who are not reading at their grade level. For example, an expert report prepared on behalf of the University of Michigan indicates that “[s]tudents learn more and think in deeper, more complex ways in a diverse educational environment.” Patricia Gurin, *Expert Report: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 365 (1999). This conclusion is based on comparisons, for college students in more and less diverse environments, of four “learning outcome” variables: “growth in active thinking processes that reflect a more complex, less automatic mode of thought,” “engagement and motivation,” “learning of a broad range of intellectual and academic skills,” and “value placed on these skills in the post-college years.” *Id.* at 391.

While all of these measures reflect desirable outcomes (although engagement, motivation, and value placed on education might more precisely be called attitudinal, rather than learning, outcomes), the general relevance of this report’s findings is perhaps limited. That the intellectual development of students who have already demonstrated exceptional academic achievement is enhanced by learning in a diverse environment may not be generalizable to the experiences of children who have failed to master even the most basic of academic skills. While students might need diversity to develop a “more complex, less automatic mode of thought,” they probably do not need diversity to learn spelling or arithmetic. More likely, what students need to learn the basics is an academically qualified teacher, and a class size small enough so that every student can receive some individual attention. *See supra* notes 62-65 and accompanying text.

114. As Jerome Morris, a professor of education, has asked:

Do African Americans once again have to follow whites in the hope of receiving a high-quality education? The promises of *Brown* might best be fulfilled if desegregation policies were reconceptualized. Instead of being predicated on the necessity of having white students in the schools, “desegregation” should focus on equity in education for the low-income African American children who still and will continue to attend public schools in the inner cities of this nation.

Jerome E. Morris, *What is the Future of Predominantly Black Urban Schools? The Politics of Race in Urban Education Policy*, 81 PHI DELTA KAPPAN 316 (1999).

dents. Thus, only one of the problems identified in *Brown*—segregation (but not inequality)—is likely to be remedied under current desegregation decrees.

Desegregation decrees cannot eliminate disparate academic achievement so long as courts can release school districts from judicial supervision without requiring the districts to do more to reduce the achievement disparity between black and white students. Realistically, though, only in those few districts operating under a desegregation decree that initially found disparate academic achievement to be a result of *de jure* segregation will courts have authority to mandate that a district implement programs to decrease an achievement gap. Additionally, indications by the Supreme Court that judicial supervision of school systems was intended to be time-limited will exert increasing pressure on district courts to find that, after several decades of judicial supervision, schools have done everything practicable to eliminate the vestiges of *de jure* segregation. In sum, efforts to compel school districts to remedy an achievement gap, within the framework established by desegregation cases decided under *Brown v. Board of Education*, seem unlikely to succeed.

This essay is in no way suggesting that racially diverse schools do not benefit both black and white students. The benefits of racial diversity, though, are insufficient to counter the stigma and the lack of opportunities caused by disparate academic achievement. To bring about racial equality, schools systems must reduce the disparity in academic achievement between black and white students. Recent court decisions finding that factors beyond the control of school districts are the cause of disparate academic achievement fail to make clear the difference between this inability to control factors that *cause* an achievement gap, and an inability to control factors that can *remedy* the gap. While factors beyond the control of school districts may very well cause a gap, school districts nevertheless do control factors that can remedy the achievement gap. Convincing school districts to exercise that control, however, will almost certainly require measures beyond the desegregation cases decided under *Brown v. Board of Education*.

