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Desegregating Politics: "All-Out" School Desegregation Explained

James S. Liebman

Columbia Law School, jl Liebman@law.columbia.edu

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DESEGREGATING POLITICS: "ALL-OUT" SCHOOL DESEGREGATION EXPLAINED

*James S. Liebman**

The problem is that we are no longer certain what kind of question public school desegregation really is.

– J. Harvie Wilkinson III¹

"In other words," I asked, "under this . . . approach, the courts would have given priority to desegregating not the students but the money and the control?"

– Derrick Bell²

TABLE OF CONTENTS

I.	IS DESEGREGATION DEAD?	1465
II.	FIVE THEORIES OF DESEGREGATION	1476
	A. Doctrinal Dots	1476
	B. Connecting the Dots: Criteria for a Satisfying Picture .	1479
	C. Five Theories	1484
	1. The Equal Educational Opportunity Theory	1485
	2. The Integration Theory.....	1495
	3. The Correction Theory	1501
	a. Why Just Intent?	1504
	b. Why Just Desegregation?	1508
	c. Overcorrection	1509
	d. Undercorrection	1513
	e. Private-Law Solutions to Public-Law Problems..	1518
	f. Summary	1523
	4. The Prohibition Theory	1524
	5. The Prophylaxis Theory	1532
	D. A Hint of a Sixth Theory	1539
III.	WHAT'S THE PROBLEM?	1540
	A. What's the Problem?	1540

* Associate Professor of Law, Columbia University School of Law. Bruce Ackerman, Bob Amdur, Derrick Bell, Vince Blasi, Richard Briffault, Norman Chachkin, Paul Gewirtz, Jeff Gordon, Jack Greenberg, Jennifer Hochschild, Jerry Lynch, Henry Monaghan, Subha Narasimhan, Gary Orfield, Harriet Rabb, Janet Sabel, Ted Shaw, and Peter Strauss provided helpful comments on drafts of this article. The support of the Samuel Rubin Program for Liberty and Equality Through Law and the Walter E. Meyer Institute Research Fund is gratefully acknowledged. This article is part of a larger work, tentatively entitled *Political Desegregation and Educational Reform*, © Oxford University Press, which is scheduled for publication in 1992.

1. J. Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration, 1954–1978*, at 132 (1979).

2. D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 113 (1987).

B.	Why Is That a Problem?	1541
1.	Equal	1542
2.	Protection	1544
3.	The State	1548
C.	Why (Especially) Race?	1565
1.	Why Race?	1565
2.	Why <i>Especially</i> Race?	1567
D.	Why Especially Segregation?	1570
E.	Why Just Intent?	1571
F.	Fit Redux	1576
G.	What Is the Problem? Redux	1580
IV.	WHAT'S THE SOLUTION?	1584
A.	If It <i>Is</i> Broke, How Should We Fix It?	1584
B.	Is It Broke Enough to Fix?	1585
1.	Is History Relevant?	1586
2.	Massive Resistance	1587
3.	System-Wide, System-Deep, and System-Long Violations	1590
a.	Systemic Intent	1592
b.	Systemwide	1594
c.	The Presumption Problem	1596
d.	The "Third-Party Nonviolator" Problem	1598
4.	Broke Enough to Fix	1600
C.	Is There a Workable Redesign?	1601
1.	Remedial Lacunae	1601
2.	Notes Toward a Filled Lacuna	1604
a.	External Constraints	1604
b.	Empathy	1606
c.	Ethical Situation	1608
3.	The Preferred Ethical Situation	1609
V.	DESEGREGATION AS REFORMATION	1614
A.	Veiling Our Alter-Egos Behind the School House Walls	1614
B.	Why Especially Schools?	1635
C.	Some Other Philosophical and Doctrinal Advantages and Implications of Reformatory Theory	1645
1.	Balancing Cardinals and Ordinals	1647
2.	Choice	1648
3.	Termination	1651
D.	Multi-District Reformation	1655
1.	Is Interdistrict Desegregation Dead?	1656
2.	Is Innocence Irrelevant?	1660
3.	Is Continuing Segregation Irrelevant?	1662
4.	How Likely Is Interdistrict Relief?	1663
	CONCLUSION	1664

I. IS DESEGREGATION DEAD?

School desegregation is not dead.³ It lives quietly in what used to be the Confederate South. Notwithstanding the Reagan and Bush Administrations' ten-year campaign to limit the legal, remedial, and temporal scope of court-ordered integration plans throughout the nation,⁴

3. By desegregation, I mean the actual attendance together in public schools of significant proportions of black and white children as a result of judicial or administrative orders issued by authorities outside the school district or by school authorities themselves as a result of litigation or the threat of litigation. More particularly, I mean the removal of statutory or other barriers to multiracial public schools and the mandated revision of attendance and transportation patterns that together cause "critical masses" of African-American and white children actually to attend school together. See W. Hawley, *Strategies for Effective Desegregation: Lessons from Research* 41-43 (1983) ("critical mass" achieved when black and white students each represent at least 20 percent of students in most schools and classrooms). Absent a critical mass of each race, desegregation is not achieved simply because schools and classrooms reflect the racial makeup of a school district, or school as a whole. Apart from a critical mass, however, no particular racial mix is required. Because school desegregation initiatives on behalf of Latino children and other ethnic minorities have been rare, see *infra* notes 15-16 and accompanying text, I generally refer to black and white children.

In this Article, I use the terms "African-American," "black," and "black American" interchangeably. Acknowledging the latter two terms' empirical inaccuracy, I nonetheless prefer them because, in my opinion, they reflect the many historical forces that single out members of the group for special reference and self-reference better than terms focused only on (some of) the ethnic affiliations of the group's members. Capitalization *vel non* of the words "black" and "white" poses a difficult problem. On the one hand, sensitivity to the divergent forces to which the two groups have been subject, respect for African-Americans' historically empowering self-designation as "Blacks," and aversion to whites' often preclusive self-designation as "Whites" recommends differentiating "Blacks" and "whites." See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1332 n.2 (1988). On the other hand, a concern that my designation not imply any imperative as to how individuals or groups ought to designate themselves recommends consistent treatment and (along with my personal distaste for the capitalized "Whites") the lower case. On balance, I have chosen the latter course. See generally Thomas, "Rouge et Noir" Reread: A Popular Memory of *Herndon v. Georgia* (forthcoming in *Duke Law Journal*, 1991) (collecting sources and discussing "difficult and delicate" issue of racial designation).

4. See N. Amaker, *Civil Rights and the Reagan Administration* 31-58 (1988); *Days, Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 *Harv. C.R.-C.L. L. Rev.* 309, 319-30 (1984); Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 *Sup. Ct. Rev.* 1, 44-49 & n.173; Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 *U. Ill. L. Rev.* 785, 829-34; West, *O.C.R. Director Admits Laxness in Enforcement*, *Educ. Week*, Dec. 6, 1989, at 1, col. 6; see also *United States v. Georgia*, 691 *F. Supp.* 1440, 1444 (M.D. Ga. 1988), appeal dismissed, 890 *F.2d* 1166 (11th Cir. 1989) (although noting that most of the affected school districts filed motions to dismiss a Justice Department lawsuit to terminate 11 Georgia desegregation plans and that the Department's actions are "totally inconsistent with the adage 'if it ain't broke, don't fix it,'" district judge permits Department to proceed so long as it bears the affected districts' litigation expenses). But cf. Miller, *Williams Charts a New Agenda for Rights Office: Moves Seen as Break with Reagan Policies*, *Educ. Week*, Sept. 5, 1990, at 1, col. 1 (noting recent revitalization of Department of Education's civil rights enforcement efforts); Snider, *Justice Argument*

desegregation persists in southern rural areas where substantial numbers of black Americans continue to reside and in southern urban areas where school districts were organized in 1970⁵ to encompass not only the inner city but also the suburbs.⁶ By many accounts, moreover, desegregation is an effective and accepted—one may even say respected—member of the family of social institutions active in those parts.⁷ From a southern perspective, reports of desegregation's demise⁸ are not exaggerated, but wrong.

Signals Key Shift on Desegregation: Bush, Reagan Officials Differ on Oklahoma Case, *Educ. Week*, June 20, 1990, at 1, col. 1 (surprisingly moderate position taken by Justice Department in school desegregation brief recently filed in Supreme Court).

5. Desegregation is too young to die. Although conceived in principle in 1954, see *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 493 (1954), virtually nowhere was it horn in fact until 15 years later—in 1969–70. In that year, the Supreme Court not only reiterated that “all deliberate speed” was no longer enough, compare *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (establishing “all deliberate speed” regime) with *Griffin v. County School Bd.*, 377 U.S. 218, 234 (1964) (criticizing “all deliberate speed” approach and urging faster-paced desegregation) and *Green v. County School Bd.*, 391 U.S. 430, 438–39 (1968) (same) but more importantly, held (twice) that “now” meant “now,” see *Carter v. West Feliciana Parish School Bd.*, 396 U.S. 290, 291 (1970); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

6. See *W. Hawley*, supra note 3, at 4 (“The greatest progress in desegregation has been in the South where changes have been dramatic and lasting”); G. Orfield, *Public School Desegregation in the United States, 1968–1980*, at 1–12 (1983); F. Welch & A. Light, *New Evidence on School Desegregation* 6, 8, 18–21 & Tables 8–11, 61 (U.S. Comm’n on Civil Rights Clearinghouse Publication 92, 1987); James, *City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public-School Desegregation, 1968–1976*, 54 *Am. Soc. Rev.* 963, 974–76, 982 (1989); Orfield, *School Desegregation in the 1980s, Equity & Choice*, Feb. 1988, at 25, 26 (as of 1984, less than 30% of all black children in the South attended 90%-plus minority schools compared to over 55% in the Northeast; “cities with the most integrated schools were under large-scale, mandatory, city-suburban plans”). The recent “reverse” migration of blacks to the South enhances the significance of the desegregated schooling that predominates there. See U.S. Census Bureau, *The Black Population in the United States: March 1988*, at 2–4 (Current Population Reports, Series P-20, No. 442, 1989) (for first time in a century, proportion of African-Americans living in South increased in the 1980s, rising from 52% to 56%).

7. See, e.g., J. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* 179–83 (1984) (strongest support for school desegregation by whites occurs among southerners whose children are or have been involved in mandatory desegregation plans); *You Were Wrong, Mr. President*, *Charlotte Observer*, Oct. 9, 1984 (editorial), reprinted in *Washington Post*, Oct. 10, 1984, at A15, col. 3 (“Charlotte-Mecklenburg’s proudest achievement of the past 20 years is not the city’s impressive new skyline or its strong, growing economy. Its proudest achievement is its fully integrated public school system”); supra note 6; infra notes 665–668 and accompanying text.

8. See, e.g., Bell, *Brown and the Interest-Convergence Dilemma*, in *Shades of Brown: New Perspectives on School Desegregation* 90, 91 (D. Bell ed. 1980) [hereinafter *Shades*]; Carter, *A Reassessment of Brown v. Board*, in *Shades*, supra, at 20, 26; Kirp & Jensen, *The New Federalism Goes to Court, in School Days, Rule Days: The Legalization and Regulation of Education* 368 (D. Kirp & D. Jensen eds. 1986) [hereinafter *School Days*]; Lawrence, “One More River to Cross”—Recognizing the Real Injury in

Desegregation lives on as well in many places outside the South. The desegregation success stories in Buffalo, Columbus, Dayton, Denver, Minneapolis, St. Louis, San Diego, and Wilmington-New Castle are as frequently mentioned as the well-regarded plans in Charlotte-Mecklenburg, Greenville, Jacksonville, Louisville, Nashville-Davidson, and Tampa-St. Petersburg.⁹

Consider also the findings of the only major study of school desegregation conducted by the federal government during the Reagan years—a study condemned in advance by one well-known researcher as having been designed to underestimate desegregation's success:¹⁰

- *Since meaningful desegregation began in the early 1970s, there has been a powerful nationwide trend away from isolating black students in black schools:* In the 125 school districts studied, the percentage of black students attending virtually all-minority schools fell from 62 to 30, while the proportion attending schools that are 26 to 75 percent white climbed from 17 to 44 percent.¹¹
- *Court- and administratively ordered desegregation plans are responsible for the diminishing racial isolation of African-American students:*
 - a. All 10 of the sampled school districts experiencing the largest decline in segregation during the period studied “adopted one or more major desegregation plans.”¹²

Brown: A Prerequisite to Shaping New Remedies, in *Shades*, supra, at 48, 49; sources cited infra note 49.

9. See, e.g., W. Hawley, supra note 3, at 31–40; J. Hochschild, supra note 7, at 26–34, 46–70; J. Raffel, *The Politics of School Desegregation: The Metropolitan Remedy in Delaware 174–95* (1980); F. Welch & A. Light, supra note 6, at 41, 43 & Tables 13, 14; J. Wilkinson, supra note 1, at 44, 95, 156–60, 189, 200–03, 242–45; Hawley & Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *Eliminating Racism: Profiles in Controversy* 281, 289 (P. Katz & D. Taylor eds. 1988) [hereinafter *Eliminating Racism*]; Levine & Eubanks, *The Promise and Limits of Regional Desegregation Plans for Central City School Districts*, 1 *Metropolitan Educ.* 36, 37–43 (1986).

10. See Adviser to U.S. Desegregation Study Quits, *Saying It's Biased*, N.Y. Times, Oct. 30, 1985, at A12, col. 6 (claiming that, by excluding districts with less than 15,000 students, only sampling districts with between 15,000 and 50,000 students, and including all districts with over 50,000 students, the study gave too little weight to the southern plans that have been the most successful and too much weight to the large-city plans that have engendered the most white flight).

11. F. Welch & A. Light, supra note 6, at 4; see id. at 16 & Table 6; see also James, supra note 6, at 969–70, 974–75 (similar results from study of segregation and desegregation in 65 metropolitan areas). Because the Reagan Administration study linked increases in interracial attendance to court-ordered plans, see, e.g., infra text accompanying note 12, and because the 44% figure in text applies to schools that satisfy the “critical mass” requirement, the study documents substantial amounts of desegregation as that term is defined supra note 3.

12. F. Welch & A. Light, supra note 6, at 40–41 & Table 13. Experiencing the greatest decline in school segregation in the period studied was the school district defendant in the Supreme Court's first “all-out” desegregation decision, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Fourth on the list of most improved districts is the defendant in the Supreme Court's most recent “all-out” desegre-

- b. School segregation increased or remained static in less than 2 percent (2 of 109) of the sampled districts operating under major court- or administratively ordered desegregation plans. For districts *without* major desegregation plans, the rate of segregative increase or stasis was nearly 70 percent (11 of 16).¹³
- c. Although, overall, only 13 percent of the districts in the sample lacked a court- or administratively ordered school desegregation plan, 85 percent of the districts in which school segregation showed no improvement or worsened had no such plan.¹⁴
- d. African-American attendance with white children "increased sharply between 1968 and 1980," but the trend among Latinos—who rarely were the subject of desegregative initiatives during the period¹⁵—was "toward less exposure to white classmates."¹⁶

Nor is desegregation a vestige of some bygone period of judicial activism. In the 1980s, federal courts ordered major new school deseg-

gation case, *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526 (1979). F. Welch & A. Light, *supra* note 6, at 41, Table 13; see *id.* at 43, Table 14 (listing 10 most thoroughly integrated districts as of mid-1980s, among them, Columbus, Ohio, see *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Wilmington-New Castle, Delaware*, see *Buchanan v. Evans*, 423 U.S. 963, *aff'g mem.*, 393 F. Supp. 428 (D. Del. 1975) (three-judge panel); and *Pasadena, California*, see *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

13. F. Welch & A. Light, *supra* note 6, at 40, 67 & Table 12. During the period when school segregation was dropping substantially in districts with school desegregation plans, housing segregation stagnated or increased. See, e.g., R. Farley & W. Allen, *The Color Line and the Quality of Life in America* 140–45 (1987); Massey & Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 *Demog.* 373, 376–88 (1989); Tobin, *Introduction: Housing Segregation in the 1980s*, in *Divided Neighborhoods: Changing Patterns of Racial Segregation* 8, 10–11 (G. Tobin ed.) (32 *Urb. Aff. Ann. Rev.* 1987) [hereinafter *Divided Neighborhoods*].

14. F. Welch & A. Light, *supra* note 6, at 40 & Table 12, 66; see also James, *supra* note 6, at 978 (study of 65 metropolitan areas concluding that "[f]ederal court intervention [has] had a strong desegregative effect").

15. See W. Hawley, *supra* note 3, at 3–4; G. Orfield, *supra* note 6, at 3–13.

16. F. Welch & A. Light, *supra* note 6, at 16. Between 1968 and 1980, the proportion of Latinos attending virtually all-minority schools increased by over 15% while the proportion attending schools more than 75% white dropped from 24 to 13%. *Id.* at 4; accord G. Orfield & F. Monfort, *Change and Desegregation in Large School Districts* 28–33 (*Nat'l School Bds. Ass'n Council of Urban Bds. of Educ.*, July 1988); Woolbright & Hartmann, *The New Segregation: Asians and Hispanics*, in *Divided Neighborhoods*, *supra* note 13, at 138, 138–57.

regation plans in Buffalo,¹⁷ Indianapolis,¹⁸ Kansas City,¹⁹ Little Rock,²⁰ Milwaukee,²¹ St. Louis,²² Yonkers,²³ and in the suburbs northeast of Pittsburgh.²⁴ Major litigation seeking new or expanded desegregation plans is pending in Charleston, South Carolina,²⁵ DeKalb County, Georgia,²⁶ Denver,²⁷ Fort Wayne,²⁸ Hartford,²⁹ metropolitan Kansas City,³⁰ Nash County, North Carolina,³¹ Queens, New York,³² Oklahoma City,³³ and Topeka.³⁴ And litigation or other governmental enforcement efforts aimed at desegregation are contemplated in metro-

17. See *Arthur v. Nyquist*, 514 F. Supp. 1133, 1139-41 (W.D.N.Y.), *aff'd mem.*, 661 F.2d 907 (2d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

18. See *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1104 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

19. See *Jenkins v. Missouri*, 904 F.2d 415, 419 (8th Cir. 1990); *Jenkins v. Missouri*, 855 F.2d 1295, 1299-301 (8th Cir. 1988), *aff'd*, 110 S. Ct. 1651 (1990).

20. See *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 407-08 (8th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1186 (1986).

21. See *Board of School Directors v. Thompson*, (E.D. Wis. settlement agreement filed Aug. 10, 1987).

22. See *Liddell v. Missouri*, 731 F.2d 1294, 1297 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984).

23. See *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1288-89 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

24. See *Hoots v. Pennsylvania*, 539 F. Supp. 335, 338 (W.D. Pa. 1982), *aff'd*, 703 F.2d 722 (3d Cir. 1983).

25. See *United States v. Charleston County School Dist.*, 738 F. Supp. 1513, 1515 (D.S.C. 1990); Snider, *In Charleston, Desegregation Case Dismissed*, *Educ. Week*, June 20, 1990, at 9, col. 1.

26. See *Educ. Week*, Nov. 22, 1989, at 3, col. 2; Newman, *Steps to End 'Racially Identifiable' Schools Ordered*, *Educ. Week*, Oct. 25, 1989, at 6, col. 1.

27. See Snider, *High Court to Rule on When Districts End 'Dual' Status*, *Educ. Week*, May 9, 1990, at 1, col. 5.

28. See *Parents for Quality Educ. with Integration, Inc. v. Fort Wayne Community Schools Corp.*, 662 F. Supp. 1475, 1477, 1482 (N.D. Ind. 1987).

29. See *Sheff v. O'Neill*, No. 360977 (Hartford/New Britain Super. Ct. May 18, 1990); Johnson, *Suit in Connecticut Challenges Schools as Racially Divided*, *N.Y. Times*, Apr. 28, 1989, at A1, col. 1.

30. See *Jenkins v. Missouri*, 904 F.2d 415, 425 (8th Cir. 1990) (order denying rehearing *en banc*).

31. See *Rocky Mount City Bd. of Educ. v. Nash County Bd. of Educ.*, No. 89-836 (E.D.N.C. filed May 4, 1989) (discussed in Note, *Attacking School Segregation Root and Branch*, 99 *Yale L.J.* 2003, 2020 n.96 (1990)).

32. See *Parents Ass'n v. Ambach*, 738 F.2d 574, 580, 583 (2d Cir. 1984).

33. See Snider, *Court Reaffirms its Decision in Key Desegregation Case*, *Educ. Week*, Oct. 25, 1989, at 6, col. 5; Snider, *Oklahoma City Ordered to Return to Busing Plan*, *Educ. Week*, Aug. 2, 1989, at 7, col. 1.

34. See Snider, *New Decision in Topeka Case Details Deep Rift Over Court's Continued Role*, *Educ. Week*, Jan. 10, 1990, at 8, col. 1; Snider, *Topeka's Schools Remain Segregated*, *Court Rules*, *Educ. Week*, June 14, 1989, at 5, col. 1.

politan Memphis³⁵ and St. Paul³⁶ as well as in a number of school districts in Arkansas,³⁷ Connecticut,³⁸ Florida,³⁹ Massachusetts,⁴⁰ and Mississippi.⁴¹

Still, in many of the nation's northern and western cities—where a sizeable proportion of the nation's minority students reside⁴²—it fairly may be said that school desegregation is not alive.⁴³ In some places, desegregation has yet to be conceived (in New York, Chicago, and Philadelphia, for example⁴⁴); in others it was stillborn (Detroit, for example⁴⁵) or died young (Los Angeles⁴⁶ and Atlanta⁴⁷). Applied to many of America's cities, therefore, predictions of desegregation's extinction—often attributed to the Supreme Court's suburbs-protecting

35. See *Educ. Week*, Feb. 7, 1990, at 2, col. 2; *Appeal Set on Duval County Busing Ruling*, *Educ. Week*, Oct. 26, 1988, at 4, col. 2.

36. See *St. Paul Desegregation Plan Features Scholarship Incentives*, *Educ. Week*, Nov. 2, 1988, at 2, col. 2.

37. See *Educ. Week*, Nov. 15, 1989, at 3, col. 5 (interdistrict desegregation suit involving three Arkansas districts); *Arkansas Pushes School Districts to Demonstrate Racial Equity*, *Educ. Week*, Sept. 28, 1988, at 2, col. 2.

38. See *Connecticut Panel Begins Desegregation Study*, *Educ. Week*, Oct. 25, 1989, at 3, col. 3; *Johnson, Connecticut Schools Get a Voluntary Racial Plan*, *N.Y. Times*, Apr. 6, 1989, at B2, col. 5; *Connecticut Judge Backs Waterbury Desegregation Plan*, *Educ. Week*, Feb. 15, 1989, at 2, col. 2.

39. See *Educ. Week*, Aug. 1, 1990, at 4, col. 4; *Federal Judge Orders Release of Dade Desegregation Records*, *Educ. Week*, May 16, 1990, at 2, col. 1; *Florida District Violated Rights Laws, O.C.R. Finds*, *Educ. Week*, Feb. 21, 1990, at 21, col. 1.

40. See *Massachusetts Dep't of Educ., Off. of Educ. Equity, 1987-88 Annual Report 2-24* (1988).

41. See *Miss. District, N.A.A.C.P. Reach Settlement in Civil-Rights Lawsuit*, *Educ. Week*, Apr. 18, 1990, at 3, col. 3; *Smothers, Mississippi Schools Facing Move to Stem Resegregation Tide*, *N.Y. Times*, Sept. 7, 1989, at B13, col. 1; see also *Snider, E.D. Reviewing Magnet-School Grant Compliance*, *Educ. Week*, Sept. 5, 1990, at 41, col. 5 (recent Department of Education desegregation enforcement initiatives in several districts in New York State and Washington State); *Miller, Cavazos Acts on Long-Dormant Civil-Rights Cases*, *Educ. Week*, Aug. 1, 1990, at 43, col. 5 (recent Department of Education desegregation enforcement initiatives in Illinois and Michigan).

42. See *W. Matney & D. Johnson, America's Black Population: 1970-1982 1-3* (Bureau of the Census Special Publication P10/POP-83-1, 1983); *James, supra note 6*, at 966; *Orfield, Housing Patterns and Desegregation Policies, in Effective School Desegregation: Equity, Quality, and Feasibility 185, 189-91* (W. Hawley ed. 1981) [hereinafter *Effective*]; *For Urban Schools: A Statistical Portent*, *Educ. Week*, June 22, 1988, at 31, col. 1.

43. See, e.g., *R. Farley, Blacks and Whites: Narrowing the Gap? 22-33* (1984); *Bell, Introduction, in Shades, supra note 8*, at i, viii; *Bullock, Equal Education Opportunity, in Implementation of Civil Rights Policy 55, 70-71* (C. Bullock & C. Lamb eds. 1984); *James, supra note 6*, at 975, 979; *Orfield, supra note 42*, at 185.

44. See *J. Hochschild, supra note 7*, at 32; *F. Welch & A. Light, supra note 6*, at 40 & Table 12; *James, supra note 6*, at 975.

45. See *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 752-53 (1974).

46. See *Crawford v. Board of Educ.*, 458 U.S. 527, 544-45 (1982); *School Rights Lawsuit Ended in Los Angeles*, *N.Y. Times*, Mar. 29, 1989, at B7, col. 1.

47. See *Orfield, supra note 42*, at 191-93 ("Atlanta compromise" ending desegregation litigation there).

decision in *Milliken v. Bradley I*⁴⁸—are widespread and not without basis.⁴⁹ Nor, given the Court's recent record in related contexts,⁵⁰ does its sudden interest in school desegregation after more than a decade of quiescence portend the reform's resuscitation.⁵¹

48. *Milliken I*, 418 U.S. 717 (1974).

49. See J. Wilkinson, *supra* note 1, at 225, 228 ("Milliken v. Bradley might one day be regarded as this century's Plessy v. Ferguson"); Bell, *supra* note 43, at viii; Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 Phil. & Pub. Aff. 3, 33, 35 (1974), reprinted in *Equality and Preferential Treatment 155* (M. Cohen, T. Nagel & T. Scanlon eds. 1977) [hereinafter *Equality*] (because "the *Milliken* limitation creates an insulated position for suburbanites," "*Milliken* means that we may have to live with all-black [city] school systems"); Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 763, 775, 778 (1986) [hereinafter *Gewirtz, Choice*]; Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 645, 647 (1983) [hereinafter *Gewirtz, Remedies*] ("*Milliken I* essentially foreclosed interdistrict relief"); James, *supra* note 6, at 965, 975, 983; Lawrence, *supra* note 8, at 57; Taylor, *Brown in Perspective, in Effective*, *supra* note 42, at 15, 29; Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 Yale L.J. 1741, 1753 & n.71 (1985). For the contrary views of two federal judges, see Doyle, *Social Science Evidence in Court Cases, in Education, Social Science, and the Judicial Process 10*, 12-13 n.21 (R. Rist & R. Anson eds. 1977) [hereinafter *Education*]; Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 Minn. L. Rev. 735, 779 & n.289 (1985).

50. See, e.g., *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2377 (1989) (restricting causes of action available to redress on-job racial harassment); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121, 2126 (1989) (increasing Title VII plaintiffs' burden of establishing prima facie case that employment practices have unlawful disparate impact on minorities); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 730 (1989) (requiring evidence of past discrimination in industry to insulate cities' minority set-aside programs affecting contracts with that industry against equal protection challenge).

51. The Court last directly addressed constitutionally mandated school desegregation in 1979. See *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). In the first half of 1990, the Court granted certiorari to decide whether the Tenth Circuit properly reversed a district court order terminating a judicially mandated school desegregation plan, see *Board of Educ. v. Dowell*, 110 S. Ct. 1521 (1990). In that same time period, while declining to review the propriety of an extensive court-ordered desegregation plan, the Court upheld by a 5-4 vote the district court's power to enjoin state-law impediments to a tax increase needed to fund the plan, see *Missouri v. Jenkins (Jenkins II)*, 110 S. Ct. 1651, 1666 (1990); see also *id.* at 1676-77 (Kennedy, J., concurring in part and dissenting in part) (questioning constitutional propriety of uniquely extensive magnet-school and school-improvement remedy). Between 1979 and 1990, the Court's decisions in desegregation cases were limited to peripheral questions. See, e.g., *Missouri v. Jenkins (Jenkins I)*, 109 S. Ct. 2463, 2469 (1989) (attorneys' fees); *Crawford v. Board of Educ.*, 458 U.S. 527, 542 (1982) (state may rescind school desegregation laws more exacting than fourteenth amendment requires); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 486-87 (1982) (overturning state's efforts to block localities' voluntary school desegregation initiatives). The reappearance of proto-"separate but equal" views among members of the federal judiciary, of a sort not publicly expressed from that quarter for decades, indicates the current legal fragility of school desegregation. See, e.g., *Jenkins v. Missouri*, 904 F.2d 415, 426 (8th Cir. 1990) (Bowman, J., dissenting from denial of rehearing en banc) ("I am . . . troubled by the implicit premise that appears to guide the panel opinion . . . that black children somehow will be better off if they are

What is more, the legal, intellectual, and moral bases for desegregation remain unstable even now,⁵² thirty-six years after *Brown v. Board of Education I*.⁵³ Indeed, once the focus of desegregation shifted in the 1970s from simply "enroll[ing] a few Negro children in formally all-white schools" to "reshap[ing] the metropolitan apartheid into which the country had so regrettably lapsed,"⁵⁴ the weight that desegregation's justifications had to bear increased at the same rate as the number of bus rides potentially entailed. At that point, the fissures that some long had suspected in the reform's legal, intellectual, and moral undergirding became apparent to all—and, in the opinion of some, positively disastrous for further desegregation.⁵⁵

"The problem," as Judge Wilkinson wrote a decade ago, is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff, is it also less clearly a constitutional requirement the Supreme Court is entitled to impose?⁵⁶

In Judge Wilkinson's view, it was precisely these plausible doubts about desegregation's justifications—rather than (as some have charged⁵⁷) an

removed from classrooms where they enjoy majority status and are transported to more distant classrooms where they will comprise a distinct minority").

52. See, e.g., R. Dworkin, *Law's Empire* 360, 382–91 (1986); A. Gutmann, *Democratic Education* 160–70 (1987); M. Walzer, *Spheres of Justice* 214–26 (1983); Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 *U. Pa. L. Rev.* 1041, 1041–43 (1984). For the most part, I focus here on the question of *Brown* in the school desegregation context and not on the decision's more general implications. I do so to keep the scope of the discussion within manageable bounds, to draw upon and locate my work within a well-developed tradition of school desegregation scholarship, and, as I explain later, to explore the field in which *Brown* has been most meaningful. See *infra* notes 721–767 and accompanying text.

53. *Brown I*, 347 U.S. 483 (1954).

54. J. Wilkinson, *supra* note 1, at 133.

55. See, e.g., N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* 104 (1975); L. Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* 258–83 (1976); T. Sowell, *Civil Rights: Rhetoric or Reality?* 13–35 (1984); R. Wolters, *The Burden of Brown: Thirty Years of School Desegregation* 6–7, 138–39, 288 (1984); Cooper, *The Coercive Remedies Paradox*, 9 *Harv. J.L. & Pub. Pol'y* 77, 80–81 (1986). For earlier criticism, see also, e.g., Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 *Harv. L. Rev.* 143, 158 (1964) (questioning desegregation as a remedy); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 33 (1959) (questioning segregation as a violation); Memorandum for the United States as *Amicus Curiae*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (No. 1713) (remedial doubts).

56. J. Wilkinson, *supra* note 1, at 132.

57. See Bell, *supra* note 8, at 95, 97; Freeman, *School Desegregation Law: Prom-*

unseemly inclination "to buy 'peace in our time'" at the expense of "discord in the next"—that led the Supreme Court in *Milliken I* to immunize tens of thousands of children in Detroit's suburbs from any role in desegregating the city's schools.⁵⁸ Moreover, notwithstanding the Court's endorsement of "all-out desegregation" in some of its post-*Milliken I* encounters with the issue,⁵⁹ these same nagging justification questions lead some to fear—and others to hope—that the Court's impending foray into the desegregation field will end in the reform's all-out retreat.⁶⁰

Desegregation is not dead in theory any more than in practice. Nor need *Milliken I* be understood as an aberration or an early warning of desegregation's justificatory or its actual demise. Rather, as I demonstrate below, desegregation remains vital not only on the ground in the South but also, potentially, in the law's contemplation and, once the law is understood, in the nation's and even possibly its citizens' hearts and minds. In particular, I argue that we have misunderstood, even morally demeaned, desegregation by seeing it as "merely" a corrective for the *educational* effects of racial separation or discrimination in the administration of public elementary and secondary schools.⁶¹ More accurately and justifiably, desegregation should be seen as a relatively simple solution in an important sphere of public life to the fundamental *political* problem at the core of the fourteenth amendment—perhaps the defining problem of American history and one that remains today the most troubling domestic issue facing the country.⁶²

ise, Contradiction, Rationalization, *in*, *Shades*, *supra* note 8, at 70, 85; see also Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 *Yale L.J.* 328, 336–42 (1982) (Court's anxiety over scope of relief in desegregation cases caused it to develop restrictive intent standard and other limitations on the equal protection right).

58. See J. Wilkinson, *supra* note 1, at 228; accord *id.* at 226–29.

59. See, e.g., *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 459–61 & nn.2, 3 (1982); *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 538 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 454–55 (1979). But cf. *Crawford v. Board of Educ.*, 458 U.S. 527, 542 (1982) (fourteenth amendment does not shield desegregation plan imposed by state courts under state law from effects of changes in that law); *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 420–21 (1977) (re-manding for further findings leading to desegregation plan affirmed in *Dayton II*); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440 (1976) (limiting integrative modifications of desegregation plan).

60. See *supra* note 51 and accompanying text; sources cited *supra* note 55.

61. Tying the desegregation decisions to the educational effects of racial separation or discrimination are, e.g.: Fiss, *The Jurisprudence of Busing*, 39 *Law & Contemp. Probs.* 194, 204–08 (1975); Gewirtz, *Choice*, *supra* note 49, at 731–54; Reynolds, *Individualism Versus Group Rights: The Legacy of Brown*, 93 *Yale L.J.* 995, 998–1003 (1984); Yudof, *Equal Educational Opportunity and the Courts*, 51 *Tex. L. Rev.* 411, 455–60 (1973).

62. "[R]ace is not like other public problems. Throughout America's history, racial issues have been high among, if not central to, the country's most important concerns;" they perpetually "threaten[] to tear this country apart." D. Bell, *supra* note 2, at 4, 37.

Realizing that no one has ever characterized school desegregation as a simple solution to any past or present national ill,⁶³ I nonetheless regard it as both serviceable *and* simple. The problem desegregation solves is the ingrained willingness of our political system to count what I here call "the racist opinion"—that citizens of one race, as such, are less deserving than those of another race of political respect and concern—as a valid basis for deciding how to allocate society's scarce material and autonomy-enabling resources. I conclude that public education may provide the only sphere of public life in which this problem is solvable at all, or at least is solvable in a direct and realistic way, and accordingly that there is much to the view that we must look (as did the Supreme Court in *Brown*) to a direct solution in that sphere as our best hope for a less direct solution in other spheres.⁶⁴

In Part II, I examine five prominent theories of desegregation: that it (1) equalizes educational opportunities or outcomes; (2) homogenizes school populations or integrates black children into the educational institutions of the previously ascendant race; (3) corrects the effects of certain tortious wrongdoing by school officials; (4) prohibits such wrongdoing; or (5) deters it. I conclude that none of these theories is capable of simultaneously explaining and justifying desegregation as that practice actually has developed in this country.

In Part III, I revisit the problem of segregation as a prelude to advancing a more fitting justification for desegregation. Offering a version of liberalized republicanism, I argue: that the fourteenth amend-

See W.E.B. DuBois, *The Souls of Black Folk* 54 (NAL ed. 1969) ("The problem of the twentieth century is the problem of the color line"); W. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* (1968); E. Morgan, *American Slavery, American Freedom* (1975); G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944); C. Woodward, *The Strange Career of Jim Crow* (1974); Crenshaw, *supra* note 3, at 1356-64; Hertzberg, *Wounds of Race, The New Republic*, July 10, 1989, at 4 ("Race is the wound that will not heal"); *infra* notes 449-457 and accompanying text.

63. See Fiss, *The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation*, 38 U. Chi. L. Rev. 697, 698 (1971) [hereinafter Fiss, *Charlotte*]; Fiss, *The Fate of An Idea Whose Time Has Come: Anti-Discrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. Chi. L. Rev. 742, 768 (1974) [hereinafter Fiss, *Fate*]; Gewirtz, *Choice*, *supra* note 49, at 730 ("extraordinary practical obstacles"); Reynolds, *supra* note 61, at 1002-05 ("runaway social experiment"); Yudof, *supra* note 61, at 448 ("painfully costly").

64. It should be clear already why I think the issues addressed in this Article are worthy of scholarly comment. A related question is why these issues are appropriate for comment by a white scholar. Although I accept many aspects of "the minority critique" of white civil rights scholarship—namely, the neglect of minority scholarship and the victim's perspective generally—I believe that the solution is to make scholarship in the field more, not less, inclusive. Compare Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561, 566-73 (1984) (criticizing history of white domination of civil rights scholarship) with Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1788-801 (1989) (responding to objections to white scholars' continued participation in civil rights discourse).

ment requires all political participants, broadly defined, to treat all individuals affected by the political process as their equals; that in our pluralistic society,⁶⁵ treatment as an equal requires political actors to render equal respect and concern in the political process to all other people based on the capacity of all people to generate their own equally worthy visions of the good; that deviations from the principle of equal concern fundamentally corrupt the political process and, if long and broad enough, threaten the continued existence of the polity; that racism constitutes just such a deviation, which continues pervasively to corrupt the nation's political processes; and that racial segregation—in schools and in other public settings⁶⁶—is perhaps the most virulent form of this polity-threatening corruption.

Having located the violation found in the desegregation decisions in the political (and not, for example, in the educational) process, I undertake in Parts IV and V to show that the Supreme Court's method of identifying and then remedying that violation accomplishes two political-process-oriented (or "processual"⁶⁷) goals: First, at the liability stage, by requiring proof of intentional, system-wide discrimination, the Court's desegregation methodology identifies situations in which, as a result of racist corruption, the political process has so fundamentally broken down that it requires reform and not simply repair. Second, at the remedial stage, by in essence actualizing the hypothetical situations that modern political theorists posit as the ideal positions from which to construct acceptable principles of justice, the Court's methodology rather elegantly effectuates that political reform.

Part V proceeds to a discussion of why the political reform achieved via desegregation is less problematic in the sphere of public education than in other spheres, thus explaining the Court's otherwise curious confinement of the remedy to that sphere. Finally, Part V applies my reformative model to a number of vexing issues posed by desegregation decrees, ranging from the role of parental choice and the timing of a decree's termination to the interdistrict-relief question at issue in *Milliken I*. On the last issue, I argue that *Milliken I*, rather than being fatal to all but the most crabbed visions of desegregation, in fact consists with the concerted migration from the South of desegregation as an effective instrument of political reform.

65. By "pluralistic society" I do not refer to a society governed according to the dictates of so-called "interest group pluralism" or "pluralist political science" but instead to a social and political system premised on "the acceptance and celebration of diversity . . . within society." Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1503, 1507 (1988); see *infra* notes 378, 422.

66. See *infra* notes 419-438 and accompanying text (defining "public").

67. Webster's Third New International Dictionary 1808 (1981) (processual: "of or relating to a legal process"); accord Fiss, *Groups and the Equal Protection Clause*, in *Equality*, *supra* note 49, at 84, 131.

II. FIVE THEORIES OF DESEGREGATION

A. *Doctrinal Dots*

*Brown v. Board of Education I*⁶⁸ held unconstitutional state statutes requiring or permitting local school districts to segregate black and white public school children. Rejecting the "separate but equal" regime of *Plessy v. Ferguson*,⁶⁹ the Supreme Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."⁷⁰ Supporting its conclusion with social scientific evidence that segregated schools afflict African-American children with comparative educational and other harms, the Court concluded that racial segregation "generates a feeling of inferiority as to Negroes' status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁷¹

*Brown v. Board of Education II*⁷² thereupon ceded to local officials and federal district courts the duty to define what *Brown I* required of systems operating de jure racially segregated schools, telling those authorities only that they should take such steps "as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."⁷³

After returning to the desegregation issue only intermittently and inconclusively during the next thirteen years,⁷⁴ the Supreme Court in *Green v. County School Board*⁷⁵ made clear for the first time that it did not suffice constitutionally for a school or district to "throw its doors open" to blacks and whites on a facially neutral basis.⁷⁶ Overturning decrees permitting freedom-of-choice plans, the Supreme Court ruled that pre-

68. *Brown I*, 347 U.S. 483 (1954).

69. 163 U.S. 537 (1896). Although *Plessy* arose in the common carrier context, the Court frequently relied upon it in the education context. See *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899).

70. *Brown I*, 347 U.S. at 495.

71. *Id.* at 494 & n.11.

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

73. *Id.* at 301.

74. "[F]rom 1955 to 1968, the Court abandoned the field of public school desegregation. Its pronouncements were few . . . [a]nd its leadership was almost nonexistent." J. Wilkinson, *supra* note 1, at 61-62; see, e.g., *Rogers v. Paul*, 382 U.S. 198, 199-200 (1965) (per curiam); *Bradley v. School Bd.*, 382 U.S. 103, 105 (1965) (per curiam); *Calhoun v. Lattimer*, 377 U.S. 263, 264-65 (1964) (per curiam); *Griffin v. County School Bd.* 377 U.S. 218, 228-29 (1964); *Goss v. Board of Educ.*, 373 U.S. 683, 688 (1963); *McNeese v. Board of Educ.*, 373 U.S. 668, 674 (1963); *Cooper v. Aaron*, 358 U.S. 1, 7 (1958). See generally J. Wilkinson, *supra* note 1, at 78-102 (criticizing Court for providing weak leadership in school desegregation field in late 1950s and early 1960s); *Gewirtz, Remedies*, *supra* note 49, at 611 n.62 (discussing Court's lack of involvement in desegregation disputes between 1955 and 1968).

75. 391 U.S. 430 (1968).

76. *Id.* at 441; accord *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968); *Raney v. Board of Educ.*, 391 U.S. 443, 447-48 (1968).

viously segregated school districts must adopt or be ordered to adopt plans that “‘so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.’”⁷⁷ The Court insisted, and a year later took steps, finally, to insure that districts voluntarily or compulsorily adopted such plans “now,”⁷⁸ “forthwith,”⁷⁹ and “immediately.”⁸⁰ The Court also held for the first time that such plans must discharge an “affirmative duty”⁸¹ on the part of desegregating districts (1) to take effective steps to eliminate the “vestiges” of prior discrimination,⁸² and (2) to refrain from any action, however benignly or neutrally motivated, that has the effect of maintaining or increasing the degree of racial separation in the schools.⁸³

In the following decade, beginning with its 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education*⁸⁴ and ending with its 1979 decisions in *Dayton Board of Education v. Brinkman II*⁸⁵ and *Columbus Board of Education v. Penick*,⁸⁶ the Supreme Court insisted that desegregation plans achieve “the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.”⁸⁷ The Court issued and upheld “all-out desegregation”⁸⁸ decrees that effectively defined “desegregation” as “integration” and mandated student-attendance techniques—for example, rezoning, the pairing and clustering of schools, and busing—that lead to the actual and extensive mixing of the races in most or all schools.⁸⁹

77. *Green*, 391 U.S. at 438 n.4 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

78. *Green*, 391 U.S. at 439.

79. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14 (1971).

80. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

81. *Green*, 391 U.S. at 437–38 (quoted in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459 (1979)).

82. *Columbus*, 443 U.S. at 459; accord, e.g., *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 417 (1977); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203 (1973); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 437–38; see also *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (*Green* “held that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies”) *White, J.*, concurring; joined by *Burger, C.J.*, and *Powell, Rehnquist, and O’Connor, JJ.*)

83. See, e.g., *Missouri v. Jenkins (Jenkins II)*, 110 S. Ct. 1651, 1666 (1990); *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 538 (1979); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489–90 (1972); *Wright v. Council of Emporia*, 407 U.S. 451, 459–60 (1972); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971); see also *Davis v. Board of School Comm’rs*, 402 U.S. 33, 37 (1971) (“measure of any desegregation plan is its effectiveness”).

84. 402 U.S. 1 (1971).

85. *Dayton II*, 443 U.S. 526 (1979).

86. 443 U.S. 449 (1979).

87. *Davis*, 402 U.S. at 37; accord *Swann*, 402 U.S. at 26.

88. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 214 (1973).

89. See, e.g., *Dayton II*, 443 U.S. at 538; *Columbus*, 443 U.S. at 458–59; *Keyes*, 413 U.S. at 201–02; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *Davis*, 402 U.S. at 37; *Swann*, 402 U.S. at 27–30; see also *Washington v. Seattle School Dist. No. 1*, 458 U.S.

On the other hand, the Court excluded from its definition of the conditions requiring desegregation the *fact* of racial separation of students in the public schools—however widespread and educationally harmful that separation might be. Instead, as a predicate for judicial intervention, the Court insisted upon purposive segregation—whether manifested in explicitly race-conscious statutes as in *Brown* or in facially neutral but invidiously motivated policies and practices as in its first northern case, *Keyes v. School District No. 1*.⁹⁰ At the same time, the Court conformed its treatment of northern and western segregation to the southern decisions' demand that guilty districts discharge the two-part affirmative duty to desegregate that the Court had established in *Green*.⁹¹ In addition, the Court devised a pair of rebuttable presumptions that allowed plaintiffs to rely, without more, upon proof of (1) racially motivated segregation on a "system-wide" basis (i.e., affecting a significant part of a school district), followed by (2) the expanded or continued *fact* of racial separation in the district's schools, to establish that the continued or expanded condition of racial separation is linked to the earlier violation.⁹²

Reaching a rather different outcome in *Dayton Board of Education v. Brinkman I*,⁹³ the Court held that a small number of discrete racially discriminatory actions by a northern city school board did not justify applying the continuing- and expanding-effects presumptions or imposing a full-blown desegregation remedy.⁹⁴ And it held in *Milliken v. Bradley I*⁹⁵ that the massive and effective segregation of the Detroit (city) School District by the Detroit School Board and the State of

457, 474–75 (1982) (overturning state statute that interfered with school district's voluntary all-out desegregation plan); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) ("all reasonable methods [must] be available to formulate an effective remedy"). As social scientific researchers have since documented statistically, the Court's "effectiveness" criterion generally requires mandatory assignment and transportation measures, notwithstanding the Court's statements, see, e.g., *Swann*, 402 U.S. at 28–29, that no particular measures are required. See, e.g., J. Hochschild, *supra* note 7, at 73 ("On average, the proportion of totally isolated black students is reduced in mandatory districtwide plans by 97 percent but in voluntary plans by only 5 percent Regression analysis shows essentially the same results—mandatory student reassignment has a vastly greater effect on levels of school segregation than any of eleven other political, demographic, or economic variables"); F. Welch & A. Light, *supra* note 6, at 6–7; Hawley & Smylie, *supra* note 9, at 282–83. A precise racial balance in every school is not required. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976); *Swann*, 402 U.S. at 24.

90. 413 U.S. 189, 208 (1973); accord, e.g., *Columbus*, 443 U.S. at 464.

91. See *Dayton II*, 443 U.S. at 538; *Columbus*, 443 U.S. at 458–59; *Keyes*, 413 U.S. at 213–14; see *supra* notes 81–83 and accompanying text.

92. See *Dayton II*, 443 U.S. at 540–42; *Columbus*, 443 U.S. at 458 & n.7, 466–68; *Keyes*, 413 U.S. at 207–11; *Swann*, 402 U.S. at 26; Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 Harv. C.R.-C.L. L. Rev. 1, 27–28 (1978).

93. *Dayton I*, 433 U.S. 406 (1977).

94. *Id.* at 417.

95. *Milliken I*, 418 U.S. 717 (1974).

Michigan did not justify extending the "all-out" remedial regime described above into Detroit's suburbs, notwithstanding the impossibility of providing Detroit's discriminated-against black school children with any meaningfully integrated classroom experience within the boundaries of that 80-percent-minority district. Noting the absence of discrimination by and invidiously motivated segregative effects in the suburbs, the five-person majority in *Milliken I* overturned a plan compelling fifty-three suburban school districts enrolling half a million pupils to take part in desegregating the 276,000-pupil Detroit city district and directed the district court to install in its place a wholly *intradistrict* plan.⁹⁶ In both *Dayton I* and *Milliken I*, the Court emphasized requirements of specific linkage between discriminatory cause and segregative effect and between violation and remedy, insisting that "the scope of the remedy [be] determined by the nature and extent of the constitutional violation."⁹⁷

B. *Connecting the Dots: Criteria for a Satisfying Picture*

The foregoing description of the cases does not do justice to the rich and complicated history of school desegregation.⁹⁸ It should, however, suggest the scattered and to some extent formless pattern of doctrinal dots that analysts seeking to draw a satisfying picture of desegregation have long struggled to join.⁹⁹ To borrow and extend Professor Yudof's description of the difficulty: "How have the courts managed to transform [*Brown II*'s] requirement of racially neutral admissions and assignment policies into an affirmative . . . obligation to integrate the public schools," then refused to enforce that obligation on behalf of admittedly discriminated-against African-American children attending all-minority schools in Dayton and Detroit?¹⁰⁰

96. See *id.* at 733 & n.14, 745, 753; see also *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 283-91 (1977) (affirming orders requiring Detroit district to provide, and Michigan partially to fund, compensatory education programs in lieu of comprehensive integration plan for four-fifths black district).

97. *Milliken I*, 418 U.S. at 744; accord *Dayton I*, 433 U.S. at 420.

98. See L. Graglia, *supra* note 55, at 18-257; R. Kluger, *Simple Justice* (1975); G. Orfield, *The Reconstruction of Southern Education* 102-51 (1969); J. Wilkinson, *supra* note 1, at 11-249; Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61, 63 & n.7 (1988) (citing authority); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049, 1088-93, 1099-102, 1107-14 (1978); Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 *Law & Contemp. Probs.* 7, 11-48 (1975); Shane, *supra* note 52, at 1062-77.

99. A major part of the problem is that the first dot—*Brown I*—won't stand still. See J. Wilkinson, *supra* note 1, at 29 (*Brown I* used brevity as a "mask for ambiguity"); Freeman, *supra* note 98, at 1057; Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 *Va. L. Rev.* 349, 351-55 (1990); Wechsler, *supra* note 55, at 34.

100. Yudof, *supra* note 61, at 448; accord Fiss, *Charlotte*, *supra* note 63, at 697 ("riddle of the law of school desegregation"); see also J. Wilkinson, *supra* note 1, at 222

An obvious answer to this question is that the dots do not form a coherent picture but rather mark the erratic trajectory of a series of case-specific compromises achieved by shifting coalitions of the Court's changing personnel. Without disputing this answer, I reject it as a working principle in favor of the possibly fictive assumption of doctrinal coherence. I do so for three reasons. First, lawyers and lower court judges must proceed as if the cases cohere. Second, in making up their minds and in "compromising" with their colleagues on the placement of the next dot, the Justices themselves will have recourse to the coherence assumption. Third, that assumption has particular force in this instance because existing doctrine has remained unusually stable in nearly all of its particulars for over a decade and a half (since *Milliken I*) and in important respects for over two decades (since *Green*).¹⁰¹ As a result, the day-to-day activities and expectations not only of hundreds of federal judges but also of thousands of school districts and millions of parents and children depend, and for years have depended, upon existing doctrine.¹⁰² The decisions accordingly do not just delineate a set of legal rules; more importantly, they define a full-fledged social practice that deserves explication as such, and that has the capacity—especially if explained in a morally satisfying way—to exert important inertial pressure on the next judicial "compromise."¹⁰³

The story of scholarly efforts to provide a philosophically satisfying explanation of the Court's desegregation doctrine is as long and involved as the doctrinal developments themselves. This story, too, has been sketched elsewhere,¹⁰⁴ but in order to continue my own story, I need to outline the five principal scholarly models of desegregation and the ways in which each fails to provide a descriptively and normatively satisfying explanation of the desegregative enterprise.

(*Green* and *Milliken* cannot be squared); Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 *Law & Contemp. Probs.* 57, 87, 99, 102, 105 (1978) (individually, cases are "a patchwork of unintelligibility;" collectively, cases are "incoherent").

101. Indeed, the National School Boards Association (NSBA), as *amicus curiae*, advocated review of the "termination" issue on which the Supreme Court recently granted *certiorari* precisely because the issue is one of the last remaining open questions in the school desegregation field. See Snider, *Court to Decide on Obligation in Unitary Districts*, *Educ. Week*, Apr. 4, 1990, at 1, col. 1 (quoting NSBA's brief); *supra* note 51; *infra* notes 805–828 and accompanying text.

102. For partial lists of school districts with major school desegregation plans, see F. Welch & A. Light, *supra* note 6, at 116–76; James, *supra* note 6, at 969–70.

103. See Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 760–62 (1988).

104. See Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1, 35–52 (1976); Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, *in* *Education*, *supra* note 49, at 21, 25–30; Freeman, *supra* note 98, at 1065–67; Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 *Calif. L. Rev.* 275, 298–374 (1972); Shane, *supra* note 52, at 1044–49; Yudof, *supra* note 100, at 88–106.

In examining the five models, I use the two standard evaluative criteria corresponding to our concerns with practice and theory: A model must "both fit[] and justif[y] what has gone before."¹⁰⁵

The criterion of fit asks whether a desegregation theory provides "a decent interpretation of American constitutional practice"—whether it proposes a paradigm or model that "capture[s our] everyday legal problems" and explains why judges "are curious about and responsive to particular facts."¹⁰⁶ Fit does not demand that a theory explain every outcome the Court has reached, much less every explanation given for every outcome. But fit does demand as a threshold matter that a theory explain the basic structure of the social arrangements that the case law is substantially responsible for shaping.¹⁰⁷ In the current context, fit requires that a theory generally account for the basic outlines of the violation and remedy that the Court's desegregation decisions define,¹⁰⁸ and that the theory satisfactorily answer a series of questions

105. R. Dworkin, *supra* note 52, at 239; accord *id.* at 139, 230–43, 255–58 (conception of law should "show practice in its best light" then "display some argument why law on that conception provides an adequate justification for coercion"); J. Ely, *Democracy and Distrust* 88–89 n.*, 101 (1980) (relying on "argument from the nature of the Constitution" and "overtly normative" argument about "consistency with democratic theory"); J. Mashaw, *Due Process in the Administrative State* 51–53, 167, 172–253 (1985) ("appropriateness" and "justificatory" analyses described and exemplified); J. Rawls, *A Theory of Justice* 20 (1971) ("reflective equilibrium" seeks a theory that "both expresses reasonable conditions and yields principles which match our considered [moral] judgments"); M. Sandel, *Liberalism and the Limits of Justice* 43–44 (1982) ("two different kinds of justification coming together"—one appealing to a "standard of descriptive . . . plausibility," the other to "our considered convictions about justice"); J. Wilson, *Equality* 8 (1966) (analytic philosophy's method of "moving back and forth between" prescription and description, "language and life"); Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 5 (1983) ("explanation and purpose"); Kahn, *Community in Contemporary Constitutional Theory*, 99 *Yale L.J.* 1, 67 (1989) (discussing R. Dworkin) ("Interpretation exists in this tension between historically given practice and normative intelligibility"); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 *Wasb. U.L.Q.* 659, 669 (judges use "methods and contents of the philosophical literature to inform and clarify that reasoning process once its constitutionally connected premise is in place"); Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 *Geo. L.J.* 89, 91–98 (1984) (exemplifying appeals to justification and fit in critique of "colorblind" approach to equal protection requirement); Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 *Sup. Ct. Rev.* 127, 128 (background theory used to interpret and test principles derived from case law).

106. R. Dworkin, *supra* note 52, at 366; Fletcher, *Fairness and Utility in Tort Theory*, 85 *Harv. L. Rev.* 537, 540 & n.12 (1972) [hereinafter Fletcher, *Fairness*] (citing T. Kuhn, *The Structure of Scientific Revolutions* 23 (2d ed. 1970)); Fletcher, *Punishment and Compensation*, 14 *Creighton L. Rev.* 691, 703, 694 (1981) [hereinafter Fletcher, *Punishment*].

107. See R. Dworkin, *supra* note 52, at 230, 240 ("some coherent theory" such that a single "official with that theory could have reached most of the results the precedents report;" interpretation "flawed if it leaves unexplained some major structural aspect of the text").

108. See *supra* note 3 and text accompanying notes 68–97.

begged by those decisions: Why has the Court limited the violation to intentional discrimination (*Why just intent?*) against blacks and members of other special groups (*Why just race?*)? And why has the Court limited desegregation to the sphere of education (*Why just, or primarily, schools?*), while limiting its decrees in that sphere almost exclusively to mandatory integration (*Why just desegregation?*)?

Fit with the doctrinal data plays an important role in my analysis for several reasons. First, like other modern interpreters, I doubt our capacity to build "morality from the ground up" and prefer a "practical morality" that seeks "an interpretation"¹⁰⁹ of "the standing features of [a] practice . . . rather than the invention of something new."¹¹⁰ It is again significant in this regard that desegregation's standing doctrinal features have persisted in important respects for decades.¹¹¹ My enterprise, therefore, is to try to explain those practices before advocating that we scrap thirty-six years of judicial handiwork and start over. Second, there are a number of pragmatic reasons why our desegregative practices deserve explanation—and, if possible, justification and, if justified, retention: (1) Those practices represent one of the longest-running efforts at sustained social reform in this country's history. (2) That effort has taken institutional root in the daily operation of more of the nation's towns and cities and psychological root in the daily lives of more of the nation's parents and children than virtually any other social reform of its time and kind. (3) The length and scope of that reform has enabled practitioners and researchers to begin to amass a workable fund of knowledge about how to make the reform work best. And most importantly, (4) our actual desegregative practices have had salutary effects on children and schools, citizens and communities, and the political process.¹¹² A theory gives up too much, therefore, if it prescribes substantially less desegregation than the Court in fact has ordered or if it premises the reform's justifiability on the Court's going substantially further than it is willing to go in ordering desegregation.¹¹³ Finally, practice provides an especially firm, familiar, and lawyerly starting point for assessing legal conceptions.¹¹⁴

109. M. Walzer, *Just and Unjust Wars* xv (1977).

110. R. Dworkin, *supra* note 52, at 67; accord Monaghan, *supra* note 103, at 727-39. See generally M. Walzer, *Interpretation and Social Criticism* 35-66 (1987) [hereinafter M. Walzer, *Interpretation*] (social critics should elaborate on existing moralities and tell stories about societies more just than, but still similar to, their own). Put differently, fit inevitably is important in order to break ties between competing theories, each morally satisfying on its own terms.

111. See *supra* text accompanying notes 101-102.

112. See *infra* notes 665-697 and accompanying text.

113. The questions comprising my fit analysis—Why just intent, race, schools, and desegregation?—were chosen carefully in this regard. A theory's conclusion that the Court erred in posing or answering any of these four questions would imply that current desegregation practice ought to be either disruptively contracted or unrealistically expanded.

114. See G. Calabresi, *A Common Law for the Age of Statutes* 73-75, 107-09 &

The criterion of justification, as I use the term, requires not only that a theory be coherent and internally consistent, determinate enough to qualify as a paradigm or model, and connected to a general moral or political principle that is defensible as a matter of abstract justice. In addition, justification requires that the defensible moral or political principle to which the theory is connected be consistent with "our considered convictions of justice"—i.e., with moral or political convictions that are held generally in our society (even if usually at a relatively high level of abstraction).¹¹⁵ The justification criterion thus includes a broadly focused fit requirement of its own.¹¹⁶ Although controversial,¹¹⁷ a demand for moral justification seems appropriate in the case of desegregation, both as an interpretive aid in a perplexing legal sphere¹¹⁸ and as a means of determining whether a highly contested set of judicial practices with widespread social consequences can be placed "in a better light from the standpoint of [the community's] political morality."¹¹⁹

n.69 (1982); R. Dworkin, *supra* note 52, at 139, 229–38; Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 349, 351–52 (1974); Fletcher, *Fairness*, *supra* note 106, at 540 & n.12; Gutmann, *Communitarian Critics of Liberalism*, 14 *Phil. & Pub. Aff.* 308, 312–13 (1985). Because the cases are more definitive of current practice than the Constitution itself, my fit analysis proceeds from the cases. Later, however, I conclude that the cases "fit" the Constitution. See *infra* notes 484–503, 591–603 and accompanying texts.

115. J. Rawls, *supra* note 105, at 19–20; accord R. Dworkin, *supra* note 52, at 164–65, 177–85, 249; Rorty, *Solidarity or Objectivity?*, in *Post-Analytic Philosophy* 3, 5–6, 12, 15–16, 18 n.12 (J. Rajchman & C. West ed. 1985); see also Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va. L. Rev.* 543, 574–75 (1986) ("normative schemes" are "embedded in society and social roles"). "[T]o say that we must work by our own lights, that we must be ethnocentric," is, of course, to eschew any strict claim of neutrality and to acknowledge "culturally contingent" results. Rorty, *supra*, at 8; Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 *Harv. L. Rev.* 1695, 1712–13 (1989); see Kahn, *supra* note 105, at 31; *infra* notes 374, 627, 652.

116. See Gutmann, *supra* note 114, at 312–13; Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *Phil. & Pub. Aff.* 219, 225 (1985) (favored justification process "starts from within certain political tradition").

117. See, e.g., Fiss, *supra* note 67, at 128. Compare J. Ely, *supra* note 105, at 48–54, 56–59 (criticizing noninterpretive efforts to derive fundamental values from moral philosophy for application in constitutional adjudication) with *id.* at 75 n.*, 79 & n.20, 88–89 n.*, 100, 101, 187 n.14, 237–38 n.54 (using utilitarian, liberal, and republican political and social theory, assertedly immanent in Constitution, to help understand Constitution's basic structure and provisions) and Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 *Duke L.J.* 959, 979–81, 985 n.79. (same) and Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1066 n.9, 1067, 1070, 1077 (1980) (disavowing possibility of divorcing constitutional adjudication from reliance on extra-textual substantive values).

118. See Michelman, *supra* note 105, at 669; Sunstein, *supra* note 105, at 136.

119. R. Dworkin, *supra* note 52, at 256.

C. *Five Theories*

In this section, I divide the numerous scholarly interpretations of desegregation into five theories that illustrate the divergent goals ascribed to the remedy: (1) the Equal Educational Opportunity theory; (2) the Integration theory; (3) the Correction theory; (4) the Prohibition theory; and (5) the Prophylaxis theory.¹²⁰ Although the five theories overlap and may be grouped in a number of ways, I separate them here to facilitate analysis, and array them in essentially the chronological order in which each came to dominate the scholarly scene. I also periodically analyze the five theories using two dichotomous measures—a product/process measure and a private law/public law measure.

The product/process measure categorizes desegregation theories based on whether they view the motivating force behind desegregation as, on the one hand, the singling out of certain goods—for example, knowledge, instruction, interracial contact, or wealth—“as so important that they must be insulated from whatever inhibition the political process might impose,” or on the other hand, a concern “with how decisions effecting value choices and distributing the resultant costs and benefits are made.”¹²¹ The product/process distinction overlaps a right/remedy distinction: The product-oriented approaches that dominated early desegregation theory tend to view desegregation as a schools-specific equal protection *right*. By contrast, the process-oriented approaches that more recently came into vogue view desegregation as a schools-specific *remedy* that the courts deploy in response to a more generally defined equal protection right.

The private law/public law measure categorizes the competing theories based on whether they perceive desegregation as aimed at private, interpersonal deviations from existing norms (analogous, for example, to traditional tort remedies) or at public, socio-structural imbalances, inefficiencies, or injustices (analogous, for example, to a regulatory system for preventing and compensating the victims of industrial

120. For alternative categorizations, see sources cited *supra* note 104.

121. J. Ely, *supra* note 105, at 75 n.* (“value-focused” versus “process-oriented” theories); see also M. Sandel, *supra* note 105, at 17–19 (“teleological” versus “deontological”); Crenshaw, *supra* note 3, at 1341–42 (“equality as a result” versus “equality as a process”); Dworkin, *De Funis v. Sweatt*, in *Equality*, *supra* note 49, at 61, 67–68 (“equal treatment” versus “treatment as an equal”); Dworkin, *What Is Equality?* Part 4: Political Equality, 22 *U.S.F. L. Rev.* 1, 3–5 (1987) (“consequentialist” versus “process”-focused; “outcome test” versus “input test”); Sandalow, *Judicial Protection of Minorities*, 75 *Mich. L. Rev.* 1162, 1177 (1977) (whether “conforms to a controlling standard” versus whether “is the result of a process that is appropriate”); Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1370, 1382–94 (1984) (“needs” focus versus “rights” focus). See generally Kymlicka, *Rawls on Teleology and Deontology*, 17 *Phil. & Pub. Aff.* 173 (1988) (analyzing different substance-process distinctions drawn by various modern political philosophers).

accidents).¹²²

1. *The Equal Educational Opportunity Theory*. — A number of commentators have read *Brown I* to require state and local public officials to provide black children with a given level of education, namely, the level generally afforded white children.¹²³ For the most part, these writers have understood this constitutional and public-law requirement to encompass a mandate to provide black and white children with the same education by educating both in the same, hence in integrated,

122. See Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4 (1982). For commentary drawing similar distinctions, see B. Ackerman, Reconstructing American Law 24–37 (1984) (“appraisal of individual actions” in search for isolated behavior that “against the background of presumptively legitimate social practice” is deemed to be deviant versus “structural account” of existing practice and of ways in which “existing practice, taken as a whole, may [or may not] be considered inefficient or unjust”); M. Damaska, The Faces of Justice and State Authority 71–88 (1986) (distinguishing “reactive” and “activist” approaches to formal adjudication); P. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 268 (1986) (distinguishing “private law” and “public law” approaches to toxic tort litigation); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 1, at 5–6, § 2, at 7 (5th ed. 1984) [hereinafter W. Keeton] (proceedings to compensate “individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests” versus proceedings to protect “interests common to the public at large, as they are represented by the entity which we call the state”); Fletcher, Punishment, supra note 106, at 692–93, 698 (legal theory designed either to “rectify the private imbalance generated by the defendant’s causing harm” or to “rectify the public imbalance generated by the defendant’s wrongdoing”). The private law/public law inquiry cuts across rather than duplicates, the product/process inquiry, inasmuch as we can imagine consequentialist private-law approaches (e.g., deterrence-focused tort schemes) as well as process-focused private-law approaches (e.g., compensation-focused tort schemes), and we can imagine consequentialist public-law approaches (deterrent criminal justice regimes) as well as deontological public-law approaches (retributive criminal justice regimes). See *id.* at 693, 698–99.

123. See, e.g., B. Ackerman, Social Justice in the Liberal State 246–47 (1980); J. Dewey, Democracy and Education 98 (1916); A. Gutmann, supra note 52, at 161–63; J. Hochschild, supra note 7, at 172–73; Bell, supra note 8, at 98–101; Carter, supra note 8, at 26–27; Edmonds, Effective Education for Minority Pupils: *Brown* Confounded or Confirmed, in *Shades*, supra note 8, at 108, 109; Fiss, supra note 61, at 200, 207; Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 588–89 (1965); Freeman, supra note 98, at 1067; Lawrence, supra note 8, at 51–52; Ortiz, The Myth of Intent in Equal Protection, 41 Stau. L. Rev. 1105, 1133 (1989); Shane, supra note 52, at 1084–85; Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123, 152–53 (1972); Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 Yale L.J. 317, 346–49 (1976) [hereinafter Note, Reading]. For criticism of the Equal Educational Opportunity theory, see M. Walzer, supra note 52, at 221–24; Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 430 n.25 (1960); Brest, supra note 104, at 9, 18 n.76, 45–46; Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 168 (1955); Dimond, School Segregation in the North: There Is But One Constitution, 7 Harv. C.R.-C.L. L. Rev. 1, 15–17 (1972); Dworkin, supra note 104, at 24–26; Taylor, The Crucial Role of Education in Achieving the Civil Rights Goals of the 1980s, 37 Rutgers L. Rev. 961, 963–64 (1985); Yudof, supra note 61, at 412–13, 420–30, 435–45.

schools.¹²⁴ Thus, while the desired end is a given level of education, the constitutionally or at least empirically mandated means to that end is generally understood to be a racially *integrated* education.¹²⁵

That a number of commentators have adopted the Equal Educational Opportunity theory is not surprising, given: (1) *Brown I*'s statement of "the question presented: Does segregation of children in public schools solely on the basis of race . . . deprive[] the children of the minority group of equal educational opportunities?";¹²⁶ (2) its discussion of the relative educational disadvantages suffered by African-American children in segregated facilities;¹²⁷ (3) the plaintiffs'¹²⁸ and the Court's¹²⁹ assumptions about the advantages of interracial education; (4) the Court's conclusion that segregation "deprives minority children of equal educational opportunity";¹³⁰ (5) the then sketchy but now substantial body of evidence establishing that black children educated in racially mixed schools score higher on I.Q. and achievement tests, are more likely to attend college and fare better there, and attain greater success in the job and housing markets, than do black children educated in racially homogeneous environments;¹³¹ (6) the Court's discussion of the particular importance of public education;¹³² and (7) the Court's subsequent endorsement, when integration has been impossible, of alternative educational-enhancement remedies.¹³³

Nonetheless, as an explanation of the desegregation doctrine as it actually developed—judged, that is, by the criterion of fit—the Equal Educational Opportunity principle is a failure. In particular, most proponents of the Equal Educational Opportunity approach assume, and

124. See, e.g., A. Gutmann, *supra* note 52, at 161–62; J. Hochschild, *supra* note 7, at 172–73; Fiss, *supra* note 123, at 583–617; Lawrence, *supra* note 8, at 50–54.

125. See Fiss, *supra* note 61, at 204, 207. But cf. Liebman, *supra* note 99, at 370–435 (nonintegrative means to equal educational opportunity end); *infra* notes 140, 142 and accompanying text (same).

126. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 493 (1954). The Court immediately answered its question: "We believe that it does." *Id.*

127. See *id.* at 494–95 & n.11 (racially separate education may "[retard] the educational and mental development of negro children").

128. See R. Kluger, *supra* note 98, at 319–21; Carter, *supra* note 8, at 22–23; cf. Crenshaw, *supra* note 3, at 1377–78 (symbolic and dignitary harms, not educational ones, were the focus); Monaghan, *Law and the Negro Revolution; Ten Years Later*, 44 B.U.L. Rev. 467, 471 (1964) (desegregation activists are "in fact not primarily interested in education" but in "integration into the mainstream of society").

129. See *Brown I*, 347 U.S. at 494 & n.11.

130. *Id.* at 493.

131. Compare authorities cited in *id.* at 494–95 n.11 (citing modest amount of social scientific research available at time suggesting that school segregation has harmful educational and psychological effects on African-American children) with authorities cited *infra* notes 675–691 and accompanying text (discussing more recent, sophisticated, and convincing social scientific research documenting school desegregation's salutary educational and other effects on African-American children).

132. See *Brown I*, 347 U.S. at 493.

133. See *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280–88 (1977).

no one has offered any good reason to doubt, that racial separation per se, rather than any cause of that condition, accounts for the educational inequalities discussed in *Brown I*.¹³⁴ Because educationally harmful "segregation can exist even when students are not assigned to schools on the basis of race . . . but rather on the basis of some . . . innocent criterion, such as geography," the Equal Educational Opportunity theory insists that the desired end-state of an equal, hence integrated, education accrue to all black children regardless of how they came to be separated from their white peers.¹³⁵

The problem with the legal premise underlying the Equal Educational Opportunity principle is, of course, that the Court, after flirting with the premise for several years,¹³⁶ rejected it in *Keyes*¹³⁷ and in numerous later decisions limiting the reach of the equal protection clause in race cases to purposive discrimination.¹³⁸ In order to answer the

134. See, e.g., A. Gutmann, *supra* note 52, at 161, 162; Fiss, Charlotte, *supra* note 63, at 707; Freeman, *supra* note 57, at 75, 83–87; Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 319–20 (1987) ("Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her?"). But cf. *Brown I*, 347 U.S. at 494 ("detrimental effect" of segregation "greater when it has the sanction of law"); Note, Reading, *supra* note 123, at 346–49 (similar).

135. Fiss, *supra* note 49, at 15–16; accord R. Dworkin, *supra* note 52, at 24; Fiss, *supra* note 61, at 200, 207–08; Gewirtz, Choice, *supra* note 49, at 731; Lawrence, *supra* note 8, at 52–54; see also *infra* note 675 (evidence suggesting that segregation's educational harms originate in the fact, and not in any particular cause, of racial isolation).

136. See, e.g., *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489–90 (1972); *Wright v. Council of Emporia*, 407 U.S. 451, 459–60 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971); *Green v. County School Bd.*, 391 U.S. 430, 435 (1968); see Yudof, *supra* note 61, at 449; see also *Cisneros v. Corpus Christi Indep. School Dist.*, 467 F.2d 142, 147–48 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973) (straightforward judicial application of Equal Educational Opportunity theory).

137. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973). Justices Douglas, *id.* at 215–16, and Powell, *id.* at 217–36, dissented from this holding. Justice Powell later embraced it. See, e.g., *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 991–95 & n.1 (1976) (Powell, J., concurring).

138. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 225, 229 (1985); *Rogers v. Lodge*, 458 U.S. 613, 617, 622 (1982); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 276–79 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976); *infra* notes 466–483 and accompanying text. Not only the "Why just intent?" but also the "Why just race?" and "Why just desegregation?" questions elude answer by the Equal Educational Opportunity theory. Thus, the theory implies that state and local officials violate the Constitution (1) whenever *any* group of children (for example, poor children) is "particularly harm[ed]," Fiss, *supra* note 49, at 15, by some educational policy, and (2) whenever *any* available educational strategy (for example, equalized funding for schools and districts) would forestall the harm. See, e.g., Horowitz, *Unseparate But Unequal: The Emerging Fourteenth Amendment Issue in Public School Education*, 13 *UCLA L. Rev.* 1147, 1162–65 (1966). The Court's decisions, however, reject both understandings of the Constitution. See, e.g., *Martinez v. Bynum*, 461 U.S. 321, 328–30 (1983) (upholding residency require-

question "Why just intent?", therefore, Equal Educational Opportunity theorists have had to adopt one of two views: either that the intent inquiry is designed to preclude further desegregation, in deference to whites who oppose the reform, or that the inquiry is not a serious requirement at all.

Adherents of the former view argue that the unpopularity of desegregation among whites, rather than any good doctrinal or philosophical reason, has led the Court to adopt a deliberately preclusive intent test. Faced with this politically decisive white hostility, these writers propose a negotiated retreat to what they believe is in any event higher educational ground: Blacks should give up the unpopular quest for mandatory integration, and with it *Brown I*'s holding that separate schools can never be equal. In return, the courts should relax the intent requirement and begin ordering state and local officials to furnish black children with "model black [i.e., separate but enhanced and truly equal] schools."¹³⁹ As Judge Carter explains the shift in perspective: "While we fashioned *Brown* on the theory that equal education and in-

ment denying tuition-free public education to alien children living in district with someone other than their parent or guardian); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973) (upholding substantial district-by-district disparities in funds available to educate children stemming from state's reliance on property taxes to fund public education); cases cited *infra* note 169.

139. Bell, *supra* note 8, at 101; accord D. Bell, *supra* note 2, at 118, 112-21. In Professor Bell's view, the "separate but enhanced" route is necessitated by "the interest-convergence dilemma"—that the courts will provide African-American children with only such beneficial relief in school desegregation cases as concurrently benefits middle class white citizens. D. Bell, *supra* note 2, at 22, 44-45, 51-74, 103-21, 154; accord D. Bell, *Race, Racism and American Law* 20-44 (2d ed. 1980); Bell, *supra* note 8, at 90; D. Bell, *Remembrances of Racism Past: Getting Beyond the Civil Rights Decline* 4-8 (1989) (unpublished manuscript, delivered at A Century of Civil Rights Struggle: A Conference on Racial Justice in the United States, Madison, Wisconsin) [hereinafter D. Bell, *Remembrances*]; Dudziak, *supra* note 98, at 62-4, 117-20; Monti, *Brown's Velvet Cushion: Metropolitan Desegregation and the Politics of Illusion*, 1 *Metropolitan Educ.* 52, 57-63 (1986). For application of an interest-convergence approach outside the desegregation area, see Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *Harv. C.R.-C.L. L. Rev.* 301, 304-05 (1987); Freeman, *Antidiscrimination Law: A Critical Review*, in *The Politics of Law* 96 (D. Kairys ed. 1982); Steel, *Nine Men in Black Who Think White*, *N.Y. Times Mag.*, Oct. 13, 1968, at 56. Professor Bell has suggested the tactical retreat discussed in the text as a means of using the desire of white middle class citizens to avoid further desegregation as the leverage necessary to convince them, in return for an end to further desegregation, to fund enhancements for all-black schools and to convince the courts to relax some of the stringent requirements, including the intent test, for affording black children relief. See Bell, *supra* note 8, at 98-101. Without, for the moment, disputing the interest-convergence thesis, but see *infra* notes 377-385, 649-650, 759 and accompanying text, I remain puzzled by the conclusion Professor Bell draws from that premise. I do not understand what interest the white majority would have in enhancing black schools were the civil rights movement—as Professor Bell proposes—to give up the threat to whites that *Brown I*'s integration requirement presents. See Hawley & Smylie, *supra* note 9, at 294; Heaney, *supra* note 49, at 810; *infra* note 650; cf. D. Bell, *supra* note 2, at 121 (economic improvements among blacks may have to precede enhanced educational opportunity).

tegrated education were one and the same thing, the goal was not integration but equal educational opportunity. *Brown* requires equal educational opportunity. If that can be achieved without integration, *Brown* has been satisfied."¹⁴⁰

Whatever *Brown I* itself may have mandated, however, its offspring since *Keyes* have not required equal educational opportunity. Rather, they have required purposive discrimination. And that requirement has such a tight grip on desegregation law and "suspect classification" adjudication in general that the Court is unlikely for now to abandon it even in return for the proffered concession that separate schools can be equal.¹⁴¹ In any event, because this branch of the Equal Educational Opportunity theory abandons desegregation, and any semblance of fit with the precedential data, I abandon it. I note, however, that the educational and political strategies upon which adherents of "separate but enhanced" all-minority schools would rely to achieve the theorists' educational goals offer little immediate hope of matching desegregation's quality-of-life-enhancing accomplishments.¹⁴²

140. Carter, *supra* note 8, at 27; accord Bell, A Model Alternative Desegregation Plan, in *Shades*, *supra* note 8, at 124, 125-39; Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 *Tex. L. Rev.* 777, 795-807 (1985); Ravitch, Desegregation: Varieties of Meaning, in *Shades*, *supra* note 8, at 30, 38-46; Committee on Policy for Racial Justice, *Visions of a Better Way: A Black Appraisal of Public Schooling* 37 (Joint Center for Political Studies 1989); Congress of Racial Equality, A Proposal for Community School Districts, in *The Great School Bus Controversy* 311, 311-12 (N. Mills ed. 1973); see also B. Ackerman, *supra* note 123, at 270 (favoring "compensatory educational effort that would provide blacks with an education no less liberal than the imperfect variety provided suburban whites"). For discussion of the capacity of all-minority schools to achieve educational success, see, e.g., T. Sowell, *Black Education: Myths and Tragedies* 259-63 (1972); U.S. Dep't of Educ., *Schools that Work: Educating Disadvantaged Children* 17, 23-25 (1987) [hereinafter *Schools that Work*]; DuBois, *Does the Negro Need Separate Schools*, 4 *J. Negro Educ.* 328 (1935). But see Hawley & Smylie, *supra* note 9, at 304; *infra* note 142 (paragraph (1)).

141. See *supra* note 138.

142. In regard to the three principal strategies for achieving equal educational opportunity in racially separate schools—"effective schools" methodology, African-American political control of city school boards and other political institutions, and decentralization of the administration of local schools, see *supra* note 140—consider that:

- (1) Despite scattered and episodic exceptions, all-black elementary and secondary schools in this country before *Brown* provided abysmally low quality instruction. See, e.g., J. Anderson, *The Education of Blacks in the South, 1860-1935*, at 148-83 (1988); Edmonds, *supra* note 123, at 118-19; M. Homel, *Down from Equality: Black Chicagoans and the Public Schools 1920-41*, at 58-84 (1984); J. Wilkinson, *supra* note 1, at 19-20; Heaney, *supra* note 49, at 752-56.
- (2) The criteria that "effective schools" research associates with the high test scores achieved at a small number of all-minority public schools—strong school leadership, a pervasive instructional focus, order, high expectations for students, and frequent testing—have not been shown to be either causal or replicable. See Elson, *Suing to Make Schools Effective, or How to Make a Bad Situation Worse*, 63 *Tex. L. Rev.* 889, 889-901 (1985); Oakes, *Improving Inner-City Schools: Current Directions in Urban District Re-*

Other adherents of the Equal Educational Opportunity theory have

- form 30-37 (Center for Policy Research in Educ., Report No. JNE-02, Oct. 1987); Purkey & Smith, *Effective Schools: A Review*, 83 *Elem. Schools J.* 427, 436-48 (1983); Stedman, *A New Look at the Effective Schools Literature*, 20 *Urb. Educ.* 295, 297-311 (1985); authority cited in Liebman, *supra* note 99, at 394 n.151.
- (3) The Comprehensive School Improvement and Planning Office of the New York City Board of Education, which in the early 1980s generated many of the studies on which "effective schools" advocates rely, e.g., Ratner, *supra* note 140, at 777, 796-98, 805 n.93, has not succeeded in exporting effectiveness to most of the district's minority schools. See Liebman, *supra* note 99, at 382 n.119; Berger, *How 2 Schools So Alike Can Be So Different*, *N.Y. Times*, July 24, 1990, at B1, col. 2.
 - (4) A comprehensive evaluation of the other program on which "effective schools" advocates principally rely, see Ratner, *supra* note 140, at 805-06 & nn.94, 95, Milwaukee's Project RISE, establishes that the program has not thus far succeeded. See Walsh, *SES, Academic Achievement, and Reorganization of Metropolitan Area Schools: Preliminary Implications of the Milwaukee Area Study*, 1 *Metropolitan Educ.* 78, 88-89 (1986); see also Oakes, *supra*, at 35-36 (disappointing experience in other cities).
 - (5) Due to the substantial and growing degree to which state governments control the political and economic resources necessary to improve local schools, see Liebman, *supra* note 99, at 380-81 & n.113, 400 & nn.174-75, as well as the slow rate of increase of African-Americans elected to local public office, the movement toward black control of city government has not appreciably improved minority schools and school systems. See, e.g., D. Bell, *supra* note 2, at 93; Fiss, *supra* note 67, at 129-30; Franklin, *Preface*, in *Committee on Policy for Racial Justice*, *supra* note 140, at i, x ("Accession to office by blacks . . . in no way guarantees that they will be able to bring about significant changes . . . since political power and economic resources frequently remain firmly rooted in the old, mainly white power structure"); Hawley & Smylie, *supra* note 9, at 285; Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *Rutgers L. Rev.* 673, 675 (1985).
 - (6) Although new, "school-based management" initiatives are afoot elsewhere, see Liebman, *supra* note 99, at 393-97 & nn.150, 165; Philadelphians "Commit" to Site-Based Management, *Educ. Week*, June 20, 1990, at 5, col. 1; Bradley, *New York City Schools Take 1st Step Toward Management at the School Site*, *Educ. Week*, May 9, 1990, at 5, col. 5; Bradley, *Uneasy Alliance Marks Launch of L.A. Plan*, *Educ. Week*, Apr. 11, 1990, at 1, col. 3; Snider, *Chicago Elections Usher in New Era of Reform*, *Educ. Week*, Oct. 18, 1989, at 1, col. 4, *New York City's and Detroit's 20-year experience with decentralized schools has been disappointing*, see, e.g., A. Gutmann, *Liberal Equality* 193, 191-97, 275-78 nn.63-90 (1980); D. Rogers & N. Chung, *110 Livingston Street Revisited: Decentralization in Action* 206-15 (1983); M. Zimet, *Decentralization and School Effectiveness* 146-52 (1973); Berger, *School Panel Gets Accounts of Corruption*, *N.Y. Times*, Mar. 13, 1990, at B1, col. 5; Berger, *School Superintendent in Queens Tells of Costly Patronage Scheme*, *N.Y. Times*, Oct. 24, 1989, at A1, col. 1; Lewis, *20 Years After Decentralization, Restructuring of Schools Is Urged*, *N.Y. Times*, Mar. 6, 1989, at A1, col. 1; Snider, *Elections for Boards in New York City Draw Record-Low Fractions of Voters*, *Educ. Week*, May 10, 1989, at 5, col. 5; Lewis, *School Boards Found Failing to Meet Goals*, *N.Y. Times*, Dec. 5, 1988, at B1, col. 5; Perlez, *Citing Disarray, Quinones Ousts*

stuck by desegregation and instead questioned the seriousness of the intent test. These theorists accuse the Court of only pretending to "give the moralists what they want" by means of the stated requirement of an evil act. In reality, these theorists argue, the Court covertly took back what it ostensibly gave the moralists by adopting a series of allegedly circular and all but explicitly irrebuttable presumptions (1) *from* the fact of segregation *to* evil intention, then (2) *from* that evil intention *to* a fiat characterization of the continuing fact of segregation as the consequence of the evil intentional act.¹⁴³

However plausible this "window dressing" characterization may have been in the early 1970s, the Supreme Court since has undressed the window in two important ways. First, by vacating and remanding two lower court desegregation decisions following its full embrace of the intent requirement in the 1975 and 1976 Terms, the Court rejected the first 180 degrees (i.e., the effect-to-intent half) of the circle of presumptions supposedly designed to neutralize the intentional-discrimination and actual-effects requirements.¹⁴⁴ Second, in *Milliken I*¹⁴⁵ and *Dayton I*,¹⁴⁶ the Court reversed lower court decisions that had ordered

School Board, N.Y. Times, Mar. 21, 1987, at A1, col. 2; Rubin, The Graying of School Decentralization, N.Y. Times, June 20, 1987, at 27, col. 2; Rule, Locally Run Schools Disappoint Minority Educators and Parents, N.Y. Times, June 27, 1980, at A1, col. 1.

- (7) The interracial contact foregone by "separate but enhanced" remedies "may be a uniquely necessary ingredient" of a number of advantages shown to follow from school desegregation. Braddock & McPartland, *The Social and Academic Consequences of School Desegregation, Equity & Choice*, Feb. 1988, at 5, 10. Such contact, for example, is critical to reducing racial prejudice and apparently improves the ability of blacks upon leaving school to secure higher paying jobs in integrated settings and to succeed in integrated higher educational, employment, and housing situations. See Camburn, *College Completion Among Students from High Schools Located in Large Metropolitan Areas*, 98 Am. J. Educ. 551, 559 (1990); Hawley & Smylie, *supra* note 9, at 282, 294; Walzer, *Thoughts on Democratic Schools*, 23 Dissent 57, 61-62 (1976); *infra* notes 675-696.

143. See, e.g., Fiss, *Charlotte*, *supra* note 63, at 698; Fiss, *supra* note 49, at 18, 26, 35 (intent requirement "dressing designed to improve the [decisions' moral] . . . acceptability"; "[not] of much significance"; and "for purposes of appearance"); Goldstein, *supra* note 92, at 28; Ortiz, *supra* note 123, at 1131-34, 1150.

144. See *Housing Auth. v. Buckley*, 429 U.S. 1068, 1068-69 (1977) (vacating decision in *United States v. Board of School Comm'rs*, 541 F.2d 1211, 1220 (7th Cir. 1976), which presumed intent from foreseeable effects, and remanding for reconsideration in light of *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976)); *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 990 (1976) (vacating decision in *United States v. Texas Educ. Agency*, 532 F.2d 380, 388 (5th Cir. 1976), which presumed intent from foreseeable effects, and remanding for reconsideration in light of same cases); see also Note, *supra* note 31, at 2004 & n.11 (lower court decisions denying school desegregation relief based on lack of proof of intentional discrimination).

145. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 753 (1974).

146. *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 421 (1977).

racially integrative relief for tens of thousands of African-American children who, whatever else could be said, were attending almost entirely racially homogeneous schools.¹⁴⁷ By the mid-1970s, therefore, proponents of the Equal Educational Opportunity theory were forced to contend either that those decisions were wrong or that the theory was.¹⁴⁸

Because my endeavor here is to defend the desegregation decisions and the practices they engender on the basis of philosophically sound principles, I depart from further discussion of the Equal Educational Opportunity theory at the point where it admittedly departs from those decisions. Before I leave it, however, let me note a double-barreled criticism often leveled against the theory. Probably because its

147. Notice also how significantly this assertedly cosmetic gloss on the Equal Educational Opportunity theory actually changes the theory. The gloss switches the circumstance triggering judicial intervention from educational inequality itself to inequality along racial lines. This move from education to race not only limits the range of children the theory serves, cf. *supra* note 138 (pure Equal Educational Opportunity theory implies a right to minimally adequate education for nonminority groups), but also weakens the theory's most important normative justification, namely, the horizon-expanding function that liberal polities often call upon compulsory education to perform for *all*, and not just minority, children, see *infra* notes 154-155 and accompanying text.

148. E.g., Fiss, *supra* note 49, at 18, 28, 30-31 (*Milliken I* shows that fact of "segregation is not at the center of the Court's concern"); see Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 47-48 (1979); Freeman, *supra* note 57, at 85; Lawrence, *supra* note 8, at 57; Yudof, *supra* note 100, at 97. Accepting the premise that American history leaves no doubt that segregation and its attendant educational harms are a product of intentional governmental discrimination might conform Equal Educational Opportunity theory to an intent requirement of sorts. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 222-23 (1973) (Powell, J., concurring in part and dissenting in part) ("the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country" is "segregated residential and migratory patterns . . . perpetuated and rarely ameliorated by action of public school authorities"); W. Wilson, *The Declining Significance of Race* 110, 120, 152 (1978); Crenshaw, *supra* note 3, at 1341-42 & n.48; Dimond, *The Anti-Caste Principle: Toward a Constitutional Standard for Review of Race Cases*, 30 Wayne L. Rev. 1, 42-61 (1983); Lawrence, *supra* note 8, at 50-54, 63, 66. This theory, however, also abandons a purely outcome-focused goal of educational enhancement in favor of a deontological call for racewide compensation—or reparations—for racewide invidious harm. See D. Bell, *supra* note 2, at 123-39; Fiss, *supra* note 67, at 127 ("blacks as a group were *put* in that [chronically subordinate] position by others and the redistributive measures are *owed* to the group as a form of compensation"); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 380, 383-85 (1987). Although Judge Wisdom has viewed school desegregation in the South in something like this light, see, e.g., *Williams v. City of New Orleans*, 729 F.2d 1554, 1573 & n.7 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 869 (5th Cir. 1966), reh'g granted, 380 F.2d 385, cert. denied, 389 U.S. 890 (1967), the Supreme Court has rejected the view. See, e.g., *Milliken I*, 418 U.S. at 745 (forbidding inclusion in remedy of districts not shown to have committed or been affected by intentional discrimination); *Keyes*, 413 U.S. at 208. However compelling the moral justification for this theory, therefore, see *infra* notes 176-179, 249-250 and accompanying text, it does not satisfy the fit criterion.

chief proponent readily conceded the point,¹⁴⁹ the Equal Educational Opportunity theory has been criticized as overly concerned with “inconclusive” empirical premises about the educational benefits of integration and insufficiently concerned with the theory’s moral basis.¹⁵⁰ In my view, both criticisms overshoot the mark.

There are indeed a number of uncertain empirical premises afoot in the desegregation area. But for me the least troubling assumption of all is this: that black children—having been confined from birth until their eighteenth year in a consistently and thoroughly segregated social environment—will find it difficult thereafter to succeed should they choose one of the many life plans offered by our society that require significant contact with members of the majority, and demographically, economically, and politically dominant, race.¹⁵¹ Indeed, assumptions such as this long have driven the nation’s commitment to providing all citizens with a free public education.¹⁵² In any event, now that most legal scholars have given up their impatient wait for empirical proof of this assumption, social scientists have begun producing it.¹⁵³

For similar reasons, I do not doubt that compelling moral principles undergird the Equal Educational Opportunity ideal. True, Equal Educational Opportunists have not very carefully explained what they mean by “equal educational opportunity.”¹⁵⁴ But *some* relatively strict

149. Professor Fiss has preferred to defend the theory as intellectually satisfying rather than “moral[ly] imperative.” Fiss, Charlotte, *supra* note 63, at 698; Fiss, *supra* note 49, at 18.

150. Gewirtz, Choice, *supra* note 49, at 737; accord Brest, *supra* note 104, at 9, 18 n.76, 45–46; Cahn, *supra* note 123, at 158; Dimond, *supra* note 123, at 15–17, 46 n.184; Dworkin, *supra* note 104, at 24–26; Yudof, *supra* note 61, at 435–38, 446, 459–60; Yudof, *supra* note 100, at 107.

151. See, e.g., B. Ackerman, *supra* note 123, at 242; A. Gutmann, *supra* note 52, at 119; J. Dewey, *supra* note 123, at 20–21; Walzer, *supra* note 142, at 61 (“in ghetto and slum schools, children are prepared for ghetto and slum life”).

152. See *infra* note 156.

153. Compare Fiss, Fate, *supra* note 63, at 768 (“evidence to document the value of integration is thin” as of 1974; “it is embarrassing to continue to use time as an excuse”) and authority cited *supra* note 150 (arguing that empirical studies of desegregation’s educational effects are inconclusive) with *infra* notes 675–696 and accompanying text (recent more encouraging empirical data).

154. Equal Educational Opportunity theorists have not carefully specified: (1) Whether they seek to equalize knowledge as a perfectionist good in itself or as an antiperfectionist means of helping all citizens pursue their own visions of the good. See J. Dewey, *supra* note 123, at 818–94 (surveying competing philosophical views on goal of education); see also *infra* notes 455–458, 668–696 and accompanying text (empirically, desegregation better serves antiperfectionist than perfectionist goals, inasmuch as desegregation improves graduates’ life chances in higher educational, employment, and other settings more than it increases learning levels); *infra* note 156 (antiperfectionist understanding fares better philosophically in our culture). (2) What kind of equalization they demand: what might be called “equal access” (extrinsic barriers to access removed), “equal chances” (social contingencies also removed), “equal ability” (natural contingencies also removed), or “equal outcomes” (motivational contingencies also removed). See A. Gutmann, *supra* note 52, at 128–34; J. Rawls, *supra* note 105, at 71–75;

version of that ideal is critical to most modern notions of a just liberal state, in which—to the extent possible without abolishing the family—the government is understood to have a responsibility to provide a free public education to all its young citizens in order that each of them may choose and embark upon a career as free as possible of the consequences of social contingency.¹⁵⁵

Indeed, upon closer analysis, it seems clear that the problem with the Equal Educational Opportunity view is less its *lack* of any, and more the *breadth* of its, moral basis—particularly when its redistributive impulses threaten, in a culturally unacceptable way, to invade contexts other than public education.¹⁵⁶ That threat materialized as early as the

Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 *Iowa L. Rev.* 1, 2-3, 18-19 & n.20 (1987); Jencks, *What Must Be Equal for Opportunity to Be Equal*, in *Equal Opportunity* 47, 66-73 (N. Bowie ed. 1988); see also *infra* notes 675-696 and accompanying text (evidence that desegregation neutralizes some social contingencies and even one contingency (I.Q.) once thought to be natural, changes motivation structures, and exposes children to a wider range of life possibilities, thus increasing likelihood of matching aptitudes and appetites with fulfilling careers). (3) How much equality is required—how far must desegregation close interracial gaps to be counted a success. See Liebman, *supra* note 99, at 356 (in some places, desegregation has reduced black-white achievement gap by a third).

155. See, e.g., B. Ackerman, *supra* note 123, at 28, 139, 155-63; J. Dewey, *supra* note 123, at 104 (democratic society must provide citizens with schooling "of such amplitude and efficiency as will in fact and not simply in name discount the effects of economic inequalities" and equip graduates "to be masters of their own economic and social careers"); J. Rawls, *supra* note 105, at 73; Jefferson, *Notes on the State of Virginia*, in *The Life and Selected Writings of Thomas Jefferson* 262 (A. Koch & W. Peden eds. 1944); see Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in *Reading Rawls: Critical Studies of a Theory of Justice* 319, 334, 344 (N. Daniels ed. 1975) [hereinafter *Reading Rawls*]; *infra* notes 736, 737. See generally Liebman, *supra* note 99, at 367-70 (discussing important function assigned to public education by modern liberal thinkers and politics).

156. Although grounded in moral principles of *some* sort, theories of constitutionally mandated redistribution, are not grounded in *our own* considered convictions of justice and accordingly violate the "moral fit" justification criterion. See, e.g., J. Ely, *supra* note 105, at 135-36; *supra* text accompanying note 116; *infra* notes 176-179 and accompanying text. The same argument, however, does not apply to school desegregation. First, desegregation is less redistributive than it at first appears. Unlike affirmative action quotas, for example, desegregation does not require that whites forswear a benefit in order that African-American children may receive it. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300 n.39 (1978) (Powell, J.) (plurality opinion); see also Liebman, *supra* note 99, at 364-67 (comparing modestly redistributive effects of desegregation and more thoroughly redistributive effects of other race-based remedial action). Nor does desegregation inflict any measurable intellectual or psychological harms on white children. See *infra* notes 574, 664, 683-685, 800-804 and accompanying text. But cf. Liebman, *supra* note 99, at 365-66 (extent of desegregative redistribution vis-à-vis white *parents*); *infra* notes 574-575 and accompanying text (same). More importantly, our history and traditions are less squeamish about constitutionally mandated redistribution of educational resources than of other resources: (1) Although none of the 50 state constitutions contains anything like an explicit requirement of state-provided nutrition, shelter, employment, subsistence, or even physical security, all but two contain provisions expressly assuring young people the right to a free public education.

mid-1950s when the Court extended the dictates of *Brown* to spheres other than public education.¹⁵⁷ By doing so, the Court forced Equal Educational Opportunity theorists either to extend their distributive claims to other spheres, thereby forsaking the case law and culturally acceptable principles,¹⁵⁸ or to explain why the "right" to desegregative distribution that they found in *Brown* did not arise in the other spheres in which *Brown* applied, thereby at least forsaking symmetry.

To conclude, then, my problem with Equal Educational Opportunity theory is not empirical nor primarily philosophical (unless the theory is extended beyond the sphere of education), but mainly that one must look elsewhere in order to find a morally satisfying principle served by the desegregation decisions and the practices they have produced.¹⁵⁹

2. *The Integration Theory.* — At least two versions of the Integration theory may be identified. According to the Universalist version, the Constitution defines racial integration as a desired end either for

See Liebman, *supra* note 99, at 367–68; Michelman, In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice, 121 U. Pa. L. Rev. 962, 1010 n.139 (1973); Ratner, *supra* note 140, at 814–16. Cf. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1007 (1989) (state has no constitutional duty to ensure personal safety of citizens); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (American constitutionalism generally obliges state to "let people alone" but not "to provide services, even so elementary . . . as maintaining law and order"). (2) The Court frequently has noted the importance of state and local governments' obligation to provide free public education. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) (quoting *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local government"); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). (3) The ideal of a single, eye-opening public education for all children to experience in "common" as a means of leveling economic and social differences is a foundational tenet of American educational and political theory. See L. Cremin, *American Education: The Transformation of the School: Progressivism in American Education, 1876–1957*, at 9–10 (1969); D. Ravitch, *The Great School Wars: New York City, 1805–1973*, at 62, 171 (1974); Braddock, Crain & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 Phi Delta Kappan 259, 260 (1984); Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245, 266 n.103 (1983); *supra* note 155.

157. See *infra* notes 724–725.

158. Compare *infra* note 163 (citing authority reflecting tendency of outcome-focused desegregation theorists to come eventually to advocate forthright social redistribution) with *supra* notes 138, 156 (doctrinal and philosophical difficulties with broadly focused distributivist theories) and *infra* notes 176–178 and accompanying text (same).

159. The authorities discussed notes 154–156 suggest two reasons why the Equal Educational Opportunity theory, although potentially palatable philosophically, has not been adopted by the Supreme Court: (1) the theory's tendency towards an unacceptable distributivism, and (2) a conviction, supportable under federalism and Republican-communitarian notions, see *infra* notes 409, 708, that substantive education-focused imperatives are the concern of state not federal constitutional law. We thus should look for desegregation's justification in a realm in which the Constitution gives the national government and its courts substantial but nonredistributive authority. See *infra* note 510.

instrumental reasons, for example, that interracial contact broadens choice horizons, or simply because racial interaction is good in itself.¹⁶⁰ Inasmuch as the Universalist view was explicitly devised to palliate the asserted empirical uncertainty of the Equal Educational Opportunity theory,¹⁶¹ it is not surprising that a skeptical empiricist, Christopher Jencks, gave the view its clearest expression: “[T]he case for or against desegregation should not be argued in terms of academic achievement. If we want a segregated society, we should have segregated schools. If we want a desegregated society, we should have desegregated schools.”¹⁶²

The alternative, Redistributive, version of the Integration theory holds that black children as a group have a substantive right not only to an equal share of the fruits of, but also to integration within, society’s dominant educational institutions. In the Redistributive view, this group right of black children is part of the group right of black Americans generally to an equal share of the fruits of, hence to integration within, the nation’s dominant social, political, and economic institutions.¹⁶³ Whether explained as just compensation for 370 years of

160. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 225–26 (1973) (Powell, J., concurring in part and dissenting in part); *id.* at 214–15 (Douglas, J., concurring); M. Walzer, *supra* note 52, at 217, 223–24 (via desegregation, “schools should aim at a pattern of association anticipating that of adult men and women in a[n] ideal pluralist democracy,” namely, a pattern characterized by free association among members of diverse communities); J. Wilkinson, *supra* note 1, at 173–75, 199; Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 *San Diego L. Rev.* 881, 950 (1988) (integration necessary “to provide cultural diversity within racially isolated school districts”); Karst, *supra* note 4, at 36, 50–51 (“best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste is the integration of our public life, from school to workplace to marketplace”); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 *U. Pitt. L. Rev.* 673, 716, 731 (1985) (integration “promotes liberal ends” through “the release of human potentialities and the enlargement of the human experience”); Yudof, *supra* note 61, at 456–58 (universalist ethic attaches “positive value to integration” based on “tradition that demands a universal society undiminished by racially identifiable institutions” and on fear that “[s]egregation of the races in public institutions, employment, and housing will inevitably lead to conflict and the destruction of democratic values and institutions”). For critical commentary, see Brest, *supra* note 104, at 11, 48; Dworkin, *supra* note 104, at 25; Fiss, *supra* note 61, at 204, 207; Freeman, *supra* note 98 at 1073–75 (lamprooning theory as seeking a society in which “everybody is a creamy shade of beige”); Monaghan, *supra* note 128, at 474, 485; Parker, *The Past of Constitutional Theory—and Its Future*, 42 *Ohio St. L.J.* 223, 245 (1981).

161. See Yudof, *supra* note 61, at 434–39, 456–57.

162. C. Jencks, M. Smith, H. Ackand, M.J. Bane, D. Cohen, H. Gintes, B. Heyns & S. Michelson, *Inequality: A Reassessment of the Effect of Family and Schooling in America* 106 (1972) [hereinafter C. Jencks].

163. See, e.g., Crenshaw, *supra* note 3, at 1341, 1352; Dimond, *supra* note 123, at 4–5, 53–54; Fiss, *supra* note 67, at 127–29, 134–35 (assimilating Equal Educational Opportunity theory to broader Redistributive theory); Parker, *supra* note 160, at 249–51; Yudof, *supra* note 100, at 80, 82 (abandoning Universalist in favor of “group protection” theory). For criticism of the Redistributive approach, see *infra* notes 176–178. Empirical evidence verifies the assumption of integration-focused Redistributivists that

concerted society-wide subordination of African-Americans,¹⁶⁴ as a prerequisite for social stability or solidarity,¹⁶⁵ or simply as a humane response to large and persistent disparities among groups in society, the Redistributive view would have the courts do exactly what its name implies—redistribute wealth, political power, and status from dominant groups in society to subordinate ones, most particularly to blacks.

Neither version of the Integration theory fits the Supreme Court's desegregation jurisprudence, as proponents of both versions readily acknowledge.¹⁶⁶ Neither version, for example, countenances the result in *Milliken I*, which confined Detroit's black children to all-black schools in the central city and kept them out of predominantly white schools in the surrounding suburban districts.¹⁶⁷ Nor can either version explain why the Court confines the desired end of mandatory integration to situations in which purposeful discrimination is the immediate cause of racial separation. In addition, both versions have difficulty: (1) finding constitutional authority for the view that participation and association with others in important institutions should be universalized, even against the will of members of the forcibly assimilated groups,¹⁶⁸ or that the equal protection clause levels economic disparities¹⁶⁹ and principally protects groups, not individuals;¹⁷⁰ (2) explaining why the Court

securing the full benefit of white educational institutions requires blacks' integration within those institutions and not simply the institutions' replication in minority communities. See Braddock & McPartland, *supra* note 142, at 70 (a principal benefit of minority attendance at integrated schools, not available in all-minority schools, is information about and personal introduction to employment and other opportunities in the predominantly white community).

164. See sources cited *supra* note 148.

165. See Fiss, *supra* note 49, at 128.

166. See, e.g., Brest, *supra* note 104, at 19–25; Fiss, Fate, *supra* note 63, at 746–47 n.10; Fiss, *supra* note 49, at 85–88, 94, 122–23; Goldstein, *supra* note 92, at 28–31; Yudof, *supra* note 100, at 88. Indeed, the Court generally has eschewed “the ‘I’ word” itself. See Fiss, *supra* note 49, at 32. True, as of 1973, the Universalist theory was “consistent” with what the Supreme Court had “done rather than what it ha[d] said.” Yudof, *supra* note 61, at 450. But since 1974 that has not been true. See *supra* notes 137–138 and accompanying text.

167. See *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 745, 753 (1974).

168. The case law, particularly in the area of education, is to the contrary. E.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (“fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children”); *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923); *infra* note 740; see Fiss, *supra* note 61, at 207 (no “constitutional peg for the universalist ethic”); Monaghan, *supra* note 128, at 474–77 (forced “racial or religious ‘balance’” is “alien to the spirit of our laws”).

169. See *Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481, 2487 (1988); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 47 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *James v. Valtierra*, 402 U.S. 137, 142 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

170. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989) (plurality opinion) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)) (equal protection right “‘guaranteed to the individual’” and “‘personal’”); *Brown v. Board of Educ. (Brown*

has limited the class-wide integration remedy to blacks and a few other racial groups and not extended it, for example, to insular religious groups and persistently impoverished whites;¹⁷¹ and (3) justifying the Court's limitation of the integration remedy to schools and its failure to extend the remedy, for example, to the employment and housing spheres.¹⁷²

Having failed the fit test, most versions of the Integration theory also score low on the justification measure. One version of the Universalist theory would deprive schools of their character as one-time, eye-opening, and choice-expanding instruments of the moderu liberal state and make them instead the initial building block of a homogenizing and choice-excluding state. In this Platonic or nationalistic mode, the Universalist ethic can be faulted as being too pervasively "result oriented"—as imposing on all citizens a single, state-mandated vision of the universalized good.¹⁷³ In its search for the strong "ethical princi-

II), 349 U.S. 294, 300 (1955); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938); Greenberg, *Race Relations and Group Interests in the Law*, 13 Rutgers L. Rev. 503, 507 (1959).

171. Compare, e.g., Fiss, *supra* note 67, at 124, 128 n.67, 131 (group disadvantaging principle requires redistribution in favor of all groups with a perpetually low "socio-economic position") with cases cited *supra* note 170 (forbidding intentional race-based governmental segregation and subjecting it to integrative remedies) and cases cited *supra* notes 138, 169 (permitting intentional wealth-based governmental segregation) and cases cited *supra* note 168 (limiting power of states to insist upon integrating unwilling members of insular religious groups with other children in public school). Once one ties blacks' "special position" in equal protection theory to their past exclusion and susceptibility to prejudice, Fiss, *supra* note 67, at 128-29, the theoretical focus shifts, it seems to me, from a single desired end-state (e.g., equal wealth) to a deontological principle associated with the fairness of the process by which citizens arrive at their heterogeneous end points. See *supra* note 147-148.

172. See Yudof, *supra* note 61, at 457-58 (Universalist principle extended to public employment and housing); see also Arendt, *Reflections on Little Rock*, 6 *Dissent* 45, 50 (1959) ("most startling point of the whole business was the Federal decision to start integration in, of all places, the public schools. It certainly did not require too much imagination to see that this was to burden children, black and white, with the working out of a problem which adults for generations have confessed themselves unable to solve"). Universalists offer three answers to the "Why just schools?" question: (1) Education unlike other governmental services and largess is a constitutionally recognized "fundamental interest[]." See, e.g., Dimond, *supra* note 123, at 5-6 n.19, 10 n.42; Ortiz, *supra* note 123, at 1134-37; *supra* note 155. But see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973). (2) Public schooling has long served as society's "most pervasive means" of assimilating citizens to a set of shared values and a "common destiny." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring); accord *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting); J. Dewey, *supra* note 123, at 24; Yudof, *supra* note 61, at 458. (3) Even if adults cannot create an ideal world for themselves, they should do so for their children. E.g., C. Jencks, *supra* note 162, at 256; Walzer, *supra* note 142, at 58.

173. See J. Dewey, *supra* note 123, at 97-106 (criticizing Platonic and Hegelian approaches that scorn the "free development of individuality in all its variety," "subordinat[e] the individual to the [superior interests] of the social whole," and em-

ple" that supposedly is lacking in the empirically grounded Equal Educational Opportunity theory, this version of the Universalist approach places itself out of the running as a viable principle for explaining and guiding judicial action in a modern liberal state.

As the other Universalist vision illustrates, however, integration need not mean totalitarianism. Rather, as strong pluralists like John Dewey and Michael Walzer have made clear, the ideal of racially and socially integrated public institutions may be understood as a monotonous means to a liberal society's diverse ends. Such institutions, for example, may help engender the intergroup tolerance and respect necessary to maintain a plural society, or they may expand the range of discernable options among which a liberal society encourages individuals to choose.¹⁷⁴ The modest justification problem that remains for me, therefore, is not that this version of the Universalist ideal has no place in our traditions and culture—it assuredly does—but only that its place is insufficiently central to support the full weight of so controversial a remedy. "[S]ociety," that is, "will not . . . submerge every value to the single one of integration."¹⁷⁵

Nor, of course, has our society shown itself willing to accept anything like the unabashedly ends-focused, leveling, and corporatist premises of the Redistributive theorists. As others have pointed out: (1) "What is remarkable is that this country has never been swept up by a political movement devoted to leveling."¹⁷⁶ (2) "If a society can be said to have an underlying political theory, ours has not been a theory of organic groups but of liberalism, focusing on the rights of individuals"¹⁷⁷ And (3) "[T]he [redistributive] standard . . . leaves little or no room for true governmental choice, since almost every governmental act affects the relative social position of blacks and whites."¹⁷⁸

phasize social stability and disciplinary training rather than personal development); A. Gutmann, *supra* note 52, at 23–28; Walzer, *supra* note 142, at 63–64; Yudof, *supra* note 61, at 457 (noting "controversial" nature of his "utopian" "assimilation[ist]" view).

174. See West, *supra* note 160, at 716, 731; sources cited *supra* note 155; *infra* notes 736–740.

175. Monaghan, *supra* note 128, at 485; see also Brest, *supra* note 104, at 48 ("Universalist ethic" not "so obviously right or widely held, that it can be read into the Constitution"). This reasoning accounts for Justice Powell's curious opinion in *Keyes* in which he combined the Court's most hawkish position on the violation—any denial of integrated schooling violates the equal protection clause—with its most dovish position on remedy—the violation is insufficiently important to warrant mandatory busing relief. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 225–26, 242–50 (1973) (Powell, J., concurring in part and dissenting in part).

176. Karst, *supra* note 156, at 261–63; accord J. Ely, *supra* note 105, at 87–101, 135–36, 162.

177. Brest, *supra* note 104, at 49; accord Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St. L.J. 3, 26 n.84 (1981); Nagel, Introduction, in *Equality*, *supra* note 49, at i, viii–ix.

178. Alexander, *supra* note 177, at 26; accord Brest, *supra* note 104, at 11 (Redistributive theory "would affect an enormously wide range of practices important to the efficient operation of a complex industrial society").

Most importantly, to the extent that moral principles with lasting historical currency in this country have fueled reform, they have done so by condemning governmentally sanctioned group identification—by forbidding the singling out of persons for harm, not because of an individual trait of their own choosing but because of their actual or assumed possession of a trait attributed to an unpopular group to which they more or less involuntarily belong.¹⁷⁹ The Redistributive theory's "group-disadvantage" focus dangerously forswears the reform-driving potential of this aspect of modern liberal theory.

Desegregation theorizing is a burial ground for disappointed predictions. In 1971, Professor Fiss "forecast" that the Supreme Court would soon jettison "the unrealistic assumption that all present segregation is a consequence of past wrongdoing" and instead "focus attention on the segregated patterns themselves."¹⁸⁰ As we have seen, however, product-focused approaches to desegregation—whether in their Equal Educational Opportunity or their Integration incarnations—cannot explain the recent decisions.¹⁸¹ Two years later, Professor Yudof's crystal ball told him that "future desegregation decisions will depend more upon the acceptance and evolution of ethical principles than on . . . empiricism . . . [or t]he vagaries of the predictive sciences."¹⁸² Once again, however, this scholarly prediction was at least half wrong. Although scholars indeed began to search for a more philosophically satisfying explanation for desegregation, that search did not lead away from "the vagaries of predictive science" but squarely into them. Thus, in an effort to escape the two prior theories' doctrinal and moral overambition, the next wave of scholarship abandoned the prior theories' socio-structural and outcome focus and fixed instead on an individual- and process-oriented enterprise of empirically identifying and correcting identifiable wrongs perpetrated by identifiable wrongdoers against the identifiably wronged. In the process, desegregation was transformed from a right into a remedy.

179. Consider the breadth of the modern legal scholarship that accepts this premise. See, e.g., D. Bell, *supra* note 2, at 95; J. Ely, *supra* note 105, at 155-58; Brest, *supra* note 104, at 5-7, 12; Crenshaw, *supra* note 3, at 1357-64, 1370-74; Freeman, *supra* note 98, at 1052-53; Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 8, 23 (1977); Kennedy, *supra* note 64, at 1794, 1816-18; Lawrence, *supra* note 134, at 330; Minow, Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 10-11, 34, 37-38 (1987); Tribe, *supra* note 117, at 1074.

180. Fiss, Charlotte, *supra* note 63, at 706. But see *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 537 (1979) and *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455-58 (1979) (belying the first half of the prediction) and *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 413 (1977) and *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 740-41 (1974) (belying the second half).

181. See *supra* notes 134-148, 166-172 and accompanying text.

182. Yudof, *supra* note 61, at 459-60.

3. *The Correction Theory*.¹⁸³ — According to the Correction theory, segregation involves an official's or agency's evil act with evil effects. The desegregation decree eradicates both evils—the violation by means of a prohibitory injunction that forces defendants to stop discriminating, the effects by means of a mandatory injunction that, by desegregating the district, eliminates the injury “root and branch.”¹⁸⁴ Given that much of the Court's desegregation rhetoric since *Green* has been self-consciously corrective,¹⁸⁵ it is not surprising that much desegregation theorizing since *Green* has had a corrective cast.¹⁸⁶

Corrective theory's long suit is its capacity to solve the “lack of a moral imperative” problem that allegedly undermined earlier theories.¹⁸⁷ The moral imperative on which the Correction theory relies is identical to the compensatory imperative that some theorists since Aristotle have understood to motivate the law of torts.¹⁸⁸ In the words of two modern tort theorists: “The argument depends upon ‘a deep sense of common law morality that one who hurts another should compensate him.’”¹⁸⁹ Or, as Corrective desegregation theorists argue, “[t]he distinctive moral force of the corrective approach . . . builds upon the strong moral claim that purposeful discrimination is a wrong whose effects should be eradicated.”¹⁹⁰ The appeal of this “You hurt me, you pay me” model—to desegregation, as well as to tort, theo-

183. “Compensation theory” is an equally suitable name for this approach to desegregation. See *infra* notes 194–200 and accompanying text.

184. *Green v. County School Bd.*, 391 U.S. 430, 437–38 (1968); see Gewirtz, *Choice*, *supra* note 49, 729–39.

185. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1970); *Green*, 391 U.S. at 437–38; Fiss, *supra* note 148, at 4–5, 46–50; cases cited *infra* notes 197–199.

186. See, e.g., Brest, *supra* note 104, at 34–36, 42; Gewirtz, *Choice*, *supra* note 49, at 729. For criticism, see L. Graglia, *supra* note 55, at 76–87, 258–83; E. Wolf, *Trial and Error: The Detroit School Desegregation Case 251–82* (1981); J. Wilkinson, *supra* note 1, at 112–13, 133–45, 222–24; Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1293–94 (1976); Dworkin, *supra* note 104, at 26–28; Fiss, *supra* note 49, at 17–38; Freeman, *supra* note 57, at 75, 81–82; Shane, *supra* note 52, at 1044–76; Yudof, *supra* note 61, at 448–56; *infra* notes 236, 262.

187. See, e.g., Fiss, *Charlotte*, *supra* note 63, at 698; Yudof, *supra* note 61, at 462 n.266.

188. See Aristotle, *The Nicomachean Ethics* 111–17 (D. Ross trans., rev. ed. 1980); other sources cited *infra* notes 193, 200. See generally Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 *J. Legal Stud.* 187, 191–201 (1981) (discussing work of several modern corrective tort scholars).

189. R. Epstein, *A Theory of Strict Liability: Toward A Reformulation of Tort Law* 25 n.25 (1980) (quoting *Green*, *Foreseeability in Negligence Law*, 61 *Colum. L. Rev.* 1401, 1412 (1961)); accord Fletcher, *Fairness*, *supra* note 106, at 538 & n.4; Posner, *supra* note 188, at 190. For discussion of the uncertain extent to which tort law actually adheres to a deontological principle of fairly distributed losses, see W. Keeton, *supra* note 122, § 2, at 21–23 & nn.7–12; Fletcher, *Fairness*, *supra* note 106, at 556–69; *infra* note 229 and accompanying text.

190. Gewirtz, *Choice*, *supra* note 49, at 729.

rists—is that it is simple,¹⁹¹ individualistic,¹⁹² and by hypothesis nonredistributive.¹⁹³

“[C]orrective justice requires annulling a departure from the pre-existing distribution of money or honors” that occurs when “an act of injustice . . . caus[es] injury.”¹⁹⁴ Although annulment through *criminal* sanctions can suffice,¹⁹⁵ Corrective desegregation theorists generally advocate annulment through *tort*-like, compensatory mechanisms.¹⁹⁶ The tort analogy is appealing because it better fits the decisional data: the Court’s desire to “‘restore’” the losses of segregation’s “‘victims,’” rather than to punish the perpetrators;¹⁹⁷ the Court’s preoccupation with proportionality between the decree and the violation’s effects and not between the decree and the violation itself;¹⁹⁸ and the Court’s resort to tort doctrine directly.¹⁹⁹ Compensation also conforms more closely to the antiredistributive ideal, by requiring victims for their undeserved losses as well as requiring perpetrators to yield their ill-gotten gains.²⁰⁰

191. R. Epstein, *supra* note 189, at 25.

192. See, e.g., P. Schuck, *supra* note 122, at 262–63; Goldstein, *supra* note 92, at 30–31.

193. See, e.g., Aristotle, *supra* note 188, at 115, 117; R. Epstein, *supra* note 189, at 12–13; Coleman, Mental Abnormality, Personal Responsibility, and Tort Liability, in *Mental Illness, Law and Public Policy* 107, 123 (B. Brody & H. Engelhardt eds. 1980); Fletcher, Punishment, *supra* note 106, at 695–97; Gewirtz, Choice, *supra* note 49, at 734–35.

194. Posner, *supra* note 188, at 200 (emphasis deleted).

195. See *id.* at 191, 194, 202; see also G. Fletcher, Rethinking Criminal Law 409–20, 459–67 (1978) (presenting corrective rationale for criminal punishment); Morris, Persons and Punishment, in *On Guilt and Innocence* 31, 34–35, 38–39 (1976) (similar).

196. Compare Brest, *supra* note 104, at 42 (corrective desegregation theory contends that desegregation’s principal moral function is compensatory: “to remedy the upset or outrage occasioned by the wrongdoer’s frustration of the victim’s justified expectations—to remedy the loss of the anticipated enjoyment of benefits possessed or reasonably expected”) and Gewirtz, Choice, *supra* note 49, at 729 (similar description of the corrective ideal underlying desegregation) with Posner, *supra* note 188, at 194 (compensatory tort theory emphasizes victim’s “right to be compensated by the wrongdoer for injury resulting from the invasion”).

197. See, e.g., *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280 (1977) (quoting *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 746 (1974)) (desegregation “decree must indeed be remedial in nature, that is, it must be designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct’”; see also D. Bell, Remembrances, *supra* note 139, at 7–8 (criticizing Court for its solicitude towards perpetrators of segregation).

198. See, e.g., *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 420 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

199. See, e.g., *Missouri v. Jenkins (Jenkins II)*, 110 S. Ct. 1651, 1657, 1665 (1990); see also *Milliken II*, 433 U.S. at 290 (desegregation remedies are “‘compensatory’”). The tort analogy now is commonplace in related spheres of constitutional adjudication. See, e.g., Abernathy, Section 1983 and Constitutional Torts, 77 *Geo. L.J.* 1441, 1446–47 (1989).

200. This rationale explains modern corrective theorists’ “preoccupation” with

Corrective desegregation theory thus commits itself to satisfying the two critical requirements of the compensatory tort model: the identification of a principle of fairness that regulates relations between two parties by entitling one of them to advantageous aspects of the existing distribution of resources;²⁰¹ and the private-law narrowing of attention to distortions in the relationship between those two parties that occur only when one party violates the fairness principle and injures the other.²⁰² In the latter regard, because compensatory tort theory seeks as precisely as possible to redress the implicit transfer of wealth from an identifiable plaintiff to an identifiable defendant that ensues when the defendant wrongfully injures the plaintiff,²⁰³ the theory requires close and direct relationships between the paying party and the injurious event and between the payment and the amount of injury suffered.²⁰⁴ To ensure that these relationships are established, and to maintain the theory's simplicity and individualistic character, the Corrective version of both tort and desegregation theory obliges the plaintiff "to demonstrate causation by establishing two analytically distinct links between the defendant's conduct . . . and the plaintiff's injury": that particular conduct caused the plaintiff's injury, and that a particular defendant bears responsibility for that conduct.²⁰⁵

Corrective theory tries to solve the "fit" problem that frustrates the Equal Educational Opportunity and Integration theories by more satisfactorily explaining the intentional discrimination requirement. Upon analysis, however, Corrective theory's answer to the "Why just intent?" question remains incomplete. More importantly, the theory cannot an-

compensation. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. Legal Stud. 477, 488 (1979); see, e.g., Coleman, *supra* note 193, at 123; Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1179-81 (1988); see also Posner, *supra* note 188, at 191, 194, 202 (puzzling over corrective tort theorists' preoccupation with compensation).

201. See Posner, *supra* note 188, at 190-203. Corrective desegregation theorists accept this requirement. See Brest, *supra* note 104, at 6-12; Gewirtz, *Choice*, *supra* note 49, at 737.

202. See Aristotle, *supra* note 188, at 114-15 (corrective justice "looks only to . . . whether one is in the wrong and the other is being wronged, and [whether] one inflicted injury and the other has received it"); *infra* notes 203-204.

203. Fletcher, *Fairness*, *supra* note 106, at 542; accord Epstein, *Self-Interest and the Constitution*, 37 J. Legal Educ. 153, 154 (1987); Posner, *supra* note 188, at 198.

204. See R. Epstein, *supra* note 189, at 25; P. Schuck, *supra* note 122, at 29-30; Fletcher, *Punishment*, *supra* note 106, at 699.

205. P. Schuck, *supra* note 122, at 29; accord Wright, *supra* note 200, at 1180-81. Corrective desegregation theory accepts this requirement: "The unique moral force of the corrective conception . . . rests upon an empirical claim that must be established in each case. Corrective steps are justified only to the extent that prior wrongs have current effects. Before initiating a remedy, therefore, courts must sort out which, if any, present conditions are traceable to past discrimination and . . . must determine when the remedy has actually eliminated those effects . . ." Gewirtz, *Choice*, *supra* note 49, at 782-83; accord *id.* at 732.

swer the "Why just desegregation?" question. Most importantly, the theory's causation component makes the theory both too narrow in some respects and too broad in others to explain the desegregation decisions. Because attempts to amend pure Corrective theory to avoid these fit problems run aground on justification difficulties, I discuss fit and justification simultaneously.

a. *Why Just Intent?* — Pure Corrective theory is incomplete: The theory says how the law should react when one person injuriously wrongs another, but it does not say what constitutes a wrong. To resolve disputes, therefore, correctivists must supplement their theory with an extrinsic conception of justice that *does* define the wrong.²⁰⁶

Corrective desegregation theorists have defined the wrong in the desegregation cases as public officials' intentional assignment of African-American children to racially identifiable schools.²⁰⁷ This definition neatly fits the decisions²⁰⁸ and is potentially compatible with Corrective tort theory.²⁰⁹ What remains to be provided, however, is a morally satisfying justification for this definition. Why, that is, apart from fit, should infliction of segregative harms be actionable at all? And, if the infliction of such harm *is* actionable, why draw the line at intent rather than at some other acceptable plateau, such as the reckless or negligent infliction of harm or the infliction of harm itself?²¹⁰

In seeking correctively appropriate justifications for various defini-

206. See, e.g., J. Rawls, *supra* note 105, at 10–11; Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L.J.* 1055, 1079–80 (1972); Posner, *supra* note 188, at 190–91, 196, 203 ("corrective justice is a procedural principle: the meaning of wrongful conduct must be sought elsewhere"); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 *Geo. L. Rev.* 963, 985, 992–93, 1004–05 (1981); Waldron, *Criticizing the Economic Analysis of Law*, 99 *Yale L.J.* 1441, 1451 (1990).

207. See, e.g., Brest, *supra* note 104, at 34–36; Gewirtz, *Choice*, *supra* note 49, at 729.

208. See, e.g., *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 534 (1979), *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

209. True, intentional wrongs may seem more congenial with modern notions of criminal law than with contemporary notions of tort law, but the intentional torts that persist today, see *W. Keeton*, *supra* note 122, at §§ 8–15, have respectable antecedents in compensatory theory going back to Aristotle. See Posner, *supra* note 188, at 190 & n.13, 201–02. Likewise, the duty to respect an individual's dignity as well as her person and property presents no problem for corrective theory. See J. Rawls, *supra* note 105, at 10–11. Finally, racial discrimination redistributes resources in a manner appropriate for corrective redress because discrimination often increases the relative status of whites (especially poor whites) by decreasing the status of blacks. See *infra* note 346 and accompanying text. But cf. *infra* notes 223–225 and accompanying text (possible incompatibility of Corrective theory's ban on intentional legislative discrimination and compensatory theory's private-law dictates).

210. Why, for example, should officials who harmfully relegate African-American children to educationally "ultrahazardous" ghetto schools not be subjected to strict liability? See *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); cf. *Restatement (Second) of Torts* § 520 (1977) (strict liability for ultrahazardous activities).

tions of wrongful conduct, modern tort theorists have vacillated between conventionalist and natural-rights theories.²¹¹ Curiously, Corrective desegregation theorists have taken the conventionalist tack. They premise “the strong moral claim that purposeful discrimination is a wrong whose effects should be eradicated” on a belief that it is the consequences of purposeful discrimination that “most people believe [to be] the distinctively terrible wrongs that blacks have suffered.”²¹²

The conventionalist tack is a curious one for desegregation theorists to take²¹³ because any even moderately concrete understanding of “what most people believe” would validate the Court’s 1896 separate-but-equal holding in *Plessy v. Ferguson*²¹⁴ and also the Court’s noxious resolve in that case to ignore what black Americans—who were not then, and are not now, “most people”—believed.²¹⁵ Likewise, such a

211. See also Posner, *supra* note 188, at 196 (drawing somewhat similar distinction between compensatory theories focused on wrongdoers’ “responsibility” and ones focused on victims’ “rights”). Compare R. Epstein, *supra* note 189, at 3–4 (emphasizing concept of causation based on “common sense notions of individual responsibility”) and Borgo, *Causal Paradigms in Tort Law*, 8 J. Legal Stud. 419, 440, 454 (1979) (concept of wrong embedded in everyday understandings of causation) and Fletcher, *Fairness*, *supra* note 106, at 547–48 (wrong defined as creation of uncommon risks) and Schwartz, *supra* note 206, at 1003 (advocating negligence test because it “does a reasonably good job of identifying that conduct which public morality would regard as wrongful”) with Epstein, *supra* note 200, at 488, 496–99 & n.63 (abandoning earlier conventionalist approach and defining wrong as violation of “the ‘natural’ set of entitlements that I think are generated by a concern with individual liberty and property rights”) and Fletcher, *Fairness*, *supra* note 106, at 569, 572 (defining wrong as violation of personal or proprietary rights that plaintiff has not waived) and Wright, *supra* note 200, at 1180–81 (wrong defined as violation of rights “based on the moral status of individuals as project pursuers”). On whether deviations from conduct that maximizes social utility can be defined as wrongful consistently with corrective justice, compare Calabresi & Hirschhoff, *supra* note 206, at 1079–81 (affirmative answer) and Posner, *supra* note 188, at 192–93 (same) with Fletcher, *Fairness*, *supra* note 106, at 547 n.40 (negative answer).

212. Gewirtz, *Choice*, *supra* note 49, at 729, 737; accord Brest, *supra* note 104, at 5, 35, 42; Fiss, *Charlotte*, *supra* note 63, at 705.

213. See generally J. Ely, *supra* note 105, at 69, 67 n.* (not sensible to employ “value judgments of the majority as a vehicle for protecting minorities from the value judgments of the majority”); the “law the legislature passed is likely to reflect the way contemporary community values bear on the issues in question”); G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *Constitutional Law* 536 (1986) [hereinafter G. Stone] (quoting Brest, *supra* note 104, at 5) (“[I]f the antidiscrimination principle really ‘rests on fundamental moral values widely shared in our society,’ why is special judicial scrutiny required when it is violated?”); Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1204 (1990) (conventionalist approaches useless when discrimination is itself an entrenched convention); Fiss, *supra* note 67, at 150–51 (especially given that public morality may echo government coercion, “deference to the prevailing popular morality seems particularly inappropriate when what is being constrained is a constitutional protection of minorities”).

214. 163 U.S. 537 (1896).

215. “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act,

standard might *not* validate the Supreme Court's 1954 holding in *Brown I*,²¹⁶ and even today might not validate desegregation.²¹⁷

More broadly, if the entitlements protected by Corrective theory

but solely because the colored race chooses to put that construction upon it." *Id.* at 551. See Purcell, Alexander M. Bickel and the Post-Realist Constitution, 11 *Harv. C.R.-C.L. L. Rev.* 521, 539 (1976) (*Plessy* thus satisfies "conventional" standard); see also sources cited *infra* note 494 (discussing widespread acceptance of racial segregation in late nineteenth-century America). The tort analogy invites recourse to relatively nonabstract, majoritarian conventions. See Schwartz, *supra* note 206, at 987-88 (conventionalist notions of fault warrant virtually conclusive deference to legislative judgments via the doctrine of "negligence per se" and heavy reliance on juries as community representatives); *infra* note 216.

216. See J. Choper, *Judicial Review and the National Political Process* 92 (1980) (two years after *Brown I*, over half the population still opposed giving blacks right to attend school with whites); J. Wilkinson, *supra* note 1, at 21 (*Brown I*'s "greatness" lies precisely "in the entrenched sentiment it challenged"). It is not clear, for instance, that tort law's traditional "community standard," see W. Keeton, *supra* note 122, § 32, at 173-75, 183, 188 nn.44-48, would have compelled or even countenanced *Brown I*'s invalidation of segregation statutes that had been duly enacted—and in many cases recently amended and strengthened, e.g., 1945 Mo. Laws 1700; see J. Choper, *supra* at 90-91—by the representatives of strong majorities in a number of American states. Nor would a national "what most people believe" standard necessarily validate the initial desegregation decisions inasmuch as close to a majority of American states as of the time of *Brown I* had segregation laws. See L. Graglia, *supra* note 55, at 18; *infra* note 483 and accompanying text; see also G. Allport, *The Nature of Prejudice* 76 (1954) (widespread racial prejudice at time of *Brown*); Sandalow, *supra* note 121, at 1186-87 (proposing national consensus standard validating action endorsed by "legislation recently enacted by most states").

217. Although I have not taken a poll or figured out how to phrase the question, my intuition is that most people do *not* believe "that [i] purposeful discrimination is a wrong [ii] whose effects should be eradicated." Gewirtz, *Choice*, *supra* note 49, at 729. Rather, I fear that, if we separated this claim into its two parts, we would measure significantly fewer responsive-chord decibels on the latter question ("effects should be eradicated") than on the former one ("discrimination is wrong"). In order to validate the intent test in conventionalist fashion, presumed "most people" must believe not only that intentional discrimination is offensive but also that the cost of a mechanism for redressing that harm is worth bearing. See Fiss, *Charlotte*, *supra* note 63, at 698. See generally W. Keeton, *supra* note 122, § 54, at 361-62 (cost of redress bears on existence *vel non* of duty of care in general tort law). For like Judge Craven, I assume that the "bedrock of public opinion" on which support for the *Brown* decision "now rests" is something like the notion "that school assignments and other legal distinctions based upon race are denigrating to the minority ethnic group" and ought to stop. Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 *Law & Contemp. Probs.* 150, 153 (1975); see L. Graglia, *supra* note 55, at 77; J. Wilkinson, *supra* note 1, at 133, 139-40, 183-84; Gutmann, *How Liberal Is Democracy?*, in *Liberalism Reconsidered* 25, 42 (D. MacLean & C. Mills eds. 1983) (busing decisions may violate "people's legitimate expectations based upon their democratic traditions and conventions"). The empirical sands underfoot shift less treacherously when we refine the question further and ask how much people are willing to pay in order to effectuate each part of that moral proposition. Inasmuch as talk and injunctive paper are cheap, people need not pay very much to effectuate the "discrimination is wrong" part of the proposition. But when the extraordinary costs of "traditional mandatory integration remedies" are factored in, one begins to sense a distinct deafening among the public to complaints about the harmful effects of segregation. Gewirtz, *Choice*, *supra* note 49, at 730-31.

derive from social institutions and the expectations these institutions generate,²¹⁸ then Corrective desegregation theory presumably cannot invalidate segregation because segregation is itself an expectations-creating social institution.²¹⁹ Likewise, if Corrective justice protects privileged aspects of the existing distribution of wealth,²²⁰ and if "common sense" notions "widely shared in our society" do the privileging,²²¹ then Corrective principles ought to defend and not defeat the distributive choices made by the community's official representatives.²²²

Corrective theory's difficulty justifying liability for legislative judgments might be ameliorated by moving from a relatively concrete to a more abstractly conventionalist definition of wrongful conduct²²³ or to a natural-law definition.²²⁴ These approaches, however, encounter yet another difficulty posed by the decisions: Why, apart from what many people actually may believe, should discrimination by *officials* but not by *private citizens* constitute an interpersonal wrong redressable through constitutionally mandated desegregation? Corrective theorists have yet to explain why a notion of the privileged distribution of resources that is muscular enough to invalidate intentional interference with that distribution by the legislature acting in the interest of society as a whole does not also invalidate similar interference by individuals acting in

218. See J. Rawls, *supra* note 105, at 10–11.

219. See Black, *supra* note 123, at 424; Karst, *supra* note 4, at 5–8.

220. See *supra* text accompanying note 193.

221. R. Epstein, *supra* note 189, at 3–4; accord Brest, *supra* note 104, at 5.

222. This reasoning may account for Professor Epstein's conversion from a conventional to a natural-rights-based definition of wrongful conduct, see *supra* note 211, in the process of developing a restrictive view of proper distributive behavior by the state. See R. Epstein, *Takings* 306–29 (1985); Epstein, *supra* note 200, at 496–97 & n.63. Professor Epstein's move to a natural-rights notion of distributive justice lying outside corrective theory illustrates the futility of efforts to identify an intentional-discrimination (or any other) test intrinsic to corrective theory. True, Aristotle made it a tenet of corrective theory that the decision maker should resolve disputes solely on the basis of what the parties have done (their conduct) and not on who they are (their status). Aristotle, *supra* note 188, at 114–15; accord Fletcher, *Fairness*, *supra* note 106, at 547 n.40. And intentional legislative discrimination offends that tenet by making decisions based on individuals' racial status, not their conduct. The conduct/status distinction breaks down, however. For example, correctively unobjectionable laws forbidding theft are not status neutral, but in fact privilege the victims' property-holding status. As such, corrective theory can be faulted for lacking any intrinsic basis upon which to distinguish between, on the one hand, laws that give people a property right in their possessions and forbid nonconsensual takings and, on the other hand, southern segregation laws, which gave whites a "property right in their 'whiteness,'" D. Bell, *Remembrances*, *supra* note 139, at 6, and forbade nonconsensual integration. In addition, although Aristotle limited tort judges to corrective justice, he imposed no such conduct-not-status limitation on legislators. See Aristotle, *supra* note 188, Book V, ch. 3–4.

223. See, e.g., A. Bickel, *The Supreme Court and the Idea of Progress* 98–100, 175–78 (1970); Chayes, *supra* note 186, at 1316.

224. Corrective tort theorists drawing upon natural rights theory include: Epstein, *supra* note 200, at 488, 496–99 & n.63; Fletcher, *Fairness*, *supra* note 106, at 569, 572; Wright, *supra* note 200, at 1180–81. See *supra* note 211.

their own, assumedly selfish, interest.²²⁵

At least as developed so far, therefore, Corrective desegregation theory has not defined "the wrong" any more successfully than has Corrective theory generally. In particular, Corrective desegregation theorists have not constructed a convincing justification for treating intentional legislative, but not private, discrimination as the wrong. As discussed below, however, more than one such rationale is available to explain the deep moral convictions that Correctivists have convincingly linked to the legislative-intent standard.²²⁶ Once we have discussed those justifications, it will be clear that it is not the intent standard but rather Corrective theory's crabbed private-law approach to rights, wrongs, and remedies—to which we next turn—that prevents the Correction theory from adequately explaining and justifying desegregation.

b. *Why Just Desegregation?* — The "Why just desegregation?" question poses a more vexing problem for the Correction theory: If the compensatory version of private-law tort theory provides the proper measure of the violation, then why should it not also provide the proper form of the remedy—namely, damages? Why, if the purpose of desegregation law is to restore the distributive balance that the defendant threw out of kilter by injuring the plaintiff, may we not presume in this as in most other areas,²²⁷ that the balance can be restored by an exchange of money between the litigants? Why, at the least, should the plaintiffs be denied the opportunity to decide for themselves in the first instance whether or not "a monetary surrogate for their injuries"²²⁸

225. See generally Karst, *supra* note 4, at 4–11 (questioning inattentiveness of constitutional jurisprudence to private discrimination's vast stigmatic harms). Constructing a correctively satisfying explanation for immunizing private, one-against-one conduct while penalizing otherwise similar legislative action is particularly difficult given corrective theory's private-law penchant for narrowing the focus of concern to two discrete parties. See *supra* notes 200–205 and accompanying text. One answer to this problem is suggested by Professor Epstein's work discussed *supra* note 222: Arguably, intentional legislative discrimination—say, in deciding to turn public property into a parking lot rather than subsidized housing—provides a decent proxy for (what by libertarian hypothesis is) illegal legislative redistribution of wealth from blacks, who get too little return on their taxes, to whites, who get too much. By contrast, an individual's discriminatory decision to sell his property to a white-owned parking lot company rather than to an African-American home builder does not directly or by proxy deprive the latter of any property interest in which he (by libertarian hypothesis) has an entitlement. Even if one accepted the libertarian hypotheses that inform this reasoning, but see *infra* note 376, and even if the reasoning justified the intentional-legislative-discrimination proxy for the wrong, the reasoning would not explain why desegregation, rather than traditional forms of "just compensation," is the remedy.

226. See, e.g., *infra* notes 330–333 and accompanying text (Professor Dworkin's treatment of intentional discrimination as a forbidden "external" preference); *infra* Part III (intentional governmental discrimination treated as offense against liberal egalitarian assumptions about individuals' equal capacity to define themselves).

227. See Wright, *supra* note 200, at 1179.

228. Fletcher, Punishment, *supra* note 106, at 692.

provides an adequate remedy at law, i.e., whether or not to pray for damages? The answer, it seems to me, is that, like modern tort law, the desegregation decisions use injunctions to serve a public-, not a private-law function²²⁹—a function that accordingly is not necessarily trumped by the remedial preferences of individual plaintiffs and that is fundamentally inconsistent with the private-law assumptions that the Correctivists believe underpin the desegregation cases.

c. *Overcorrection.* — Even if the compensatory tort analogy is extended no further than Correctivists take it, their theory cannot explain the bulk of the Court's desegregation decisions. Pure Corrective theory both limits and commits the remedy to curing the actual effects of the violation, i.e., to eliminating the "conditions of black disadvantage . . . causally linked to the defendant's [violation]."²³⁰ Contrary to these dictates, the desegregation decisions are both over- and under-corrective; they neither limit nor fully commit the remedy to relieving the identifiable harms imposed on identifiable children by the discriminatory acts of identifiable defendants.

Turning first to the ways in which "all-out desegregation" remedies are overcorrective, recall that the "unique moral force of the corrective conception . . . rests upon an empirical claim that must be established in each case," namely, that there is a direct and identifiable "link between present conditions (which are the focus of the remedy) and prior wrongful acts."²³¹ Manifestly, the all-out desegregation remedies the Court actually has imposed—which require nearly all white and black students in the defendant district during at least some portion of their elementary and secondary careers to abandon their neighborhood schools and board buses bound for other schools—do not heed this imperative. Although in all of the Court's cases, substantial racial discrimination against African-American children had been found dating back many decades,²³² there was no finding that many of the white parents and children directly affected by the remedy had taken part in or profited by the violation. Nor was any exemption allowed for white children or parents who could establish that they were entirely innocent of any violation or unjust enrichment. Nor, finally, did the federal courts predicate the remedies in those cases on findings linking the effects of the violations to most or even a majority of the black children benefited thereby—many of whom, for example, had come to the district or been born after the violations occurred and all of whom had

229. See W. Keeton, *supra* note 122, § 88A, at 631–32 (injunctions no longer limited to situations in which damages are inadequate; use turns on social value of enterprise being enjoined).

230. Gewirtz, Choice, *supra* note 49, at 732.

231. *Id.* at 782–83; accord *supra* text accompanying note 205.

232. See, e.g., *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 534–40 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 466–67 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198–205 (1973).

been influenced by vast demographic and other forces in addition to official segregation.²³³

In short, an "ethical void still exists" when the Supreme Court's all-out desegregation decisions are viewed from a Corrective perspective: "[T]he cost of the remedy is placed on those who were neither perpetrators nor beneficiaries of the past wrongful conduct,"²³⁴ and "the identity between the victim of the discrimination and the beneficiary of judicial actions tends to disintegrate."²³⁵ Vis-à-vis both "innocent" white children and violationally unaffected black children, the "all out" relief endorsed by the Supreme Court violates one of the first principles of Correction theory, namely, that the remedy compensate but not redistribute.²³⁶

233. For example, during the decades- or even century-long period of the typical violation, see, e.g., cases cited *supra* note 232; *infra* note 272, the city probably received two large waves of black and white in-migrants during and after the World Wars and suffered a large suburban out-migration of whites and jobs during the four decades following the creation of the Federal Housing Administration in 1936. As a result of these and other shifts, the city by now probably has a ghettoized, if intermittently regentrified, predominantly minority, central-city core surrounded by a layer of racially transitional neighborhoods ringed in turn by increasingly affluent layers of predominantly white upper-middle class neighborhoods somewhere in the midst of which lies a city-suburbs boundary. See sources cited *infra* note 258. Overlay this narrative map with a neighborhood-school assignment plan and it should be clear that there are an awful lot of causes and effects with which to contend. Although important, therefore, see sources cited *infra* notes 258, 303, discrimination by officials is not the only plausible cause of segregation.

234. Fiss, *Fate*, *supra* note 63, at 770; accord Brest, *supra* note 104, at 36; Gewirtz, *Remedies*, *supra* note 49, at 605; see also Posner, *supra* note 188, at 197 ("if the injurer is not the source of the compensation, then someone else, who is innocent, must be, and why is not that innocent party a victim of the wrongdoer's injurious conduct?"). The Supreme Court briefly flirted with a purely corrective approach in Justice Rehnquist's decision for the Court in *Dayton Bd. of Educ. v. Brinkman* (*Dayton I*), 433 U.S. 406, 420 (1977) (remedy for school board's three minor violations limited to curing violations' "incremental segregative effect[s]"), then expressly rejected that approach (over Justice Rehnquist's dissent) in *Dayton II*, 443 U.S. at 531 & n.5, and *Columbus*, 443 U.S. at 458 n.7, 465-68 ("incremental segregative effects" test applies only to minor violations; broader remedial holdings of *Swann* and *Keyes* control in cases of "systemwide" violations).

235. Fiss, *Fate*, *supra* note 63, at 770; accord Shane, *supra* note 52, at 1062-76; Yudof, *supra* note 61, at 455-56.

236. See, e.g., P. Schuck, *supra* note 122, at 287; Brest, *supra* note 104, at 42; Nagel, *supra* note 177, at ix ("One does not automatically compensate for wrongs to some members of a group by benefiting other members. . . . Either the member benefited must himself have been hurt as the result of injustice to others, or the benefit to him must indirectly benefit others who have been victims of injustice."); Wright, *supra* note 200, at 1182 (corrective justice allows "full but not excessive compensation"). The intellectual assault on desegregation by officials and judicial nominees of the Reagan and Bush Administrations has focused on this moral defect of the remedy from a Corrective perspective. See, e.g., T. Eastland & W. Bennett, *Counting by Race* 122-42 (1979); L. Graglia, *supra* note 55, at 116-32; J. Wilkinson, *supra* note 1, at 133; Cooper, *supra* note 55, at 80-81; Reynolds, *supra* note 61, at 1003; see also Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 Sup.

Corrective theorists are aware of the disjunction between their theory in its pure form and the Court's all-out desegregation decisions. Professor Gewirtz, for example, has constructed a detailed argument designed to bridge the gap between theory and practice. Because that argument is the most thorough gap-bridging attempt of which I am aware, I discuss it here to illustrate my skepticism that the Corrective theory's explanatory capacity can be enhanced without destroying its moral power.

In order to conform Corrective theory to *Swann*, *Keyes*, and kindred decisions, Professor Gewirtz interprets the so-called *Swann* (continuing-effect) and *Keyes* (expanding-effect) evidentiary presumptions as devices for relieving plaintiffs of the need explicitly and mechanically to link cause and effect, violation and remedy.²³⁷ Understood correctively, the *Swann* presumption provides that proof of (1) purposive governmental segregation on a "systemwide" basis as of Time A, say 1954, and of (2) the fact of racial separation at Time B, say 1990, and of (3) the absence of concerted desegregative efforts between Time A and Time B, creates a presumption that the de facto segregation at Time B is the "continuing effect" of the de jure segregation at Time A.²³⁸ Similarly understood, the *Keyes* presumption provides that proof of (1) purposive governmental segregation in Area A, comprising a "substantial" part of a school district, and of (2) the fact of racial separation in Area B elsewhere in the district at the same time, and of (3) the absence of concerted efforts to contain the effects of the segregative acts in Area A, creates a presumption that the de facto segregation in Area B is the "expanding effect" of the de jure segregation shown in Area A.²³⁹ By way of these devices, Corrective theorists would deem officials' intentionally discriminatory imposition of segregative attendance patterns in a substantial part of the district to be the cause of racially separate-in-fact attendance patterns that exist later in time and elsewhere in the district.²⁴⁰ The defendant could rebut the presumption by proving that racial separation would obtain at Time B and in Area B even had the Time A and Area A discrimination never taken place.²⁴¹ Corrective theorists argue that traditional evidentiary principles support this use

Ct. Rev. 1, 9-12 (all-out desegregation cases constitute improper "system of covert reparations—transferring wealth to blacks from [innocent] nonblacks"); Laycock, Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights, 99 Yale L.J. 1701, 1730 & n.108 (1990) (busing cases improperly seek "a status quo that never would have existed even if the Constitution had not been violated").

237. See Gewirtz, Choice, *supra* note 49, at 740-41, 751-52.

238. See *Dayton II*, 443 U.S. at 537-40; *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

239. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461 (1979); *Keyes*, 413 U.S. at 211-12.

240. See Gewirtz, Choice, *supra* note 49, at 740-41, 751-52.

241. See *Keyes*, 413 U.S. at 213.

of the presumptions because the devices "lead to a preferred allocation of error costs" to the "proven wrongdoer."²⁴²

I have three objections to this attempt to assimilate to Corrective theory the above version of the presumptions and the Court's decisions relying on those presumptions.²⁴³ First, the Correction theory's moral imperative, which depends upon a direct link between the tortious act of a specific wrongdoer and the conditions the remedy requires that wrongdoer (and only that wrongdoer) to eradicate, gets utterly lost in the black box forged by the continuing- and expanding-effect presumptions.²⁴⁴ Especially troubling in this regard is the curious leap the presumptions make from evil *intention* to temporally and geographically separated harmful *effects* without any meaningful account of the causal process presumed to be at work or of how illegal causes are distinguished from neutral demographic and preferential ones.²⁴⁵

Second, although the presumptions purport to satisfy Corrective theory's requirement of an identifiable victim, by putatively linking all currently segregated African-American children to prior discriminatory acts, the devices do not claim to satisfy the theory's requirement of an identifiable wrongdoer. The presumptions, that is, do not endeavor to link all of the parents and children who actually "pay" for the remedy to the violation.²⁴⁶ For this reason, I am unconvinced by an appeal to evidentiary principles favoring placement of error costs on proven wrongdoers, inasmuch as Corrective theory supplies no good reason for identifying all of the white children included in the Court's desegre-

242. Gewirtz, Choice, *supra* note 49, at 786-87.

243. Although I do not think the presumptions assimilate the decisions to Corrective theory, I do believe they play an important role in explaining desegregation. See *infra* notes 565-573 and accompanying text.

244. When deployed as stand-ins for proof of causation, the two presumptions are susceptible to the criticism that they substitute "contrived," "hypothesized," and "theoretical possibilities" for actual linkages, Fiss, Charlotte, *supra* note 63, at 700, 705; accord Fiss, *supra* note 49, at 19; that they are "not supported by natural probabilities," Fiss, *supra* note 61, at 207; and that they are "self-contradictory," "verbal gimmickry," Freeman, *supra* note 57, at 80. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 506-07 (1979) (Rehnquist, J., dissenting); Chayes, *supra* note 122, at 50; Kurland, *Brown v. Board of Education Was the Beginning*, 1979 Wash. U.L.Q. 309, 362. Professor Gewirtz argues that these attacks are inconsistent in their conjoined assertions that the presumptions are conjectural and all but irrebuttable. Gewirtz, Choice, *supra* note 49, at 788 n.191. There is no inconsistency, however. If, after hearing evidence, a court believes that there is a 20% chance that government segregation caused existing attendance patterns, a 20% chance that identifiable neutral factors caused the segregation, and a great deal of uncertainty, a presumption in favor of either litigant would have only conjectural support at the same time as it would be irrefutable because of the likewise conjectural support for the opposing party's theory.

245. The problem is not solved by dividing the leap into two shorter ones—from intent to local effects, thence to chronologically and geographically distant effects—given the tenuous empirical assumptions that continue to plague the latter leap. See *supra* note 244.

246. See *supra* text accompanying notes 203-205.

gation remedies as wrongdoers.²⁴⁷

Third, once one presumptively subjects the vast demographic patterns found in the Supreme Court's intradistrict decisions to the Corrective imperative, there is no morally or intellectually satisfying explanation for the Court's holding in *Milliken I* that forbade an interdistrict remedy and thereby left *uncorrected* the similar racial-isolation patterns found in Detroit. Either the intradistrict decisions are not (i.e., are *more* than) corrective or the interdistrict decision is not (i.e., is *less* than) corrective.²⁴⁸

d. *Undercorrection*. — As the last point illustrates, the desegregation decisions not only "cure" too much to be corrective; in even more compelling ways, they cure too little. Thus, a Corrective analysis that honestly acknowledged the genesis of school segregation would have to take "a sweeping and interconnected view of American racial history, moving from the slave auctions to exploitation of slave labor . . . to the Jim Crow laws of past and present centuries, to the Negro's . . . internment in the [urban] ghetto."²⁴⁹ The Court's decisions do not take that tack, however. Instead, they discard "large chunks of the Negro's oppression" and "whittle[] [away] the enormity of our unpardonable past into some narrow and manageable channel."²⁵⁰

247. See also *infra* note 248 (explaining why vicarious liability does not provide a sufficient basis for identifying all, but only, the white children included in the Court's desegregation decisions as wrongdoers). In his earlier article, Professor Gewirtz argues that it is important to acknowledge the "innocent" character of many white families affected by "all-out desegregation" remedies. Gewirtz, Remedies, *supra* note 49, at 591–608. This argument makes correctively problematic his later article's placement of virtually the entire weight of the corrective justification of desegregation on the assertion that it is "a preferred allocation of error costs" to subject those same "innocent" white families to the "extraordinary" burden of an all-out desegregation remedy. Gewirtz, Choice, *supra* note 49, at 786–87, 730–31. As we will see, Professor Gewirtz's first article lets the white families off too easily. See *infra* notes 573–577 and accompanying text. Although Professor Gewirtz notes that evidentiary presumptions also may be justified as contributing to a determination of the truth, he does not defend the *Swann* and *Keyes* presumptions on this basis because of the devices' palpable risk of error. See Gewirtz, Choice, *supra* note 49, at 744, 754; Gewirtz, Remedies, *supra* note 49, at 666–67.

248. *Milliken I* thus undercuts another answer to the overcorrection critique, namely, private-law tort theory's mechanistic resort to vicarious liability to avoid having to immunize a corporate wrongdoer's "innocent" shareholders, employees, suppliers, and customers from the effects of a crippling judgment against the corporation. For if *Swann* did not overcorrect when it effectively made "innocent" parents and children who happened to live in Mecklenburg County vicariously liable for the state's and the county district's violations, it is difficult to see why *Milliken I* did not undercorrect when it held that state residents who happened to live in suburban districts (i.e., in political units created by the state) were not vicariously liable for the state's and the city district's violations. See *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 770–72 (1974) (White, J., dissenting) (vicarious liability a valid basis for including suburbs in remedy); Note, *supra* note 49, at 1753–54.

249. J. Wilkinson, *supra* note 1, at 140.

250. *Id.*; accord D. Bell, *supra* note 2, at 48 (Court "unwilling to recognize and

Consider also that officially mandated school segregation existed in this country for well over a century before *Brown I*,²⁵¹ so that as of 1954, 1970 (when school desegregation actually began in earnest), and even 1990, the majority of as yet uncompensated victims of school segregation have been adults, not children. Yet, so far as I am aware, no school desegregation remedy has ever compensated graduates of segregated elementary and secondary public schools for the educational, economic, psychological, or political harms they have continued to suffer throughout their adult lives as a result of their segregated and inferior schooling.²⁵² Most particularly, desegregation remedies have never compensated anyone, child or adult, for what we usually think of as the most compensable of all harms—the lost earnings and wealth that demonstrably flow from the poor schooling, confinement to neighborhoods with substandard, typically rental, housing, and lost job opportunities that in turn demonstrably flow from officially mandated school segregation.²⁵³

Consider, finally, that, even as to the tiny subset of effects of intentional segregation that the Court's desegregation remedies do address (namely, current school-attendance effects), substantial undercorrection consistently occurs under the Court's decisions as a result of: (I) the Court's reluctance to address the segregated-schooling consequences of the residential segregation that was the official policy and the ubiquitous product of virtually all federal, state, and local housing

remedy the real losses resulting from long-held, race-based subordinate status"); Brooks, *supra* note 160, at 894–95; Crenshaw, *supra* note 3, at 1342.

251. See, e.g., *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 209 (1849) (upholding Boston School Committee's policy of segregating blacks); J. McPherson, *Battle Cry of Freedom* 88 (1988); Hall, *Negroes Ask for Equal Education Facilities* (1787), in *A Documentary History of the Negro People in the United States* 19 (H. Aptheker ed. 1951); Heaney, *supra* note 49, at 738–39 & nn.9, 14, 20, 743–45, 748–56.

252. Because desegregation in its early days cost many black teachers their jobs based on claims that blacks were too poorly educated in segregated schools to teach white children, see Watson, *School Integration: Its Meaning, Costs and Future*, 4 *J.L. & Educ.* 15, 15 (1975), the remedy harmed far more adult graduates of separate schools than it compensated. Although the Court used to interpret the "disparate impact" prong of Title VII's ban on employment discrimination as a form of compensation for the "childhood deficiencies in education and background of minority citizens," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973); accord *Griggs v. Duke Power Co.* 401 U.S. 424, 430 (1971), the Court recently has backed away from that view, *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2124–25 (1989).

253. See, e.g., *United States v. Texas Educ. Agency*, 600 F.2d 518, 525 (5th Cir. 1979); *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984), *aff'd* on this ground, 807 F.2d 657 (8th Cir. 1986) (*en banc*), cert. denied, 108 S. Ct. 70 (1987) ("forced segregation ruins attitudes," "is inherently unequal," and "produces low achievement which ultimately limits employment opportunities and causes poverty"). The classic description of official racism's cumulative causation of harms to African-Americans is found in G. Myrdal, *supra* note 62; see also Braddock, Crain & McPartland, *supra* note 156, at 260–62 (recent compendium of comparative economic harms visited on black graduates of segregated public schools); *infra* note 303 (connection between school and housing segregation).

agencies in this country until the 1960s;²⁵⁴ (2) the ease with which intentional discriminators can obscure their illicit motivation and thereby avoid liability;²⁵⁵ and (3) the ruling in *Milliken I* that no multidistrict remedy, hence no remedy at all, is available for the intradistrict segregation affecting black children who reside in districts that, often partly as a result of the districts' own segregative actions, have by now become virtually all black.²⁵⁶

In order to explain the decisions' palpably undercorrective attributes, Corrective theorists have found it necessary to draw a line between "broad and narrow" effects and to subject only the latter to a cure.²⁵⁷ Once again, however, the price of improving the theory's descriptive capacity is the devaluation of its moral currency.

The problem with any distinction between narrow and broad effects is, of course, its susceptibility to arbitrariness in contravention of the Correction theory's moral imperative. To begin with, Corrective theorists cannot avoid the charge of arbitrariness by attributing the decisions' undercorrection to difficulties of proof of the mundane sort that all plaintiffs face. For it is not very difficult for litigants and courts to find buried in the history of most cities any number of examples of identifiable official wrongdoers whose identifiable discrimination saddled identifiable black adults as well as children with identifiable economic and other harms of a type that the Court's decisions do not redress.²⁵⁸

254. See, e.g., *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 728 n.7 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 23 (1971). Compare Note, *Housing Discrimination as a Basis for Interdistrict School Desegregation Relief*, 93 *Yale L.J.* 340, 340 (1983) (affirmative answer to question reserved in *Swann*) and cases cited *infra* notes 556, 855 (same) with *Bell v. Board of Educ.*, 683 F.2d 963, 968 (6th Cir. 1982) (negative answer). See generally *infra* note 258 (impact of official discrimination on segregation of neighborhoods and schools); *infra* notes 556, 855, 857 (offering explanation of apparently conflicting case law).

255. See, e.g., *D. Bell*, *supra* note 2, at 72, 170-71; J. Ely, *supra* note 105, at 128 n.*, 137-38, 145, 147, 171; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 *N.Y.U. L. Rev.* 36, 62-63 (1977); Karst, *The Costs of Motive-Centered Inquiry*, 15 *San Diego L. Rev.* 1163, 1163-65 (1978); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *Harv. L. Rev.* 1388, 1418-19 (1988); Lawrence, *supra* note 134, at 319-21 & nn.3-14; Soifer, *Complicity and Constitutional Law*, 42 *Ohio St. L.J.* 383, 397 (1981).

256. See Gewirtz, *Remedies*, *supra* note 49, at 646-48 (*Milliken I* undercorrective). The two last mentioned causes of undercorrection may arise, on occasion, under any compensatory regime due to case-specific evidentiary difficulties or judgment-proof defendants. As is discussed below, however, the desegregation cases, like, for example, mass exposure cases, are so inherently fraught with these kinds of difficulties that a substantial question arises whether morally satisfying, private-law corrective techniques are meaningfully available. See *infra* notes 265-284 and accompanying text.

257. See Brest, *supra* note 104, at 34-36; Gewirtz, *Choice*, *supra* note 49, at 731-33, 783, 796 n.217 (Constitution "does not provide a remedy for all harms causally linked to purposeful discrimination" and is only "narrowly corrective;" goal of eliminating effects of past discrimination an illusion if taken literally).

258. The segregative process in most cities is similar, its details banal, its identifi-

Although other criteria for distinguishing "narrow" and "broad" effects may be identified, those criteria are uniformly arbitrary—as, for

able perpetrators, victims and effects manifold. See G. Myrdal, *supra* note 62, at 348–53, 618–39. First, a given part of the city was literally defined as "for blacks." There, long before 1954, the city situated its all black schools (named, for example, Lincoln, (Booker T.) Washington, and Bethune); and there the city made its African-American citizens live, using racial-zoning ordinances, the strategic location of blacks-only public housing projects, parks, and recreational facilities, racially disparate law-enforcement practices, and restrictive covenants that realtors dared not violate lest the state revoke their licenses. These practices developed during the first large migration of blacks into the city during and following World War I and were in full flower during the even larger in-migration in the 1940s and 1950s. As thousands of new black families moved into the metropolitan area, inundating the relatively few blacks who lived there before, the in-migrants had but one place they could locate assuming only that they chose to live either in a structure that they purchased or rented or that the government provided *or* within a reasonable distance of the only schools their children were permitted *de jure* to attend (free transportation from elsewhere was not provided) *or* near to one of the established churches of their denomination, which previously located in the ghetto because racial zoning ordinances, violence, or restrictive covenants forbade any other location. Then, just as urban black communities began to burst at the seams, spilling block by block into nearby white neighborhoods, the Federal Housing Administration embarked on a calamitous policy, lasting from 1936 until the 1960s, of refusing to insure mortgages except on new homes located in racially homogenous neighborhoods. As a result: (1) the vast suburbanization process of the 1940s–1960s all but excluded African-Americans (no developer could afford to risk prospective buyers' access to FHA mortgage insurance by selling to a single black individual); (2) FHA financing was virtually unavailable in older urban areas, so newly formed white families with young children were discouraged from moving into older urban areas, black families were discouraged from moving anywhere else, and the housing stock in older areas rapidly deteriorated for lack of federally backed investment; and (3) blacks accumulated essentially no real property wealth at a time when the property wealth of white citizens—real property comprising the largest category of wealth held by Americans—mushroomed. Consider, finally, that: (1) *explicit* public-housing segregation in most cities in the country continued until the last few years of the 1960s, (2) most of the residential relocation caused by the urban renewal and highway-building booms of the 1950s and early 1960s took place on a more or less explicitly segregated (whites-to-the-suburbs, blacks-to-the-city) basis, and (3) well into the 1980s, public school, housing, relocation, transportation, and other state and municipal officials have been found to have continued intentionally to discriminate against blacks in deciding where to locate facilities and to whom to allow access to their facilities. See, e.g., *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1364–68 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490–95, 1501–05 (W.D. Mo. 1984), *aff'd in relevant part*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987); *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1109–1111 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); K. Jackson, *Crabgrass Frontier* 190–230 (1985); Fossett & Orfield, *Market Failure and Federal Policy: Low-Income Housing in Chicago 1970–1983*, in *Divided Neighborhoods*, *supra* note 13, at 158, 158–80; Kain, *Housing Market Discrimination and Black Suburbanization in the 1980s*, *in id.*, at 68, 68–94; Lawrence, *supra* note 134, at 366–67 & nn.231–38; Logan & Schneider, *Racial Segregation and Racial Change in American Suburbs*, 89 *Am. J. Soc.* 874, 884–87 (1984); Rabin, *The Roots of Segregation in the Eighties: The Role of Local Government Actions*, in *Divided Neighborhoods*, *supra* note 13, at 208, 208–26; Yinger, *The Racial Dimension of Urban Housing Markets in the 1980s*, *in id.*, at 43, 43–67.

example, are lines between one discriminatory governmental actor and another,²⁵⁹ one time period and another,²⁶⁰ and one type of identifiable harm and another.²⁶¹ Once distinctions such as these are drawn, moreover, the Correction theory immediately falls prey to the principal argument of its post-*Milliken I* critics—that the theory trivializes a complex and dynamic “social system” of governmental discrimination by choosing to recognize and punish only occasional and sporadic manifestations of the systemic wrong.²⁶²

Even more fundamentally, if there is a moral imperative to eradicate the effects of “what most people believe are the distinctively terrible wrongs that blacks have suffered”—and if those wrongs include that blacks “were deliberately subordinated and remain so today largely because of the effects of purposeful discrimination extending throughout American society over many years”²⁶³—then arbitrary distinctions such as those listed above, which stop so substantially short of eradicating identifiable effects, purely and simply disobey the imperative. Finally, even having paid so dearly in moral terms, the above distinctions still do not accomplish their explanatory task. For none of them yet explains *Milliken I*, in which the Supreme Court acknowledged the lower courts’ findings that identifiable *school* officials committed *recent* identifiable acts of discrimination with current *location-of-attendance* effects on identifiable African-American children, but held that those findings did not support the interdistrict remedy that admittedly was necessary to cure those effects.²⁶⁴

259. See supra note 254 and accompanying text (distinguishing actions of school and nonschool officials).

260. See Brest, supra note 104, at 42. The lengthy and continuing nature of many governmental violations as well as the difficulty of uncovering them and their effects make statutes of limitations unsatisfactory dividing lines. See cases cited supra notes 232, 258.

261. See, e.g., Brest, supra note 104, at 34–36 (arguing that only correctable harm is psychological effect of identifying some schools as for blacks and others as for whites); Gewirtz, Choice, supra note 49, at 751–53 & nn.75, 766, 774–75 (only “relevant” and correctable harms are “racially concentrated attendance patterns,” racially identified schools, and some educational deficits of children still in school).

262. See, e.g., Bell, supra note 8, at 94; Crenshaw, supra note 3, at 1341–46; Delgado, supra note 139, at 342; Fiss, supra note 148, at 46–48; Freeman, supra note 98, at 1049–56, 1108–09; Goldstein, supra note 92, at 30–32, 42–43; Karst, supra note 4, at 25–26; Lawrence, supra note 8, at 50; see also Nahmod, Section 1983 Discourse: The Move from Constitution to Tort, 77 Geo. L.J. 1719, 1720 (1989) (similar attack on corrective approaches to section 1983 adjudication). Most of these critics attribute the Correction theory’s underconceptualization of the problem to its process-oriented character. The analysis here, however, reveals that the theory’s private-law contours are responsible for its blinkered view of the violation and its obsessive demand that the existing distribution of rights and resources be preserved.

263. Gewirtz, Choice, supra note 49, at 729.

264. *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 723–29, 744–45 (1974). Professor Gewirtz’s effort to draw a nonarbitrary line between narrow and broad effects, and thus to explain *Milliken I*, does not avoid these problems. Arguing that the corrective

e. *Private-Law Solutions to Public-Law Problems.* — Ultimately, private-law Corrective approaches fail to respond satisfactorily to insidi-

moral imperative is subject to "permissible remedial limits" that "override corrective goals," Professor Gewirtz would let courts cut off the corrective enterprise at the point where its effects-eliminating advantages to black children are substantially outweighed by certain of its disruptive disadvantages to innocent white children. Gewirtz, Choice, supra note 49, at 732-34, 780; Gewirtz, Remedies, supra note 49, at 591-608, 634, 647; accord Brest, supra note 104, at 36, 42, 47 & n.214. Although disagreeing with the balance he believes *Milliken I* actually struck, Professor Gewirtz concludes that the Court was engaging in something like this balancing process when it excused suburban children from the remedy. Gewirtz, Choice, supra note 49, at 779-82; see Gewirtz, Remedies, supra note 49, at 647-50. But see infra note 315 (*Milliken I* limited scope of cognizable violations, not range of available remedies). The first problem with this explanation is the slipperiness of a theory that can as easily explain a desegregation regime in which as important a decision as *Milliken I* is the law as one in which *Milliken I* is not the law. See supra text accompanying note 115; infra notes 320-322 and accompanying text. The second problem is how *Milliken I*'s immunization of "innocent" whites living in suburban areas lying outside the central-city-only Detroit district can coexist with *Swann*'s refusal to immunize similarly "innocent" whites living in suburban areas lying, for wholly fortuitous reasons, inside the defendant county-wide district in that case. See Fiss, supra note 49, at 38. Once Corrective theory accords white parents and children the status of innocent nonviolators, any process that weighs their interests in the remedy-defining balance invites the stingy result of *Milliken I* and threatens the generous holding of *Swann*. Third, in order even to contemplate the possibility that the interests of white children in attending schools near home could overwhelm the interest of blacks in eliminating "the distinctively terrible wrongs that blacks have suffered," Gewirtz, Choice, supra notes 49, at 729, it is necessary—still arbitrarily—to ignore a huge chunk of those wrongs. Compare supra notes 232-233 and accompanying text (segregation's immensely harmful educational, psychological, and economic effects on blacks) with supra note 156 and infra notes 574, 664-674, 683-694, 800-804 (desegregation's only modestly harmful effects on whites). Fourth, when as in *Milliken I* the wrongdoers at fault are state officials, it is hard to see why their constituent voter-taxpayers—who to this extent are not innocent because they can "throw the bums out of office"—should not have to pay for 100% of the officials' mal-, mis-, or nonfeasance, just as state taxpayers often pay 100% of the damages owed the victims of the state's negligently operated school buses. See supra note 248. Finally, consider the logic of this "remedial limits" explanation: Desegregation remedies inevitably require "innocent" whites to forego certain rights and resources owned by them. In order to ameliorate that redistributive result, it sometimes is fair that victimized African-Americans bear a likewise redistributive cost, hence desegregation remedies sometimes require black victims to forego certain remedial rights and resources otherwise owed to them. This logic "explains" the desegregation decisions by analogizing them to a "corrective" tort system that permits persons negligently harmed in accidents occurring at Third and Main to recover damages from otherwise uninvolved red-headed people but limits the damages to 40% of the total. Although red-headed people might be assuaged by the fact that the system is "fairer" than one allowing the victims to recover 100% of their damages from innocent persons, the victims can make a convincing argument that the 100% solution is the fairer one. See Coleman, Justice and the Argument for No-Fault, 3 Soc. Theory & Prac. 161, 177 (1975). But see Waldron, supra note 206, at 1452-54. In any event, even if the 40% limitation—or any other interest-balancing constraint—made the system less comparatively redistributive, hence from a corrective perspective less comparatively immoral, the system remains unconscionably immoral from a corrective perspective as to nearly everyone involved. See infra notes 311-322 and accompanying text (criticizing similar "remedial limits" argument premised on equitable concerns).

ously prevalent, decades-long, metropolitan-wide, multidisciplinary, and variously harmful public racial discrimination for the same reasons that private-law compensatory tort approaches fail to respond satisfactorily to mass toxic disasters. The complicated character and massive scale of the problem in both situations cause the correctively critical prerequisites of an identifiable plaintiff and an identifiable defendant²⁶⁵ to elude proof, notwithstanding that unjustly enriched wrongdoers almost certainly have visited harms on large numbers of victims. As a result, the compensatory system's vaunted moral integrity evaporates.

Recent tort scholarship has focused attention on the plight of cancer victims who can show that they have been exposed to a toxic agent that increases the incidence in the population—but may be only one of many causes—of the cancer suffered by the plaintiffs, and who also can show that the toxic agent was manufactured by at least one—but who cannot specify which—member of a defendant group of chemical companies.²⁶⁶ The plight of residentially and educationally segregated black children is analogous. These children likewise can show that they have been exposed to the discriminatory acts of a number of school and housing officials any one or combination of which—along with myriad “neutral” factors—may have caused the plaintiffs' segregation.

The most problematic feature of both mass toxic tort and Corrective desegregation litigation is the difficulty of proving specific causation of injuries that, regrettably, are not “substance-” or discrimination-“specific.”²⁶⁷ For example, what result should obtain if thousands of plaintiff victims can show that forty-five percent of the cancerous or segregative conditions existing in the relevant population are the responsibility of the defendant chemical companies or the defendant school and housing officials, but none of the victims can show more than a fifty-percent likelihood that their own cancer or segregation is the defendants' fault?²⁶⁸ Should all of the plaintiffs lose, as ought to occur if the traditional tort system and the preponderance-of-the-evidence rule are retained (in which case, what becomes of the moral imperative that all nonreciprocal harms be compensated)?²⁶⁹ Or should all plaintiffs win, as might occur, for example, under a regime of presumptions or other burden-shifting devices (in which case, what becomes of the moral imperative that reciprocal harms not result in redis-

265. See *supra* notes 200–203 and accompanying text.

266. See P. Schuck, *supra* note 122, at 302 nn.4, 6.

267. *Id.* at 185, 261–62; accord *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 481–82 (1979) (Powell, J., dissenting) (“de facto segregation has existed on a large scale in many of these cities, and often it is indistinguishable in effect from the type of de jure segregation outlawed by Brown”).

268. P. Schuck, *supra* note 122, at 268.

269. Compare *id.* at 262–68 (undercompensatory result of tort system in mass exposure cases) and Rosenberg, *The Causal Connection in Mass Exposure Cases: A ‘Public Law’ Vision of the Tort System*, 97 *Harv. L. Rev.* 851, 877–81 (1984) (same) with sources cited *supra* note 262 (undercompensatory results in desegregation cases).

tribution of resources)? Or, finally—to use the so-called “public law vision of the tort system”—should all plaintiffs win but receive compensation for only forty-five percent of their injuries (in which case, what becomes of *both* moral imperatives)?²⁷⁰

Both kinds of cases present the further difficulty of linking a given plaintiff's harms known to have been created by some one of the defendants to the defendant actually responsible.²⁷¹ Although burden-shifting devices and allocation measures that tie damages to market shares have been used, they, too, deviate from the Corrective imperative that “one who injures (and none other) pays the cost of the injury (but no more).”

Both kinds of cases also involve: “large scale, because of the number of potential plaintiffs [and] defendants . . . ; spatial dispersion, because of the large number of jurisdictions having plausible claims to provide the governing law; temporal dispersion, because of the duration of exposure and the fact that injuries might not fully manifest themselves for . . . years; and enormous cost, because of all the[se] factors.”²⁷² In addition, the devices available to assure manageability in both kinds of cases—class actions, judicial participation in case management and settlement, judicial notice and other forms of judicial self-education, substitution of statistical for individualized evidence, and masters²⁷³—have the same de-individualizing and de-moralizing effects (from a Corrective perspective) on the procedural front as the various

270. Rosenberg, *supra* note 269, at 905–25; see, e.g., *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 761–65 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); P. Schuck, *supra* note 122, at 186–88, 243, 268–69.

271. See, e.g., P. Schuck, *supra* note 122, at 29–30, 183, 268.

272. *Id.* at 262; accord *id.* at 262–68; Rosenberg, *supra* note 269, at 887–92. As originally filed in 1977, the Kansas City interdistrict school desegregation case involved close to 200,000 school children living in six counties in two states in two federal judicial districts in two federal judicial circuits and named as defendants over a dozen school districts and their boards and superintendents, two state boards and two departments of education, two states, and three federal departments. See *School Dist. v. Missouri*, 460 F. Supp. 421, 427 (W.D. Mo. 1978); Joint Addendum A (Excerpts from Record) to Briefs of Appellants Kalima Jenkins, et al. and the School District of Kansas City, Missouri at A77, *Jenkins v. Missouri*, 807 F. 2d 657 (8th Cir. 1986) (en banc) (No. 77–0420), cert. denied, 484 U.S. 816 (1987); see also *Jenkins v. Missouri*, 807 F.2d 657, 660–61 & nn.2, 3, 5 (8th Cir. 1986) (en banc), cert. denied, 484 U.S. 816 (1987) (“Over the course of 64 trial days, plaintiff[s] called over 140 witnesses, offered 2,100 exhibits, and designated approximately 10,000 pages of depositions”); *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490–503 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 807 F.2d 657 (8th Cir. 1986) (en banc), cert. denied, 108 S. Ct. 70 (1987) (findings spanning a 120-year period and actions by 12 school districts, the City of Kansas City and several of its agencies, the State of Missouri and ten of its agencies, HUD and a number of its offices, and the United States Department of Education).

273. See, e.g., P. Schuck, *supra* note 122, at 263–70; Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 *Colum. J. Envtl. L.* 1, 28–42 (1986); Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 *Geo. L.J.* 1389, 1390–91 (1985).

harm- and damage- allocating innovations have on the substantive front.²⁷⁴

As in the toxic-tort context, the traditional tort approach is not an effective response to the polycentric problems posed by the school desegregation cases correctly understood but instead is “an ostrich-like avoidance of them.”²⁷⁵ Moreover, the only alternative proposed in the toxic-tort area that bears any kind of resemblance to desegregation law—the so-called “public-law vision” of a classwide solution relying upon proportional liability and probabilistic proof of causation²⁷⁶—deserts the Corrective ideal in the most fundamental ways.²⁷⁷

Lest this analysis leave the impression that the public-law-tort vision of simultaneous public-law deterrence and private-law compensation²⁷⁸ provides a satisfying, if noncorrective, explanation for the desegregation cases, consider finally the ways in which the segregation situation is *less* easily amenable to the deterrence-compensation goals of that vision—from both moral and administrative standpoints—than is the toxic-tort situation.²⁷⁹ First, on the indeterminate-plaintiff issue, litigants and judges in toxic tort cases can utilize the conclusions of a well-established and scientifically accepted medical field—epidemiology—to determine whether and with what frequency certain chemical

274. See P. Schuck, *supra* note 122, at 262–66, 269–70; see also B. Ackerman, *supra* note 122, at 33–34 & n.5 (linking, on one hand, a narrow private-law vision of substantive law and narrow and individualistic procedures traditionally used in such cases and, on other hand, a broader public-law approach to legal problems and looser, more judicially activist procedures listed in text); M. Damaska, *supra* note 122, at 71–96 (noting link between dispute-resolving goal of legal rules in Anglo-American jurisdictions and autonomy-focused fact-finding procedures and comparing both to policy-implementing goal of legal rules and truth-focused fact-finding procedures in continental jurisdictions); Chayes, *supra* note 186 at 1288–304 (discussing impact on adjudicative procedures of transformation in American law from exclusive focus on resolving private disputes to greater emphasis on resolving society-wide problems). Compare P. Schuck, *supra* note 122, at 263–67 (“vices of mass tort class actions” from moralistic and individualistic perspective of traditional tort theory) with E. Wolf, *supra* note 186, at 295 (similar individualistically premised criticisms of class action litigation in desegregation setting) and Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 *Yale L.J.* 470, 482–516 (1976) (same) and Rhode, *Conflicts of Interest in Educational Reform Litigation*, in *School Days*, *supra* note 8, at 278, 283–89 (same).

275. P. Schuck, *supra* note 122, at 267–68.

276. *Id.* at 270 (discussing Rosenberg, *supra* note 269).

277. See P. Schuck, *supra* note 122, at 274–76 (“By taking the giant step to a wholly aggregative, distributive justice approach—one in which individual A is compensated by [defendant] B even though A may not have been harmed by B or indeed by any responsible actor (other than Mother Nature)—the public law structure” may “destroy whatever residual moral justification remains for shifting A’s loss to B through tort adjudication” (emphasis deleted)); Posner, *supra* note 188, at 197–98.

278. See Rosenberg, *supra* note 269, at 905–25.

279. For criticism of the public-law response to mass-exposure cases, see P. Schuck, *supra* note 122, at 268–76; Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 *Colum. L. Rev.* 277, 305–29 (1985).

agents cause certain kinds of cancer.²⁸⁰ In the segregation setting, by contrast, the social scientific techniques available for isolating and quantifying the potential causes of such social phenomena as racial residential patterns are far cruder and less uniformly accepted.²⁸¹ Accordingly, the various correctively dubious but potentially utilitarian means that the courts and commentators have devised for allocating toxic tort damages to defendants based on the quantified extent to which their products increased the risk of particular cancers are not as meaningfully available in the school desegregation cases.²⁸²

280. See P. Schuck, *supra* note 122, at 262, 272.

281. See, e.g., D. Horowitz, *The Courts and Social Policy* 22-56, 274-84 (1977); E. Wolf, *supra* note 186, at 211; Goldstein, *supra* note 92, at 42 & nn.208-09. I do not rest my conclusions here on the assertion that judges are incompetent to make correlation-based causation determinations as opposed to "mechanical" determinations or interpretive judgments. See Dworkin, *supra* note 104, at 23, 26-28, 31; Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057, 1109 (1975). The available empirical data suggest that judges acting within the confines of a multi-party, evidentiarily rationalized, adversarial system are able competently to amass and analyze statistical materials and that they often do so more effectively than, for example, legislators. See, e.g., M. Rebell & A. Block, *Educational Policy Making and the Courts* 206-12 (1982); Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 *Law & Soc'y Rev.* 371, 377-86 (1980); Chayes, *supra* note 186, at 1308. Many of the well-known attacks on judicial competence in this regard are beside the point because they compare the technical competence of judges to that of statisticians, rather than to judges' more likely substitutes, namely, administrators and legislators. See, e.g., J. Frank, *Courts on Trial: Myth and Reality in American Justice* 14-36, 81-102 (1949); D. Horowitz, *supra*, at 24, 293-94. Moreover, to the extent that judges are properly accused of being "bad" at statistical analyses because they are inexperienced, the answer is to give them more, not less, experience and training. See B. Ackerman, *supra* note 122, at 65-71, 73-76, 107. Finally, far from being foreign to what judges do, making causal judgments plays an important part in everyday common law judging. For example, when a court decides that an entire industry's failure, say, to fence-in construction-site elevators constitutes negligence because the probable future costs of injuries from unfenced sites outweighs the probable cost of providing fences, the courts are making causal (i.e., correlational, not mechanical or interpretive) judgments. See, e.g., *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947); Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1, 22-23 (1960). My point is not that judges are particularly bad at assessing causation or that such assessments ought not to play a role in private- or public-law adjudication of any sort, but only that judges and all other analysts will have trouble making the causation determinations demanded not only by private-law compensatory, but also by tort-based public-law/regulatory, approaches to school desegregation. Cf. *infra* notes 470-483, 503 and accompanying text (proposing use of historical, demographic, and statistical evidence to answer interpretive questions posed by intent test in desegregation and other public-law contexts).

282. Compare P. Schuck, *supra* note 122, at 186-88, 243, 268 (in toxic tort context, statistically based proportionate damage rule is "readily" available to reduce recovery of individual plaintiffs when epidemiological studies establish the number of excess diseases in relevant population caused by defendant class) and Rosenberg, *supra* note 269, at 866-68 (proportionate damage rule ideal in mass tort litigation) with, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971) (isolating effects of official discrimination is difficult given "myriad factors of human existence" that cause racial separation).

Second, although it generally is not difficult to identify the manufacturers of a defective chemical agent sold for profit during a specified period, it decidedly is difficult to identify which of the public officials whose actions affect where people live and attend schools have intentionally discriminated during the relevant period. Thus, the toxic tort cases do not really involve indeterminate defendants but rather a determinate *class* of defendants, the members of which are indeterminately liable for particular injuries. The desegregation cases, by contrast, involve indeterminacy *both* as to who contributed to the problem *and* as to when, where, and by how much. For this reason, and because of the relative difficulty of quantifying political as opposed to for-profit economic responsibility for harm, neither a market-shares approach, which provides a relatively simple and intuitively fair means of allocating damages among known but indeterminately responsible wrongdoers in the toxic tort area,²⁸³ nor any reasonable facsimile provides a workable method of distributing the monetary or injunctive remedial burden among liable local, state, and federal school and housing officials and their constituencies.²⁸⁴

Third, even assuming that determinate victims and wrongdoers could be identified, the money-damages remedy in the toxic tort and like contexts provides a close to surgical means of transferring rights and resources from the putative wrongdoer and no one else to the putative victims and no one else. The injunctive remedy in the school desegregation decisions, by contrast, is far too blunt an instrument to ensure a rearrangement of rights and resources that avoids robbing some and enriching others.

f. *Summary.* — The Correction principle provides an incomplete answer to the “Why just intent?” question and no answer at all to the “Why just desegregation?” question. Nor, absent modifications that shirk the Corrective moral imperative, can the principle explain either the remedial breadth of desegregation decisions such as *Swann* and *Keyes* or the remedial limitations of all of the Court’s decisions—especially *Milliken I*. Most significantly, because Corrective theory promises so much more in the way of nonredistributive compensation than it produces, it leaves desegregation dangerously susceptible to attacks from both sides.

From a left perspective, the Correction theory begs the claim that the Court’s decisions ferociously undercompensate in two ways: First, the decisions crowbar a social system’s longstanding and widespread misdeeds with pervasive socio-structural consequences into the Correc-

283. See, e.g., P. Schuck, *supra* note 122, at 243; Rosenberg, *supra* note 269, at 866–68.

284. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610–13, 607 P.2d 924, 936–38, 163 Cal. Rptr. 132, 144–46, cert. denied, 449 U.S. 912 (1980) (market-share allocation of damages among DES manufacturers); P. Schuck, *supra* note 122, at 183–84.

tive paradigm of an individual's momentary and idiosyncratic lapse with only isolated interpersonal effects. Second, switching metaphors, the decisions stack the deck against blacks by defining virtually every compensatory, hence morally good, deed done by the courts for blacks as an at least equal and opposite redistributive, hence morally bad, deed done to whites. Not surprising, therefore, is the left critics' Redistributive proposal to abandon Correction altogether, and with it the desegregation decisions, and to address forthrightly, and with whatever moral force can be mustered, the necessarily outcome-focused needs of African-Americans.²⁸⁵

From the right, the Correction theory faces the internal criticism that the theory's left critics anticipate, namely, that the decisions immorally overcorrect by redistributing the rights and resources of white "third-party nonviolators," none of whom deserves to pay, to blacks, only some of whom deserve to be paid.²⁸⁶

The Correction theory thus leaves the Court's desegregation jurisprudence friendless, a begetter of "dashed black expectations and white resentments."²⁸⁷ For, given the length, width, and breadth of the violation and its result, and their indiscriminate intermingling with myriad "neutral" acts and consequences, and given the individualistic and antiredistributive limitations on Correction theory's private-law mechanism for sorting cause and effect, any purely corrective system necessarily will "undercorrect," while any compensatorily modified Corrective system necessarily will redistribute, and hence "undermoralize." Additional justification for the decisions is needed.

4. *The Prohibition Theory.* — The Prohibition theory is a theory of right with almost no theory of remedy. Accepting the Correctivists' view of official racial discrimination as a prohibited deviation from interpersonal norms, the Prohibition theory limits the remedial object when courts confront the wrong to henceforth prohibiting its recurrence. Taking to heart the Correction theory's private-law understanding of the violation and its antipathy to redistribution, the Prohibition theory deploys the remedy exclusively against those harms that are redressable without cost or benefit to anyone besides identifiable wrongdoers and the identifiably wronged. Then, taking to heart the difficulties of individually identifying the wrongdoers and especially the wronged and of directing an affirmative injunction at those persons but no others, the theory concludes that the best the courts can do is to issue a negative injunction forbidding the identified wrongdoers to err again in the future.²⁸⁸

285. See, e.g., sources cited *supra* note 262.

286. See sources cited *supra* notes 55, 236.

287. J. Wilkinson, *supra* note 1, at 113.

288. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 258 (1973) (Rehnquist, J., dissenting); L. Graglia, *supra* note 55, at 76-87, 258-83; T. Sowell, *supra* note 55, at 13-35; E. Wolf, *supra* note 186, at 241-50; R. Wolters, *supra* note 55, at 6-7, 138-39,

Prohibitory theory can be reached by a different route: The theory tracks the outdated equitable principle that a violation of a right will be prohibited via negative injunction, but that restoration of the *status quo ante* generally will not be ordered via mandatory injunction.²⁸⁹

Once Prohibitory theory abandons the goal of compensation, it no longer advocates a deontological mechanism for restoring rights to the victims of prior wrongs.²⁹⁰ Rather, the theory is both product- and future-focused; it seeks a world in which the doers of the interpersonal wrong of intentional segregation do it no more.

For the Prohibitory theorist, the law once was and should return to being simple: *Brown I* held that statutory school-admission rules designed to segregate black from white children violate the equal protection clause.²⁹¹ *Brown II* thereupon directed officials to admit black children "to public schools . . . on a [racially] nondiscriminatory basis."²⁹² Although, true to the Corrective ideal, the Court in *Green* and subsequent decisions experimented with curbing not only the violation but also its harms, that task—as the Court began to recognize in *Milliken I*—proved daunting and now should be foregone.²⁹³ Instead,

288; Goodman, *supra* note 104, at 277, 286, 298–310; Kitch, *supra* note 236, at 9–11; Laycock, *supra* note 236, at 1730 & n.108; Symposium: The 1985 Federalist Society National Meeting, 9 Harv. J.L. & Pub. Pol'y 1 (1986); sources cited *supra* notes 55, 266. For scholarly criticism, see, e.g., Fiss, *supra* note 49, at 14–15; Gewirtz, Choice, *supra* note 49, at 731, 734–35, 738–39; Yudof, *supra* note 61, at 446–48; sources cited *supra* note 4 and *infra* note 308. Although some Prohibitory theorists claim that constitutionally mandated "colorblindness" dictates rejection of all but negative injunctive relief, their rejection of even the modest and nonredistributive remedies that orthodox Correctivists would employ goes further than colorblindness requires. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 735–39 (1989) (Scalia, J., concurring in the judgment) (compensatory orders restoring to blacks what whites took from them out of racial animus are "colorblind"). In practice, however, orthodox Corrective approaches, see, e.g., *supra* note 234, may end up correcting rather little, given the difficulty of precisely isolating the effects of different causes of segregation, see *supra* notes 265–284 and accompanying text, hence Prohibitory theory may be said to arrive cheaply and directly (if by a less morally defensible route) where pure Correction arrives after much cost and tribulation.

289. See 4 J. Pomeroy, *Equity Jurisprudence* §§ 1338, 1359, 1359a (5th ed. 1941); *id.* § 1359a (early restrictions have given way and it is now settled that a court of equity can award mandatory as well as prohibitive injunctive relief). Desegregation decisions appealing to equitable principles include: *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 737–38 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

290. Nor may Prohibitory theory be explained as substituting a criminal-law model for a tort model of corrective justice. See *supra* note 195 and accompanying text. For the negative injunction upon which Prohibitory theorists inflexibly rely has neither the punitive traits nor the capacity for proportionality with the violation that corrective penalties require. See G. Fletcher, *supra* note 195, at 409–18, 461–66; Morris, *supra* note 195, at 34, 38–39, 45.

291. See Craven, *supra* note 217, at 153.

292. *Brown II*, 349 U.S. at 300.

293. See generally L. Graglia, *supra* note 55 (criticizing Court's "misguided effort to further racial equality by means of compulsory integration").

it should suffice today as assertedly as it did in the mid-1950s to effectuate *Brown I*'s simple, prohibitive moral imperative by way of *Brown II*'s simple, prohibitively injunctive imperative: School officials found to be utilizing discriminatory admissions practices should be ordered to desist and to admit black children to their schools on a "nondiscriminatory basis" of those officials' choice. Should any African-American child thereafter consider herself aggrieved by whatever new admissions practice is adopted—be it a neighborhood school plan, a freedom-of-choice plan, or whatever—she may protect herself by demonstrating once again, if she can, that the new admissions practice, like the old one, is intended to segregate. Should the child succeed in this second suit, a second negative injunction would issue prohibiting the offensive practice.²⁹⁴

As a theory of what the Supreme Court has done in the desegregation cases, the Prohibitory approach is a self-confessed failure; its explanatory power ends in 1955 with *Brown II*. Thereafter, the theory eludes by a wide margin every doctrinal dot on the historical page, including even *Milliken I* which, at the least, approved modest intradistrict student-reassignment relief.²⁹⁵ Consistently since 1968—as witnessed by the Court's striking down the freedom-of-choice plans in *Green* and its companion cases,²⁹⁶ the neighborhood-school plans in *Swann* and its companion case,²⁹⁷ and the deannexation plans in two 1972 cases²⁹⁸—the Court has ruled that, however innocently motivated, segregative-in-fact student-admissions plans imposed in the immediate wake of de jure segregation violate the Constitution.²⁹⁹ Indeed, only one lower court decision has ever advanced a strictly Prohibitory theory, and the Supreme Court expressly disapproved that decision in *Keyes*.³⁰⁰

The Prohibition theory does not, therefore, "fit." Nor does it "justify." True, by accepting the Correction theory's moral objection to

294. See sources cited supra note 288.

295. See *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 753 (1974).

296. See *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459-60 (1968); *Raney v. Board of Educ.*, 391 U.S. 443, 448-49 (1968); *Green v. County School Bd.*, 391 U.S. 430, 442 (1968).

297. See *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37-38 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971); see also *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 541-42 (1979) (subsequent invalidation of neighborhood school plan); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 453 (1979) (same).

298. See *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489-90 (1972); *Wright v. Council of Emporia*, 407 U.S. 451, 459-60 (1972).

299. See also *Griffin v. County School Bd.*, 377 U.S. 218, 225 (1964) (forbidding district undergoing desegregation to shut down schools altogether and provide tuition vouchers); Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 *Colum. L. Rev.* 1448, 1466-71 (1962) (discussing lower courts' blanket rejection of facially neutral "pupil-placement" schemes).

300. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200-01 n.11 (1973) (disapproving *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955)).

saddling "innocents" with the cost of the remedy as well as equity's resistance to mandatory injunctions, the Prohibitory view succeeds in avoiding both the desegregation decisions' *overcorrection* vis-à-vis assertedly innocent third-party nonviolators and the objection often leveled against ends-focused theories that unhappy means do not justify even very happy ends. But the cost of the Prohibition theory's evasion of those two problems is the creation of two even bigger problems: extreme *undercorrection*, and an inequitable failure to achieve the theory's own self-professed happy ends.

To support their approach, the Prohibitionists draw upon the paradigm of, let us call it, the "Ideal School District," a district that, for the moment, is being run by above- or below-board segregationists.³⁰¹ The Ideal District, let us say, has twenty-five schools, fifteen for whites and ten for blacks. Although both sets of schools are spread throughout the district, officials will not let black children attend the nearby schools for whites, and the white children, with or without official sanction, will not attend the nearby schools for blacks. Once the Ideal District is ordered to refrain from these segregative practices, its Ideal demography leaves its school board no not-obviously-discriminatory alternative to what amounts to a *de facto* integration plan. Thus, the Ideal District's leaders need simply—and have no alternative but to—admit all children to all schools on a strictly geographic or choice basis, and the wrong *plus its effects* are for the most part righted.

Outside a few rural districts in the South,³⁰² no such Ideally segregated districts exist. Indeed, it is very likely *because* of segregation that most school districts depart from the Prohibitionist's Ideal. For in the "Typical School District" operated by above- or below-board segregationists, a court very likely will find that the offending officials either intentionally put black schools where black children, but no white children, already were or caused in-migrating black children to move to where black schools, but no white schools, already were. The court will probably also find that the offending officials thereupon located all the new white schools, which in turn affected white families' residential preferences, as geographically far away from African-American neighborhoods as possible, probably in newer suburban areas where FHA, relocation, public- and subsidized-housing, and other practices would not let or help black families live.³⁰³

301. See, e.g., L. Graglia, *supra* note 55, at 67–89.

302. See, e.g., *Green v. County School Bd.*, 391 U.S. 430, 432 (1968).

303. For a description of the paradigmatic situation, with illustrative citations, see Dimond, *supra* note 123, at 20–32; *supra* note 258. For additional illustrative cases, see, e.g., *Keyes*, 413 U.S. at 191–95; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20–21 (1971); *Adams v. United States*, 620 F.2d 1277, 1284–91 (8th Cir.) (en banc), cert. denied, 449 U.S. 826 (1980); *Morgan v. Kerrigan*, 509 F.2d 580, 586–98 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1294–358, 1388–518 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988); *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490–95,

When a prohibitory injunction issues in this Typical community, the Typical school board probably will behave much like its Ideal counterpart. It will direct that admissions henceforth take place on either a strictly geographic or strictly choice basis (pursuant to the latter of which, choices in all likelihood will be influenced substantially by geographic proximity).³⁰⁴ In the Typical District, therefore, the Ideal District's modest deviations from strict racial proportionality probably will give way to only the minutest deviations from strict racial separation.

The Prohibition theory at this point affords two alternatives to black children who suspect continued discrimination and who find themselves still attending the same schools with the same black classmates the same several miles from the same schools attended by the same white children as hefore. The black children may sue the school board, alleging intentional discrimination anew, or they may accept their fate and go on about their segregated business.

Should the black children choose the first alternative, they would face the daunting prospect of consuming a lot of their own and the courts' time and resources trying to prove that the school board's conclusion that children might best be required or allowed to attend the schools nearest their homes was so exceedingly irrational that a court should find it invidiously motivated.³⁰⁵ Remember, too, that under Prohibitory theory, the court may not strike down a new, innocently motivated admissions scheme simply because it preserves the effects of the old, invidiously motivated one.³⁰⁶ Such action by the court might force school boards, in order to distinguish current actions from prior ones, to do by indirection what the Prohibition theory refuses to make them do directly—namely, to integrate the schools by mixing at least some “innocent” white children with some not-identifiably-injured

1501-03 (W.D. Mo. 1984), aff'd in relevant part, 807 F.2d 657 (8th Cir. 1986) (en banc), cert. denied, 108 S. Ct. 70 (1987); *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 234-51 (S.D. Ohio 1977), aff'd, 583 F.2d 787 (6th Cir. 1978), aff'd, 443 U.S. 449 (1979); *Evans v. Buchanan*, 393 F. Supp. 428, 434-38 (D. Del.) (three-judge panel), aff'd mem., 423 U.S. 963 (1975).

304. See *Kitch*, supra note 236, at 9-10 (Prohibitory theorist advocating neighborhood-school remedy for neighborhood-school violation).

305. Any other student-assignment decision would subject the board to criticism of either the reverse-discrimination kind, if it instead used an integratively racial criterion, cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (reverse discrimination claim in context of teacher hiring), or of the minimum-rationality kind, if the board instead used most other available criteria such as a preference for long-distance husing or assignment to schools alphabetically or by lot, cf. Note, *The Equality of Allocation by Lot*, 12 Harv. C.R.-C.L. L. Rev. 113, 113 (1977) (discussing advantages of allocating “scarce goods” by lot as opposed to more common uses of “merit, market, and temporal priority”).

306. E.g., *Riddick v. School Bd.*, 784 F.2d 521, 539 (4th Cir.), cert. denied, 474 U.S. 938 (1986). Rather, the first prohibitory injunction may cut off consideration of pre-injunction actions unless those actions tell the court something specific about the motivations of the present school board. See *Mayor v. Educational Equality League*, 415 U.S. 605, 622-23 (1974); *Spomer v. Littleton*, 414 U.S. 514, 521-22 (1974).

black children.³⁰⁷ Accordingly, even if the virtually undetectable results of their first judicial outing do not deter the black children from setting forth a second time, the wholly undetectable results they have reason to expect if they do try again almost certainly will dissuade them.

Ultimately, therefore, having eschewed any compensatory goal, a Prohibitory approach likewise provides virtually no incentive to the Typical School Board to refrain from choosing segregative school-assignment patterns: If the district does discriminate a second time, it may well escape being sued; if it is sued, it probably will escape liability; if it is found liable, it assuredly will face but a second injunction forbidding discrimination but allowing it yet again to formulate a new, perhaps only marginally different, assignment policy—which policy is even less likely to prompt a suit, which suit is even less likely to succeed, and so on.³⁰⁸

Although possible alterations of the Prohibition theory come to mind that might mitigate its lack of fit and its compensatory and deterrent underachievement, none of those revisions is philosophically satisfying. For example, the theory might defend the desegregation decisions as having created a remedy with such an *in terrorem* effect that antidiscriminatory deterrence (and even occasionally some compensation) is assured or at least partially advanced. As we have seen, however, that approach—albeit far more successfully prohibitory—violates the Prohibitory theorists' insistence upon so-called "colorblind" nonredistribution.³⁰⁹ In addition, such an approach properly might be rejected because it raises justification questions of its own. For instance: Why desegregation? Why not damages, to take the obvious private-law example?³¹⁰

307. Prohibitory theory thus commits the immoral act that Professor Black contends would have accompanied a contrary result in *Brown I*, namely, "making . . . law . . . based on self-induced blindness, on flagrant contradiction of known fact." Black, *supra* note 123, at 426.

308. See, e.g., D. Bell, *supra* note 2, at 159; Cavanagh & Sarat, *supra* note 281, at 408 (prohibitory remedies "provide little more than symbolic victories"); Freeman, *supra* note 98, at 1079–81.

309. See sources cited *supra* note 288.

310. The possibility of damages illustrates the justificatory difficulties of insistently injunctive Prohibitory theory. Prohibitory theory abandons compensation as a goal, not because of anything wrong with compensation but because of the corrective crudeness of affirmative injunctions as a means of compensating. The same logic, however, that leads Prohibitionists to reject the excessively blunt instrument of affirmative injunctions as redistributive vis-à-vis "innocent" whites also should lead them to reject the excessively fine remedial tool of negative injunctions as even more redistributive vis-à-vis uncompensated blacks. The more logical solution would be to make good old-fashioned private-law damages paid to identifiable victims the prohibitive price of future wrongdoing. That approach also would commend itself to equitable purists, given their preference for available *legal* remedies. A deterrent-damages-to-identifiable-victims approach, however, does not provide a fitting or justifiable explanation of, or alternative to, desegregation: (1) It does not explain even one of the insistently injunctive desegregation

One also might premise a prohibitory explanation of the cases on a trio of equitable remedial principles more liberal and modern than the archaic maxim that pure Prohibitory theory tracks:³¹¹ (1) modern equity's tolerance of mandatory injunctions;³¹² (2) the "equitable clean-up" doctrine, which allows litigants who establish equity jurisdiction to secure relief not normally available in equity if "necessary to the effective termination of the entire matter in dispute";³¹³ and (3) the principle that "considerations of policy [and] expediency" limit the scope of equitable relief.³¹⁴ Together, these principles might be said to belie any equitable justification for limiting relief to negative injunctions and at the same time explain the decisions' only partial correction.

Proponents of something like this remedial-limits approach have argued that it has two virtues: Given its equitable flexibility, the approach easily can explain what the Court has done in the desegregation cases, although, admittedly, not what the Court has said.³¹⁵ And, by

decisions. (2) It does not solve the "indeterminate plaintiff" and "indeterminate defendant" problem, hence it is likely to remain relentlessly undercorrective vis-à-vis undiscovered victims and underdeterrent vis-à-vis undiscovered wrongdoers. See P. Schuck, *supra* note 122, at 262-68, 286-94; Rosenberg, *supra* note 269, at 863-66, 869-81, 900-02; *supra* notes 278-284 and accompanying text. And (3) it may well entail more dollars-and-cents costs—undercorrection notwithstanding—than our society, regrettably, is willing to pay. Thus, "educational enhancement" substitutes for desegregation, which provide a rough measure of the educational damages that might be assessed, have proved quite expensive. See *Missouri v. Jenkins (Jenkins II)*, 110 S. Ct. 1651, 1667-68 (1990) (Kennedy, J., concurring in part and dissenting in part); Brief of Petitioner at 5-10, *id.* (No. 88-1150) (almost half a billion dollars spent on fewer than 40,000 black children—with no compensation for lost earnings and the like). Desegregation, by contrast, is cheap, rarely increasing districts' operating budgets by more than two or three percent. Hawley & Smylie, *supra* note 9, at 287-88.

311. See *supra* note 289 and accompanying text.

312. See O. Fiss, *Injunctions* 124, 247-71, 415-81 (1972); sources cited *supra* note 289.

313. Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. Pa. L. Rev. 320, 320 & n.1 (1951); accord 1 J. Pomeroy, *supra* note 289, §§ 181, 227, 231, 237e, 237f; 1 J. Story, *Commentaries on Equity Jurisprudence* § 64 (14th ed. 1918).

314. 4 J. Pomeroy, *supra* note 289, § 1338; accord O. Fiss, *supra* note 312, at 90-93.

315. See J. Wilkinson, *supra* note 1, at 223-29; Brest, *supra* note 104, at 36, 42, 47 & n.214; Gewirtz, *Remedies*, *supra* note 49, at 591-608; Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1, 33 (1989); Note, *supra* note 49, at 1741-43, 1751-55 & nn.62 & 76, 1762-65. In *Milliken I*, the Court overturned an interdistrict remedy on the ground that such relief required an interdistrict violation, not present in the case, and not on the ground that an interdistrict remedy was too costly. See *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 744-46 (1974). The difference between the two rationales is important. Thus, faced with proposals for interdistrict transfer plans that drastically limit remedial burdens by making school districts' participation economically costless and children's participation elective, the lower courts have not adopted the proposed remedy directly, as "remedial limits" theory would seem to allow, and instead have demanded proof of an interdistrict violation, as *Milliken I*'s rhetoric seems to require. See *Jenkins v. Missouri*, 904 F.2d 415, 418-20 (8th Cir. 1990). One might try to solve this problem by claiming that

forthrightly acknowledging what the Court's rhetoric has obscured—that concerns about cost and public resistance are producing remedies far narrower than the rights that were violated—the approach stimulates creative guilt and frustration that, over the long run, may compel judges and legislators to expand available remedies.³¹⁶

An attempt to assimilate a remedial-limits understanding of the cases to corrective justice founders, given the decisions' *over*correction as well as the vast extent of their *under*correction.³¹⁷ Even on equitable grounds, the remedial-limits approach is questionable, given the "equitable clean-up" doctrine's preference for damages³¹⁸ and given the extent to which the approach inequitably rewards wrongdoers for the demographic and psychological success of their segregative wrongs.³¹⁹

Equally important is the indeterminacy of the remedial-limits theory. Although the chancellor's foot is elastic enough to be the measure of almost any remedy and remedial limit, it provides an unstable basis on which to ground such momentous decisions as those to use injunctive rather than monetary relief; to compensate victims still in school but not those already graduated; to direct relief at the violation's school-assignment effects but not at its dignitary and economic harms; to make children who object ride buses across previously sacrosanct attendance-zone boundaries but not let children who volunteer ride buses across school-district lines;³²⁰ and the like.³²¹ Accordingly, even if remedial limits could explain the cases³²² and justify them on the basis of pliable, if correctively deficient, equitable maxims, the remedial-limits solution would remain too flimsy to warrant suspending the search for a more satisfying theory of desegregation.

judges not only may respond to equitable concerns at the remedial stage but also may—and in *Milliken I* did—"take account of public attitudes and public resistance . . . at the rights-declaring stage." Gewirtz, Remedies, *supra* note 49, at 676. This strategy, however, raises all the objections discussed *supra* notes 213–222 and accompanying text to using a conventionalist approach to the declaration of minority rights. See Note, *supra* note 49, for additional objections to this strategy.

316. See, e.g., Note, *supra* note 49, at 1759–65. Normally, I would not premise a "fit" objection solely on a theory's deviation from the decisions' rhetoric but not their results. See text accompanying *supra* notes 106–119. That objection seems appropriate here, however, because much of the theory's justification depends upon the Court's actually declaring what it has failed, and probably does not want, to declare—namely, that it deliberately has chosen a skimpy remedy for the violation of a spacious right.

317. See *supra* notes 257–264 and accompanying text.

318. See I J. Pomeroy, *supra* note 289, § 237f; Levin, *supra* note 313, at 324.

319. See Note, *supra* note 49, at 1763; *supra* notes 256, 258 and accompanying text.

320. See *supra* note 315.

321. See Laycock, *supra* note 236, at 1730 & n.108 (discussing D. Laycock, *Modern American Remedies: Cases and Materials* 234–81 (1985)) (desegregation cases violate equitable principles, which limit remedies to "restor[ing] victims to their rightful position[s]" in strictly corrective fashion).

322. But see *supra* notes 315–316 (inability of "remedial limits" theory to explain *Milliken I* and other Supreme Court and lower court decisions).

In sum, the abundance of post-*Brown* public morality at the Prohibition theory's front-end disappears at its status-quo-preserving back-end, by which point it is clear that the theory accomplishes no good end at all. Neither *Brown*'s moral imperative nor its discrimination-free-world objective is done justice by ineffectual shakes of the injunctive finger.³²³ Indeed, had the Court thus prohibitively dropped the matter as of 1955, there is good reason to believe that the present-day strength of *Brown*'s acknowledged moral imperative would not have emerged over the succeeding thirty-six years.

Accordingly, although the Prohibition theory persists in the literature and the culture, it does so doctrinally only by forsaking twenty years' worth of post-*Green* decisions and morally only by leaving what even it recognizes as "bad enough" alone. As such, the Prohibition theory—in its pure form and in the remedial-limits form sketched above—fails in its attempt to avoid the fit and justification problems afflicting the Correction theory by retaining the latter's private-law focus³²⁴ but moving in a more deterrent or ends-focused direction. Having thus far rejected product-focused theories of both the public- and private-law varieties and process-focused theories of the private-law kind, the way is charted for exploration of the remaining category of simultaneously process-focused and public-law theories.

5. *The Prophylaxis Theory.* — Although others have flirted with it,³²⁵ the Prophylaxis theory's only well-developed defense is found in a short speech that Ronald Dworkin delivered at a law-and-social-science conference in 1976.³²⁶ There, Professor Dworkin roundly criticized the Equal Educational Opportunity and Correction theories for saddling judges with critical causal determinations of the "school segregation causes educational or demographic harm" variety. Judges, he concluded, are unfit or at least unwilling to make such conclusions because they call for statistical as opposed to either mechanical (e.g., "brakes fail, car crashes") or interpretive (e.g., "intentional discrimination is an insult") judgments.³²⁷ Undertaking, then, to provide a properly judge-like explanation of the Court's "all-out desegregation" orders, Professor Dworkin holds those remedies explainable—and justifiable in terms

323. See D. Bell, *supra* note 2, at 52–56 (indicting system that condemns but does nothing to cure effects of discrimination).

324. E.g., L. Graglia, *supra* note 55, at 36; Cooper, *supra* note 55, at 80–81; Reynolds, *supra* note 61, at 996–98.

325. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 737–38 (1989) (Scalia, J., concurring in judgment) (offering version of prophylaxis theory discussed *infra* note 352); Shane, *supra* note 52, at 1044–49, 1092–97; Yudof, *supra* note 100, at 88 ("group protection" approach with deterrent overtones).

326. See Dworkin, *supra* note 104, at 28–31. For critical commentary, see Gewirtz, Choice, *supra* note 49, at 739 n.33; Goodman, *supra* note 104, at 292–93; Yudof, *supra* note 61, at 448–49; see also Fiss, Fate, *supra* note 63, at 764 (anticipatory criticism).

327. See Dworkin, *supra* note 104, at 26–28, 31; accord *supra* note 281; *infra* notes 561, 784 and accompanying text.

of "political morality"—as measured doses of interpretive public-law prophylaxis.

According to Professor Dworkin's much criticized, and since partially abandoned,³²⁸ political theory, the political "machinery" of the modern liberal state is designed to compute the comparative social utility of alternative allocative measures by counting and comparing the total number of votes (i.e., individual "preferences") favoring each alternative. The problem, however, is that some people's votes are no better than monkey wrenches; they do not deserve to be counted because, by unduly magnifying certain preferences, they destroy the social-utility-measuring capacity of the machine. It is to screen out those votes, Dworkin concludes, that we have a right to equal protection of the laws.³²⁹

In an earlier work, Professor Dworkin had explained why he then believed that one man's preference for allocating scarce resources to himself as opposed to others is grist for the utility-toting political machine, while another man's preference for dividing resources along racial lines, whether or not he takes more for himself, is not. According to this explanation, the political-utility computer breaks down unless it strictly adheres to Bentham's maxim that "each man is to count as one and no man is to count as more than one."³³⁰ In Dworkin's view, moreover, the maxim is violated and the machine does break down if it is designed so that it not only counts an individual's internal or personal preference for *his* enjoyment of some goods or opportunities" but also the individual's "external preference for the assignment of goods and opportunities to *others*."³³¹

From these premises, Professor Dworkin's desegregation theory proceeds as follows: Because they reflect "external" preferences, "[u]tilitarian arguments that justify disadvantage to members of a race against whom prejudice runs will always be unfair arguments" unless properly countable personal preferences would justify the same disad-

328. See R. Dworkin, *supra* note 52, at 382-86; R. Dworkin, *A Matter of Principle* 66, 359-61, 365-66 (1985); Dworkin, *supra* note 154, at 10; *infra* note 343 (citing criticism of Dworkin's views).

329. Dworkin, *supra* note 104, at 28-29.

330. R. Dworkin, *Taking Rights Seriously* 234 (rev. ed. 1978) (discussing J. Bentham, *An Introduction to the Principles of Moral Legislation* xvi-xvii (J. Burns & J. Hart eds. 1982)).

331. *Id.* For Professor Dworkin, it is fine for a given citizen to cast her vote for building a natatorium but not a theater because she personally likes to swim and hates Strindberg and Shaw. But it is not proper for another citizen to vote for the same result because, although he would not frequent either facility himself, he nonetheless believes on religious grounds that people who attend theaters but not pools are sinners, or on racist grounds that the theater is likely to beget more threatening interracial contact than the pool. Counting the latter vote is forbidden because, by effectively "double count[ing]" the former voter's "personal" preference for the pool through the inclusion of the latter voter's "external" preference for the pool, the egalitarian utility-maximizing machine is thrown out of whack. *Id.* at 233-35.

vantage in the absence of racial prejudice.³³² The problem is that it is not usually possible to construct a utilitarian device that counts only personal preferences. For personal and external preferences, especially when the latter are of the racially discriminatory variety, "are so inextricably tied together, and so mutually dependent, that no practical test" is available for distinguishing the personal and external aspects of any individual's overall preferences.³³³

At this point in Professor Dworkin's theory, two interpretive judgments, based on "pattern[s] of preferences within the community," intervene.³³⁴ Professor Dworkin begins with the nation's history of "widespread and pervasive" prejudice.³³⁵ Against this background he puts himself in the position of a judge faced with a racially segregative-in-fact political decision—a decision, for example, that assigns children to schools by drawing district lines in the "natural way" that "produces segregated schools because neighborhoods are segregated."³³⁶ Interpretively analyzing this situation, Dworkin-as-judge reaches two conclusions: first, that "[t]here is a high antecedent probability that any community decisions on that issue will be corrupted" by historically and culturally ingrained racial prejudice;³³⁷ second, that any uncorrupt preferences relied upon by the board in choosing the neighborhood school plan are necessarily "so intertwined with [the arguments based on] prejudice that they cannot be disentangled to the degree necessary" to determine if the same result would have obtained even absent the prejudice.³³⁸

Against the background of historical racism, the judge must conclude that the "antecedent probability" that prejudice has determinatively corrupted any political decision that in fact disadvantages African-Americans is so (interpretively, not statistically) high that the equal protection clause forbids it.³³⁹ For the Prophylactic theorist, then, the equal protection clause does not simply seek prohibitively to screen corrupting preferences out of the utility-determining political machine. In addition, the clause prophylactically insists upon discarding any segregative-in-fact decisions that emerge at the back-end of the process, against the antecedently high probability that the prohibitory screening device failed and that such decisions were corrupted by external racist preferences. The court accordingly must substitute its own uncorrupt result, namely all-out desegregation.³⁴⁰

332. *Id.* at 237–38.

333. *Id.* at 236.

334. Dworkin, *supra* note 104, at 29.

335. R. Dworkin, *supra* note 330, at 237–38; accord Dworkin, *supra* note 104, at 30.

336. Dworkin, *supra* note 104, at 29.

337. *Id.*

338. R. Dworkin, *supra* note 330, at 237–38.

339. See Dworkin, *supra* note 104, at 30.

340. See *id.* at 30 ("The order speaks to those in political power and says this: 'If

The explanatory power of the Prophylaxis theory is immediately suspect inasmuch as the Supreme Court's fascination with prophylaxis ended twenty years ago, and the Court has spent a good bit of the ensuing decades cutting back on the decisions spawned by that fascination.³⁴¹ Moreover, the apparently conclusive effect that the Prophylaxis theory assigns to a racially segregative-in-fact result brings the theory into conflict with the Court's insistence since *Keyes* upon actual empirical proof of segregative purpose; the theory provides no answer to the "Why just schools?" question, inasmuch as many segregative governmental decisions in this country have as high an antecedent probability of corruption as those in the sphere of education; and the theory cannot, as is so frequently the case, explain *Milliken I* and *Dayton I*, both of which presented precisely the segregative-in-fact set of political decisions that would have led Professor Dworkin's interpretive judge to smell an antecedently high probability of a radical-intervention-requiring rat.³⁴²

As a philosophical justification for the desegregation decisions, the Prophylaxis theory fares somewhat better, but still does not quite succeed. Like the Correction and Prohibition theories, the Prophylaxis theory builds upon the moral bedrock provided by the interpretive judgment that racial segregation is an insult to the minority race, and, hence, is wrong. In good public-law fashion, however, the Prophylaxis theory avoids the Correctivists' and Prohibitionists' disappointingly narrow remedial outcomes by "interpreting" into the equal protection clause's prophylactically corrective and prohibitory ambit a far broader, more structural, and more serious violation—the corruption of our very political processes—justifying a far more intrusive remedy.

you refuse yourself to produce an outcome that negates the antecedent probability of corruption, then we must impose upon you such an outcome.' ”).

341. Compare, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 723–26 (1969) (adopting prophylactic rule restricting ability of potentially vindictive prosecutors, in violation of the due process clause, to impose higher penalties after retrial on criminal defendants who overturned their initial convictions on appeal) and *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (adopting prophylactic rule forbidding admission at criminal trials of in-custody statements obtained during interrogation of criminal defendants unless prosecutor proves that, before making the statements, the defendant was apprised of his fifth amendment rights to silence and to counsel during interrogation and expressly waived those rights) and *Mapp v. Ohio*, 367 U.S. 643, 655–60 (1961) (adopting prophylactic rule excluding admission at criminal trials of evidence obtained in violation of fourth amendment) with, e.g., *Duckworth v. Eagan*, 109 S. Ct. 2875, 2879–81 (1989) (limiting scope of *Miranda* rule) and *Texas v. McCullough*, 475 U.S. 134, 137–40 (1986) (limiting scope of *Pearce* rule) and *United States v. Leon*, 468 U.S. 897, 905–08 (1984) (limiting scope of *Mapp* rule) and *Stone v. Powell*, 428 U.S. 465, 484–88 (1976) (same).

342. The hypothetical case Professor Dworkin puts, focusing as it does on segregative-in-fact “district,” as opposed to attendance-zone, “lines,” is precisely the case actually presented in *Milliken I*. Only his and the Court's outcomes differ. Dworkin, supra note 104, at 29. In Dworkin's own words, then, we must question whether he has “draw[n] from [the applicable] line of precedent a characterization that seems to [be] a more sensitive characterization . . . than any other.” *Id.* at 24.

Where I, like others, begin experiencing trouble with Professor Dworkin's theory is at the divide he identifies between internal and external preferences. My complaint, however, unlike some others, has less to do with whether utilitarian theory recognizes the divide and more to do with Professor Dworkin's assignment of discrimination to the "external" side of the gap.³⁴³ If, for example, one agrees, as I be-

343. Attacking the utilitarian bona fides of Dworkin's theory are Baker, *Counting Preferences in Collective Choice Situations*, 25 *UCLA L. Rev.* 381, 383-87 (1978); Ely, *Commentary*, 56 *N.Y.U. L. Rev.* 525, 543-44 (1981); Ely, *supra* note 117, at 972-81; Hart, *Between Utility and Rights*, 79 *Colum. L. Rev.* 828, 838-46 (1979); Sager, *Rights, Skepticism and Process-Based Responses*, 56 *N.Y.U. L. Rev.* 417, 434-36 (1981); West, *supra* note 160, at 715. Professor Dworkin responds in R. Dworkin, *supra* note 328, at 66, 360-72; Dworkin, *A Reply by Ronald Dworkin*, in *Ronald Dworkin and Contemporary Jurisprudence* 282, 282-91 (M. Cohen ed. 1983). Endorsing the distinction that Professor Dworkin draws, but doubting its derivation from utilitarianism as opposed to some higher or amendatory principle, see, e.g., J. Wilson, *supra* note 105, at 128-29 (equal concern principle cannot be derived from utilitarian democratic theory, but preference for a constrained utilitarian democracy can be derived from the equal concern principle); Ely, *supra* note 117, at 985-86 & n.79 (American Constitution reveals utilitarian influences, but its refusal to count racially discriminatory preferences offends "unmodified" utilitarian theory); Gutmann, *supra* note 217, at 27 & nn.9-10; Nagel, *The Limits of Objectivity*, in *1 The Tanner Lectures on Human Values* 127 (1980).

Given the shellacking Professor Dworkin has taken on this point, I hesitate to say so, but I believe that a better utilitarian defense of the internal-external distinction can be made than I so far have seen: Assume along with Bentham, that the crux of utilitarian decisional procedures is that each person counts as one and no person counts as more than one. See J. Bentham, *supra* note 330, at xlvi-xlvi; Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 *J. Pol. Econ.* 309, 315-16 (1955); Kymlicka, *supra* note 121, at 176-81. An obvious problem with a political system adhering to this one person, one vote principle is that on the first vote a majority can express a preference that, in the future, the votes of members of a minority group should count for only one-half. If, in that event, the system adheres to the one person, one vote maxim in the first poll, it will have to violate that maxim in all subsequent polls by acceding to the majority's will and undercounting the votes of minority members. Anticipating this possibility, the framers of a Benthamite constitution might adopt a clause prohibiting amendment of the one person, one vote provision. Consider, however, that in any manageable political system, a vote in a single election—usually of an official—must suffice as a proxy for votes on the myriad decisions that the official will make each day. Given that fact, a vote in a single election in which a majority not only says "George for President" but also says "George, for the next four years, count blacks' preferences as only one-half" might effectively amend the one person, one vote provision as to all decisions George makes until he stands for re-election. Anticipating that possibility, the Benthamite Framers might buttress their "no amendment" clause with an "equal future votes" clause forbidding the political process to count preferences of the "in the future, count X for one half" or "count Y for two" sort, lest the counting of such preferences in periodic elections have the consequence of effectively amending the one person, one vote provision during the terms of office of elected officials. Thus, although utilitarian democratic theory does not imply a distinction between self-regarding and other-regarding votes and may even resist the distinction as antimajoritarian, see J. Ely, *supra* note 105, at 78-79, the distinction nonetheless may be necessary to preserve the utilitarian democratic constitution. See also Rawls, *The Idea of an Overlapping Consensus*, 7 *Oxford J. Legal Stud.* 1, 12 (1987) (utilitarianism not "stable" unless "assumptions are made limiting the content of . . . desires, preferences, or inter-

lieve Dworkin does, that self-respect is a critical and scarce societal good that is subject both to intense personal preferences and to strikingly different allocations among citizens depending upon how the government acts,³⁴⁴ then it does not take long to see that many racially discriminatory views will fall squarely within the category of countable *internal* preferences: "Thus if men take a certain pleasure in discriminating against one another, in subjecting others to a lesser liberty as a means of enhancing their self-respect, then the satisfaction of these desires must be weighed in [utilitarian] deliberations according to their intensity."³⁴⁵ Nor is this a fanciful example in the present context. A principal historical explanation of the rise of both the slaveholding and Jim Crow regimes in the South is precisely that they served politically to enhance the comparative self-respect of the white yeoman and working class vis-à-vis blacks.³⁴⁶

This criticism is important because it leaves Professor Dworkin without a description of the structural or public-law malfunction that the desegregation decisions are supposed to repair. If, for example, an Italian-American's preference for segregative legislation stigmatizing African-Americans turns out to be no different in principle or effect than the same voter's clearly "internal" preference for self-respect-enhancing legislation declaring October 12 to be a day of national celebration, then Professor Dworkin offers no good reason to deploy desegregation to cure the former "perversion" of the system but not the latter.

Additionally, the Prophylaxis theory does not explain why all-out desegregation is the appropriately preventive remedy. The morally unsatisfying answer Professor Dworkin gives to the question is this: For all the Prophylaxis theory can show, integrative remedies are "based upon a mechanical formula that otherwise has no appeal."³⁴⁷ Nonetheless, although "evidently arbitrary," such remedies are appropriate because they, unlike the assignment patterns they replace, are not "evidently . . . corrupt."³⁴⁸ Were "all-out desegregation" orders the

ests"). All that (gingerly) said, I remain dubious that this particular definition of the forbidden kind of vote (i.e., a vote for devaluing or revaluing some other person's vote in some future formal or informal vote) encompasses all forms of racial discrimination that the Court has addressed in its desegregation decisions, hence I do not conclude that this defense (if such it be) of Professor Dworkin's ruminations on utilitarianism serves as well to defend his desegregation theorizing.

344. See, e.g., R. Dworkin, *supra* note 330, at 235, 237; J. Rawls, *supra* note 105, at 180-83, 234, 256, 440-46, 547; B. Williams, *Moral Luck* (1981); Michelman, *supra* note 155, at 346.

345. J. Rawls, *supra* note 105, at 30-31.

346. See D. Bell, *supra* note 2, at 36-43, 51-74; A. de Toqueville, *Democracy in America* 357, 375 (J. Mayer ed. 1969); L. Ford, *Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860*, at 359-60 (1988); J. McPherson, *supra* note 251, at 56, 241-44, 506-07; C. Woodward, *supra* note 62, at 6-8, 60-95.

347. Dworkin, *supra* note 104, at 30.

348. *Id.*

“only”³⁴⁹ alternatives to segregative-in-fact neighborhood and choice plans, Professor Dworkin’s something-arbitrary-beats-something-corrupt answer just might do³⁵⁰—although the more “arbitrary” or financially and educationally costly and unreasonable the remedy turned out to be, presumedly the higher the justifying antecedent probability of corruption would have to be. But desegregation may not be the only alternative that is antecedently unlikely to be corrupt. One might well expect adherents of the gilded-ghetto branch of the Equal Educational Opportunity theory, for example, to step in here and propose a variety of alternatives—sufficiently drastic and expensive to overcome or weaken the antecedent probability of corruption—such as “separate but enhanced” all-black schools or a plan for increasing the number of black elected officials or for achieving community control of the schools. Damages or reparations also would serve.

There is another problem with the desegregation remedy as perceived by Professor Dworkin’s Prophylaxis theory: If the violation lies in the political process, then why remedy that violation by changing the outcome of the process rather than the process itself?³⁵¹ To this extent, some version of a prohibitory remedy, which responds to the political violation with a prohibition against the political system’s erring again, might satisfy better because, at the least, it would better reflect the violation.³⁵²

The Prophylaxis principle’s failure to provide a morally satisfying answer to the “Why just desegregation?” question has important consequences. In particular, absent a justification for choosing desegregation as its one and only remedy, the Prophylaxis theory has no answer to exemption requests from white children who claim that desegregation’s high transactions costs make them worse off than they would have been had no remedy been ordered or had one of the nonintegrative but equally prophylactic options listed above been utilized in desegregation’s stead.

349. *Id.*

350. See Note, *supra* note 305, at 314.

351. See Yudof, *supra* note 100, at 86.

352. In an aside on desegregation in his opinion in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), Justice Scalia advances a version of the Prophylaxis theory. See *id.* at 737–38 (Scalia, J., concurring in judgment) (quoting *Green v. County School Bd.*, 391 U.S. 430, 439 (1968)) (in school but no other setting, prior segregator’s adoption of “race-neutral” admissions criteria that continue to produce racially identifiable facilities is so ineffective at “dismantling the state-imposed dual system” that [it] might ‘indicate a lack of good faith,’” hence Court forbids defendant simply to initiate “race-neutral” admissions and requires unspecified amount of desegregation for unspecified time until dual system is “completely disestablished”). Like Professor Dworkin, Justice Scalia begs the “Why just desegregation?” question because enhancement of black schools or cession of political power to the African-American community might as easily establish “good faith.” Justice Scalia also provides no explanation for treating the violation in school (but, for some reason, in no other cases) as something other than a failure to adhere to “race-neutral” procedures.

Accordingly, although avoiding the Equal Educational Opportunity and Integration theories' potentially distributivist aims, the Correction theory's morally draining causal uncertainties, and the Prohibition theory's morally trivializing results, the logic of the Prophylaxis theory does not lead all the way to the all-out desegregative outcome it purports to justify. Something more still is needed in the way of both doctrinal explanation and philosophical justification. Because, however, the Prophylaxis theory comes closer than the other theories to meeting the fit requirement and avoids many of the other theories' philosophical difficulties, it makes sense, for the moment at least, to continue the search for the still elusive explanation and justification of desegregation doctrine and practice along the public-law and process-oriented way that Professor Dworkin points. It is to that search that I now turn.³⁵³

D. *A Hint of a Sixth Theory*

I believe that there is a consistent explanation for all of the Supreme Court's desegregation decisions—one that need not threaten

353. Below, I list a number of ways one might divide the various theories for comparative purposes. The asterisk indicates the category that includes the theory I presented below:

- | | | |
|---|-----|---|
| 1. <i>Outcome-focused</i>
Equal Educational Opportunity
Integration
Prohibition | vs. | <i>Process-focused</i> *
Prophylaxis
Correction |
| 2. <i>Right-focused</i>
Equal Educational Opportunity
Integration
Prohibition | vs. | <i>Remedy-focused</i> *
Correction
Prophylaxis |
| 3. <i>Private-law-oriented</i>
Correction
Prohibition | vs. | <i>Public-law-oriented</i> *
Equal Educational Opportunity
Integration
Prophylaxis |
| 4. <i>Accusatory</i> *
Correction
Prohibition
Prophylaxis | vs. | <i>Nonaccusatory</i>
Equal Educational Opportunity
Integration |
| 5. <i>Legislative-fact-dependent</i>
Equal Educational Opportunity
Correction | vs. | <i>Interpretive</i> *
Integration
Prohibition
Prophylaxis |
| 6. <i>Temporary remedy</i> *
Correction
Prophylaxis (?) | vs. | <i>Permanent remedy</i>
Prohibition
Equal Educational Opportunity
Integration |
| 7. <i>Forward-looking</i>
Equal Educational Opportunity
Integration
Prohibition
Prophylaxis | vs. | <i>Backward-looking</i> *
Correction |

the holdings in *Green*, *Swann*, and *Keyes* in order to accommodate those in *Milliken I* and *Dayton I* or vice versa, and one that connects all the doctrinal dots into a coherent picture of the critically important enterprise upon which the Court embarked thirty-six years ago and that remains substantially unfinished today.³⁵⁴

In order to lay out my explanation and justification of desegregation, I begin in Part III by identifying the systemic political problem that public school segregation poses. Next, Part IV proposes an idealized method of "reforming" or "reconstructing" political processes corrupted by discrimination and segregation. Part V then returns to the desegregation decisions themselves to show: (1) how closely they in fact conform to idealized politically reformative solutions; (2) how desegregation Reformatively understood uses an instrumentally Integrationist remedy with important Equal-Educational-Opportunity side effects to accomplish simultaneously Corrective, Prohibitory, and Prophylactic objectives and how in doing so it nonetheless avoids most of the corrosive empirical and moral problems that trouble the five competing theories; (3) why the remedy of desegregation has been principally confined to the field of education; and (4) why it is important to keep the remedy in place in that potentially evangelical sphere. In the last-mentioned spirit, Part V concludes with some remarks about the desegregative work yet to be started in the nation's northern and western metropolitan areas.

III. WHAT'S THE PROBLEM?

A. *What's the Problem?*

Why must there be desegregation? In Part II, I concluded that the answer to this question is not supplied solely by either the educational deficits that many African-Americans suffer; their absence from the political, economic, and social mainstream; the harms inflicted upon them as a result of their white fellows' interpersonal wrongs; or the antiutilitarian willingness of a utilitarian political process to count "external" preferences. Here, I conclude that there must be desegregation because there is racism in the political system; because the nation saw fit after the Civil War to reconstitute itself under a system of government that assured its black citizens "exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society";³⁵⁵ and because de jure segregation constitutes just such legislation implying inferiority in civil society: "To separate [black children] from others . . . 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

354. See *supra* notes 5, 42-49 and accompanying text.

355. *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879) (quoted in *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 490-91 n.5 (1954)).

ever to be undone.”³⁵⁶

It is true, of course, as the accepted judicial and scholarly view of segregation has long held, that segregation, like other forms of governmental discrimination, is an “insult,” one that is particularly egregious when wielded against children.³⁵⁷ But private discrimination is an insult as well. Yet, except in its most virulent form, that kind of discrimination has not thus far been constitutionally forbidden, no matter how ruinous it may prove to the dignity of its black victims.³⁵⁸ As the phrases from *Strauder v. West Virginia* and *Brown v. Board of Education I* quoted above suggest, and as an emerged and emerging consensus among modern legal scholars and political theorists goes a long way towards explaining, what is forbidden is segregation affecting blacks’ “status in the community” and in “civil society,” i.e., their status in those spheres in which citizens take part in their “legislative”³⁵⁹ capacity.

The problem with segregation, then, is *legislative* racism, racism infecting political judgments about how organized society should allocate scarce resources, educational or otherwise. The problem is the belief that the government may give some people less “protection of the laws” because those people, notwithstanding their status as members of “civil society,” are by someone’s lights inferior. There is something more here, then, than the fact that the government is a bigger and more powerful insulter than the rest of us. There is something more here even than the harms, grievous as they are, suffered by black Americans. What I think an emerged legal-political-philosophical consensus reveals is that there is here a harm suffered by us all and a recognition that equal protection is self-protection for us all.

B. *Why Is That a Problem?*

Our age is obsessed with equal protection.³⁶⁰ I cannot hope here to describe that obsession entirely, much less to psychoanalyze it. But neither can I avoid the question of the meaning of the equal protection clause in the desegregation cases. Accordingly, by identifying some

356. *Brown I*, 347 U.S. at 494.

357. E.g., *Brunson v. Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970) (en banc) (Sobeloff, J., concurring) (“segregation is forbidden simply because its perpetuation is a living insult to the black children”); accord *Black*, supra note 123, at 427; *Cahn*, supra note 123, at 155; *Dworkin*, supra note 104, at 22.

358. See infra notes 392, 394, 456.

359. As I explain below, by “legislative,” I mean the behavior of officials and citizens—acting in and through all agencies of government, see, e.g., *Monroe v. Pape*, 365 U.S. 167, 239 (1961); *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954)—that defines, including via interpretation and enforcement, the rules by which society distributes its scarce resources. See infra notes 386–438 and accompanying text.

360. For example, 11 of the last 26 Forewords to the Harvard Law Review’s Supreme Court issues (1963–1989) have been principally concerned with equal protection.

points at which the equal protection theorizing of others converges and subjecting the synthesized conclusions to the fit and justification analyses I developed earlier, I briefly explain here my "legislative racism" definition of the problem that the desegregation cases confront.

Although the equal protection clause³⁶¹ assumedly means what it says—we ought not, that is, interpret it inconsistently with its words—it does not very clearly say what it means.³⁶² Three things are clear, however, and they provide a useful interpretive starting point: First, the clause imposes some kind of duty having to do with equality. Second, that which must be equalized is denominated as protection. Third, the bearer of the equalization duty is the state. I begin this Part by identifying a consensus among scholars in regard to each of these three points of relative clarity in the clause. I then synthesize the three concepts into a single, mainly liberal but partly republican view of the clause and the problem it aims to resolve. Finally, after identifying the relationship of race, segregation, and intentional discrimination to that problem, I test my conclusions against the clause itself in historical context.

1. *Equal*. — It is possible to identify a verbal consensus of sorts that begins to give content to the clause's arguably most important word, "equal": Equality does not mean that minorities can never be treated less favorably than others, but it does forbid "the denial to minorities of . . . 'equal concern and respect in the design and administration of the political institutions that govern them.'"³⁶³ This formulation of the "antidiscrimination principle," or a version of it, may be found in the writings of numerous equal protection scholars³⁶⁴ as well as political and other theorists representing liberal,³⁶⁵ natural

361. U.S. Const., amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

362. See, e.g., J. Ely, *supra* note 105, at 12–14, 30–33 (clause "cannot intelligibly be given content solely on the basis of [its] language and . . . history"); Fiss, *supra* note 67, at 85 (clause "has no [facial] meaning"); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 *Harv. C.R.-C.L. L. Rev.* 7, 24 (1979); Sherry, *supra* note 105, at 89.

363. J. Ely, *supra* note 105, at 82 (quoting R. Dworkin, *supra* note 330, at 180).

364. See, e.g., Alexander, *supra* note 177, at 45–46 ("equal worth" and "equal regard"); *id.* at 44–49 & nn.136, 138–39 (collecting authority); Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 *Tex. L. Rev.* 1029, 1030–48 (1980) (equal counting; "equality of respect"); Brest, *supra* note 104, at 7 (clause forbids "assumptions of the differential worth of racial groups" or "racially selective sympathy and indifference"); Crenshaw, *supra* note 3, at 1345; Fiss, *supra* note 67, at 130–31; Karst, *supra* note 179, at 5–6 (quoting J. Rawls, *supra* note 105, at 256) ("'ethic of mutual respect and self-esteem'"); Lawrence, *supra* note 134, at 350; Tribe, *supra* note 117, at 1072 ("equal respect in which we as a society aspire to hold each individual").

365. See, e.g., B. Ackerman, *supra* note 123, at 171; R. Dworkin, *supra* note 330, at 234, 273; A. Gutmann, *supra* note 142, at 170 ("agreement among several diverse strands of liberalism . . . that people are potentially free and equal moral beings"); R. Nozick, *Anarchy, State and Utopia* 333–34 (1974); J. Rawls, *supra* note 105, at 75–83, 536 (each citizen "treated with the respect due to a sovereign equal"); M. Sandel, *supra*

rights,³⁶⁶ feminist,³⁶⁷ republican,³⁶⁸ utilitarian,³⁶⁹ and laissez faire³⁷⁰ perspectives, among others.³⁷¹ Ascertaining whether this verbal con-

note 105, at 19–20 (discussing Kant and Rawls); Galston, *Liberal Virtues*, 82 *Am. Pol. Sci. Rev.* 1277, 1287 (1988); Kateb, *Democratic Individuality and the Claims of Politics*, 12 *Pol. Theory* 331, 337 (1984); Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 *J. Legal Educ.* 359, 362–64 (1981); West, *supra* note 160, at 674, 681–82, 725; G. Kateb, *Democratic Individuality and the Meaning of Rights* 11 (paper delivered at Columbia Legal Theory Workshop, Mar. 20, 1989).

366. See, e.g., R. Dworkin, *supra* note 328, at 59, 68; J. Wilson, *supra* note 105, at 22, 98; Rawls, *supra* note 116, at 236–37 n.19; J. Coons, *Premises of a Descriptive Equality* 75–76 (paper delivered at the Columbia Legal Theory Workshop, Mar. 2, 1988) (“condition entailing the absolute value or dignity of persons”).

367. Feminist theory accords persons equal respect not by ignoring their differences and deeming them alike but instead by divesting their differences of normative significance. E.g., Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in *Women and Moral Theory* 148, 164, 169 (E. Kittay & D. Meyers eds. 1987) (each “entitled to expect and to assume from the other forms of behavior through which the other feels recognized and confirmed as a concrete, individual being with specific needs, talents, capacities”); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 *U. Pa. L. Rev.* 291, 365–69 (1985); Marcus, Spiegelman, DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law: A Conversation*, 34 *Buffalo L. Rev.* 11, 53 (1985) (Menkel-Meadow) [hereinafter Marcus]; Minow, *supra* note 179, at 32–33, 38 (need to respect each person’s “distinguishing” features, reject any “single superior perspective for judging questions of difference,” and “resist the denigration implied by difference”); Sullivan, *Rainbow Republicanism*, 97 *Yale L.J.* 1713, 1718 (1988); West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1, 5–6, 21–28, 60 (1988); Note, *Toward a Redefinition of Sexual Equality*, 95 *Harv. L. Rev.* 487, 497–502 (1981).

368. See, e.g., A. Gutmann, *supra* note 52, at 44–45; M. Walzer, *supra* note 52, at 216 (“equality of consideration”); Gutmann, *supra* note 217, at 27, 45 (discussing authority); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind. L.J.* 145, 183 & n.132 (1977–78) (citing J. Rousseau, *The Social Contract or Principles of Political Right*, in *The Social Contract and Discourses* 1, 13–14, 30 (Everyman’s ed. 1950)); Sunstein, *supra* note 105, at 128, 140.

369. See, e.g., R. Dahl, *A Preface to Democratic Theory* 32, 34, 36–38 (1956); J. Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* 167–70, 208–15, 238–42, 295–301 (1986).

370. See, e.g., Michelman, *Politics and Values or What’s Really Wrong with Rationality Review?*, 13 *Creighton L. Rev.* 487, 493–94, 496 (1979) (those law and economics theories that understand the aim of social organization as the “universal enhancement of each individual’s expectations, not collective enhancement of the sum of all individual expectations” insist that the state, when market failure necessitates intervention, accord equal weight to each citizen’s preferences).

371. See, e.g., C. MacPherson, *Democratic Theory: Essays in Retrieval* 51–52 (1973) (“equal effective right of the members to use and develop their human capacities”). See generally Dworkin, *supra* note 154, at 7–10 (“no significant body of political opinion among us would either reject . . . outright or [significantly] qualify” the “abstract egalitarian principle” that state must show equal concern for life of each citizen); Kymlicka, *supra* note 121, at 173–74, 178–81 (collecting views of various contemporary Western political philosophers who endorse “equal concern” requirement); Rawls, *supra* note 116, at 236–37 n.19; Sunstein, *supra* note 105, at 134, 143 & nn.30, 61–63 (“prevailing understanding of equal protection is classically liberal”).

sensus advances the interpretive enterprise in any way requires answers not obviously embedded in the "equal concern and respect" formulation to two additional questions: Respect and concern vis-à-vis citizens' interest(s) in what? And, respect and concern from whom?

2. *Protection.* — Egalitarians might wish to see equalized either of two broad categories of interests. The "perfectionist" egalitarian wants every citizen to have an equal amount of some particular right or resource that the Constitution, or some other authoritative source besides the citizen herself, establishes uniformly for all.³⁷² Some adherents of the Equal Educational Opportunity theory, for example, are educational input- or outcome-focused perfectionists, while some adherents of the Integration theory focus their perfectionism on the distribution among citizens of society's economic product or of participation in society's economic, political, and social mainstreams.³⁷³ By contrast, "antiperfectionist" egalitarians do not demand that citizens be treated equally by receiving equal amounts of some particular good. Rather, antiperfectionist theory requires only that each citizen be treated as the equal of all other citizens in his or her capacity to define and to pursue his or her own good.³⁷⁴

Upon reflection, it appears that both the equal protection clause on its face and the "equal respect and concern" consensus described above take the same, antiperfectionist side in the perfectionist-antiperfectionist debate. To begin with, the word used by the Constitution to answer the question "Equalize what?" is decidedly nonperfectionist: It does not conjure up visions of undefined or undirected persons queuing up to receive equal amounts of some legally specified good or right that will define and direct them, but rather of persons responsible for defining themselves and directing their own projects who are seeking governmental protection in equal amounts when they do so.

Likewise, the "equal concern and respect" consensus described above is antiperfectionist. In the first place, "concern" and "respect," like "protection," suggest an active and self-defining personality that

372. See A. Gutmann, *supra* note 142, at 2; Kymlicka, *supra* note 121, at 181-82, 187-90.

373. See *supra* notes 123-125, 163-165 and accompanying texts.

374. See, e.g., Dworkin, *supra* note 121, at 3-8. On one view, antiperfectionism differs from perfectionism by not requiring the state to distribute anything new to citizens but only to protect something citizens already have, namely, the capacity to choose. See Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *Pol. Theory* 81, 84-87 (1984) (discussing Rawls). On another view, antiperfectionism is a form of perfectionism that requires the state to distribute "the capacity to choose," as opposed to some other tangible or intangible good, equally to all citizens. See *supra* note 154; notes 161-162 and accompanying text (some Equal Educational Opportunity and Integration theories use perfectionist means (equal distribution of educational resources) to the antiperfectionist goal of enabling individual choice). Neither version of antiperfectionism is "neutral" because both require the state to value the capacity to choose above other capacities. See *supra* note 115; *infra* note 627.

partially pre-exists, rather than being defined by, governmental action.³⁷⁵ The equal concern concept thus requires the government to accord equality to each self-defined and heterogenous personality as the government finds that personality, rather than homogenizing all personalities by giving everyone an equal portion of some definitive and unexchangeable good or resource. Moreover, when parties to the consensus insist that the government afford all citizens equal concern and respect, they generally seem to mean that the government, when it sets about distributing scarce resources, should accord each person equal status as a human being precisely because each person is, equally, a potential creator of his or her own valid good and because each heterogenous person's self-defined good is equally worthy of governmental attention and protection.³⁷⁶

375. That individuals are assumed to be partly defined in advance of action by the state does not imply that they are defined by exogenous desires, but rather that they are defined by their own choices, including, quite possibly, choices that are altruistic or morally premised. Nor does self-definition imply immutability or atomism, inasmuch as a person's interactions and cooperation with others constantly encourage and enable her to redefine herself and may themselves be the objects of her redefinition. See, e.g., Herzog, *Some Questions for Republicans*, 14 *Pol. Theory* 473, 480 (1986); Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 *Fla. L. Rev.* 443, 448, 451 (1989); G. Kateb, *supra* note 365, at 13, 24–28, 30 (liberalism's negative injunction against interference with persons different from ourselves implies affirmative injunction that we be receptive to options those persons pose); *infra* note 420.

376. See Galston, *supra* note 365, at 1286–87 (discussing Locke, Kant, Mill, Emerson, Thoreau, Whitman); Kymlicka, *supra* note 121, at 178–88; Sherry, *supra* note 115, at 568 n.118. Included in this consensus are, among others: CONSTITUTIONAL SCHOLARS, e.g., Karst, *supra* note 179, at 8; Lawrence, *supra* note 134, at 350; Tribe, *supra* note 117, at 1077; LIBERAL THEORISTS, e.g., B. Ackerman, *supra* note 123, at 11; J. Rawls, *supra* note 105, at 212, 505; Gutmann, *supra* note 114, at 312; Richards, *supra* note 365, at 362–64; Sandel, *supra* note 374, at 82, 86 (liberal view that “what is most essential to our personhood[s]” are “not the ends we choose but our capacity to choose them”); G. Kateb, *supra* note 365, at 10, 12 (“What one claims for oneself one must concede to the rest,” namely, the right “not necessarily [to] say or do great things, but rather [to] say and do one's own things”); NATURAL RIGHTS THEORISTS, see, e.g., J. Wilson, *supra* note 105, at 22, 97; Dworkin, *The Original Position*, *in* *Reading Rawls*, *supra* note 155, at 16, 50–51; J. Coons, *supra* note 366, at 33–35; FEMINIST LEGAL THEORISTS, see, e.g., Benhabib, *supra* note 367, at 164; Cornell, *supra* note 367, at 360–63; Marcus, *supra* note 367, at 53 (Menkel-Meadow); REPUBLICAN THEORISTS, see, e.g., Michelman, *supra* note 65, at 1533–35; Sunstein, *supra* note 105, at 134; UTILITARIAN THEORISTS, see Kymlicka, *supra* note 121, at 176–81 (citing authority); LAW AND ECONOMICS THEORISTS, see Michelman, *supra* note 370, at 498.

Following Mill and Dewey, Professor West perceives a countertradition in liberal thought that (1) rejects state neutrality towards individual choice because of the dehumanizing limits on choice set by most people's socially narrowed range of experience, and (2) requires the state, in perfectionist fashion, to supply all people with a superior “good life” devised by persons of “superior experience.” West, *supra* note 160, at 681–90, 700–01, 710, 717–25. Following Dewey, I agree that state antiperfectionism does not justify state passivity and deference to market choices in the face of socially narrowed choice horizons, and instead entails active efforts by the state to broaden all citizens' choice possibilities. Those efforts probably must include education for all chil-

This identification of people's capacity to choose their own good as the attribute that makes them equally human hence humanly equal, and that, as such, deserves constitutional protection, derives support from a number of sources. Among those sources are: (1) the empirical truth of the proposition that we are all, in fact, alike in our differences—i.e., in our capacity to choose and to pursue different ends—and that we are more like each other and less like other organisms in this particular respect;³⁷⁷ (2) the ubiquitous acceptance in western cultures characterized by “the fact of pluralism”³⁷⁸ of the included principle of religious toleration;³⁷⁹ (3) the recurrent appearance of the “equal capacity to choose” principle in western thinkers from Rousseau, Kant, and Mill to latter day republican, liberal, utilitarian, and feminist thinkers;³⁸⁰

dren, see *infra* notes 736–740 and accompanying text, and may include, for example, subsidies for the arts and subsistence payments to the poor. See A. Gutmann, *supra* note 142, at 9; see also R. Dworkin, *supra* note 52, at 212 (service of “general interest” also allows legislation to favor disadvantaged or other groups without violating anti-perfectionist principles). I believe modern liberalism parts company with Professor West, however, when she obliges the state to impose on all of us the single good life that a person of superior experience would choose for himself, rather than requiring the state to respect the many good lives that each of us, once given partially state-subsidized access to superior experiences, can choose for ourselves.

377. See, e.g., H. Arendt, *The Human Condition* 8, 175 (1958) (“Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else”); human condition “has the twofold character of equality and distinction”); J. Wilson, *supra* note 105, at 22, 81–85, 102–04; Gutmann, *supra* note 114, at 311 n.14; Michelman, *Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4, 33 (1986); Minow, *supra* note 179, at 75.

378. E.g., Rawls, *supra* note 116, at 225; accord M. Sandel, *supra* note 105, at 50; Gutmann, *supra* note 114, at 317. “Pluralism” has many meanings, including a brand of politics that determines outcomes by plotting the vectors of constituents’ desires, see, e.g. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 32–34 (1985) [hereinafter Sunstein, *Interest*]; a social arrangement characterized by the coexistence of a number of self-defining and solidaristic familial, religious, ethnic, and other groups, see, e.g., M. Walzer, *supra* note 52, at 216, 223; and a political and social arrangement characterized by cooperation among diverse self-defining individuals, see, e.g., Michelman, *supra* note 65, at 1504 & n.38; Rawls, *supra* note 343, at 1–4; Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1540, 1572 (1988) [hereinafter Sunstein, *Beyond*]. I use the term in the last-mentioned fashion, although by focusing on self-definition I include arrangements of the middle sort in which individuals come to define themselves in terms of their membership in a group. See, e.g., Dworkin, *supra* note 154, at 31; Rawls, *Fairness to Goodness*, 84 *Phil. Rev.* 536, 550 (1975); *supra* note 65; *infra* note 422.

379. See, e.g., Rawls, *supra* note 116, at 225; *infra* notes 387–390, 482 and accompanying text; *infra* notes 384, 434 (equal protection principle linked to injunction against establishment of religion).

380. See *supra* notes 365–371 and accompanying text; *supra* note 376. Some feminist and other scholars question “the assumption that ‘taking the viewpoint of others’” “is truly compatible” with the liberal notion of an “objectified” person “reasoning behind a ‘veil of ignorance.’” Benhabib, *supra* note 367, at 164–65. See M. Sandel, *supra* note 105, at 30, 50–65; M. Walzer, *Interpretation*, *supra* note 110, at 5; Minow, *supra* note 179, at 60 n.240. This view, however, misinterprets the veil of ignorance and similar “objective” stances as describing the “*definitional identity*” of human beings,

(4) the principle's nonreciprocal ability to require and harmonize as well as to coexist with both liberty and democracy;³⁸¹ and particularly (5) the principle's identification of a *lingua franca* or lowest common denominator that makes communication possible among a pluralistic society's diverse groups, each of which uses a different measure of value;³⁸² (6) the obvious importance of choice as a potential source of satisfaction and as a foundation for other values;³⁸³ (7) the possibility of enhancing unity, solidarity, and security by giving normative significance to an attribute in which we are all the same and, at the same time, withdrawing normative significance from the many potentially divisive ways in which we are different by recognizing those differences as merely the variegated results of the capacity in which we are all normatively the same;³⁸⁴ and (8) the intuitive or culturally imbedded reasona-

Benhabib, *supra* note 367, at 166, rather than proposing a heuristic device to help individuals shed their own perspectives and acknowledge and assume those of others. See Gutmann, *supra* note 114, at 312; Rawls, *supra* note 116, at 236-37; Sunstein, *Beyond*, *supra* note 378, at 1567 n.160.

381. See R. Dworkin, *supra* note 328, at 372 (rights traditionally described as consequences of general "right to liberty are in fact the consequences of equality instead"); J. Ely, *supra* note 105, at 78-79 (Constitution's majority-rule presumption and antimajoritarian exceptions both designed to assure equality—the former the equality of the many vis-à-vis the few; the latter the equality of the few vis-à-vis the many); *The Federalist* No. 51, at 323-24 (J. Madison) (C. Rossiter ed. 1961) (same); J. Wilson, *supra* note 105, at 18, 128-33 (whereas pure democracy allows majority to disadvantage minorities and to subvert important liberties and whereas liberalism has no good way of responding to white racists' demand to be separated from blacks because (the whites believe) blacks interfere with the whites' well-being, an egalitarianism premised on the capacity to choose implies a presumptive preference for democracy's "one person, one vote" rule and conforms the definitive criterion of equality to the central focus of liberalism); see also R. Dworkin, *supra* note 328, at 59, 66 (criticizing Ely's view that "equal concern" principle derives from rather than being amendatory of democratic theory); Ely, *supra* note 117, at 963-64 (criticizing Dworkin's early view that "equal concern" principle derives from rather than being amendatory of utilitarian theory); Gutmann, *supra* note 217, at 27 (most modern democratic theorists qualify democracy with a "nondiscrimination constraint").

382. See J. Wilson, *supra* note 105, at 22-23, 40-44, 97 (given plural nature of our self-defined values, capacity to choose is the only trait we have and value in common, hence the only value that permits "communication or fraternity"); Michelman, *supra* note 377, at 32-33 (feminist insight that our capacity to define ourselves or to be seen as "different" provides the sought-for "common ground" and "makes possible normative interchange that is, at the same time, (i) mutually intelligible, (ii) potentially critical of any participant normative vision, and (iii) free of a priori privileged status for any vision"); G. Kateb, *supra* note 365, at 13, 17-18 ("a new sort of connectedness," a "working together by working apart," based on transformation of tolerance into receptivity); see also Fletcher, *Punishment*, *supra* note 106, at 705 (need for "set of principles that function as the lowest common denominator among diverse purposes and motives"); Minow, *supra* note 179, at 94 (except through mutual recognition of the other's capacity to be different, "we confront tragic limits in our abilities to make meaning together" and lack "a language to speak across conflicting affiliations"). But see Lopez, *The Idea of a Constitution in the Chicano Tradition*, 37 *J. Legal Educ.* 162, 164 (1987).

383. See J. Wilson, *supra* note 105, at 103-04.

384. See, e.g., *id.* at 97-98, 104, 40-44, 86; Arendt, *supra* note 172, at 48;

bleness of the proposition that people should respect others' apparently idiosyncratic projects as the price of others respecting theirs and, therefore, as the otherwise exorbitant price of cooperation and stability in a plural society.³⁸⁵

3. *The State.* — If equal concern and respect for each other's capacity to choose is so important, then why should that duty attach only to the state? And what is "the state"—how do we distinguish an individual's actions from those of the state?

Even here, the emerged consensus discussed above provides some, albeit less clear, answers. To begin with, recall that the antiperfectionist or "equal capacity to choose" gloss on the equal protection principle implies that personality partially pre-exists the state and enables each of us to identify our own vision of the good.³⁸⁶ Recall, as well, that religious freedom is the precursor and paradigmatic case of our equal capacity to choose and that among religions there are many—including

Michelman, *supra* note 377, at 32–33 (solidaristic potential of feminist insight that "[d]ifference is what we most fundamentally have in common"); Minow, *supra* note 179, at 13, 33, 75 (capacity to achieve "impartiality" and construct community by accepting each person's particularity, recognizing that there "is no single, superior perspective for judging questions of difference" and realizing that difference is only meaningful as a comparison, not as a negative characteristic of one of the traits being compared); Rawls, *supra* note 116, at 249. The ascription of normative significance to differences that inevitably result from diverse individuals' exercise of their common power to choose is identified as the central evil at which the equal protection principle aims in, e.g., J. Wilson, *supra* note 105, at 50–53; Crenshaw, *supra* note 3, at 1357 n.98 (racism as "vision of 'normative whiteness'"); Marcus, *supra* note 367, at 20–21, 45–46, 53 (MacKinnon, Gilligan, Menkel-Meadow) (normative maleness); Minow, *supra* note 179, at 13, 32–36, 68–71 (attacking "assumed point of comparison: women are compared to the unstated norm of men, 'minority' races to whites, handicapped persons to the able-bodied, and 'minority' religions to 'majorities'"); see also County of Allegheny v. ACLU, 109 S. Ct. 3086, 3102, 3119–22, 3124, 3133–34 (1989) (opinions of Blackmun, O'Connor, Brennan, and Stevens, JJ.) (evil at which establishment clause aims is state's ascription of normative significance to religious choices).

385. See, e.g., *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503, 1520 (D. Colo. 1983) ("viability of a pluralistic democracy . . . depends upon the willingness to accept all of the 'thems' as 'us'"); J. Wilson, *supra* note 105, at 22, 153, 158; Arendt, *supra* note 172, at 47–48; Gutmann, *supra* note 114, at 313 (quoting Larmore, Book Review, 81 J. Phil. 336, 338 (1984) (reviewing M. Sandel, *supra* note 105) (liberal justice "makes claims on us 'not because it expresses our deepest self-understandings,' but because it represents the fairest possible *modus vivendi* for a pluralistic society")); Rawls, *supra* note 343, at 21.

In stating that we are free to choose our own good, I assume the standard "security principle" limiting individuals' self-defined goods to those that do not threaten the "person or property" of others. Dworkin, *supra* note 154, at 11, 29. Although I do not think that the security principle ought to immunize most "morals" legislation from the claim that it is unconstitutionally perfectionist, I believe that such legislation and the decisions permitting it, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986), are vestiges of what I hope are fading assumptions about the demands of interpersonal security and not proof that we routinely let the state choose among nondangerous good lives. But see Fletcher, *The Watchdog of Neutrality*, 83 Colum. L. Rev. 2099, 2107–08, 2115–16 (1983) (reviewing B. Ackerman, *supra* note 123).

386. See *supra* note 375 and accompanying text.

some that form an important part of the nation's heritage—whose adherents, although content to “live and let live,” insist upon living by themselves.³⁸⁷ Recall, finally, that an inducement provided to people to abide by the “equal capacity to choose” principle in one—call it the “public”—sphere is the freedom and security gained thereby to pursue their own, even exclusionary, religious or other choices in other—call them “private”—spheres. If recognition of the “equal capacity to choose” principle in the public sphere is designed, and is attractive, as a means to protect people's freedom in the private sphere, then the recognition will not serve its purposes if it entirely displaces most people's private spheres.³⁸⁸ To extend the religious-tolerance analogy, the nonestablishment principle governing the public sphere does not obviate, but rather demands, a free-exercise principle to protect the private sphere.³⁸⁹ The equal protection (or nonestablishment) principle ac-

387. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Old Order Amish).

388. See Larmore, *supra* note 385, at 338; Sullivan, *supra* note 367, at 1721–22.

389. The use of complementary but potentially conflicting nonestablishment and free-exercise principles occurs not only in the religion context, see, e.g., *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3134–36 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), but also in the associational-rights context, see, e.g., *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2234 (1988) (city may forbid “establishment” of gender norm in certain business activities, notwithstanding negative impact of doing so on “free exercise” prerogative of men to associate exclusively among themselves), and, as I argue here, in the equal protection context, see *infra* note 392 (Constitution forbids government to “establish” one vision of good in public sphere, in order that persons may freely exercise choice as to good in private sphere). Rejecting 30 years of judicial interpretation, Professor Smith argues that the establishment clause was not intended to require state neutrality among competing religious principles but only to forbid intervention by churches and the federal government in each other's internal affairs. See Smith, *Separation and the “Secular”*: Reconstructing the Disestablishment Decision, 67 *Tex. L. Rev.* 955, 971–75 (1989). Even if government neutrality was *not* a “live option” in 1791, however, taking steps to avoid religious persecution and interfaith conflict *was*. *Id.* at 964–65 & n.44. Accordingly, if the neutrality principle provides an effective modern means of achieving the latter option in the modern world, Professor Smith offers no good reason to shun that principle. See *infra* note 503. In any event, Professor Smith also notes that the 1791 Framers may well have designed the clause to *legalize state* religious establishments. See Smith, *supra*, at 964 n.44, 972 n.93. If, as Professor Smith assumes, the clause nonetheless now forbids state establishments, we presumedly must mind the intent of the 1868 and not the 1791 Framers. See G. Wood, *Republicanism, Remarks Delivered at the Columbia Legal Theory Workshop*, Apr. 2, 1990 (principle of state neutrality among religions took hold in ante-bellum period). Focusing the nonestablishment principle on the public sphere and the free-exercise principle on the private sphere solves two other conundrums that Professor Smith poses: (1) How can the “‘shared intuitive ideas’” of as religious a society as ours include a religious-neutrality principle? And (2) how can the neutrality principle abide the laws the Court has upheld that single out particular religious adherents (e.g., Sabbatarians) for protection from burdens on those adherents' free exercise? See Smith, *supra*, at 1012–14, 990–93. The answer is that a fervent desire to preserve a broad space in society in which a multiplicity of religions may be freely practiced neither clashes with the shared intuitive idea that the government should avoid endorsing any one of those religions nor forbids the state to help preserve that “private” space against incursions from the public and social spheres. Although it will not always be easy to tell

cordingly must apply in a sphere large enough to induce people seeking the benefits and protections of that sphere to agree to accept the principle and to enable persons accepting it to communicate, co-exist, and cooperate, while still small enough to avoid dangerously repelling too many people whose exclusionary choices (or free-exercise requirements) forbid their acceptance of the tolerance principle in too large a segment of their lives.³⁹⁰

The broadest notion of a public sphere, short of one without boundaries at all, would require persons having control over any resource that someone else might wish to share or purchase—say a house of worship or just a house—to exercise that control consistently with the principle of equal concern and respect.³⁹¹ Religious or cultural separatists, that is, could cut themselves off from nonbelievers only by truly living in “the middle of nowhere.” Were the balance thus struck, it is not hard to imagine a number of groups in our society finding too small the inducement to accept the “equal capacity to choose” principle in so big a sphere of activity.

A more modest definition of the public sphere sees it (1) as necessarily encompassing those political processes that set the rules governing how resources in the society are to be distributed and (2) as being voluntarily expandable, say by majority vote of relatively encompassing constituencies, to economic and social activities large enough

when the state is preferring a sect and when it is clearing a space in which the sect's adherents may freely exercise, the “no endorsement” test—which I below analogize to the “no intentional discrimination” test—does a credible job of distinguishing the two situations. See *infra* notes 426, 482.

390. See Rawls, *supra* note 343, at 3, 13–17, 20–21. Most modern political and legal conceptions recognize a public-private dichotomy, although they vary widely in the amount of territory they place on either side of the line. See, e.g., Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519, 1580 (1982) (law and economics view that cities should be treated as private homeowners associations and freed of most fourteenth amendment requirements but that homeowners associations as well as cities should be subject to “public” duty of just compensation); Horowitz, *The History of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1423, 1424–27 & nn.14–15, 17 (1982) (liberals favor expansive private sector; republicans, legal realists, and modern critical scholars favor broader public sector); Karst, *supra* note 4, at 8–11 (marketplace and workplace included in public sphere); Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358, 1387 (1982) (critical legal studies view that public sphere should reach into workplace to assure “sexually pluralistic environments” there but that public may not impose its idea of proper sexual preferences on individuals); Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. Pa. L. Rev. 1429, 1429–34 (1982) (liberalism insists upon distinction as means of protecting private spheres; left liberals assign morals to “private” and economic behavior to “public” sphere; right liberals reverse the assignments); Rawls, *supra* note 116, at 226–27, 240–41 & n.22 (“deep disagreement” over last two centuries between adherents of Locke’s “liberty of the moderns” emphasizing private liberty and property and Rousseau’s “liberty of the ancients” emphasizing “political liberties and the values of public life”).

391. See, e.g., J. Wilson, *supra* note 105, at 129–30; Dworkin, *supra* note 154, at 36; Klare, *supra* note 390, at 1418; Parker, *supra* note 160, at 251.

to have an important impact on how the rules set by the political process are implemented.³⁹² To the extent that a consensus exists here, it seems to have formed around this more modest view, although this consensus admittedly is less inclusive than the ones that support the interpretations of “equal” and “protection” offered above. The “state action” consensus holds as follows: Persons responsible for influencing how the government shapes and operates “the processes that structure choice among good lives”³⁹³ may not base their decisions on assumptions, assertions, or preferences of the “I am better than you” or “my choice of (or capacity to choose) values is better than yours” sort.³⁹⁴

392. The public/private notion advanced here builds upon Hannah Arendt’s division of human activity into three spheres—political, social, and personal. H. Arendt, *supra* note 377, at 28, 38; accord Pitkin, *Justice: On Relating Private and Public*, 9 *Pol. Theory* 327, 330–31 (1981). That notion is as follows: (1) In the political sphere, the “equal concern” (or nonestablishment) principle always applies. (2) In the personal sphere, the “equal concern” principle never applies (or, put another way, the right of free exercise always applies). (3) In the social sphere, the “equal concern” principle presumptively does not apply (or, the free-exercise principle presumptively does). Principle (3)’s presumption may be rebutted in favor of the “equal concern” principle, if adherents of religiously, ideologically, racially, or otherwise exclusive views retain the capacity to practice their beliefs in commodious times, places, and manners and if a legislative majority properly concludes that (a) there are important reasons to promote equality in the social sphere or (b) promoting equality in the social sphere will help preserve equality in the political sphere against incursion by overly powerful social groups. See *infra* note 423. This approach arguably explains the Court’s decisions in cases in which equal-access and associational interests clash. Compare *Smith v. Allwright*, 321 U.S. 649, 661–62 (1944) (electoral primaries located in political sphere, illustrating principle (1)) and *Roberts v. United States Jaycees*, 468 U.S. 609, 618–20 (1984) (*dicta*) (personal relationships afforded sanctuary from state interference, illustrating principle (2)) with *New York State Club Ass’n v. City of New York*, 108 S. Ct. 2225, 2230 (1988) (public interest in equal access to “private” clubs at which important business is conducted outweighs the interest in private association, illustrating principle (3a)) and *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983) (limitation on religious liberty justified by overriding governmental interest in desegregated schools, illustrating principle (3a)) and *Runyon v. McCrary*, 427 U.S. 160, 175–79 (1976) (Congress may outlaw racial discrimination in private education that impairs individual’s right to contract, illustrating principle (3a)) and *Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976) (approving statutory limits on private political contributions because limits promote equal access to elections, illustrating principle (3b)). See generally Karst, *supra* note 4, at 18–24, 26–27, 46–47 (under current interpretation, thirteenth and fourteenth amendments ban only slavery and discriminatory state action but permit Congress and perhaps state legislatures to extend ban to discrimination in private schools, workplace, and marketplace). On the last quarter century’s legislative extension of the “equal concern” principle to the social sphere, see *Failing, Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt’s View of the Supreme Court’s Dilemma*, 49 *U. Pitt. L. Rev.* 143, 144–45 & nn.1–4, 154 (1987); *Fiss, Fate*, *supra* note 63, at 745–48; *Freeman*, *supra* note 98, at 1076–79.

393. A. Gutmann, *supra* note 52, at 45.

394. Most of the liberals cited *supra* notes 365 and 376 adhere to this view. There are a couple of responses to possible left critiques, see, e.g., *Horwitz*, *supra* note 390; *Klare*, *supra* note 390, of this public/private distinction: (1) The proposal below to en-

Who, then, are the persons responsible for shaping and implementing the rules governing the distribution of resources and choice among good lives? To answer this question, I join the recent effort to ally liberal and republican theory.³⁹⁵ More precisely, I attempt to show how the antiperfectionist liberalism that principally informs our notions of "equality" and "protection" can help achieve the simultaneously liberating and unifying qualities that modern republicanism values once the duty implied by egalitarian liberalism is extended, in classically republican fashion, to all citizens and not just to public officials.³⁹⁶

Republicanism broadly understood conceives of the state as the joint political action of persons denominated as citizens.³⁹⁷ A private person becomes a public citizen when she exhibits "*civic virtue*," i.e.,

compass within "state action" the effectual conduct of citizens as well as officials tends toward broader republican conceptions of the public sphere. See Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *Yale L.J.* 1623, 1625-26 & n.12 (1988); Michelman, *supra* note 65, at 1531; see also Ortiz, *supra* note 123, at 1128 (subjecting constituents' actions to equal protection duty goes "a long way towards erasing the distinction . . . between public and private action"). (2) Together with the allowance for legislative expansion of the "public" sphere to encompass the social as well as the political arena, see *supra* note 392; *infra* note 423, the definition of state action proposed here partially answers a principal objection to restrictive "state action" notions, namely, that they ignore economic and social power centers with vast political influence. See, e.g., Horwitz, *supra* note 390, at 1428; Parker, *supra* note 160, at 251; Pitkin, *supra* note 392, at 330.

395. Republicans making overtures to liberals include B. Barber, *Strong Democracy* 118, 308 (1984) ("reorient liberal democracy toward civic engagement and political community" rather than "raze it"); Michelman, *supra* note 375, at 445-52 & nn.6, 10; Sherry, *supra* note 115, at 578 & nn.163, 166; Sunstein, *Beyond*, *supra* note 378, at 1541, 1567-69. Liberals making overtures to republicans include Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 *Fla. L. Rev.* 491, 513-21 (1989); Galston, *supra* note 365, at 1288; Gutmann, *supra* note 114, at 320-22; Kateb, *supra* note 365, at 361-65; Rawls, *supra* note 116, at 226-27. In the middle are: Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1035 (1984) [hereinafter Ackerman, *Discovering*]; Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 *Calif. L. Rev.* 837, 886-87 (1983). Lamenting the negotiations is Horwitz, *History and Theory*, 96 *Yale L.J.* 1825, 1831-35 (1987). Reviewing the bidding is Fallon, *supra* note 115, at 1730-31. See generally Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 484-85 & n.63 (1989) [hereinafter Ackerman, *Constitutional*] (citing numerous contributions to contemporary Republican thought); Symposium: *Civic Republicanism and Its Critics*, 14 *Pol. Theory* 423 (1986); Symposium: *The Republican Civic Tradition*, 97 *Yale L.J.* 1493 (1988); Symposium on *Republicanism and Voting Rights*, 41 *Fla. L. Rev.* 409 (1989).

396. I henceforth use the terms "antiperfectionist" and "egalitarian" interchangeably. Notes 375-376 and 422 distinguish egalitarian liberalism from libertarianism and from a rigid commitment to the exogenous origin of desires, market outcomes, and interest-group politics.

397. See Michelman, *supra* note 377, at 17 (republicanism "not a well-defined historical doctrine" but a loose "tradition"); see also Letter from J. Adams to J. Tiffany (Apr. 30, 1819), reprinted in 10 *Works of John Adams* 378 (C. Adams ed. 1856) (republicanism "may signify anything, everything, or nothing"). See generally Ackerman, *Discovering*, *supra* note 395, at 1027-31 (mobilization of citizenry in collective effort to redefine the common good); Michelman, *supra* note 377, at 36-55; Sunstein, *Interest*,

when she accepts the responsibility of engaging in joint political activity devoted not to her own good but to the good of all.³⁹⁸ Republicanism assumes that persons in their private activities, symbolized by the home and family, will act in a self-regarding manner. But in the public—i.e., usually, the political—sphere, republicanism's definitive desideratum is public-regarding action.³⁹⁹ Using whatever means are available, therefore, including civic education, public rituals, and a commitment to the myth or reality of shared values or shared ancestry, the "government's first task" is to create "citizens" by cultivating public spiritedness among its people.⁴⁰⁰

Thus defined and programmed, citizens in the republican conception govern themselves and their community in a particular way—via *participation* in communal deliberations.⁴⁰¹ Those deliberations are characterized by "*practical reason*."⁴⁰² Practical reason is in part simply the discussants' rhetorical expression of civic virtue in arguments that are based on the common, rather than one's individual, good. Practical reason includes as well the discussants' commitment, and their use of communal deliberations, to identify "right" answers to public questions, i.e., answers that actually and acceptably identify the "*general good*" and the best course for achieving that good.⁴⁰³ Participation in this process under these circumstances produces "*public happiness*," a kind of fulfillment—in the classical view, the fulfillment of one's highest potential as a human being—achievable only through the act of communal and public self-definition and self-government.⁴⁰⁴

A principal attraction of republicanism is its capacity, in theory at least, to promote social solidarity through the inclusive, participatory, and fulfilling process of communal self-definition and self-government. To accomplish this goal, republicanism attempts to synthesize will and reason. It tries to create law that is simultaneously *authoritative*, because all persons governed by it participate in its creation, and *reasoned*, because arguments in a law's favor consist in demonstrating how the law contributes to the common good and not simply in certifying that the law serves one's own interests.⁴⁰⁵

supra note 378, at 31–38 ("dialogue and discussion among the citizenry" critical features of republican political processes).

398. See G. Stone, supra note 213, at 5; Sherry, supra note 115, at 551–55.

399. See Michelman, supra note 368, at 183–84.

400. G. Stone, supra note 213, at 5.

401. See, e.g., Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1070 (1980); Michelman, supra note 377, at 19; Pitkin, supra note 392, at 345; Sunstein, *Beyond*, supra note 378, at 1547–48.

402. Sunstein, *Interest*, supra note 378, at 31–32.

403. See, e.g., Michelman, supra note 65, at 10; Sunstein, *Interest*, supra note 378, at 31–32.

404. See H. Arendt, supra note 377, at 122–33; Michelman, supra note 377, at 38–41; Pitkin, supra note 392, at 331–38.

405. See Kahn, supra note 105, at 3–4, 7.

From the perspective of modern liberal democracies, republicanism fails to satisfy for a number of reasons. The first reason is republicanism's preference for the public over the personal, both in its definition of value (the general good) and in its limitation of the highest forms of self-fulfillment to the public rather than the private sphere (public happiness). Indeed, by letting a single publicly defined good trump people's heterogeneous, personally defined goods, and by adopting a perfectionist theory of personality that limits fulfillment to only one type of action—i.e., joint, public-regarding action—pure republicanism violates the antiperfectionist requirement that I earlier associated with the fourteenth amendment's term "protection."⁴⁰⁶

In addition, we need only look around ourselves to discover a pair of compelling practical problems with pure republicanism—namely, how few "citizens" among us are willing to drop their own plans and projects (both selfless and selfish) and devote themselves to joint and public action for the common good;⁴⁰⁷ and how unlikely it is that those citizens could discover a good common to as vast and pluralistic a populace as our own.⁴⁰⁸ By itself, in fact, this last problem has led many

406. See *The Federalist* No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961) (conditions necessary for republicanism violate "first object of government," namely, preservation of liberty and "diversity in the faculties of men"); Ackerman, *Discovering*, supra note 395, at 1032-37, 1043; Bell & Bansal, *The Republican Revival and Racial Politics*, 97 *Yale L.J.* 1609, 1612 (1988) ("seeds of teleology and hierarchy" in view that "role of the human being as citizen" is truest to "essence of humanity"); Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community*, 14 *Pol. Theory* 423, 424-29 (1986); Rawls, supra note 343, at 4 (given "fact of pluralism," securing agreement on general and comprehensive conception of good requires "oppressive use of state power"); Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 *Fla. L. Rev.* 523, 524, 533-35 (1989). Horribles conjured up by republican notions of a communally or politically identified common good include those discussed in: Brest, supra note 394, at 1630 (book banning); Dworkin, *Liberalism*, in *Public and Private Morality* 113, 134-37 (S. Hampshire ed. 1978) (antigay legislation); Epstein, supra note 203, at 156 (repeal of antidiscrimination ban); Sandel, supra note 374, at 91 ("a darker politics . . . amid echoes of the moral majority"); Starobinski, *Rousseau in the Revolution*, *N.Y. Rev. Books*, Apr. 12, 1990, at 47 (political terror).

407. See, e.g., Ackerman, *Discovering*, supra note 395, at 1025, 1031-32; Dworkin, supra note 121, at 13-17; Herzog, supra note 375, at 484; Macey, *The Missing Element in the Republican Revival*, 97 *Yale L.J.* 1673, 1679 (1988); Pitkin, supra note 392, at 327; Sullivan, supra note 367, at 1719; see also J. Updike, *Self-Consciousness: Memoirs* 119 (1989) ("One source of my sense of grievance against the peace movement when it came was that I hadn't voted for any of its figures—not for Abbie Hoffman or Father Daniel Berrigan or Reverend William Sloane Coffin or Jonathan Schell or Lillian Hellman. . . . I had voted for Lyndon Johnson, and thus had earned my American right not to make a political decision for another four years").

408. See, e.g., Fallon, supra note 115, at 1698, 1734; L. Hand, *Is There a Common Will?*, in *The Spirit of Liberty* 47, 52-56 (1960); Herzog, supra note 375, at 484; Rawls, supra note 343, at 1-2; Sandel, supra note 374, at 91, 93; see also Sunstein, supra note 105, at 137 n.39 ("How a particular value becomes public is something of a mystery."). Exemplifying the difficulty of identifying "public values" or the "general good" are the conflicting views of several modern thinkers associated with republicanism on the question whether, under republican principles, "existing power relations" within the family

observers to exclude pure republicanism from consideration by any but small polities with "a homogenous population and . . . a common past."⁴⁰⁹

Enter, then, the modern day liberal republicans. These scholars seek to avoid the classical theory's perfectionist tendencies while retaining its communal benefits. Modern republicans, that is, seek a lawmaking process that not only is *reasoned* as well as *authoritative*, but also is personally *liberating* as well as socially *adhesive*.

Modern republicans propose that republicanism be saved from its illiberal tendencies and made into a useful theory of the modern state by "economizing" on—i.e., in some way moderating—the traditional doctrine's onerous demands on citizens.⁴¹⁰ More precisely, liberally economized republicanism replaces the theory's traditional form of economization—limitations on citizenship based on wealth, gender, race, and ideology⁴¹¹—with economizations more congenial to liberal sensibilities. Among these writers' proposals are ones to economize republicanism by occasion—reserving participatory and public-regarding

are illegitimate. Compare Sunstein, *Interest*, supra note 378, at 56–57 (they are) and Gutmann, supra note 114, at 309 (same) with M. Sandel, supra note 105, at 16, 30–34, 169 (they are not; rather, they come as close as any relations in modern society to achieving the republican communitarian's solidaristic ideal) and Arendt, supra note 172, at 55 (similar). Concluding that political processes powered by continuous public participation do not create solidarity but rather faction, hostility, and social disparities are, e.g.: The Federalist No. 49, at 315 (J. Madison) (C. Rossiter ed. 1961); Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567, 1618–39 (1988); Kerber, *Making Republicanism Useful*, 97 Yale L.J. 1663, 1665 (1988).

409. Arendt, supra note 172, at 47; accord, e.g., R. Dahl, supra note 369, at 15, 52–53 (views of Rousseau, Jefferson, and Madison); A. MacIntyre, *After Virtue* 210, 244–45 (2d ed. 1984); Fraser, *Legal Amnesia: Modernism Versus the Republican Tradition in American Legal Thought*, 60 *Telos* 15, 21, 23 (1984); Hirsch, supra note 406, at 433–35; Michelman, supra note 377, at 19, 21–22 & n.96 (antifederalist views); Rose, supra note 395, at 910; Rossum, *Representation and Republican Government: Contemporary Court Variations on the Founders' Theme*, 28 *Am. J. Juris.* 88, 101–03 (1978); Sullivan, supra note 367, at 1715. On just *how* small and homogenous a polity would have to be to qualify for classical republican governance, see J. Dewey, supra note 123, at 25 ("Inside the modern city, in spite of its nominal political unity, there are probably more communities, more differing customs, traditions, aspirations, and forms of government or control than existed in an entire continent at an earlier epoch").

410. Ackerman, *Discovering*, supra note 395, at 1031–35; accord Kahn, supra note 105, at 6 & n.20; Michelman, supra note 377, at 58–60.

411. Traditionally, republics made identification and achievement of the "common" good easier by limiting the "citizens" whose good mattered to members of a single class, gender, race, faith, and/or ideological sect. See, e.g., J. Wilson, supra note 105, at 29 ("in Athens at its most democratic, it was never more than the powers of adult male citizens which were intended to be equal: slaves, women, and resident aliens did not count"); Crenshaw, supra note 3, at 1374 (racism historically used in United States to create artificial community among whites by juxtaposition with excluded blacks); Hirsch, supra note 406, at 435–36; Kateb, supra note 365, at 53–55; Pitkin, supra note 392, at 335 (Hannah Arendt's republicanism denies citizenship "to all but a handful of males").

republican political action for special "constitutional moments" in history when the voice of the "people" truly must and may be heard.⁴¹² Other modern republicans economize by participant—reserving the duties and privileges of "citizenship" to a small group of self-selected persons who choose to accept republicanism's illiberal constraints by, for example, standing for election as our official representatives⁴¹³ or, in one version, accepting appointment as life-tenured judges.⁴¹⁴ Still others economize by size-limiting republican communities to ones no larger than municipalities and, in some cases, to ones too select to include *any* part of the state.⁴¹⁵

To my mind, all these economizations are troublesome. Economizations by occasion and participant demean republicanism to at most either a once-in-a-lifetime affair (those of us under sixty-five are still waiting our turn) or an ongoing spectator sport.⁴¹⁶ In either event, the inclusionary, participatory, and fulfilling, hence most of the authoritative and adhesive, attributes of the theory's view of the state are foregone. Moreover, neither approach—but particularly the latter—

412. Ackerman, *Discovering*, supra note 395, at 1022–23; see Sandel, supra note 374, at 93 (during war).

413. See, e.g., J. Ely, supra note 105, at 78, 79–82, 86, 99 ("citizen[ship]" limited to elected representatives; civic virtue limited to their duty to accord "equal concern and respect to minorities and majorities alike"); G. Wills, *Explaining America* 179–92 (1981); Ackerman, *Discovering*, supra note 395, at 1029–31; Rossum, supra note 409, at 106; Sunstein, *Interest*, supra note 378, at 34–35, 42, 46–48.

414. See, e.g., Fraser, supra note 409, at 20–21, 43, 51 ("substantive vision of the good articulated within the republican polity" replaced by lawyers' and judges' "faculty of judgment"); Michelman, supra note 377, at 66–77 ("judges represent practical reason to the people" via exercise of "subjective right-answer thesis"); Michelman, supra note 65, at 1514, 1521–25, 1536–37; Minow, supra note 179, at 16, 81–82, 95. When the two participatory economies are conjoined, law "speaks for 'the community personified.' The community's integrity is the law's integrity as legislators make and judges construe it." Michelman, supra note 377, at 72 (quoting R. Dworkin, supra note 52, at 175); see also *id.* at 217 (virtue defined as "integrity" and limited to lawmakers and judges).

415. See, e.g., Cover, supra note 105, at 25–33; Rose, supra note 395, at 910–12; Sullivan, supra note 367, at 1719–21.

416. See A. Gutmann, supra note 52, at 39 ("citizens stay at home while their elected representatives make laws"); J. Pocock, *The Machiavellian Moment* 518–24 (1975); Brest, supra note 394, at 1625–26; Michelman, supra note 65, at 1520–23, 1531, 1537; Parker, supra note 160, at 256; Pitkin, supra note 392, at 344 ("what distinguishes [republican] political life is the *potential* for decisions made not merely in the name of the whole community but actually by that community collectively, through participatory political action"); B. Barber, *The Conquest of Politics*, ch. 1, at 26 (paper delivered at the Columbia Legal Theory Workshop, May 4, 1987) (ruing post-war liberal political philosophy's "preference for 'thin' rather than strong versions of political life in which citizens are spectators and clients while politicians are professionals who do the actual governing"). By requiring representatives to "stand above" rather than mirror the interests of their constituents, Sunstein, *Interest*, supra note 378, at 42, 52; accord Ackerman, *Discovering*, supra note 395, at 1027–28, modern republicans sever the one link between representatives and their constituents that allowed our own civic forbears to accept representative democracy as a palatable substitute for classical participatory republicanism. See Rose, supra note 395, at 884; Rossum, supra note 409, at 103–06.

convincingly avoids an “ominously totalist,” hence nonliberating, search for a single “general good” or explains how we can expand the pool of truly public-regarding citizens beyond the paltry numbers we see around us.⁴¹⁷ Similarly, the proliferation of communities that economization by size begets, although productive of authority and cohesion *within* each law-giving community, cannot achieve authority and cohesion *among* those communities.⁴¹⁸ The possibility of each community’s liberation thus poses the threat of the others’ subjugation.

In any event, none of these theories of economization solves the problem presented here—the development of a conception of “the state” that is consistent with and gives meaning to a duty of equal concern and respect applicable to actors in some but not all spheres of human activity. Toward this latter end, let me identify within the “equal” and “protection” consensuses outlined earlier yet another liberal-republican method of economizing on the meaning and demands of civic virtue, public reason, the general good, and public happiness.

In classically republican fashion, this alternative vision of citizenship and the state commits *all* persons participating in the political process at *all* times to a version of civic virtue. In liberal fashion, however, it defines that virtue in terms of the egalitarian consensus identified earlier.⁴¹⁹ A person becomes a citizen when she accepts the responsibility of engaging in political activity premised on the view that all persons are equal in their capacity to define their own good and that all goods so defined are equally worthy of her, and the political process’s, respect and concern. In her private activities she may act, as a person, in a self- or group-regarding manner and may pursue her own even exclusionary ends. In the public political sphere, however, when she acts as a citizen, she must abide by republicanism’s liberally economized but still definitive desideratum—equality-regarding action.⁴²⁰

417. Michelman, *supra* note 377, at 23; accord sources cited *supra* notes 406–408.

418. See Kahn, *supra* note 105, at 59–63.

419. For other versions of “liberal virtue,” see K. Greenawalt, *Religious Convictions and Political Choice* 4, 11–12, 55–56 (1988) (liberal constraints on divisive reliance on religious values as basis for political decisions); Ackerman, *Discovering*, *supra* note 395, at 484; Galston, *supra* note 365, at 1278–80 (cataloguing different definitions of virtue that may be gleaned from liberal writers as diverse as Locke, Mill, and Emerson); G. Kateb, *supra* note 365, at 10 (point of specifically political rights is not to use them to press class advantage but to attain a moral status—self-governance); see also R. Dworkin, *supra* note 52, at 176, 188–90 (virtue defined as adherence to concept of “law as integrity”).

420. More or less explicitly equating civic virtue with the equal respect principle are *Steele v. L. & N. Ry.*, 323 U.S. 192, 202 (1944) (duty of “citizens” of labor organization); A. Gutmann, *supra* note 52, at 31–47, 56–70, 76–77, 118 (rather than inculcating “good morals,” public schools should teach “religious toleration and mutual respect for persons”); J. Ely, *supra* note 105, at 79–87; J. Sklar, *Ordinary Vices* 233 (1984) (“democratic liberal character” requires that each individual “respect humanity, the rational moral element in himself and in *all* other men”); Galston, *supra* note 365, at 1287; Rawls, *supra* note 343, at 10 n.17, 18 n.27, 20 (traditional conception of common good

Thus constrained, citizens in this conception of the state govern themselves and their community through whatever level and type of participation they can manage, subject only to the restriction that their economized practical reason—i.e., whatever arguments they make, as citizens, to influence the outcome of the public debate—accept the principle that all persons are equal in their capacity to choose their own good lives and that all lives so chosen are equally deserving of the political process's respect and concern.⁴²¹ True, of course, different people will choose to participate in different ways: some merely as voters, others as letter writers and speakers, others as group or community leaders engaged in more or less regular dialogue with officials, and others as the appointed or elected officials themselves. But whoever participates must have egalitarian-economized virtue and whoever discusses and deliberates must do so via egalitarian-economized practical reason. Although the process no longer provides assurances or demands faith that its product represents the all-trumping "general good," it at least makes an economized attempt to assure that, in reaching whatever outcome it produced, it treated no one's individually identified good as unworthy. To the extent, finally, that there are some

replaced with "a liberal conception of justice" that "includes the good of every citizen" and is committed to "mutual acceptance on a footing of equality"); G. Kateb, *supra* note 365, at 13, 22 ("highest component of democratic individuality" is toleration transformed into responsiveness to alternative realities posed by different others). Although intended to be more muscular, the conceptions of modernized civic virtue offered by legal academia's two leading republicans seem to me to render down to the "equal concern" conception offered here. See, e.g., Michelman, *supra* note 65, at 1505–06 ("inclusory, plurality-protecting conception of republican citizenship"); Michelman, *supra* note 368, at 184 ("special citizen's . . . mode of sympathy and respect for all equally"); Sunstein, *supra* note 105, at 128, 134, 135, 140, 165 (duty to forego actions that "are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another"); Sunstein, *Interest*, *supra* note 378, at 56–58, 65, 75; Sunstein, *supra* note 105, at 135–36, 145–58 (illustrating violation of "public value" requirement with numerous discrimination cases); Sunstein, *Beyond*, *supra* note 378, at 1554–56, 1567 n.160, 1568 (in a plural society, there may be no "unitary public good;" universalism may boil down to requirements of a well-functioning deliberative process and "that political actors attempt to assume the position of those who disagree"). Economizing on virtue by limiting it to "equal concern" has the benefits of (1) directly linking the reason why economization is necessary in the first place, i.e., our heterogeneity, to the difference-denaturing economization technique actually chosen; (2) freeing liberal republicanism of its baffling attempt simultaneously to preserve plural goods and to promote a "common" one; (3) foregoing any visionary demand for deliberative agreement on common values; and (4) creating a favorable environment for—without demanding—the liberating transformation of participants' own values and projects through synthesis with the perforce respected values and projects of others, see *supra* note 375.

421. The fourteenth amendment thus may be seen as supplementing the original Constitution's Madisonian economization by participant, which based its hope of virtuous national rule on what Professor Wood has described as the "disinterested" character of a governing elite, with an economized version of Jeffersonian republicanism, which premised the possibility of society-wide virtue on the "natural sociability" of all human beings. G. Wood, *supra* note 389, at 4–5, 17–20, 29–33; see *infra* notes 595–596 and accompanying text.

citizens who derive a special kind of fulfillment from other-regarding action, including action premised on respect for other persons' values or at least for their capacity to generate values, then this liberal-republican conception even holds out to those people the possibility of an egalitarian-economized public happiness.⁴²²

Notice how limiting virtue to liberalism's "equal respect and concern" requirement, while extending that duty to all citizens, consists with a republican notion of the state and conserves some of republicanism's attractive qualities without keeping its illiberal flaws: On the one hand, this approach reinvigorates republicanism's inclusionary understanding of the state as encompassing the actions of all citizens at all (even "normal") times. To this extent, it retains more of old-time republicanism's participatory character than do most other economized versions.⁴²³ On the other hand, the approach limits republicanism's civic-virtue, practical-reason, and general-good demands upon citizens and the political process to observance of a single egalitarian principle on which our society, or substantial elements within it, already have reached consensus. To this extent, the approach is more consistent with "life in the big polity" than are classical republicanism and most versions of modern, economized republicanism.

In addition, the egalitarian principle that this approach equates with virtue—that we are all alike in one very important way, which provides a common medium of communication and neutralizes the normative significance of the ways in which we differ—offers as good a surrogate as we are likely to find in a large plural society for the solidarity-enhancing smallness, homogenous population, and common past that permitted Classical Greek, Renaissance Italian, and Enlightenment Swiss city-states to function as republics. As such, egalitarian-econo-

422. See Michelman, *supra* note 368, at 150–52 & n.30. In this same, other-regarding way, economized virtue produces a politics different from interest-group pluralism. See Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 *Yale L.J.* 1633, 1637 n.10 (1988) (interest-group pluralism excludes philosophies holding "that everyone in society should be willing to accept and tolerate persons whose beliefs and practices are different from their own"); Fallon, *supra* note 115, at 1707–09 n.154; Michelman, *supra* note 375, at 448–49; Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1694 (1984); *supra* notes 65, 378.

423. This view of state action provides an additional justification for legislatively extending the "equal concern" duty to the social sphere, see *supra* notes 392, 394: Given the extent to which the social and political spheres are intertwined and the extent to which behavior in the former influences behavior in the latter, the legislature may well conclude that its duty to foster virtue among *citizens* in the political sphere, see *supra* text accompanying note 400, requires the extension of that duty to *persons* active in other "public" contexts. See generally Karst, *supra* note 4, at 10–11 ("The behavior we call private discrimination is not just the result of racism but the cause of further racism."). Once we recognize that the "equal concern" duty applies to all individuals active in politics writ large, it requires only an empirical judgment that the class of citizens who inject their views into the political process roughly coincides with the class of persons involved in other walks of "public" life to support the educative extension of the "equal concern" duty to social activities conducted in a demonstrably "public" manner.

mized citizenship approaches the modern republicans' aspiration of a lawmaking process that is simultaneously *authoritative*, because all citizens (all persons who choose to participate) are responsible for its operation; *reasoned*, because appeals to one's own values and interests are tempered by a commitment to respect those of all others; *adhesive*, because a quality that unites us all is constantly affirmed;⁴²⁴ and *liberating*, because that quality is our difference and our capacity for self-definition.⁴²⁵

Still, this vision of a state whose participants are committed—when they act as citizens—to according each other and all members of society equal recognition needs greater resolution. How, most importantly, do we tell citizens from persons? Consider, for example, the segregationist who assumes his soap box in Town Hall Square and begins preaching the virtues of racial separation in the schools when the mayor, city council members, and members of the school board happen by. Surely, such a speaker might conceive of himself as contributing to the political dialogue and might harbor hopes, perhaps even well-founded ones, that his oration will affect official policies. Is the mayor, therefore, duty-bound to have the police arrest the self-proclaimed citizen-speaker for violating the equal protection clause? My answer to the question of where persons stop and citizens begin is something like: by their fruits shall they, citizens, be known. If, therefore, the speaker in my example in fact incites the school board to revise the district's attendance zones to achieve greater racial separation, then at that point the speakers' speech joins the boards' resolution as (unlawful) actions of the state.⁴²⁶

424. See *supra* note 384 and accompanying text.

425. The problem of authority remains to the extent that citizens, who must abide by an "equal respect" principle that they did not legislate, do not in fact accept that principle. See Kahn, *supra* note 105, at 76–80 & n.354. Above, I list several reasons why the "equal respect" principle is and ought to be rather widely accepted in our society. See *supra* notes 377–385 and accompanying text. But see *infra* notes 516–578 and accompanying text (periods when and places where Americans pervasively have shirked their equal concern responsibilities). Among those reasons is the wide space that acceptance of the "equal concern" principle in the *public* sphere clears in the *private* sphere for numerous internally authoritative, reasoned, adhesive, and liberating communities that, in the latter sphere, need not accept the "equal respect" principle or any other ecumenical principle. See *supra* notes 385, 418 and accompanying text; see also R. Dworkin, *supra* note 52, at 196–201, 212 (listing four equal-concern-focused conditions under which communal obligations, although not chosen, become authoritative because they satisfy the demands of "fraternity"). But cf. Cover, *supra* note 105, at 10, 16–17, 44 (larger community's ecumenism is fatal to creative anarchy of smaller communities); Kahn, *supra* note 105, at 82–84 (doubting possibility of a simultaneously authoritative and reasoned lawmaking process in an extended polity).

426. For examples of courts treating evidence that officials acceded to the racist desires of their constituents as proof of equal protection violations, see *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Rogers v. Lodge*, 458 U.S. 613, 622–27 (1982) (racial block voting); *Memphis v. Green*, 451 U.S. 100, 114–16 nn.23–24, 26 (1981); *Mobile v. Bolden*, 446 U.S. 55, 74 n.20 (1980); *Village of Arlington Heights v. Metropolitan Hous.*

This conception of nonvirtuous citizenship stops short of punishing action that self-confessedly but unsuccessfully attempts to influence political outcomes based on "we are better than they" thinking. Instead, the conception requires that the action actually have incited an outcome premised on a lack of equal respect and concern.⁴²⁷ The liberty-preserving reasons for this limitation are analogous to those that convinced the Court to abandon a first amendment standard allowing

Dev. Corp., 429 U.S. 252, 269 (1977); *Reitman v. Mulkey*, 387 U.S. 369, 373-76 (1967); *Anderson v. Martin*, 375 U.S. 399, 403 (1964) (racial identification of school board candidates on ballots); *United States v. Board of School Comm'rs*, 573 F.2d 400, 412 n.31 (7th Cir.), cert. denied, 439 U.S. 824 (1978); *Arthur v. Nyquist*, 573 F.2d 134, 144-45 (2d Cir.), cert. denied, 439 U.S. 860 (1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 142-49 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *United States v. Missouri*, 515 F.2d 1365, 1370 (8th Cir.), cert. denied, 423 U.S. 951 (1975); *Daily v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970); *Clemons v. Board of Educ.*, 228 F.2d 853, 856 (6th Cir.), cert. denied, 350 U.S. 1006 (1956) (Stewart, J., concurring); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1314-27 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988); *United States v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich 1982), modified, 727 F.2d 560 (6th Cir.), cert. denied, 469 U.S. 821 (1984); *United States v. Board of School Comm'rs*, 456 F. Supp. 183, 187 (S.D. Ind. 1978), aff'd, 637 F.2d 1101 (7th Cir.), cert. denied, 449 U.S. 838 (1980); *Morgan v. Hennigan*, 379 F. Supp. 410, 427, 438 (D. Mass.), aff'd sub nom. *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Hoots v. Pennsylvania*, 359 F. Supp. 807, 821 (W.D. Pa. 1973), appeal dismissed, 495 F.2d 1095 (3d Cir.), cert. denied, 419 U.S. 884 (1974); *Davis v. Schnell*, 81 F. Supp. 872, 876-81 (S.D. Ala.), aff'd mem., 336 U.S. 933 (1949) (approvingly cited in *Village of Arlington Heights*, 429 U.S. at 267); *Dimond*, supra note 123, at 30 n.127; Note, supra note 31, at 2008-20 nn.32, 40, 61, 63-66, 71-74, 81-83, 94-97; see also *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968) (law forbidding teaching of evolution struck down under establishment clause because it was adopted to conform to some constituents' religious views); *Eule, Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1505-06 nn.5-6 (1990) (citing decisions) (constitutional review of laws enacted by citizens via plebiscites using same standards used to review laws enacted by representatives).

Suppose, instead, that a legislator takes a "yes or no" poll of her constituents' views on a proposal to mandate school integration across the state. Assume, as well, that a strong majority of her constituents votes "no" on the bill in part based on an unexpressed desire to confine African-American children to urban districts. Is the legislator forbidden to rely on the poll notwithstanding her conscientious wish to "mirror" her constituent's desires? See supra note 416. Are her constituents who conscientiously believe on religious or other grounds that interracial contact is a bad thing forbidden to base their response to the poll on that belief? The answer is yes: The legislator violates her "equal concern" duty when she fails to hold herself as well as her constituents to the injunction against legislation premised on "we are better than they" thinking. Moreover, even if the legislator voted against the proposal after conscientiously, but unsuccessfully, attempting to separate her constituents' racist and nonracist preferences and to mirror only the latter (and assuming that racist preferences hidden from the legislator could be exposed in court), the constituents in my view have violated *their* constitutional duty as citizens to foreswear inciting public action based upon a "we are better than they" rationale.

427. By "incitement," I mean citizens' intentional injection of racially biased views into "public" debates when those views count as "a," but not necessarily "the," motivating factor in an official decision, see infra note 469, and that have a relatively direct, contemporaneous effect on that decision.

punishment of speech presenting a "clear and present danger" of a substantive evil that society has a strong interest in preventing and instead to insist that actionable "advocacy of the use of force or of law violation" be "directed to inciting or producing imminent lawless action."⁴²⁸

My standard, of course, is even more protective of private liberty than is the Supreme Court's free speech test inasmuch as it replaces the Court's proscription against inciting "*imminent* lawless action" with a proscription limited to the action itself. But I, after all, am concerned with: (1) action that usually does not amount to the direct overthrow of the republic or imminent physical endangerment; (2) a political process in which the transformation of speech into action typically occurs in a more mediated fashion than a fiery speaker's agitation of an angry crowd; (3) all manner of self-defining behavior and not simply illegality-advocating speech; and (4) identifying a public-private distinction that not only avoids deterring citizens from defining their own exclusionary ends but also lets them do so enough of the time that they, or most of them, will be enticed at other times to forego exclusionary action.⁴²⁹

428. Compare *Schenck v. Unites States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used . . . create a clear and present danger that they will bring about the substantial evils Congress has a right to prevent.") with *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). See generally J. Ely, *supra* note 105, at 105-16 (discussing "clear and present danger" and "incitement" tests in first amendment context). Both the constitutional rule of *Brandenburg* ("You can believe in it and say it, but you can't incite it") and the legislated rule of *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) ("You can believe in it (racial discrimination) and teach it to your children, but you can't practice it" (by excluding blacks from admission to private schools)) are analogous to the rule advanced here ("You can believe in it and live it in your private life, but you can't cause the state to adopt it").

429. By limiting illegality to actual and intended incitement, see *supra* note 427, my definition of "the state" eschews prior restraints and resists compelling unwilling private persons to be public citizens. See sources cited *supra* notes 406-407. "Chilling effect" considerations also justify limiting the remedy for politically effective "unequal concern" thinking to reforming the political process, see *infra* Part V, rather than, for example, criminally punishing or even assessing damages directly against errant citizens, at least in the absence of the kinds of concerted action that the civil rights laws long have criminalized, see 18 U.S.C. § 241 (1988). The "speech and debate" cases draw a remedy-based distinction similar to the one proposed here: On the one hand, those cases immunize lawmakers from damages and other relief for enacting unconstitutional laws because allowing such relief might corrupt the political process by causing legislators to act out of "self-" and not in "the public interest." *Spallone v. United States*, 110 S. Ct. 625, 634 (1990). On the other hand, as long as the remedial action will not pervert the legislative process in this way, the cases permit remedies for actual or contemplated unconstitutional legislation that are designed to—and in fact do—effectively nullify or avert legislation, necessitate the enactment of substitute laws, or otherwise subject legislators to speech-and-debate-chilling political risks. See *Spallone v. United States*, 110 S. Ct. at 633-34 (upholding crippling contempt fines against city that forced recalcitrant city legislators to change their votes); *Supreme Court of Virginia v. Consumers Union*,

Even with these limitations, this republicanized notion of equal-protection state action is controversial.⁴³⁰ It should be no more controversial, however, than the various mainstream equal protection theories noted above that limit virtue, or the duty of equal concern, to legislators alone.⁴³¹ Thus, although it is true that the state-action notion offered here departs from any recognizable form of preference-

446 U.S. 719, 732, 737 (1980) (legislators cannot be enjoined to change unconstitutional law, but state officials can be enjoined from enforcing it); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402, 405 n.29 (1979) (damages not available against legislators themselves, but are available against regional legislative agency); *Tenney v. Brandhove*, 341 U.S. 367, 379-80 (1951) (Black, J., concurring) (Court's holding that members of legislative committee cannot be sued "is not a holding that their alleged persecution of Brandhove is legal;" "there is still much room for challenge to the Committee's action"); see also Smith, supra note 389, at 993-94 (by enjoining enforcement of religiously nonneutral legislation, establishment clause penalizes legislators for expressing religious convictions and impinges on legislators' freedom of expression). Acknowledging citizens' role in the legislative process, the *Noerr-Pennington* doctrine extends a similarly partial-but-not-total immunity to citizen-lawmakers, in this case under the petition clause. As in the test I propose, *Noerr-Pennington* considerations that allow restriction of citizens' political speech are: (1) proof that citizens' political advocacy corrupts the political process or seeks illegal legislation, see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 94-95, 99, 107 & nn.141-45 (1977); Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 93-95 (1985); (2) the relatively nonintrusive nature of the remedy ordered, see Fischel, supra, at 93-94; and (3) the imposition of a remedy only after advocacy has caused actual harm to the particular process at issue, see id. at 103 (relief inappropriate where improper lobbying faces rebuttal before legislature acts but appropriate where speech has immediate consequences). See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983) (although NLRB may not prevent employer from filing meritorious state suit seeking injunction against picketing employees, Board may enjoin baseless suit that abuses judicial process). Compare *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-41 (1961) (lobbyists' misrepresentations to legislature before it acted on lawful legislation not offensive to legislative process and no basis for treble antitrust damages) with *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (harassing conduct preventing competitors from gaining access to administrative process "corrupted" process and would warrant antitrust injunction).

430. Compare J. Wilson, supra note 105, at 129-30 (resisting subordination of equality to liberty even in private sphere) with B. Ackerman, supra note 123, at 57-58 (political discourse should be limited by neutrality principle) and Rawls, supra note 116, at 231 (although individuals may be guided by exclusionary thinking in private affairs, they may be persuaded for sake of social stability that exclusionary "points of view are not to be introduced into political discussion") with K. Greenawalt, supra note 419, at 11, 91, 94, 207, 216-17 (arguing on liberty and other grounds that citizens, as a last resort, other arguments failing, may rely on exclusionary religious convictions to answer important political questions, albeit subject to three tolerance-based constraints that approach equal-concern virtue) with Smith, supra note 389, at 993-99 (ill-advised and unrealistic to expect or require citizens to shed their religious convictions in the public sphere) and Tushnet, *Book Review*, 89 Colum. L. Rev. 1131, 1135, 1139-40 (1989) (reviewing K. Greenawalt, supra note 419) (questioning view that, "You can have [religious beliefs], but you can't act on them").

431. See supra notes 413, 416.

respecting utilitarianism, so, also, do mainstream equal protection theories: Under both approaches, some politically expressed preferences do not count.⁴³² Moreover, any and all republican justifications for extending the duty to ignore some preferences to legislators is matched and surpassed by my more fully republican commitment to including "citizens," as well as legislators, within the politically elect. Likewise, once mainstream equal protection theories acknowledge that "I am better than she" logic has no place in the lawmaker's mind—whether or not the logic was that mind's own product or was implanted there by a constituent—those theories would seem equally to disavow the legitimacy of that logic whenever it appears in and incites the political process. Given that we almost always precipitate governmental action through political advocacy directed at representatives, it makes little difference (apart from the "chilling effect" concerns to which my "actual incitement" test responds⁴³³) whether the forbidden logic is screened out at the constituent or at the representative level.⁴³⁴

By awaiting official misconduct before declaring that an actionable departure from egalitarian-economized civic virtue has occurred, I beg the question of how my version of economized republicanism differs from the versions I criticize above for limiting the duty of virtue to officials. Also begged is the question of what this theory adds to vicarious liability and like rationales for disadvantaging "private citizens" when voiding actions by "public servants." The answer is that egalitarian-economized virtue better fits and justifies our desegregative and other practices.⁴³⁵ As noted earlier, vicarious liability doctrine either is too

432. See *supra* note 343.

433. See *supra* notes 427–429 and accompanying text.

434. Again, insights from the establishment clause debate are relevant. See generally L. Tribe, *American Constitutional Law* 1294 (2d ed. 1988) (although "[l]egislators and political activists ought to be free to express the religious roots of their beliefs, . . . at some point political speech becomes governmental speech" that is "constitutionally problematic"); Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 *Calif. L. Rev.* 846, 895–96 (1984) ("when [citizens] cast their votes they are exercising governmental power just as much as their representatives").

435. In addition to explaining "all-out" desegregation, a citizen-focused theory of the state helps explain: (1) the equal protection and establishment clause cases making it a violation for legislators "neutrally" to mirror their constituents' racially and religiously intolerant views, see *supra* notes 426, 434; (2) the Court's puzzling (or even "[i]ntuitively . . . wrong") rulings paying no more deference in constitutional adjudication to laws passed by the people themselves via plebiscite than to laws passed by representatives, see *Eule*, *supra* note 426, at 1506–07; (3) the constitutional difference it makes—even when all citizens are represented in the state legislature and when each makes up only a tiny proportion of her representatives' constituency—that individual citizens in some districts comprise a "tinier" proportion of their representatives' constituency than do citizens in other legislative districts, see *Reynolds v. Sims*, 377 U.S. 533, 561–68 (1964); (4) the Court's preference for contempt fines that, in effect, penalize the constituency as a whole rather than individual legislators for the legislature's failure to adopt laws necessary to comply with fourteenth amendment decrees, see *Spallone v.*

narrow to justify the outcomes in *Swann* and *Keyes* or is too broad to explain the outcome in *Milliken I*.⁴³⁶ Likewise, Professor Dworkin has identified important situations in which private-law vicarious liability notions are too narrow to account for the feelings of "group responsibility" that unimplicated citizens often experience in the wake of pervasive public-law malefactions.⁴³⁷ As is developed below, the citizen-including version of the state proposed here can explain these apparent anomalies.⁴³⁸ As a result—and despite its "merely" symbolic divergence from citizen-excluding versions of the state at the violation stage—the citizen-including version acquires substantial moral and practical bite at the remedial stage.

C. *Why (Especially) Race?*

1. *Why Race?* — How does this analysis apply to the problem of "legislative racism" introduced above? To begin with, for the first two-thirds of the period during which this nation has been continuously settled by whites, the definitive status accorded blacks by the dominant white culture was that of slaves—beings who in the imagination of the dominant race and in the letter and spirit of the law were "nonpersons" and who in actual and violently enforced fact had little or no capacity to define and to pursue their own visions of the good.⁴³⁹ On the eve of

United States, 110 S. Ct. 625, 633–34 (1990); (5) the reason why citizens' racially polarized voting justifies the remedial imposition of single-member districts under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1988), see *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986); and (6) the fact that citizens have no less, and may be given more, constitutionally enforceable responsibility to keep their interventions in the political process free of politically corrupting misrepresentations and harassment than do legislators themselves, compare *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (antitrust laws constitutionally may prevent citizens from intervening in administrative process in manner calculated to harass intervenors' economic competitors and to corrupt administrative process) with *Tenney v. Brandhove*, 341 U.S. 367, 376–79 (1951) (legislators immune from lawsuit alleging they used committee hearings as bad faith means of harassing ideological opponents and suppressing free expression).

436. See *supra* note 248.

437. R. Dworkin, *supra* note 52, at 172–73 (vicarious liability doctrine cannot explain why "Germans not alive when Nazis ruled their country feel shame and a sense of obligation toward Jews [and why] white Americans who inherited nothing from slaveholders feel an indeterminate responsibility;" the explanation lies instead in "a deep personification of political . . . community").

438. See, e.g., *infra* notes 683–691 and accompanying text.

439. See, e.g., *The Federalist* No. 54, at 337 (J. Madison) (C. Rossiter ed. 1961) (Constitution "decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property," the latter because the slave by law is "subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another"); E. Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 78–89 (1988) (slaves' similar perception of their own condition); see also J. Dewey, *supra* note 123, at 114 ("Plato defined a slave as one who accepts from another the purposes which control his conduct"); J. Ely, *supra* note 105, at 81 (slaves as "nonhuman"); Rawls, *supra* note 116, at 240, 242 (slaves "not counted as sources of claims" or "recognized as persons at all"); *Leviticus*, 25:39–25:46 (Jewish Pub. Soc. of

the Civil War, moreover, the United States Supreme Court extended that status as a matter of constitutional law to the nation's "free" black residents, much as state law and the dominant race's imagination had long since done.⁴⁴⁰ "The infamy of the *Dred Scott* opinion" and the cultural and personal opinions it reflected, "was precisely . . . its bland assumptions of racial superiority, its shameful equation of [humanity, hence] citizenship with whiteness."⁴⁴¹

Since the Emancipation Proclamation, the view of blacks as nonpersons,⁴⁴² as the pejorative contrast to humanly "normative whiteness,"⁴⁴³ as persons lacking the will or capacity to define or to pursue their own "goods"—as, even still, "irreparably different and less worthy than whites" of respect and concern—has persisted in the nation's law and in the dominant race's imagination and stereotypes.⁴⁴⁴ A white

Am. ed. 1962) ("[Y]ou may also buy [slaves] . . . from among the children of aliens resident with you But as for your Israelite brothers, no one shall rule ruthlessly over the other."). Prominent among the "good lives" denied American slaves were ones defined by their own African heritage; they could not, that is, even choose to be African-Americans. See O. Patterson, *Slavery and Social Death* 5 (1982) ("[s]laves differed from other human beings in that they were not allowed freely to integrate the experience of their ancestors into their lives to inform their understanding of social reality with the inherited meanings of their natural forebears, or to anchor the living present in any conscious community of memory"); see also J. Baldwin, *The Evidence of Things Not Seen* 7 (1985) ("in this country, someone who looks White and who, refusing to deny his Black ancestry, declares himself Black, has made a genuine and, sometimes, a genuinely moral choice").

440. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404–05, 407 (1856) (African-Americans not "people" within Preamble to Constitution because they had been "considered . . . a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority"; blacks "so far inferior, that they had no rights which the white man was bound to respect"); accord W. Jordan, *supra* note 62, at 101–35, 403–21; J. McPherson, *supra* note 251, at 79–82.

441. Karst, *supra* note 156, at 269; accord Karst, *supra* note 179, at 13 (discussing *Dred Scott*) ("A nonperson, in other words, could not be a citizen").

442. See Brest, *supra* note 104, at 7–8; Karst, *supra* note 156, at 269–70; Lawrence, *supra* note 134, at 350; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J., dissenting) ("persons [not] regarded as persons").

443. See Crenshaw, *supra* note 3, at 1357–60 & n.98, 1373–74; Karst, *supra* note 179, at 6 n.25 (quoting E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* 5 (1963)); sources cited *supra* note 346 (recurrent use in American history of black-white oppositional dynamic to bridge class, ethnic, and regional divides among whites by virtue of their shared distinctness from blacks).

444. D. Bell, *supra* note 2, at 95; accord *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("what can more certainly arouse race hate . . . than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"); Crenshaw, *supra* note 3, at 1359, 1377 (blacks' "stigma of 'otherness'" "precludes their potentially radicalizing [visions of the good] from penetrating the dominant consciousness" and excludes blacks from the "community of equals" defined by its members' ability to define their own life goals); Karst, *supra* note 179, at 8 (weakened "sense of individual identity" because blacks not "regarded as . . . full human being[s], worthy of respect and dignity" but rather "merely as a specimen of the stigmatized cate-

school teacher in Atlanta crystallized the prevailing sentiment in reflections to a reporter on the possibility of having African-American children in her classroom:

I've known nigras all my life, and I didn't think they would adjust to our schools. I have nothing against them. I just thought their minds weren't like ours. And I *still* think many of them have a long way to go. . . . Yes, I'm ready now to let those that can do it come to our schools. . . . That's where I've changed.⁴⁴⁵

Accordingly, even though the so-called "liberty of the moderns"⁴⁴⁶—the enshrinement in modern conceptions of justice of individuals' capacity, once artificial constraints are foregone, to ascertain and accomplish their own ends—"may function to mystify" in its own, for example, antiredistributive ways, it nonetheless still reaches out to those individuals whom our culture continues to define by their differences as not quite "normal," "natural," or human.⁴⁴⁷ In Professor Crenshaw's words, the egalitarian consensus, which embodies the liberty of the moderns in liberal legal thought, "remains receptive to some aspirations that are central to Black demands and may also perform an important function in combatting the experience of being excluded and oppressed. The receptivity to Black aspirations is crucial"⁴⁴⁸

2. *Why Especially Race?* — So far, most of what I have said in the context of legislative racism applies as well to the intervention of any "nonneutral,"⁴⁴⁹ motivational reasoning in the political system, includ-

gory"); Kennedy, *supra* note 64, at 1753 (African-Americans treated as "unfit to participate as equals in the cultural, social, or political life of the nation"). Note the precision with which the dominant culture's persistent stereotypes about blacks—redolent with notions of docility, emotionalism, and intellectual inferiority and thus of a lack of moral independence—excludes blacks from Kantian and other modern notions of humanity; see also Crenshaw, *supra* note 3, at 1359, 1370–74 & n.153 (historical, sociological, and psychological literature); Pettigrew, *supra* note 142, at 696 (studies showing that stereotypes still "lower white expectations of black performance" and "question the basic 'belongingness' of . . . black members").

445. Cole, *How Do the Teachers Feel?*, *Saturday Rev.*, May 16, 1964, at 89.

446. Rawls, *supra* note 116, at 226–27.

447. Crenshaw, *supra* note 3, at 1357; Minow, *supra* note 179, at 32.

448. Crenshaw, *supra* note 3, at 1357. For these reasons, Professor Fiss's rejection of the individualistic antidiscrimination principle and his embrace of a principle focused on trait-defined groups, see Fiss, *supra* note 67, at 128, is problematic for members of those groups who seek to escape the assertedly definitive and normative implications of those traits. See Minow, *supra* note 179, at 34, 37–38; *supra* note 179 and accompanying text; see also B. Ackerman, *supra* note 123, at 242 (nation's treatment of black minority is paradigmatic case of violation of "equal capacity to choose" gloss on antidiscrimination principle); R. Dworkin, *supra* note 330, at 237–38 (same); J. Rawls, *supra* note 105, at 99, 545 (same).

449. B. Ackerman, *supra* note 123, at 10–12. But see *supra* notes 115, 374; *infra* note 627 (questioning "neutrality" of theories that identify individual choice and value creation as preeminent good).

ing legislative sexism, religious intolerance, or even petty vindictiveness.⁴⁵⁰ But, however egregious other forms of exploitative, "I am better than you," political discourse are generally,⁴⁵¹ in our particular pluralist state, racism is worse. Legislative racism in this country is dangerously unjust not simply because it strikes at the necessarily egalitarian foundational premise of a pluralistic political system, but also because of the sustained intensity with which it has buffeted that foundation throughout American history—because it has been with us so long,⁴⁵² has proven so intractable,⁴⁵³ has wreaked such cumulative harms,⁴⁵⁴ and has threatened to destroy basic aspects of our political system⁴⁵⁵ and to draw into conflict two huge, virtually all-inclusive segments of the population that repeatedly in the past have shown themselves capable not only of a virtually total and alienating separation from each other for long periods of time but also of sustained and or-

450. See, e.g., J. Ely, *supra* note 105, at 137 & n.10, 141–43. Although I agree that blacks are the "intended primary beneficiaries" of the fourteenth amendment, Fiss, *supra* note 67, at 124; accord, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 682 n.3 (1966) (Harlan, J., dissenting), I also agree that the clause's language and its underlying "equal concern" principle forbid its limitation to blacks or to race or to "race plus nationality" only, see J. Ely, *supra* note 105, at 23–24, 30, 149; Sunstein, *supra* note 105, at 129.

451. See B. Ackerman, *supra* note 123, at 243–45.

452. See A. de Tocqueville, *supra* note 346, at 358 ("the inevitable danger of a conflict between blacks and whites . . . is a nightmare constantly haunting the American imagination"); Morgan, *Negrophobia*, N.Y. Rev. Books, June 16, 1988, at 27; sources cited *supra* note 62.

453. See, e.g., J. Ely, *supra* note 105, at 74, 84, 135; Brest, *supra* note 104, at 2; Delgado, *supra* note 139, at 923.

454. See, e.g., Brest, *supra* note 104, at 10–12; Fiss, *supra* note 67, at 127–28; Karst, *supra* note 179, at 24.

455. The race question, for example, threatens again, as it did in the 1850s, to destroy one of the most important and otherwise durable foundations of the nation's political stability—its two-party system. Thus, much of the commentary on the 1988 presidential election—the fifth out of the last six lost by the Democrats and the seventh in a row in which the winning candidate did not receive a majority of both black and white votes—focused on the question whether a national coalition that forthrightly includes and claims to represent the interests of African-Americans can succeed politically. See, e.g., Edsall, *Race in Politics*, N.Y. Rev. Books, Dec. 22, 1988, at 23; McPherson, *How Race Destroyed the Democrats' Coalition*, N.Y. Times, Oct. 28, 1988, at A35, col. 2; Oreskes, *In Racial Politics: Democrats Losing More than Elections—Analysts See White Flight to G.O.P.*, N.Y. Times, Nov. 20, 1988, § 4, at 5, col. 1; see also Crenshaw, *supra* note 3, at 1362 n.119, 1376 nn.169–76 (similar commentary on 1984 election); Dudziak, *supra* note 98, at 80 & n.104 (1948 election); Oreskes, *The 1989 Elections: Virginia; Joy of Democrats Diluted in Virginia—Wilder's Running Mates Got Much Higher Vote Totals*, N.Y. Times, Nov. 9, 1989, at A1, col. 2 (1989 gubernatorial elections). Notably, until the year *after* the last election in which whites and blacks reached consensus, see *The Voting Rights Act of 1965*, 42 U.S.C. § 1971 (1988), and with the exception of a brief period following the Civil War when a sizeable chunk of *white* citizens were effectively disenfranchised, the two-party system has survived only by disenfranchising large segments of the nation's black population.

ganized violence against each other.⁴⁵⁶ Lest one think that those days are past, moreover, one, as the saying goes, need only read the newspaper.⁴⁵⁷

456. See, e.g., *Racially Motivated Violence: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 14-55, 154-61 (1989)*; *Chicago Comm'n on Race Relations, The Negro in Chicago: A Study of Race Relations and a Race Riot (1922)*; I S. Drake & H. Clayton, *Black Metropolis: A Study of Negro Life in a Northern City 65-76 (1962)*; E. Foner, *supra* note 439, at 119-23, 425-59; H. Gutmann, *The Black Family in Slavery and Freedom, 1750-1925, at 25-27, 386-99, 435-39 (1976)*; J. McPherson, *supra* note 251, at 145-62, 201-13, 506-07; *Nat'l Advisory Comm'n on Civil Disorders, Report 19-87, 158-61 (1968)*.

457. See, e.g., Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges*, *N.Y. Times*, May 9, 1990, at A1, col. 5; Glaberson, *Racial Tension from Slaying Seen at Trial*, *N.Y. Times*, Apr. 3, 1990, at B1, col. 5; Berger, *Professors' Theories on Race Stir Turmoil at City College*, *N.Y. Times*, Apr. 20, 1990, at B1, col. 2; Finder, *Racism and Arson: A New Chapter in an Old Story*, *N.Y. Times*, Feb. 11, 1990, § 1, at 40, col. 1; Applebome, *Two Sides of the Contemporary South: Racial Incidents and Black Progress*, *N.Y. Times*, Nov. 21, 1989, at A22, col. 1 ("A rising tide of racial incidents across the South, including attacks and cross burnings, has provided a sour counterpoint to a decade of electoral progress by blacks"); Blumenthal, *Black Youth Is Killed by Whites; Brooklyn Attack Is Called Racial*, *N.Y. Times*, Aug. 25, 1989, at A1, col. 1; Hays, *July 4 Racial Clash Leaves Rosedale Split Over Its Image and Its Reality*, *N.Y. Times*, July 30, 1989, § 1, at 32, col. 1; Barbanel, *New Yorkers Pessimistic on Race Relations, Poll Shows*, *N.Y. Times*, June 23, 1989, at B1, col. 2; Kaufman, *New Yorkers Wrestle With a Crime: Whatever Role Race Had in Park Attack, It's Topic No. 1*, *N.Y. Times*, Apr. 28, 1989, at A1, col. 2; Finder, *Blacks Remain Shut Out of Housing in White Areas*, *N.Y. Times*, Mar. 13, 1989, at B1, col. 2; *Education Called Key to Calming Racial Tensions in Dallas*, *Educ. Week*, Feb. 8, 1989, at 7, col. 4; *More Than 200 Arrested in Miami; In 2d Night of Racial Disturbances*, *N.Y. Times*, Jan. 18, 1989, at A1, col. 1; *Slaying of a Black in Portland Evokes Outrage on Racism*, *N.Y. Times*, Nov. 16, 1988, at A22, col. 1; *Black Church, Burned Twice, Vows to Rebuild*, *N.Y. Times*, Nov. 1, 1988, at A24, col. 4; *Race and a Death Dividing Two Neighborhoods on S.I.*, *N.Y. Times*, Oct. 17, 1988, at B1, col. 4; *Wicker, Yonkers and the South*, *N.Y. Times*, Aug. 30, 1988, at A19, col. 2; *Cuomo Outlines Program to Fight Racial Prejudice*, *N.Y. Times*, July 15, 1988, at B1, col. 5; *Carter-Ford Panel Says Race Issues 'Moving Backward'*, *Educ. Week*, June 1, 1988, at 4, col. 5; *Death of Black in Jail Beating Stuns 2 Towns*, *N.Y. Times*, Jan. 6, 1988, at A14, col. 1; *Thousands in Civil Rights March in Georgia Town; Klan Aide and 13 More Are Held*, *N.Y. Times*, Jan. 25, 1987, at A1, col. 2; *Black Leaders Say Queens Attack Is Evidence of 'Pervasive Problem'*, *N.Y. Times*, Dec. 23, 1986, at A1, col. 1; *Why Here? Faculty Members Interpret Racist Incidents on Campus*, *Stan. Observer*, Nov. 1988, at 1, col. 3; *State Starting an Investigation of Clash at Massachusetts U.*, *N.Y. Times*, Nov. 18, 1986, at B24, col. 1; M. Sovern, *A Statement to the Columbia University Community*, Mar. 23, 1987 ("This episode [involving interracial violence among students] has brought to the surface tensions among our students" that "exist on virtually every campus"). For other sources documenting recent increase in overt racial hostility, see Brooks, *supra* note 160, at 932-34 & nn.213-25; Crenshaw, *supra* note 3, at 1333 n.3; Kennedy, *supra* note 64, at 1782; Note, *Combatting Racial Violence: A Legislative Proposal*, 101 *Harv. L. Rev.* 1220, 1220 & n.1 (1988); sources cited *supra* note 258.

Or study the survey data. See, e.g., Crenshaw, *supra* note 3, at 1348 n.66 (citing survey data); Jackman & Muha, *Education and Intergroup Attitudes: Moral Enlightenment, Superficial Democratic Commitment, or Ideological Refinement*, 49 *Am. Soc. Rev.* 751, 763, 765 (1984) (racism remains prevalent including among well educated); Lawrence, *supra* note 134, at 321, 328-44; Pettigrew, *supra* note 142, at 687, 673, 674 ("growing convergence of results" attained through variety of research methods re-

D. *Why Especially Segregation?*

Plessy notwithstanding, state-enforced segregation is a particularly virulent expression of political racism. As discrimination by division, segregation disparages not only by word and intended effect but also in deed. First, segregation makes a reality of the belief underlying it, that the objects of the discrimination are different—indeed, separated—from humanity. If racism in all of its forms oppresses symbolically by excluding African-Americans from belonging to the “human” race, then racism expressed through segregation oppresses corporeally as well by actually excluding African-Americans from the places and institutions where “humans” carry on their lives.⁴⁵⁸

Second, segregation facilitates more and easier discrimination. By dividing blacks from the rest of us—by creating what Professor Black has called “a position of walled-off inferiority”⁴⁵⁹ populated by what Professor Crenshaw calls “a clearly visible ‘other’”⁴⁶⁰—segregation permits the rest of us more easily to target blacks for special disadvantage without having to risk our own interests.⁴⁶¹ Segregation does not simply disparage a discrete and insular minority as such but, in addition, forcibly magnifies the group’s discreteness and insularity⁴⁶² so as to enlarge and highlight the discriminators’ target.⁴⁶³ Segregation, therefore, not only violates democratic pluralism’s necessarily egalita-

vealing “subtle [and] indirect” but nonetheless “severe and difficult manifestations of both individual and institutional racism [as] a prominent part of American life”). But see Roper, *Racial Tensions Are Down*, *N.Y. Times*, July 26, 1990, at A19, col. 2; Roth, *Social Psychology’s “Racism,” The Pub. Interest*, Winter 1990, at 26, 29.

458. See M.L. King, Jr., *Stride Toward Freedom: The Montgomery Story* 113 (1958) (“Justice and equality, I saw, would never come while segregation remained, because the basic purpose of segregation was to perpetuate injustice and inequality”); Black, *supra* note 123, at 424–25 & n.15 (segregation in South “a triumph of extreme racist over moderate sentiment”); Crenshaw, *supra* note 3, at 1357, 1377.

459. Black, *supra* note 123, at 427.

460. Crenshaw, *supra* note 3, at 1360.

461. This divide-then-discriminate strategy also facilitates more neutral-seeming, e.g., “merely” geographic, discrimination. Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (school financing disparities among school districts in Texas do not violate equal protection clause).

462. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (antisegregation laws); Fiss, *supra* note 49, at 15.

463. See Carter, *supra* note 8, at 22; Shane, *supra* note 52, at 1084–85; Yudof, *supra* note 100, at 87. Whatever else may be said about one minority’s discreteness and insularity as opposed to another’s “diffuseness” and “anonymity,” the former characteristics clearly enhance the probability of sustained and organized violence either by or against the, for those reasons, self-identified, cohesive, visibly different, and physically separated minority. See Arendt, *supra* note 172, at 47. Compare J. Ely, *supra* note 105, at 161 (“hostility” and “tendency to stereotype” can be diminished and checked by “increased social intercourse” of different racial groups; appreciating ways in which groups are not different “is the beginning of political cooperation”) with Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713, 731–40 (1985) (“easy to identify groups . . . that are not discrete and insular but are nonetheless victims of prejudice”).

rian premise by making disadvantageous allocative distinctions based upon nothing more than personal differences; it also insists upon the permanence and visibility of the difference, whether or not the people disadvantaged thereby choose for themselves to make the disadvantaging characteristic definitive of themselves or their good.⁴⁶⁴

It may be true, as Senator Sam Ervin proposed two years after *Brown I*, that “man” (or, better, a “man”), may find “his greatest happiness among people of similar cultural, historical, and social background.”⁴⁶⁵ And a pluralistic society lets that man harbor and even act on that belief in his own private sphere. But when that “man” comes to act as an American “citizen” and incites the political process to keep a person with a background different from his in “her place” as defined by her background, then the inference is unavoidable that he, as citizen, seeks to accord her less respect and concern than he accords persons sharing his own background, and hence that he has violated the equal protection principle.

E. *Why Just Intent?*

Obviously, my view of the problem in the desegregation cases attends the motivations that lead officials to act and those that lead citizens to incite officials to act: Citizens’ effective incitement of official action and officials’ actions themselves violate the equal protection clause when either the citizens or the officials premise their conduct on a belief that the individuals disadvantaged thereby are less worthy of respect and concern than are the citizens or officials themselves, or that the disadvantaged individuals are not worthy creators of their own values. To this extent, my notion of what is and is not a problem in terms of the functioning of the political process tracks the motive-centered analyses of other process-based theorists⁴⁶⁶ and is susceptible to the same obloquy to which those analyses have been subjected.⁴⁶⁷

464. Segregation thus commits two cardinal antipluralistic sins: It forces blacks to be defined by their race, and then condemns that characteristic, which many blacks may wish to include among their defining characteristics, as unworthy. See, e.g., Gewirtz, Choice, *supra* note 49, at 747 (contrasting compelled and chosen racial separation); Walzer, *supra* note 142, at 62 (“The residential segregation of black Americans is very different from that of Irish Catholics, WASPs, Jews, and so on;” it is “a great deal less voluntary and a great deal more thoroughgoing”); see also Ackerman, Constitutional, *supra* note 395, at 533–35, 548 (segregation especially onerous because it deployed the full power of the activist state against blacks, yet, via *Plessy*, was shielded from constitutional scrutiny as merely “social” bias).

465. Ervin, The Case for Segregation, *Look*, Apr. 13, 1956, at 32; see also M. Walzer, *supra* note 52, at 222–24 (noting black activists’ argument that “most black Americans would choose to live together, shaping . . . and controlling [their] local institutions,” even if politics were “free of every taint of racism”).

466. See, e.g., R. Dworkin, *supra* note 328, at 66; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 *Yale L.J.* 1205, 1217–22 (1970); Sunstein, *supra* note 105, at 131 n.16, 138–40, 145–50.

467. See, e.g., sources cited *supra* note 255.

Nonetheless, when directed at my "equal concern" analysis, that obloquy seems overstated for three reasons. First, a number of the oft-heard complaints about process-oriented intent tests actually are complaints about *private-law* process-oriented tests—tests that not only require proof that the evil intention of an identifiable wrongdoer have motivated the action in question but also limit the remedy to redressing the identifiable harms that the identifiable wrongdoer's invidious actions caused identifiable victims.⁴⁶⁸ As I demonstrate below, however, a *public-law* process-oriented approach sheds the private law's fixation on actual causation and with it the private law's severe remedial limitations. Under the public-law approach, once the plaintiffs establish that the offensive motivation has corrupted the political process, they have proved their public-law case and have established a right to have the process publicly reformed.⁴⁶⁹

Second, the "equal concern" test encompasses unconscious racism. Citizens and officials may deprive blacks of equal respect and concern in a number of ways. They may consciously set out to harm blacks by counting their votes negatively.⁴⁷⁰ They may ignore black votes that they know were cast.⁴⁷¹ Or, due to racial stereotypes or a lack of interracial empathy, they may fail to apprehend that, how, or with what intensity blacks are voting—as occurs, for example, when legislators fail to realize that contemplated legislation would adversely affect black Americans.⁴⁷² Whatever form the denial of equal concern takes, a seri-

468. See *supra* note 262; see also Gewirtz, Choice, *supra* note 49, at 732, 782–83 (causation, not intent, is most important limitation on private-law process-oriented desegregation remedy).

469. See, e.g., *infra* notes 529–564 and accompanying text. A public-law approach to motivation also explains and emphasizes what Corrective theory cannot explain, and what critics of the intent standard typically ignore, namely, that a violation occurs whenever an illicit motivation actually has corrupted the decision making process whether or not that motivation is the primary, proximate, or but-for cause of the disadvantaging outcome. E.g., *Hunter v. Underwood*, 471 U.S. 222, 225, 228 (1985); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 270–71 n.21 (1977); *Butts v. City of New York*, 779 F.2d 141, 145 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *United States v. Board of School Comm'rs*, 573 F.2d 400, 411 (7th Cir.), cert. denied, 439 U.S. 824 (1978); see *Ortiz*, *supra* note 123, at 1108–10, 1118; *supra* note 427; see also *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1785 & n.7 (1989) (critical inquiry is whether gender was factor when employment decision made).

470. See, e.g., *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest"); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (discrimination "made an end in itself").

471. See, e.g., *D. Bell*, *supra* note 2, at 96; *R. Dworkin*, *supra* note 52, at 382; *J. Ely*, *supra* note 105, at 82 n.33, 103, 135.

472. See, e.g., *J. Ely*, *supra* note 105, at 157; *Brest*, *supra* note 104, at 7–8, 14; *Karst*, *supra* note 179, at 48; *Lawrence*, *supra* note 134, at 347.

ous malfunction in the political machinery has occurred.⁴⁷³

Third, the “equal concern” approach permits a relatively objective analysis of legislation and the process that produced it. Under that analysis, official action is invalidated if it cannot help but convey the impression that the disadvantaged group is not equally worthy of the community’s respect and concern. Although such an analysis often would not annul legislation with a disparate impact on one group or another—given that nearly all governmental action singles out some individuals to bear a greater burden than others without implying anything negative about the disadvantaged individuals’ humanity or standing in the community⁴⁷⁴—on other occasions the only interpretation of the legislation, in historical context, is that the burdened class is less worthy of respect than others.

One may reach the conclusion that disrespect-conveying legislation violates the equal protection clause by either of two routes. First, the impression conveyed by a statute or other action may supply the best available indication of its maker’s or taker’s intention.⁴⁷⁵ This rationale has particular force when what is being inferred from the impressions official action conveys are the motivations of the citizenry as a whole and not just those of the legislature.

Second, the overriding requirement that legislators treat all persons with equal concern and respect implies, without recourse to motive, that legislation is out of bounds if it in context conveys but one reasonable interpretation—that members of the disadvantaged class are less worthy of respect than others. This latter, “cultural meaning”⁴⁷⁶ or (as I prefer to call it) “public-law motivation” standard captures most of the content of the antidisubordination tests that many scholars have offered as alternatives to the intent test, although it focuses less singlemindedly on the subordinating result of the action as perceived by the victim and more on the meaning that the legislation and process that generated it announce or convey to the citizenry at large.⁴⁷⁷

473. See Lawrence, *supra* note 134, at 348 (discussing “possible process-distorting effects of unconscious racism on a governmental decision”).

474. See *supra* note 376. For example, screening devices for oversubscribed jobs and individual decisions in regard to the location of subsidized housing by themselves may not convey a message about the persons disadvantaged thereby, although a pattern of actions persistently disadvantaging the same group might do so. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977); *Washington v. Davis*, 426 U.S. 229, 246 (1976). But cf. Lawrence, *supra* note 134, at 357, 365–74 (objective analysis may require different outcome in *Arlington Heights* and *Washington*).

475. See Lawrence, *supra* note 134, at 324; see also R. Dworkin, *supra* note 52, at 361 (legislative motivation identified by “set of convictions [that] would provide the best justification” for the law).

476. Lawrence, *supra* note 134, at 324–27.

477. See, e.g., L. Tribe, *supra* note 434, at 1514–21; Black, *supra* note 123, at 426; Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L.

The Supreme Court's "intentional discrimination" holdings only erratically "fit" the above analyses of unconscious racism and of legislation's conveyance of a racist message as I would apply those subtests.⁴⁷⁸ The Court's ambivalence is explicable, however, by dividing the Court's intentional discrimination decisions into two categories. The first category encompasses legislative discrimination, including school segregation, that the Court understands as presenting a socio-structural or public-law problem. The Court adjudicates "public-law discrimination" claims by examining the legislation's objective as well as subjective purpose and by relegating the causation issue to an affirmative, no-causation, defense. The second category includes discrimination that the Court treats as merely a private-law infraction, subject to strict proof by the plaintiff of subjective intent and at least "but for" causation.⁴⁷⁹

Rev. 1003, 1059-60 (1986); Crenshaw, *supra* note 3, at 1377-79; Freeman, *supra* note 98, at 1070; Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. Ill. L.R. 493, 500; Kennedy, *supra* note 255, at 1419-20; Marcus, *supra* note 367, at 33-34 (MacKinnon); see also *supra* note 474 (cases in which public-law and purely outcome-focused tests might reach different results).

478. See Eule, *supra* note 426, at 1564-65 & n.279 (Court vacillates between "loose[]" and "miserly" analyses of invidious intent). Compare, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (invalidating irregular boundary line that almost perfectly separated blacks from whites) and *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (followed by, e.g., *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)) (invalidating jury selection procedures that give public officials opportunity to discriminate and whose "result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner") and *Brown v. Board of Educ. (Brown I)* 347 U.S. 483, 494 (1954) (segregation invalid because it conveys "a feeling of inferiority as to [blacks'] . . . status in the community") and *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (segregation as "badge of servitude") and *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (actions that qualify as an "assertion of . . . inferiority") with *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (absent case-specific evidence identifying actual offending authority, system-wide statistical disparities in capital sentencing based on race of victim do not violate equal protection) and *Memphis v. Greene*, 451 U.S. 100, 128-29 (1981) (no violation for city to construct barrier that stopped traffic between African-American and white neighborhoods) and *Palmer v. Thompson*, 403 U.S. 217, 225-26 (1971) (criticized in *Washington v. Davis*, 426 U.S. 229, 243-48 (1976)) (no violation for city to close swimming pool rather than integrate it) and sources cited *supra* note 474 (housing and employment discrimination).

479. Compare cases cited in Ortiz, *supra* note 123, at 1109-10, 1112 nn.24, 40-41 (decisions falling in first category; public-law treatment) and cases discussed *supra* note 92 (same) and cases discussed *infra* notes 481, 483, 543, 556, 560 and accompanying text (same) with sources cited *supra* notes 474, 478 (decisions in second category; private-law treatment). Professor Ortiz likewise divides the Court's discrimination cases into two categories, one made up of voting, jury, and school desegregation cases and the other employment, housing, and capital punishment cases. See Ortiz, *supra* note 123, at 1115-32, 1142-45. I am not convinced, however, by Professor Ortiz's explanation of the two categories as involving, respectively, "fundamental" and "nonfundamental" interests in the traditional equal protection sense: The life and liberty interests at stake in the capital-punishment context surely fall within the Court's "fundamental" category, while education is not by the Court's lights "fundamental." See sources cited *supra* note 138. Moreover, unlike Professor Ortiz, I read the two sets of cases as taking a different

In particular, the Court's reliance in the former, public-law category of cases on objective indicia of illicit motivation is congenial to both unconscious-racism and public-law-motivation analyses.⁴⁸⁰ So, too, are the Court's holdings in the school desegregation and other cases in which a particular governmental process has produced a series of highly visible, racially nonrandom outcomes that necessarily lead citizens to conclude that members of the disadvantaged minority group do not receive or deserve the respect that the process accords other citizens.⁴⁸¹ Likewise, the test the Court currently uses to answer the highly analogous "equal concern and respect" questions that arise under the establishment clause when governmental action distinguishes between members of different religious (as opposed to racial) groups neatly conforms to the message-conveying or public-law-motivation subtest under discussion here.⁴⁸² Also indicative of the capacity of the unconscious racism and public-law-motivation subtests to "fit" the prevailing liability standard are the numerous federal court decisions applying the Supreme Court's "objective indicia of intent" to reach conclusions consistent with concerns for unconscious racism and

approach not only to intent but also to causation and as choosing between the two approaches on the basis of whether the Court conceives of the discrimination at issue as embedded in the governmental process—as jury and voter discrimination and school segregation historically have been—or as simply the occasional lapse of individual decision makers—as the Court currently is disposed to view employment, housing, and capital-punishment discrimination. See sources cited *supra* notes 474, 478. This same public-law/private-law distinction also seems to be at work in a couple of recent Title VII cases in which, by enhancing plaintiffs' causation and intent burdens and eviscerating the disparate-impact cause of action, the Court has sought to move the Title VII remedy from astride the public-law/private-law divide to a place entirely on the private-law side of the line. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2123–25 (1989); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1798 (1989) (O'Connor, J., concurring in the judgment).

480. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461–65 & nn.8–12 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

481. See, e.g., *Rogers*, 458 U.S. at 623–27; *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 538–40 & nn.9–11 (1979); *Columbus*, 443 U.S. at 461–65 & nn.8–12; *Keyes v. School Dist. No. I*, 413 U.S. 189, 198–205 (1973); *Gomillion*, 364 U.S. at 345, 347; *Hernandez*, 347 U.S. at 482; *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

482. See, e.g., *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3102, 3119–22, 3124, 3134 (1989) (opinions of Blackmun, O'Connor, Brennan, and Stevens, JJ.) (citing *Wallace v. Jaffree*, 472 U.S. 38, 69–70, 76 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)) (majority of Court favors establishment clause standard focused on whether purpose and impact of statute "actually conveys a message" that religion or a particular religious belief is favored and on "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement"); see also *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989) (plurality opinion) (importing same standard into equal protection analysis of affirmative-action classifications that, although benign in intention, "may in fact promote notions of racial inferiority and lead to a politics of racial hostility"); *supra* notes 379, 387–390 and accompanying text; *supra* notes 384, 392, 426–435 (linking nonestablishment and equal protection principles).

for the message that governmental action disadvantaging minorities conveys.⁴⁸³

F. *Fit Redux*

The "equal capacity to choose" principle finds justification in a number of modern political and legal theories and, particularly, in its presence at their confluence. But what of the threshold question of fit? What can be said about the principle's fit with the Constitution and particularly with section one of its fourteenth amendment? As noted above, that provision's open-ended language and multifaceted history forestall definitive judgments about fit.⁴⁸⁴ Nonetheless, the preceding discussion permits a number of encouraging observations.

First, the "equal capacity to choose" principle generally fits the three operative words in section one—"equal," "protection," and "state."⁴⁸⁵ Indeed, by focusing particular attention on and giving anti-perfectionist content to the otherwise vague word "protection,"⁴⁸⁶ the "equal capacity to choose" principle makes good sense out of what the amendment's framers conceived of as the most important term in the clause.⁴⁸⁷ Second, by focusing attention on identifying and preserving those republican political processes (in particular, presumptive

483. Identifying the intent analysis in equal protection cases as "objective" or inclusive of unconscious racism are, e.g.: *Lincoln v. Board of Regents*, 697 F.2d 928, 943 (11th Cir.), cert. denied, 464 U.S. 826 (1983); *United States v. Board of School Comm'rs*, 573 F.2d 400, 412-13 (7th Cir.), cert. denied, 439 U.S. 824 (1978); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 182-83 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975). Relying on foreseeable racially disparate impact that is inexplicable except in racial terms are, e.g., *Dayton II*, 443 U.S. at 536 n.9; *Columbus*, 443 U.S. at 461-62; *Village of Arlington Heights*, 429 U.S. at 265-66; *Gomillion*, 364 U.S. at 347; *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 410 (8th Cir. 1985) (en banc), cert. denied, 476 U.S. 1186 (1986); *Diaz v. San Jose Unified School Dist.*, 612 F.2d 411, 414 (9th Cir. 1979), aff'd, 705 F.2d 1129 (1983); *United States v. Unified School Dist. No. 500*, 610 F.2d 688, 692 (10th Cir. 1979); *Arthur v. Nyquist*, 573 F.2d 134, 142 (2d Cir.), cert. denied, 439 U.S. 860 (1978); *United States v. Texas Educ. Agency*, 564 F.2d 162, 166 (5th Cir. 1977). Relying on various process-focused factors, listed *infra* note 550, that are calculated to reveal unconscious racism and the interpretation the citizenry likely will give the legislation are, e.g.: *Rogers*, 458 U.S. at 622-27; *Village of Arlington Heights*, 429 U.S. at 266-67; *Dowdell v. City of Apopka*, 698 F.2d 1181, 1186 (11th Cir. 1983); *Talbert v. City of Richmond*, 648 F.2d 925, 929-31 (4th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1110 (7th Cir.), cert. denied, 449 U.S. 838 (1980); *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir.), cert. denied, 449 U.S. 875 (1980); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 143-44 & n.22 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

484. See W. Nelson, *The Fourteenth Amendment* 71-80, 133-36 (1988); *supra* note 362 and accompanying text.

485. See *supra* notes 363-438 and accompanying text.

486. See *supra* notes 372-385 and accompanying text.

487. See J. ten Broeck, *Equal Under Law* 217 (1965); Fiss, *supra* note 49, at 95-96 & n.16; Karst, *supra* note 179, at 13-15; Tussman & ten Broeck, *The Equal Protection of the Laws*, 37 *Calif. L. Rev.* 341, 342 (1949).

majoritarianism tempered by the citizen's duty of virtue) that serve as the best means of achieving liberal—i.e., choice-protecting and enhancing—ends, the “equal respect and concern” understanding conforms to the basic structure, the intellectual history, and many of the specific provisions of the Constitution.⁴⁸⁸

A third consideration is, to my mind, the most convincing: In essence, the interpretation of the clause offered above requires that the political system treat all individuals, but particularly blacks—being creators of their own values and their own ends—as, in this sense, “fully human.”⁴⁸⁹ That interpretation conforms directly to the least controversial of all of the clause's possible purposes—namely, to overrule once and for all *Dred Scott*'s equation in perpetuity of black skin with the slave's dependent status as less than fully human.⁴⁹⁰ Fourth, and to similar effect, the “equal capacity to choose” gloss on the equal protection clause adheres closely to the meaning that the immediate beneficiaries of the clause—recently emancipated slaves—themselves gave to their newly enacted, if never fully realized, rights.⁴⁹¹ Fifth, the “equal concern and respect” principle conforms to the language and holding of the Court's earliest invalidation of governmental conduct under the equal protection clause, *Strauder*, and to its most important invalidation

488. See J. Ely, *supra* note 105, at 77–101 (cataloguing constitutional provisions designed to protect the political process); *infra* notes 591–594, 601 and accompanying text (giving examples of those provisions). But see Lynch, Book Review, 80 *Colum. L. Rev.* 857, 860–62 (1980) (reviewing J. Ely, *supra* note 105).

489. Lawrence, *supra* note 134, at 350.

490. See Ackerman, *Constitutional*, *supra* note 395, at 509; Karst, *supra* note 179, at 12–13; Kinoy, *The Constitutional Right of Negro Freedom*, 21 *Rutgers L. Rev.* 387, 391–93 (1967); *supra* notes 439–441 and accompanying text.

491. See E. Foner, *supra* note 439, at 77–119. To freed men and women, equality before the law meant more than ending legalized separation of families and punishment by the lash and encompassed the full accouterments of “individual and collective autonomy”—what a South Carolina freedmen's convention called the right to “develop our whole being by all the appliances that belong to civilized society”—including the right to travel when and where they saw fit; to choose their own names; to dress as they pleased; to conduct political, social, and religious meetings unfettered by white surveillance and white definitions of orthodoxy; to satisfy a “seemingly unquenchable thirst for education”; and to practice subsistence agriculture on their own plots of land as the best means of achieving “a measure of choice as to whether, when, and under what circumstances to enter the labor market,” notwithstanding that cash crops grown on the white man's larger plots might have been more lucrative for themselves and the white man. *Id.* The “equal capacity to chose” gloss also adheres to a meaning blacks gave the rights they sought in the Civil Rights Movement. See J. Baldwin, *supra* note 439, at 22 (“The Black demand . . . for desegregation [was] a demand that one be treated as a human being and not like a mule, or a dog.”); M.L. King, Letter from Birmingham City Jail, in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 293 (J. Washington ed. 1986) (“when your first name becomes ‘nigger’ and your middle name becomes ‘boy’ . . . and your last name becomes ‘John,’ and . . . when you are forever fighting a degenerating sense of ‘nobodiness’; then you will understand why we find it difficult to wait”).

since then, *Brown I*.⁴⁹² Sixth, the principle fits the Court's motive-centered analysis in the desegregation decisions.⁴⁹³ Finally, the principle better fits the terms and history of the clause than the equal educational opportunity, integration, redistribution, individually focused correction, and quasi-utilitarian principles underlying other desegregation theories.

What, then, is to be made of the evidence that most of the legislators who passed upon the fourteenth amendment believed that it did not forbid racial segregation?⁴⁹⁴ My first answer parallels *Brown's* answer.⁴⁹⁵ The point is not the one usually attributed to *Brown*, however—that the practice of public education was virtually unknown in 1868 and, thus, could not have been on the drafters' minds.⁴⁹⁶ Rather, the point is that the practice of public education that *could* have been on the drafters' minds is *not* the practice that the Court actually reviewed in *Brown*. In the earlier period, citizen and state participation in "public education" was voluntary and at best erratic, and the state's role was essentially proprietary. As of 1954, by contrast, citizen and state participation had become compulsory and universal and the state's role all but plenary.⁴⁹⁷ It takes only a modest expansion of modern views of the constitutionally unregulated "social" sphere to immunize the earlier practice.⁴⁹⁸ On the other hand, even the drafters' premodern vi-

492. See *supra* notes 355–356.

493. See sources cited *supra* notes 426, 470, 480, 481, 483.

494. Compare R. Bork, *The Tempting of America* 76 (1990) ("*Brown* is consistent with [and even] . . . compelled by, the original understanding of the equal protection clause") and Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 59–60 (1955) (*Brown I* consistent with intent of fourteenth amendment's framers) with R. Berger, *Government by Judiciary* 118–19, 191–92 (1977) ("impossible to conclude" that fourteenth amendment framers "intended that segregation be abolished") and Monaghan, *supra* note 103, at 723 (quoting Tribe, *How Relevant Is 'Original Intent' Doctrine?*, *Legal Times*, Dec. 22, 1986, at 12, col. 1) ("those who wrote and ratified the Fourteenth Amendment believed that it would permit racial segregation in public schools") W. Nelson, *supra* note 484, at 133–36 (individual congressmen divided on desirability of school segregation; congressional debates did not consider issue; some opponents and proponents of amendment during ratification debates assumed it forbade school segregation; during Reconstruction, Congress funded Washington D.C.'s segregated schools but defeated amendment to 1875 Civil Rights Act permitting racially separate schools).

495. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 489–90 (1954).

496. See *Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring) (citing *Brown I*). But see Monaghan, *supra* note 103, at 728 (criticizing *Brown I*).

497. See *Brown I*, 347 U.S. at 493 & n.4; Ackerman, *Constitutional*, *supra* note 395, at 533 & n.164 (citing authority); see also *id.* at 531–35 (not only educational practices but also realization of state's power to affect private choices expanded between *Plessy* and *Brown I*); *supra* note 156 (nearly all modern state constitutions include requirements that states provide free public education to all); *infra* note 735 (plenary public role in operating or regulating modern public schools).

498. Compare *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) (no "state action" in state's regulating private utility) and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (no "state action" in state's licensing of discriminatory private

sion of the constitutionally controlled "civil" sphere probably would encompass the later practice.⁴⁹⁹

A second answer lies in the now infamous but at that time, let us assume, sincere passage in *Plessy v. Ferguson* in which the majority acknowledged that a legislative "badge of inferiority" would indeed violate the equal protection clause but concluded that no such advertisement accompanied "separate but equal" segregation.⁵⁰⁰ Granting likewise that most of the fourteenth amendment's ratifiers sincerely believed that the provision's underlying principle did not extend to segregation, we also may grant that many of them held that opinion for the same reason as the *Plessy* majority: they believed that legislators could enact segregation statutes without intending thereby to convey, and without generally conveying, a message inconsistent with the amendment's underlying "equal respect and concern" principle.⁵⁰¹ Whatever the truth of that essentially factual, and doubtless psychologically naive,⁵⁰² assertion when the fourteenth amendment's framers and the *Plessy* majority made it, the fact is that by 1954, and certainly today, no such empirical assertion reasonably may be made about the myriad legislative and administrative actions that are necessary on a daily basis to maintain and operate racially segregated schools.⁵⁰³

clubs) with *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-24 (1961) ("state action" in state's construction and maintenance of building occupied by privately owned restaurant that excluded African-Americans). See generally *supra* note 392 (distinguishing constitutionally regulated "political" sphere from constitutionally unregulated "social" and "private" spheres).

499. See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (fourteenth amendment assures "political," not "social" equality); Ackerman, *Constitutional*, *supra* note 395, at 533-35 (contrasting premodern and modern views of public sphere); Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 *Geo. L.J.* 1493, 1501-02 & nn.53-56, 1505, n.68 (1989) (post-Reconstruction Court's conception of protected "civil" and "political" spheres and the unprotected "social" sphere).

500. 163 U.S. 537, 551 (1896) (quoted *supra* note 215).

501. See R. Bork, *supra* note 494, at 75-76, 82; W. Nelson, *supra* note 484, at 186-87.

502. See Lawrence, *supra* note 134, at 319-20.

503. See Black, *supra* note 123, at 421-30. Two principles are advanced here: First, the framers' understanding at a relatively high level of abstraction of a highly abstract clause trumps conclusions that the framers may have reached, willy nilly, about the principle's application to particular situations that are not, in terms, discussed in the provision. See, e.g., R. Dworkin, *supra* note 52, at 359-63; J. Ely, *supra* note 105, at 118-19; Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. Rev.* 204, 209-12, 222-23 (1980); Karst, *supra* note 4, at 14; see also Sunstein, *Legal Interference with Private Preferences*, 53 *U. Chi. L. Rev.* 1129, 1140 (1986) ("second order preferences" may trump "first order preferences"). It may well be, for example, that "the public understanding of the language," Monaghan, *supra* note 103, at 725, of the first amendment's free exercise clause when the nation adopted it was that Christians or adherents of "western" religions were protected but that polytheistic Hindus were not. Yet, should the case arise today, it would be senseless to require the litigants to determine what James Madison, Patrick Henry, and the average yeoman farmer thought of

G. *What Is the Problem? Redux*

What the passages quoted earlier from *Strauder* and *Brown I* suggest as a matter of decisional law, the consensuses described above affirm as a matter of acceptable principle: By allowing racism in the political system, we reject a critical self-preservative premise of a liberal, pluralistic, and presumptively democratic state—namely, the philosophical idea, common to much modern political theory, that in a just and well-ordered but heterogeneous society, the political system and each one of us acting in and through it must treat every human being, simply because she *is* a human being and is capable of generating her own values, as the moral equal of every other human being. For a thoroughly plural society to function democratically, that is, there must be a mutually recognized and protected equality among citizens based on each citizen's right and ability to be different. For pluralism to work, there must be a right to be plural—to be different—without for that reason being deemed inferior and made worse off in civil society. Absent a mutually recognized and protected assumption of equality in the political affairs of the pluralistic state—were it, for example, permissible for the majority to attempt to impose its particular features or its vision of the good as the standard by which to measure everyone else's share of public security and support⁵⁰⁴—either our plurality, or more likely our state, would disappear.

Regarding the same point from the perspective of the individual, not the process: Each of us has a vision of ourselves and of our good that makes us different from the next person and that, we may even think, makes us (spiritually, for example) more worthy than that person. In order to protect our freedom to hold that belief, however, and to pursue our own idiosyncratic good, we find it necessary, when we act together through our political institutions, to undertake to forego asserting our or our life plan's superiority. Instead, insofar as we are acting not as persons but as *citizens*, we undertake to strip ourselves down to our lowest common political denominator—our uniform ability to be different, to have our own vision of the good, but also to tolerate each other's visions to the extent necessary to allow sufficient social coopera-

Hinduism. For by now it is clear that what the first amendment framers meant by "religion" includes all persuasions, just as it is clear by now that the category of "unequal respect" includes segregation. See *supra* note 389.

Second, times change, and so do the facts. Hence, the framers' uncodified assumptions of historical or even legislative fact—for example, that citizens and legislators can insist upon racial segregation without thereby intending or conveying a "badge of inferiority"—should not bind interpretation decades and even centuries later about how the provisions' underlying principle at whatever level of abstraction applies in particular cases. But see Monaghan, *supra* note 103, at 728; Sandalow, *supra* note 121, at 1168; Smith, *supra* note 389, at 960-62.

504. See *supra* notes 376, 385; *supra* note 474 and accompanying text (responding to claim that majorities via morals and market-replacing legislation frequently impose values on others).

tion so that we may be secure in pursuing our own good. Hence, we agree in our political lives to refrain from any effective action premised or justified on the ground that some distinguishing characteristic of a citizen, or of her particular life plan, makes her inferior to the rest of us.

Historically, the principal way in which this nation has deviated from its commitment to equal respect and concern has been its treatment of its black inhabitants. In maintaining a racially subordinating stance, our polity has taken extreme measures that it has applied to no other group with such sustained intensity, including the endorsement of enslavement, the authoritative declaration that blacks—"free" or enslaved—were less than human, and a century following of legalized internment of blacks north and south in "position[s] of walled off inferiority."⁵⁰⁵ From time to time, the rendering of African-Americans as the official "other"—the normatively bad, "docile," "emotional," or "unintelligent" half of the dichotomous pair whose normatively good side everyone else united in forming—provided bonds that held otherwise ethnically, socially, and economically pluralistic white society together.⁵⁰⁶ The Civil War showed once and for all, however, how tenuous are bonds fashioned out of an official ideology of unequal respect and concern. Since the Civil War, therefore, the nation has been committed in *legal* principle—and, for the last third of a century, in intermittent practice—to forging a new kind of bond, one that recognizes our plurality as our strength and not as our republican achilles heel, our diversity as our unifying characteristic, our opposing values as the product of our homogenizing ability to give value, and our capacity to be and to choose to be different as the definitive way in which we are all, solidaristically, the same.

Critical to the cohesiveness and stability of a polity necessarily united by this seeming paradox is a trade, an accommodation codified in the fourteenth amendment's words "equal," "protection," and "state." To preserve our definitive capacity to choose our own—even exclusionary—values and projects as private persons, we commit ourselves when we act as public citizens to a "typically American" form of civic virtue which demands that, in our role as "the state," we respect and protect equally the persons that all others are and have chosen to be. To preserve our right to free exercise in the private sphere, that is, we commit ourselves to nonestablishment in the public sphere.

Understood this way, the problem in the desegregation cases is not simply that the government has insulted some individuals, however offensive that is. Rather, the most fundamental and threatening problem

505. Black, *supra* note 123, at 427. The polity's "unequal capacity to choose" stance towards blacks is best reflected, perhaps, by considering the group whose current treatment best mirrors the historical treatment of blacks—convicted felons, whom society by law stigmatizes, separates from itself, deprives of political participation, and brutalizes in numerous more or less conscious and violent ways.

506. See *supra* note 346 and accompanying text.

presented in these cases is that the political system, in its day-to-day decision making with regard to who gets what, has repudiated this accommodation and corrosively undertaken to process and act upon—i.e., to “establish”—the citizenry’s or the legislators’ belief that some persons in society are not fully human, are not equally worthy creators of their own values, and are not, in sum, deserving of equal concern and respect. As Hannah Arendt wrote after President Eisenhower dispatched federal troops to Little Rock to protect a few African-American children seeking to enroll at the city’s formerly all-white Central High, the “United States is not a nation-state in the European sense and never was;” the “principle of its political structure is, and always has been, independent of a homogenous population and of a common past”; hence the nation’s survival is “only due” to “its all-comprehensive, typically American form [of] equality [which] possesses an enormous power to equalize what by nature and origin is different.” “The point at stake, therefore, is not the well-being of the Negro population alone, but, at least in the long run, the survival of the Republic.”⁵⁰⁷

There are a couple of important consequences of viewing the school segregation problem in this legislative-racism light. First, the perspective helps us to see just how systemic the problem really is. The problem is thoroughly so. To begin with, legislative racism entails not only a raft of dignitary, educational, and other harms to one group of citizens caused by the process, but also a devastating harm to the process. Indeed, it entails as fundamental a “structural” defect in a pluralistic political system as is imaginable because, by establishing a “we are better than they” orthodoxy, it denies the validity of plurality and corrodes the nonestablishment principle that lies at the core of our pluralistic political system.

Second, the legislative-racism perspective forces us to acknowledge how far backwards, as well as forwards, in the political process the unjust racist opinion intervenes. In its worst form,⁵⁰⁸ legislative racism is not merely the aberrational corruption of a classroom by a teacher here, of a set of schools by a superintendent there, or even of the year’s attendance plan by the school board throughout the district. Rather, in its most virulent form, legislative racism means that the racist opinion is intervening in the political process at hundreds of places at the level of the constituency—i.e., that the racist behavior on the part of public officials is “representative,” in the full republican sense, of a deeper and wider antipluralist malady among the citizenry. However diligently and even creatively officials carry out their racially-corrupted public charge, the before-the-fact impulse and after-the-fact acceptance come democratically and ubiquitously from below.

Not only does this latter view of the problem underscore its sys-

507. Arendt, *supra* note 172, at 47–48.

508. See *infra* notes 529–564 and accompanying text.

temic seriousness by revealing the breadth as well as the self-destructive nature of the corruption. In addition, it leads to the realization that a constituency capable of politically working its racially corrupted will through, say, a teacher, a superintendent, or a school board also very likely will endeavor to advance its antipluralistic goals through whatever other governmental agents may find it necessary or at least politic to respond to that will. In its worst forms, therefore, segregative racist legislation embodies a deep processual harm: It corrupts the pluralistic political system from its constituent base to its legislative apex, and does so by way of an outcome-determining mode of "we, as such, are better than they" political discourse that, in its historical and emotional intensity, as well as through its denial of the validity of pluralism itself, is so highly corrosive that it threatens ultimately to shut down the political system entirely.

I realize, of course, that this approach is seriously "accusatory."⁵⁰⁹ For that reason, the application of the theory as a basis for judicial intervention commensurate with the seriousness of the problem it perceives warrants a good deal of caution and circumspection. As we proceed, I hope to apply such caution and circumspection in my own analysis and to show that the Court has abundantly adhered to those qualities in its decisions in this area.

Notice how this simultaneously public-law and process-oriented definition of the problem in the desegregation cases diverges from that assumed by the competing theories discussed earlier. As developed here, the problem is not simply the Equal Educational Opportunity theory's concern for educational harms in the public schools nor the Prohibition or Correction theories' private-law peeve regarding the fact or effects of an occasional official's discriminatory wrong. Rather, the problem is a far more "public" and processually pervasive one than each of those theories contemplates, although one that encompasses many of their concerns. Nor, on the other hand, is the problem perceived as a threat to some controversially product-focused Equal Educational outcome or to some Universalist-Redistributivist-Integrationist ideal posed by the nation's lack of sufficient social, ethnic, or economic homogeneity. Instead, the problem is perceived as something like those potentially perfectionist ideals' opposite—namely, a threat to the pluralistic ideal.

Finally, although the public-law, process-focused definition of the problem outlined here remains closest to that offered by Professor Dworkin in his rendering of the Prophylaxis theory, my derivation of a citizen- and representative-focused "equal concern" principle from an emerged liberal-republican consensus improves upon Professor

509. See Karst, *supra* note 255, at 1165–66. The approach here is more accusatory than most because it focuses on current as well as past discrimination and directs the accusation not only against public servants but also the public. It is less accusatory because the blame is collective not individual. See Lawrence, *supra* note 134, at 325–26.

Dworkin's derivation of a similar but solely representative-focused principle from a tenuously modified utilitarianism. Thus, we are ineluctably drawn to the other question that, as was noted earlier, the Prophylaxis theory cannot answer: Why is desegregation the solution?

IV. WHAT'S THE SOLUTION?

A. *If It Is Broke, How Should We Fix It?*

Before answering the question that closed the last section, let me pose a more abstract one. Suppose a given society depends upon a large and complex machine to allocate and distribute certain important societal goods in a just manner. Suppose also that the machine's myriad valves, joints, and seals make it susceptible to sabotage at the hands of a large and powerful group of citizens who are able to infuse the system with a corrosive agent that not only causes the machine to allocate and distribute more goods to them than they deserve but also increases the likelihood of sabotage by other groups seeking to reclaim their proper share of goods, threatens to contaminate the machine's output, and risks eventually shutting down the machine. Suppose, finally, that the society's Constitution entrusts its Supreme Court with authority to inspect, maintain, and repair the allocative-distributive machine and generally to assure that the machine functions according to the Constitution's specifications.⁵¹⁰

Presented with this problem, the Court has several alternatives, ranging from a tune up or other routine maintenance, to overhaul or substitution of a new but identical unit, to all-out redesign and replacement. Three factors come to mind that might induce the Court to choose the "redesign" option notwithstanding its high transition and operating costs:

510. Although snuck in as an embellishment on a "hypothetical," this representation of judicial review accurately reflects my view of the matter. To put a well-ventilated conclusion as succinctly as possible: Because the political process may *be* the problem, that process cannot be left to decide whether there *is* a problem and, if so, how to solve it. Rather, trouble-shooting and reparative tasks are more appropriately assigned to an authority removed from the political process and competent both to assess the process's conformity with the Constitution's "equal concern" principle and to remedy any non-conformity found. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); B. Ackerman, *supra* note 122, at 310-12; J. Choper, *supra* note 216, at 67-70; R. Dworkin, *supra* note 52, at 375; J. Ely, *supra* note 105, at 73-104; *The Federalist* No. 81, at 483 (A. Hamilton) (C. Rossiter ed. 1961); see also R. Dahl, *supra* note 369, at 58 (Supreme Court as "*deus ex machina* that regularly saves American democracy from itself"); Walzer, *Philosophy and Democracy*, 9 *Pol. Theory* 379, 384 (1981) (philosophically acceptable role of judicial review in democratic theory and practice). What I add to prior thinking on the point, besides my both more and less liberally economized view of the republican trouble being shot, see *supra* Section III.B, is a theory of processual repair that is lacking in other process-oriented conceptions, see *infra* notes 579-590, 597 and accompanying text.

- The consequences of the machine's malfunctioning are great.
- The citizenry's propensity for sabotage is great, and either (a) the machine frequently has succumbed to that sabotage in the past and efforts to sabotage-proof the machine through maintenance, repairs, or overhaul historically have not succeeded; (b) virtually all of the machine's many working parts are susceptible to sabotage; or (c) both.
- A viable, alternative design exists that is either (a) less susceptible to sabotage, (b) more likely to dampen the citizenry's desire or willingness to commit sabotage, or (c) both. For this factor to be present, the new design's expense in terms of transitionally and operationally forfeited resources must be justified by the degree to which the new design diminishes the harmful effects of sabotage projected in the first factor above, multiplied by the likelihood of successful sabotage projected in the second factor.

In the next section, I show that the problem posed by the desegregation cases is serious enough in its harmful societal consequences and in its ubiquity and intractability to satisfy the first two conditions above calling for processual redesign—or, as I shall call it here, for “reforming” or “reconstructing” the system. In the section following, I set forth ideal specifications for reforming the system along the lines required by the third condition above. Part V then shows that all-out desegregation satisfies those ideal specifications, and, accordingly, the third condition, by providing—although regrettably only “in the field of public education”—a redesign of the political system that is sufficiently immune to racist sabotage and sufficiently likely to forestall such sabotage in the future to justify its costs.

B. *Is It Broke Enough to Fix?*

In Part III, I demonstrated why legislative racism in the form of segregation is a serious, potentially life-threatening affliction of the body politic. In doing so, however, I limited that characterization to legislative racism “in its worst” or “most virulent” form. This section explains why I think the problem framed by the desegregation cases presents the worst-case situation and, as such, why the problem satisfies the first two prerequisites for a reformative solution—namely, that the antipluralist malfunctioning of the political process be both perilous and persistent. My point of departure is the last Part's implication that the systemic harms caused by legislative racism are the more dangerous—both to blacks and to the pluralistic political system itself—the deeper the racist opinion is shown to have permeated down to and through the constituency, the more widely it is shown to have pervaded the various agencies of government, and the longer it has persisted in doing both. I conclude below that the Court's desegregation remedy is

best understood as being triggered by proof of harms of just this especially pernicious, i.e., deep, wide, and lengthy sort.

1. *Is History Relevant?* — We begin with history. For historically, this nation has gone well beyond the “simple fact” of racism to racism as a culture, a way of life.⁵¹¹ Without retelling that story, I make three historiographical points: First, hardly any observer has addressed the equal protection question over the last thirty-five years without concluding that, taken in the context of American history, any clear pattern of state-sponsored racial separation raises at the very least an abnormally high “antecedent probability of corruption” in the political process.⁵¹² Second, a number of those observers, Justice Powell and Judge Wisdom included, have made convincing arguments that American history makes the antecedent probability of legislative racism high enough when it comes to school segregation to justify dispensing with the formalities, assuming that official racism played a role in creating segregated conditions, and judicially imposing a nonsegregative result.⁵¹³ Third, in their roles as historians, the federal courts have borne out the empirical judgment underlying both the preceding points: An informal review of *West's Federal Digest* and the *Race Relations Law Reporter* reveals a remarkably high proportion of cases—probably over ninety percent—in which plaintiff school children, state and local human rights agencies, and prior to the last two administrations, the Department of Justice and the Department of Health, Education, and Welfare (HEW)/Department of Education brought suit against one or more local school districts and succeeded in convincing a trial or an appellate court that at least one of the defendants had segregated the schools intentionally.⁵¹⁴

Nonetheless, even a ten percent error rate counsels caution—hence my earlier promise to proceed cautiously, and to show that the Supreme Court has proceeded cautiously, before making the intensely accusatory judgments necessary to justify reconstructing the political process as intensively as I intend to show desegregation reconstructs it. There are two ways in which the Supreme Court's desegregation decisions may be seen to have insisted—*quite* cautiously—upon proof of deep, wide, and lengthy racist corruption of state and local political

511. See *supra* notes 439–465 and accompanying text.

512. See Dworkin, *supra* note 104, at 28–29; accord *Oregon v. Mitchell*, 400 U.S. 112, 126–27 (1970); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948); J. Ely, *supra* note 105, at 153 n.64, 161 n.*, 169; Black, *supra* note 123, at 423; Fiss, *supra* note 61, at 210–11; Lawrence, *supra* note 8, at 50–56; see also *supra* note 148 (collecting sources contending that America's racist past justifies assumption that invidious discrimination motivates virtually all governmental decisions that result in racial segregation).

513. See, e.g., R. Dworkin, *supra* note 330, at 237–38; *supra* note 148.

514. See also F. Welch & A. Light, *supra* note 6, at 4, 40 & Table 12 (in large sample of school districts in nation, 87% had mandated school desegregation plan in effect between 1968 and 1984); G. Orfield, *supra* note 98, at 108–12 (discussing role of HEW).

processes governing schools before concluding that those processes were suffused with antipluralist afflictions of sufficient magnitude and intractability to warrant reformation.

2. *Massive Resistance*. — The Court's decisions reflect a cautiously arrived at conclusion of pervasive political corruption, first, in their historical progression—a progression that reflects a Court reluctant in principle to believe, but unable on proof to blink, the worst about racism's permeation of the political processes governing southern schools.

Recall that the Court in *Brown I* refrained from issuing any remedial order at all, setting the matter down for oral argument again and allowing a year to pass before issuing the "vague" remedial order in *Brown II*.⁵¹⁵ Although requiring local school boards to make a "prompt and reasonable start toward full compliance" with the Court's order to "admit black children to public schools on a racially nondiscriminatory basis," *Brown II* invited local officials to determine for themselves how and when to comply based on their own "good faith" assessments of "the public interest."⁵¹⁶ Recent analyses of previously unavailable documents indicate, moreover, that the Court intended its "all deliberate speed" directive to "signal flexibility"—apparently on the theory that "gradualism and time" would lead naturally to the repeal of an earlier period's explicitly racist laws, thence to acceptance of, and compliance with, the Court's mandate that political processes be rid of racial prejudice.⁵¹⁷

In the decade after *Brown II*, neither acceptance nor compliance, neither "good faith" efforts to remove explicitly segregative policies nor any apparent "public interest" in doing so, surfaced anywhere in the South. Instead, explicitly and virulently racist massive resistance was the order of the day at every level of state and local government. This story, too, is oft-told.⁵¹⁸ Recalling a fragment of it, however, reminds us of the enlightening and embittering education the Supreme Court underwent after *Brown* in regard to the amplitude of southern racism, as a generation of southern black children was systematically thwarted in its efforts to secure an integrated education for itself. Consider, then, the thoughts and emotions that may have lain beneath Justice Black's precise and passionless recitation of the facts of *Griffin v.*

515. See J. Wilkinson, *supra* note 1, at 61–77.

516. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 295, 300 (1955).

517. Gewirtz, *Remedies*, *supra* note 49, at 610, 625; accord *id.* at 610 n.59 (citing authorities); Elman & Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 *Harv. L. Rev.* 817, 827–31, 842–43 (1987).

518. See, e.g., N. Bartley, *The Rise of Massive Resistance* 97–81, 237–50 (1969); A. Lewis, *Portrait of a Decade: The Second American Revolution* 32–45, 208–10 (1964); G. Orfield, *supra* note 98, at 102–50; H. Rogers & C. Bullock, *Law and Social Change: Civil Rights Laws and Their Consequences* 69–111 (1972); J. Wilkinson, *supra* note 1, at 24, 51–52, 61–127; F. Wilhoit, *The Politics of Massive Resistance* 41–70 (1973); Heaney, *supra* note 49, at 765–68.

*County School Board*⁵¹⁹ a decade and a week after *Brown I*:

This litigation began in 1951 when a group of Negro school children living in Prince Edward County, Virginia, filed a complaint . . . alleging that they had been denied admission to public schools attended by white children

[After *Brown I* and *Brown II*, e]fforts to desegregate Prince Edward County's schools met with resistance. In 1956 . . . the Virginia Constitution was amended to authorize the General Assembly and local governing bodies to appropriate funds to assist students to go . . . to nonsectarian private schools, in addition to those owned by the State or by the locality. The General Assembly met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools, and to extend state retirement benefits to teachers in newly created private schools. . . . In April 1959 the General Assembly abandoned "massive resistance" to desegregation and turned instead to what was called a "freedom of choice" program. . . . At the same time the Assembly repealed Virginia's compulsory attendance laws and instead made school attendance a matter of local option. . . . Having as early as 1956 resolved that they would not operate public schools "wherein white and colored children are taught together," the Supervisors of Prince Edward County refused to levy any school taxes for the 1959-1960 school year, explaining that they were "confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color." As a result, the county's public schools did not reopen in the fall of 1959 and have remained closed ever since A private group, the Prince Edward School Foundation, was formed to operate private schools for white children in Prince Edward County and, having built its own school plant, has been operating ever since the closing of the public schools.⁵²⁰

Thirteen years of black struggle for integrated schools—eight without integration, five without schools.

In 1964, over ninety-eight percent of the African-American children in the South still attended all-black schools, most in districts that resolutely refused even to propose removal of explicitly segregative mandates.⁵²¹ Although the Court announced in *Griffin* that "[t]he time

519. 377 U.S. 218 (1964).

520. *Id.* at 220-23. Elsewhere, the pattern recurred—often with a leaven of violence. E.g., Heaney, *supra* note 49, 765-68; see J. Wilkinson, *supra* note 1, at 45, 61, 78-84, 120-22, 97-102 (for "generation of black children in the South," *Brown I* "scarcely mattered").

521. U.S. Comm'n on Civil Rights, *Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Public Schools 4* (1976); accord J. Wilkinson, *supra* note 1,

for mere 'deliberate speed' ha[d] run out,"⁵²² and four years later in *Green* required plans that "promise[] realistically to work now,"⁵²³ it was not until the Court held twice during the 1969-1970 school year that "now" meant now⁵²⁴ that black children began attending school with white children in appreciable numbers throughout the South.⁵²⁵ Thus, although it took southern communities only a couple of years to finish desegregating their schools, it took over a decade and a half to force them to begin.

Before deciding *Green* and the 1969-1970 cases inaugurating the modern "all-out desegregation" era, therefore, the Supreme Court exhibited a *surfeit* of caution, circumspection, and patience. It did so, apparently, on the assumption that the extreme and widespread racism of a bygone era that had necessitated passage of the fourteenth amendment and brought forth Jim Crow would slowly but naturally give way, nearly a century later, to a more mature political process capable of functioning without the antipluralistic "white over black" assumption. What the Court found instead was a continuation, perhaps an intensification, of historical racism at a constituent depth, at an intergovernmental breadth, and over a decade-and-a-half, no-end-in-sight length that more than sufficiently justified concluding both that the political process governing public education was dangerously antipluralistic to the core and that reparative efforts should give way to reconstructive ones, assuming a viable reconstructive remedy could be found.⁵²⁶

The scholarly literature has tended to treat the impact of Massive

at 65 (as of 1962, "not a single Negro attended white schools or colleges in Mississippi, Alabama, or South Carolina").

522. *Griffin*, 377 U.S. at 234. The Court rued the slow pace of compliance in, e.g., *Bradley v. School Bd.*, 382 U.S. 103, 105 (1965) (per curiam); *Goss v. Board of Educ.*, 373 U.S. 683, 689 (1963).

523. *Green v. County School Bd.*, 391 U.S. 430, 439 (1968).

524. *Carter v. West Feliciana Parish School Bd.*, 396 U.S. 290, 291 (1970); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

525. See *supra* note 5. HEW threats to cut off federal funds under the Civil Rights Act of 1964 prompted large numbers of southern districts to begin desegregating in the mid-1960s and to finish doing so in the early 1970s. See G. Orfield, *supra* note 98, at 108-18. Where something called "desegregation" occurred prior to *Green*, it generally took the form of "freedom-of-choice" plans under which the first few African-American children to exercise the option to transfer to previously all-white schools were met with more or less officially sanctioned retaliation and violence, and no whites invoked the option to transfer to previously all-black schools. See, e.g., *Monroe v. Board of Comm'rs*, 391 U.S. 450, 457 (1968); *Raney v. Board of Educ.*, 391 U.S. 443, 446 (1968); *Green*, 391 U.S. at 441-42; U.S. Comm'n on Civil Rights, *Southeru School Desegregation, 1966-1967*, at 45-69, 88 (1967); Gewirtz, Choice, *supra* note 49, at 735-54; see also J. Wilkinson, *supra* note 1, at 78 (four stages of desegregation: "absolute defiance," 1955-1959; "token compliance," 1959-1964; "modest integration," 1964-1968; "massive integration," 1968-present).

526. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13-14 (1971) ("[d]eliberate resistance" part of justification for "systemwide"-violation finding and "systemwide"-remedy order).

Resistance on the Supreme Court's developing desegregation jurisprudence as an "embarrassment"—likening the Court's behavior to an intimidated parent's fearful response to a persistently ill-behaved child.⁵²⁷ In my view, however, the Massive Resistance era served a critical, if disheartening, function. It confirmed what a dispassionate reading of the nation's history already suggested, but what a cautious Court would not accept by presumption: that the infection of the political process in the South by the racist opinion was wide, deep, and long; that racially demeaning segregation represented neither the dead hand of Jim Crow nor simply the demagoguery of a few retrograde politicians but the considered and heartfelt choice of recurring majorities of the region's white citizenry; that, in *Green's* most famous phrase, antipluralist politics permeated the political system's "root and branch" and accordingly required root-and-branch reconstruction.⁵²⁸

3. *System-Wide, System-Deep, and System-Long Violations.* — In the 1970s, the Court's attention increasingly was diverted from the rural South, as in *Griffin* and *Green*, to urban areas in the South and especially the North and West, as in *Swann*, *Keyes*, *Milliken*, *Dayton*, and *Columbus*. By now, the Court not only had the nation's unrelentingly racist history to guide its interpretive judgment about the depth, breadth, and length of racism's contamination of state and local political processes but also overwhelming proof that the still visible symptoms of that history were not truly vestigial, to use another of the Court's famous desegregation metaphors, but rather were sigus of a festering root and branch malignancy. Moreover, as early as *Brown I* the Court had good reason to suspect that the racist opinion infected local and state political systems throughout the country: The *Brown* defendants filed a state-by-state survey revealing explicitly segregative legislation in the past and often the present of virtually every one of the forty-eight States;⁵²⁹ the consolidated cases in *Brown* presented the question of the

527. J. Wilkinson, *supra* note 1, at 65, 100–01; accord Freeman, *supra* note 98, at 1081; see, e.g., R. Dworkin, *supra* note 52, at 391; Bell, *supra* note 8, at 100; Black, *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 22 (1970); Carter, *The Warren Court and Desegregation*, 67 Mich. L. Rev. 237, 246 (1968); Yudof, *supra* note 61, at 456.

528. *Green*, 391 U.S. at 437–38 (school boards operating dual systems have "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"). Although often cited Correctively, *Green's* "root and branch" metaphor speaks not to the effects but to the process or "system" of discrimination.

529. See *Segregation and the Fourteenth Amendment in the States: A Survey of State Segregation Laws, 1865–1953*, Prepared for the Supreme Court in *Brown v. Board of Education* (B. Reams, Jr. & P. Wilson eds. 1975); see also *Beckett v. School Bd.*, 308 F. Supp. 1274, 1311–15 (E.D. Va. 1969) (quoted in *Keyes v. School Dist. No. 1*, 413 U.S. 189, 228 n.12 (1973) (Powell J., concurring in part and dissenting in part)) ("Only as to the states of Maine, New Hampshire, Vermont, Washington, Nevada, and Hawaii does it appear from this nonexhaustive research that no discriminatory laws appeared on the books at one time or another.").

legality of segregation in Kansas and Delaware as well as Virginia and South Carolina;⁵³⁰ and the *Brown I* decision itself noted that the "separate but equal schools" doctrine originated in an 1850 Massachusetts Supreme Judicial Court decision, and pointedly commented that segregation "persisted" in the North and "has long been a nationwide problem, not merely one of sectional concern."⁵³¹

These suspicions were confirmed by the early 1970s, given the by-then conclusive historical treatment of segregation's invention in and permeation of the North before it traveled South,⁵³² the success of HEW and private plaintiffs in demonstrating de jure segregation in the North,⁵³³ and other data showing, in Justice Powell's words, that the "history of state-imposed segregation is . . . widespread in our country" and makes it "probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at some time been supported or maintained by government action."⁵³⁴ As Justice Powell asked: "If Negro and white parents in Mississippi are required to bus their children . . . [because] of past de jure segregation . . . , should not the same reasoning apply in Gary, Indiana, where no more than five years before *Brown* the same practice existed?"⁵³⁵

Nonetheless, despite the importunings in *Keyes* of the plaintiffs and amici curiae and of Justices Powell and Douglas to recognize the *fact* of segregation "wherever occurring" as sufficient evidence of racist contamination of local and state political processes, a majority of the Court once again took a more cautious approach.⁵³⁶ The *Keyes* Court limited the availability of "all-out desegregation" to cases involving proof of a "deliberate racial segregation policy" with respect to a sufficiently "substantial portion of the district" to "constitute[] the entire . . . school system a dual . . . system."⁵³⁷ When that finding is made, the Court continued, "as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to

530. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 486-87 (1954).

531. *Id.* at 491 n.6 (discussing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 200 (1849)); accord *Civil Rights Cases*, 109 U.S. 3, 4-5 (1883) (four of five racial discrimination cases arose outside South); L. Litwack, *North of Slavery* 97-103, 114-23, 132-49 (1961); Dimond, *supra* note 123, at 54-56.

532. See C. Woodward, *supra* note 62, at 17-21.

533. See sources cited in Dimond, *supra* note 123, at 11-14.

534. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 228 & n.12 (1973) (Powell, J., concurring in part and dissenting in part).

535. *Id.* at 228-29 (quoting Goodman, *supra* note 104, at 297); accord *id.* at 216 (Douglas, J., concurring); sources cited *supra* note 148.

536. See *supra* note 148. More particularly, although the Court did not set a standard so accusatory that America's racist past could not satisfy it (assuming such a standard exists), the Court did insist upon an extension of the accusation to the present—and to citizens as well as representatives—before proceeding with a remedy as muscular as all-out desegregation.

537. *Keyes*, 413 U.S. at 214; accord, e.g., *id.* at 203, 204; *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 457-60 & n.7, 465-68 & n.15 (1979).

a racially nondiscriminatory school system.'"⁵³⁸

In *Keyes*, as in *Green*, therefore, the emphasis lies squarely on the existence of a racially contaminated political "system" and not, for example, on one or another of the system's individually identifiable effects. Moreover, *Griffin's* and *Green's* acknowledgment of the politically express character and the historic and post-*Brown* resilience of the antipluralist, processual infection is mirrored in *Keyes's* requirements—each treated in a subsection that follows—of (1) "deliberate" segregation, that is (2) sufficient in its "substantial" geographic breadth and its temporal length to qualify as (3) an antipluralist "policy" that contaminates "the entire . . . system" defined (4) not simply by the officials who carry out that policy but also by a citizenry that persistently and perennially demands it. In sum, embedded in *Keyes's* requirement of proof of deeply processual or systemic—in Justice Brennan's phrase "system-wide"—discrimination as a predicate for "all-out desegregation"⁵³⁹ is an insistence on case-specific proof of the first two prerequisites to a properly cautious decision to reform rather than simply repair the political process.⁵⁴⁰

a. *Systemic Intent*. — First, consider segregative intent, a requirement that the Court adopted as a prerequisite to school desegregation in *Keyes* a few years before deciding that it applied in other fourteenth amendment contexts as well.⁵⁴¹ Although, as discussed above, an "equal respect and concern" notion of equal protection naturally and justifiably relies on an intent test,⁵⁴² that test poses special demands in school desegregation cases—principally, the difficulty of proving intent, not when a specific individual makes a single political decision respecting a discrete event, but rather when a multimember, multilevel bureaucracy makes a series of decisions over the course of several decades with regard to scores of schools, hundreds of teachers, and thousands of children.⁵⁴³ Although a number of commentators urged the Court to ameliorate these difficulties by allowing judges to presume intent from the fact, foreseeability, or avoidability of an action's segregative impact,⁵⁴⁴ the Court rejected that view in the mid-1970s by sum-

538. *Keyes*, 413 U.S. at 203 (quoting *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)).

539. *Id.* at 208, 214.

540. See *supra* text following note 510 (dangerous and persistent political malfunction).

541. Compare *Keyes*, 413 U.S. at 206 (requiring purposive discrimination in school desegregation context) with *Washington v. Davis*, 426 U.S. 229, 239 (1976) (announcing new rule requiring purposive discrimination in all race-based equal protection contexts).

542. See *supra* notes 466–483 and accompanying text.

543. See, e.g., *Keyes*, 413 U.S. at 198–200 & n.10, 215; *United States v. School Dist.*, 521 F.2d 530, 536 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Hart v. Community School Bd.*, 512 F.2d 37, 50 (2d Cir. 1975); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 *Yale L.J.* 111, 119–21 (1983); Note, Reading, *supra* note 123, at 321–22.

544. See, e.g., *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 421

marily vacating two lower court desegregation decisions that presumed intent from "foreseeable effects."⁵⁴⁵ Henceforth, intent had to be proved from scratch and not with the aid of ready-made evidentiary shortcuts.

These moves convinced commentators on the left that the Court seized upon the intent requirement as a more or less bad faith means of shutting down desegregation at the historical and geographical point where the interests of blacks in extending the remedy diverged from those of middle-class whites newly threatened by it.⁵⁴⁶ Commentators on the right agreed that the intent test lowered the Court's violation-identifying sights, but tried to rationalize the adjustment on principled, private-law, grounds.⁵⁴⁷ As I have shown, neither view explains the Court's remedially robust desegregation jurisprudence.⁵⁴⁸ Reconstructive theory, by contrast, gives the requirement of "reading the mind of the school board"⁵⁴⁹ a simultaneously less sinister, less parsimonious, and more explanatory public-law aspect: Although the "systemic intent" requirement manifestly presents a high hurdle for plaintiffs to surmount in school desegregation situations, it does so in order to justify a confident conclusion when the hurdle is cleared that the racist opinion has intervened not simply in the isolated deliberations of an occasional public official but throughout the political system at myriad points and at its deepest constituent level.⁵⁵⁰

Analyzing the "segregative intent" requirement this way clarifies the requirement's application. What courts should be looking for is not, or not simply, some specific official's race-tainted subjective state of mind. Rather, they should be looking for sufficiently widespread indicia of the racist opinion's injection into the political process at the deepest constituent level to warrant an interpretive conclusion that racism has corrupted the political process governing the schools root and

(1977) (Stevens, J., concurring); Fiss, Charlotte, *supra* note 63, at 698; Note, Reading, *supra* note 123, at 338 n.95 (citing authority).

545. See cases cited *supra* note 144.

546. See, e.g., Bell, *supra* note 8, at 98; Freeman, *supra* note 98, at 1069-71; Karst, *supra* note 255, at 1163-65; Kennedy, *supra* note 255, at 1418-19; Minow, *supra* note 179, at 84.

547. See sources cited *supra* note 288.

548. See *supra* note 139; *supra* notes 141-142, 231-248 and accompanying text.

549. Note, Reading, *supra* note 123, at 317.

550. A concern for the depth and breadth of the points at which the racist opinion has entered the political process explains the "objective indicia" of intent on which the desegregation cases have relied, including, for example, a history of racism in the community; the segregative result's foreseeability and visibility to the public; deviations from longstanding, hence probably publicly desired, procedures or policies when racially segregative actions are undertaken; rejection of less segregative alternatives that but for segregative concerns would have been more attractive to constituents; racist remarks by decision makers during political campaigns; and the conformity of segregative political decisions to the expressly racial preferences of members of the constituency. See sources discussed *supra* notes 426, 483 and accompanying text.

branch.⁵⁵¹ The Supreme Court, thus, has not used the so-called "objective" indicia of "intent" to reveal the racially tainted firing of a given official's (or agency's) synapses but rather to permit the evaluative judgment that the political system, at the constituent level, is incapable of functioning in a properly pluralistic manner.

b. *Systemwide*. — *Keyes's* process-focused "segregative intent" standard is reinforced by the decision's requirement of proof that whatever racial discrimination entered the political process have done so on a "systemwide" scale.⁵⁵² To meet this "systemwide" requirement, the Court has looked for corrupted deliberations that affect not simply the constituents whose children attend one school but those whose children attend many schools;⁵⁵³ not simply assignment policies but siting, construction, transportation, and special education decisions;⁵⁵⁴ not simply students but teachers and administrators;⁵⁵⁵ and not simply educational demographics but "thicker" and more permanent housing patterns.⁵⁵⁶ In addition, the Court has looked for corrupted decisions not simply during a single school board's tenure but during numerous administrations.⁵⁵⁷ What the "systemwide discrimination" requirement entails, therefore, is positive, case-specific

551. The question also might be posed as follows: Has a given constituency's political process governing schools produced such a long, continuous, and public series of decisions disadvantaging blacks that the process conveys the interpretation that blacks are less worthy of respect than other persons. See *supra* notes 474-477 and accompanying text.

552. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203 (1973).

553. E.g., *id.* at 198-99 & n.10 (discrimination affecting 8 schools, serving 38% of the district's African-American enrollment).

554. *Id.* at 201-02.

555. *Id.* at 201-02, 213-14.

556. *Id.* at 198-99 & n.10, 202-03, 213-14 (school policies with "reciprocal effect on the racial composition of residential neighborhoods"). This constituency-focused analysis helps explain the intuitively reasonable but doctrinally baffling reliance of some desegregation decisions on racially discriminatory actions that segregated the schools but were taken by officials who were not school officials or parties to the lawsuit and who were not required to participate in the remedy. See, e.g., *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 755-56 (1974) (Stewart, J., concurring); *Adams v. United States*, 620 F.2d 1277, 1291 & n.21, 1294 n.27 (8th Cir.) (en banc), cert. denied, 449 U.S. 826 (1980); *Reed v. Rhodes*, 422 F. Supp. 708, 789 (N.D. Ohio 1976), aff'd in part and remanded, 607 F.2d 714 (6th Cir. 1979), cert. denied, 445 U.S. 935 (1980); *Evans v. Buchanan*, 393 F. Supp. 428, 434-38 (D. Del.) (three-judge panel), aff'd mem., 423 U.S. 963 (1975); *Hart v. Community School Bd.*, 383 F. Supp. 699, 707-26 (E.D.N.Y.), appeal dismissed, 497 F.2d 1027 (2d Cir. 1974); *Lawrence*, *supra* note 8, at 57-59; Note, *supra* note 254, at 340; *infra* note 857. Once it is clear that the violation focuses not on school officials but on the political constituency interested in how the schools are governed, it makes sense to examine all the officials and agencies through whom that constituency might work towards racist ends. See *infra* notes 862-866 and accompanying text.

557. See, e.g., *Keyes*, 413 U.S. at 198-99, 200, 210-11; accord *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 529-41 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455-58 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 7 (1971).

proof⁵⁵⁸ of what Professor Dworkin, for example, would simply presume “based on our knowledge of our community, and a more general sense of human nature”⁵⁵⁹—namely, that the relevant political constituency’s infusion of the process with corrosive racial prejudice is widespread and pervasive.⁵⁶⁰

It is just this kind of interpretive judgment about the depth, breadth, and length of the racist corruption of the political system that Judge James B. McMillan, the trial judge in *Swann*, described when he characterized his opinion in that case as giving “a full picture of how urban segregation had come to pass and was still being maintained by the most powerful of human forces—governmental and otherwise.”⁵⁶¹ What is called for by the “objective intent” and “systemwide violation” requirements, then, is proof of corruption of the pluralistic political machinery sufficient in intensity, depth, breadth, and length to implicate “the state” in its republican entirety and to meet both the first (intense harm) and second (chronic malfunctioning) prerequisites for a systemically reformative remedy.

Will we find this magnitude and density of racism in the political processes that administer schools in the last decade of the twentieth century? I hope not. But the evidence we have is not hopeful considering racism’s durability over the 400 years of white rule on this continent; its rampancy and obstinacy in the 1950s and 1960s; its frequency in school desegregation settings, among others, in the 1970s and 1980s; its visibility in contemporary politics, as well as in public opinion and other social scientific soundings; and, most ominous of all, its in-

558. See J. Wilkinson, *supra* note 1, at 199 (“systemwide violation” requirement is “tedious, expensive,[] protracted,” “involving school board minutes, attendance rosters, old newspapers and city maps”).

559. Dworkin, *supra* note 104, at 29.

560. R. Dworkin, *supra* note 52, at 237. The *Keyes* requirements transform judicial opinions from the common law judge’s short story analyzing an individual defendant’s discretely tortious actions and psychology to the public-law judge’s novel sociologically “dismantling” the entire social and political structure in which public schools are embedded. See, e.g., *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289, 1314–27 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 584 F. Supp. 328, 329–56 (E.D. Ark. 1984), *aff’d in relevant part*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986); *Reed v. Rhodes*, 422 F. Supp. 708, 711–96 (N.D. Ohio 1976), *aff’d in part and remanded*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980), *additional findings*, 500 F. Supp. 404, 407–23 (N.D. Ohio 1980), *aff’d*, 662 F.2d 1219 (6th Cir. 1981); *Morgan v. Hennigan*, 379 F. Supp. 410, 482–83 (D. Mass.), *aff’d sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). See generally Dimond, *supra* note 123, at 20–32 (cataloguing myriad acts of commission and omission on which courts have relied to find state-enforced segregation).

561. McMillan, *Social Science and the District Court: The Observations of a Journeyman Trial Judge*, 39 *Law & Contemp. Probs.* 157, 162 (1975); see also Black, *supra* note 123, at 426 (quoted *infra* text accompanying note 784).

crease and violent cast in recent years.⁵⁶²

Another aspect of *Keyes* deserves mention here. Further illustrating the Court's cautious approach to processually reconstructive remedies is the threefold opportunity it affords defendants to exonerate themselves even after plaintiffs prove systemwide discrimination. Defendants may avoid reformatory relief by proving either (1) that the various indicia of systemic racial corruption of the political process do not, in fact, bespeak "a policy to create or maintain segregation;" (2) that they are discharging or have discharged their "affirmative duty 'to effectuate a transition to a racially non-discriminatory . . . system;'" or (3) that "a lesser degree of segregated schooling would not have resulted" had the Board acted differently.⁵⁶³

The first and to some extent the last of these rebuttal opportunities go to reconstructive predicate number one—intense systemic harm. More interestingly, all three rebuttal opportunities relate directly to predicate number two—the intractability or irreparability requirement. Separately or together, the three rebuttal opportunities enable defendants to show that, notwithstanding occasional or historical antiegalitarian lapses, they have succeeded in repairing the pluralistic political process so that racism no longer pervasively intervenes and that whatever segregation-in-fact results is the "natural" consequence of a properly functioning system.⁵⁶⁴

c. *The Presumption Problem.* — If we think of the various adjudicative requirements in *Keyes* as having been designed to reveal a pervasively and intractably "broke" hence severely harmed and harmful political process, then we solve two of the problems that have given the five theories discussed earlier the most trouble. The first problem is the seriousness, and if taken seriously the empirical uncertainty, of the so-called continuing-effect (*Swann*) and expanding-effect (*Keyes*) presumptions. I *do* take these presumptions seriously, thereby avoiding the Equal Educational Opportunity, Integration, Prohibition, and Prophylaxis theories' rejection of or inability to account for the presumptions' recurrence and central place in the desegregation decisions.⁵⁶⁵ But, by reorienting those presumptions, I also avoid the debilitating factual questions that so infuse the Correction theory's understanding of the devices.⁵⁶⁶

Recall that the Correction theory relies on the existence of official discrimination at Time (or in Area) A and of racial separation in schools or housing at Times (or in Areas) A and B as the basis for presuming

562. See *supra* notes 258, 455; *supra* notes 62, 439–445, 452–457, 515–528 and accompanying texts.

563. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203, 210–11, 214 (1973) (quoting *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)).

564. *Id.* at 203.

565. See *supra* notes 92, 143–148 and accompanying text.

566. See *supra* notes 237–248 and accompanying text.

that (1) the official discrimination at Time (or in Area) A actually caused the racial separation existing at that Time (or in that Area), and (2) that either the official discrimination at Time (or in Area) A or its presumed effect—i.e., the racial separation existing at that Time (or in that Area)—actually caused the racial separation existing at Time (or in Area) B.⁵⁶⁷ The Correctivist, that is, must defend the *Swann* and *Keyes* devices on the basis of three not obviously reasonable assumptions: that proof of one of the two traditional elements of compensatory tort claims (breach of the duty of fairness) establishes the other, qualitatively different element (causation of harm);⁵⁶⁸ that official discrimination—only one of a number of potential causes of the racial separation that pervades the nation⁵⁶⁹—is in fact the cause of the racial separation established in any and all school desegregation cases; and that, in those cases, official discrimination caused not only the racial separation existing at the same time and in the same place as the discrimination but also the separation existing later and farther afield.⁵⁷⁰

In place of this unsatisfactorily long, asymmetrical, and empirically dubious, discrimination/segregative-effect/continuing-segregative-effect chain of presumptive reasoning, Reformatory theory deploys a shorter, more symmetrical, and less empirically doubtful device. Reformatively understood, the *Swann* presumption says: If it is shown that the racist opinion saturated the political system stem to stern at Time A, and if we observe that same system generating outcomes at Time B that continue to disadvantage African-Americans, and if the official actors in that process cannot produce evidence that they or others undertook efforts to cleanse the process in between Times, then we may assume that the process has continued during the period to be antipluralistic and corrupt. The *Keyes* presumption is even easier to explain: Once it has been shown that the racist opinion infused the political system when it separated the races in Area A, then we may presume, if we observe that same system making similarly racially separative decisions at the same time in Area B, that the system's actions in Area B are similarly tainted by the racist opinion.

Put less formally, this discrimination/discrimination version of the presumptions holds that it is reasonable to assume, absent contrary proof, that a state or local political system that disadvantaged blacks at

567. See Gewirtz, Choice, *supra* note 49, at 786; *supra* notes 237–242 and accompanying text.

568. See *supra* notes 201–202 and accompanying text.

569. Among the other potentially important causes of racial separation are personal preferences, "chain migration" (the process by which people moving from one place to another locate in close proximity to relatives, friends, or persons of like background who previously made a similar move), racially variable economic status, geographically variable housing costs and employment opportunities, and private discrimination. See *supra* notes 233, 258 and accompanying text.

570. See generally *supra* notes 237, 242 and accompanying text (questioning reasonableness of these assumptions).

Time A (or in Area A) as the result of a deep, broad, longstanding, and politically realized conviction that blacks are less worthy than whites, and that has continued disadvantaging blacks until Time B (or has disadvantaged them as well in Area B), undertook the latter action in the same antipluralistic spirit as the former. If the white majority was pervasively disposed to use the political machinery to discriminate at Time A or in Area A, why should we doubt its disposition to use it the same way at Time B or in Area B when, for all we can tell and for all the majority's representatives can show, the results of both sets of actions and the political process generating those results are the same?

Now, moreover, unlike in Corrective theorizing, *both* traditional justifications for evidentiary presumptions fall into place. First, by drawing upon standard, uncontroversial indicia of illicit intent—for instance, on an historic pattern of racially tainted political acts the effects of which, inexplicably, are reproduced by the same system's later (or geographically separate) action—the, in any event shorter, more symmetrical, and more intuitively satisfying discrimination-now/discrimination-later(elsewhere) chain of presumptive reasoning seems well suited to “contribute to determination of the truth.”⁵⁷¹ This conclusion is strengthened by the devices' allocation to the system's own representatives of the rebuttal responsibility to show that the system is free of influential racist opinions. In that way, the party with the best access to the truth is given the burden of proof.⁵⁷² Likewise, by first recognizing that the constituency shown to be responsible for infusing the political system with influential antipluralistic discourse is the “wrongdoer”—and only then burdening that constituency with the presumptions' risk of error—the present analysis more clearly demonstrates how the presumptions achieve the “preferred allocation of error costs.”⁵⁷³

d. *The “Third-Party Nonviolateur” Problem.* — The immediately preceding point also helps explain how Reformatory theory avoids the moral problem of exposing assertedly “innocent” white families—so

571. Gewirtz, Choice, *supra* note 49, at 786; cf. *supra* note 247 (Corrective theory's inability to take advantage of the truth-determination rationale that typically justifies presumptions). By contrast to Corrective theory's discrimination/effect/continuing-effect chain of reasoning, which curiously insists upon heroic proof of intentional discrimination but virtually no proof of the distinct causation requirements, the interpretation offered here makes the “controversial” presumptions close to mundane: The evidentiary devices simply allow the presumptive extension of the temporal and spatial margins of a harmful condition (racism's intervention in a given political process), as to which heroic proof already has been adduced.

572. See Gewirtz, Choice, *supra* note 49, at 786 n.187.

573. *Id.* at 786; accord *supra* note 247. Although the Court has not expressly applied the presumptions outside the school desegregation area, its occasional willingness to infer current from prior discrimination in nonschool cases seems to depend upon the same pervasive-prior-discrimination trigger that in my view activates the presumptions in the school cases. E.g., *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); cases compared *supra* notes 478–479 and discussed *infra* notes 821–826 and accompanying text.

called “third-party nonviolators”—both to the risk of the presumptions’ “error costs” and to inclusion in what is to them an unwanted and potentially costly remedy. First, Reformatory theory explains why desegregation—assuming, as I show below, it reforms malfunctioning political systems—is *not* generally harmful to the citizens and children affected by it.⁵⁷⁴ For by restoring, or for the first time approximating, a civil society in which all are presumed equal and in which distributive explanations of the “I am better than you” sort are suppressed, *we all* may more securely pursue our distinctive visions of the good.

Once a “systemwide violation” in the sense explained here is established, moreover, the “third-party nonviolation” concept becomes tenuous indeed. Once, that is, the entire political system down to its

574. Citizens who believe that African-Americans do not deserve equal concern will continue to consider themselves harmed. That kind of harm, however, does not count, in my Reconstructive estimation. See *infra* notes 659–660 and accompanying text. As for other potential harms: (1) Researchers have produced no credible evidence that school integration has a harmful effect on white students’ academic achievement, self-esteem, interracial attitudes, access to higher education, or job prospects. See *infra* notes 664–666, 683–694 and accompanying text. (2) Busing is safer than walking to school and has virtually no attitudinal or academic effects on students. See sources cited Liebman, *supra* note 99, at 364 n.68. On average, busing adds only a few minutes to the time students spend each day getting to and from school and only a 2% or so increase in desegregating districts’ transportation budgets. See *id.* Indeed, apart from desegregation, the Court’s principal contact with busing has been its adjudication of parents’ claims that the state constitutionally must or at least may bus their children to school. See, e.g., *Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481, 2485–86 (1988) (rural children demanding to be bused to school free of charge); *Everson v. Board of Educ.*, 330 U.S. 1, 3–5 (1947) (parochial school children seeking to preserve right to be bused to school at state expense); see also M. Walzer, *supra* note 52, at 224 (busing has never been controversial; only busing to achieve integration is controversial); J. Wilkinson, *supra* note 1, at 134–36 (similar); Rothman, ‘American Icon’: Educators Celebrate the Yellow School Bus’s 50th Birthday, *Educ. Week*, Apr. 19, 1989, at 5, col. 5. Nor do the amount and distance of busing have much effect on the amount of white flight different desegregation plans cause. See *infra* note 672 and accompanying text. (3) “[A] school’s being under court order to desegregate is associated with only a slight increase in the amount of student violence” in the first two years of implementation; “as time goes on” and “larger numbers of students are bused to achieve racial balance, the desegregation process ceases to be a factor” contributing to violence. I Nat’l Inst. of Educ., U.S. Dep’t of Health, Educ. & Welfare, *Violent Schools-Safe Schools: The Safe School Study Report to the Congress* 132 (1978). (4) Desegregation increases white loss from school districts in the year or two immediately before and after implementation. When certain kinds of plans are used, however, desegregation thereafter may reduce the rate of white loss, resulting in a net gain in white students after some years. See *infra* notes 669–673 and accompanying text. (5) Parental fears about their children’s physical and academic well-being do accompany the initial implementation stage but evaporate over time and eventually give way to surprisingly high rates of satisfaction with desegregation. See *infra* notes 667–668 and accompanying text. (6) As members of the Court have noted, desegregation merely substitutes one mandatory school assignment for another, hence has far less coercive and redistributive impact on whites (“innocent” or not) than, for example, the withdrawal of seniority rights, withholding of contracts, denial of admission, and other “race-conscious” remedies. See cases discussed in Liebman, *supra* note 99 at 365–66 & nn.72–74.

constituent core is understood as being tainted by the racist opinion, we may not properly assume that its white-citizen constituency, or most of its members, are in fact innocent. Moreover, once that constituency's representatives fail to show in rebuttal that at least some aspects of the status quo are untainted by antipluralistic distributive decision making—once, that is, the defendants or white third-party intervenors fail to show how explanations of the “you and I are equally worthy” variety can explain the disadvantages visited on black Americans by the political system—there is much reason to believe and little reason to doubt that persons threatened by changes in the status quo are not innocent. At the very least, we then will have good reason to believe that *most* of the affected constituency are neither innocent nor nonviolators.⁵⁷⁵

Finally, the constituency's pervasive participation in the violation, the violation's length and strength, and its offense against the obligations that hold the polity together suggest the kinds of conditions under which public-law infractions become those of “the community considered as a moral agent in its own right.”⁵⁷⁶ Such infractions in turn suggest the kinds of conditions under which citizens do and ought to feel some responsibility even for public actions they opposed or that preceded their joining the state.⁵⁷⁷

4. *Broke Enough to Fix*. — Following the plaintiffs' satisfaction of the system-wide-segregation requirement of *Keyes*, these things are clear: (1) The political process has succumbed to and acted upon the racist opinion not once but many times; not in one neighborhood but all over; not in a single domain of political concern but throughout the agencies of government; and not simply via representatives but at the instance of the entire, uneconomized, republican “state.” (2) Despite an “affirmative” legal obligation to do so, the participants in and opera-

575. I say “most,” recognizing the “innocence” claims of families recently arrived in the district. But see *infra* notes 576–577 and accompanying text. Those families do not present a major problem for Reconstructive theory, however, given their small numbers, their almost certain status as beneficiaries of an array of schools-specific political decisions that their predecessor-constituents incited, the benefits to them of a pluralistically reconstructed political system, and the theory's departure from any private-law commitment to perfect congruence between burdened wrongdoer and benefited victim in favor of a public-law demand for congruence between the damaged political machinery and the politically reconstructive remedy. See *infra* Parts IV.C, V.A. White children might claim innocence on a different ground, namely, that they did not vote or otherwise incite the political process. As the paradigmatic case of “virtually represented” persons, however, particularly in school matters, white children are implicated in the violation: Their putative interests fueled the misfiring of the political process. See *infra* notes 599–607 and accompanying text; see also *supra* note 574; *infra* notes 664–668, 683–694 and accompanying text (desegregation benefits but has no known harmful effects on white children).

576. Kahn, *supra* note 105, at 71 (discussing R. Dworkin, *supra* note 52, at 168–75); accord *supra* note 437 and accompanying text.

577. See R. Dworkin, *supra* note 52, at 172–73.

tors of the corrupted political system have not themselves reconditioned, restored, or even adjusted it. The system is both broke and broke enough to require construction or formulation of a new one.⁵⁷⁸

C. *Is There A Workable Redesign?*

We come then to the third and last prerequisite to a judicial decision to reconstruct the system—the requirement of an alternative design that averts or eliminates enough of the pre-existing corruption to justify the design's transition and excess operating costs.

1. *Remedial Lacunae*. — Although there is no dearth of theorizing on the equal protection *problem*, there is precious little theorizing on equal protection *solutions*, at least by process-focused theorists addressing post-constitution-making restorative steps. This fact has led outcome-oriented scholars to claim that, even when process-oriented theory identifies some injustice by the political process that must be corrected, it yields no “basis for specifying what the corrected process would look like.”⁵⁷⁹ Because, so the argument goes, process theories (1) cannot tolerate substantive remedial outcomes, including redistributive ones that otherwise might improve the position of the disadvantaged group in the political process, and (2) are partial to private-law corrective remedies that are capable of redressing only “isolated actions against individuals rather than . . . a societal policy against an entire group,”⁵⁸⁰ such theories inevitably suffer “a remedial lacuna” at

578. Making proof of systemwide corruption a prerequisite to the violation's broad accusation against and the remedy's all-out demands on the white majority begs the question of relief when the proof falls short of the public-law threshold. That question is not the one I set for myself here and I do not fully answer it. The bare private-law minimum is a purely Corrective remedy that requires identifiable wrongdoers to compensate identifiable victims. See *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 420 (1977) (discussed *supra* note 234); see also *supra* notes 478–479 and accompanying text (private-law approaches in employment and other putatively private-law contexts). Also probably necessary but not assuredly sufficient, see *supra* notes 265–284 and accompanying text, is the remedy towards which the middle of the Court has been groping in the affirmative action cases and at which the whole Court arrived in its non-system-wide-desegregation decision in *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977), namely, that, even absent identification of actual wrongdoers, victims of identifiable violations receive compensation for their harms via remedies that thinly but widely distribute relatively circumscribed and noncoercive burdens among innocent whites. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 727–29 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 280–81 (1986) (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980) (plurality opinion). Ultimately, this latter approach would call for reparations similar to those that the nation has promised the Japanese-American victims of its World War II internment policies. See B. Bitker, *The Case for Black Reparations* 8–29 (1973); Mydans, *Aged War Detainees Still Unpaid for Lost Freedom*, N.Y. Times, Aug. 17, 1989, at A1, col. 2. These residual remedies also are appropriate in system-wide cases to the extent that all-out desegregation leaves uncompensated any private-law harms that those remedies cure.

579. Fiss, *supra* note 67, at 131.

580. Crenshaw, *supra* note 3, at 1342.

the public-law level: "[A]ll that can be done with a violation of the [public-law] type described is to call it one and declare the [act] invalid."⁵⁸¹

Surprisingly, most process-focused theorists seem to agree that only two types of public-law remedies are available—judicial imposition of a new substantive outcome (redistributive), and a judicial order requiring the offending officials to remake the decision (prohibitory)—of which, most such theorists conclude, only the latter is appropriate.⁵⁸² Consider, for example, the remedial ruminations of a leading process-focused theorist, John Hart Ely. Professor Ely characterizes his "approach to constitutional adjudication" as

akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results it intervenes only when the 'market,' in our case the political market, is systematically malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the 'wrong' team has scored.)⁵⁸³

What is curious about this passage is that, although it neatly summarizes *when* a violation has occurred (whenever the pluralistic political process "systemically" malfunctions), it does not say—except by rejecting one obvious alternative (dictating a new substantive result)—*how* the violation is to be remedied. Nor is the referee analogy, instructive as it is on the "*when*" issue, helpful or even accurate on the "*how*" question, given that referees have a number of remedies at their disposal ranging from rinning the play over again, to penalizing the offender in some specified way, to changing the process (for example, by requir-

581. Freeman, *supra* note 98, at 1079–80; accord Crenshaw, *supra* note 3, at 1342–45; Lawrence, *supra* note 134, at 354; Parker, *supra* note 160, at 231 n.40.

582. See, e.g., J. Choper, *supra* note 216, at 25, 27 ("main" constitutional remedy "is to nullify the finished product of the lawmaking process"; in "rare" cases, court may "substitute" its own for legislature's outcome); Baker, *supra* note 364, at 1048; Brest, *supra* note 104, at 12–14 (denial of benefit based on race does not entitle victim to benefit "but only to have the decisionmaker reconsider her application under the proper criteria"); Karst, *supra* note 156, at 281. Noting the unsatisfactory nature of Redistributive and Prohibitory remedies, Professor Sandalow proposes that courts remedy equal protection violations—defined as deviations from a properly revealed national value consensus—by forbidding offending local officials to legislate in the area and requiring them to seek a national value consensus by securing congressional action. Sandalow, *supra* note 121, at 1177, 1181–82, 1186–89. This proposal has three problems. It requires courts, in order to determine if a violation occurred, to identify existing national consensuses that local legislation offends. But see J. Ely, *supra* note 105, at 63–65 (impossibility of identifying national or other public consensuses). It inexorably would thrust even such paradigmatically local decisions as school district assignment patterns into the lap of Congress. But see A. Gutmann, *supra* note 52, at 71–75, 99–101 (strong defense of local democratic control of public education). It places equal protection at the mercy of national majorities. But see authorities cited *supra* note 213 (criticizing proposals to make minority rights turn on majority views).

583. J. Ely, *supra* note 105, at 102–03.

ing the offending team to play shorthanded), to changing the outcome (as, for example, after a goaltending violation in basketball, when the unfairly denied points are added to the score of the offended-against team).

Likewise, although Professor Ely at times alludes to the possibility of truly process-focused remedies,⁵⁸⁴ at the only point where he directly confronts the question of post-constitution-making remedies, he lapses into a purely prohibitory mode: "When [a discriminatory] principle of selection has been employed, the system has malfunctioned . . . and the remedy, save only in cases of clearly nonprejudicial error, is to reject the product of the malfunctioning process and start over."⁵⁸⁵ Foul called, play goes over, leaving the offending and offended-against parties in the same undeterred and unprotected positions that we earlier saw undermine Prohibitory theory's justification and leave processual approaches vulnerable to Redistributivist attack.⁵⁸⁶

I do not find convincing the specific responses that processual theorists have made to claims that a prohibitively implemented judicial review scheme underenforces and trivializes the systemic rights and wrongs that process theory identifies.⁵⁸⁷ Neither, however, do I find convincing the Redistributivists' identification of that scheme's proces-

584. See, e.g., *id.* at 67 (if "legislatures are only imperfectly democratic," appropriate response is "to make them more democratic"); *id.* at 170 (compelled virtual-representation remedy for explicit racial classifications); *id.* at 172 (approving fourth amendment remedy of using search warrant requirement to substitute neutral magistrate's decisional process for that of unsupervised police officers).

585. *Id.* at 137; accord *id.* at 138, 157, 169.

586. See *supra* notes 262, 301-308, 579-581 and accompanying text.

587. Professor Ely has three responses to the claim that motive-centered liability tests are futile because they permit courts to validate the same offensive law after it is reenacted for ostensibly different reasons. His first answer—that officials only rarely will retrace the same action—cheats by arguing too easy a case. See J. Ely, *supra* note 105, at 138-39. For the solace the answer gives in regard to a discrete and difficult-to-disguise enactment of, for example, a poll tax (1) does not apply to black children faced with a complex neighborhood school plan that segregates and that easily may be replaced with a different complex plan that segregates only marginally less, and (2) wholly ignores the chilling effect in all cases of second-round litigation costs. See *supra* notes 301-308 and accompanying text. Second, the support Professor Ely derives from the analogy to the criminal defendant convicted by a biased jury—who is not released following judicial review but retried and probably reconvicted, J. Ely, *supra* note 105, at 139—is misplaced. The accused is not retried by the same—biased—jury but by a new and properly selected one: The offending process is not simply rerun, but replaced. Finally, although Professor Ely acknowledges that a prohibitively enforced intent test inevitably results in substantial *underenforcement* and that something "more is needed if the rights of minorities are to be adequately protected," *id.* at 145; accord *id.* at 128 n.*, 138-39, 157 n.72, the something more he offers—the ban on enactments that explicitly "classify on the basis of" race—is nothing more at all. For explicit racial discrimination went out of style with butch wax, leaving in its place persistent but covert racial discrimination against which Professor Ely's prohibitory remedies admittedly underenforce. See *id.* at 161 n.*, 169; *supra* note 457.

sual character as the source of its weakness.⁵⁸⁸ Rather, the weakness lies in the puny private-law remedies that process-oriented theorists typically deploy to redress what they acknowledge are pervasive public-law wrongs.

To be sure, processual theorists offer their specific responses to the remedial-thinness critique merely to supplement a more general response—that the post-Revolutionary and post-bellum framers designed the political process so nearly perfectly that processual maladies rarely occur.⁵⁸⁹ This response in turn prompts the Redistributivists' allegation that processual theory proceeds from a self-evidently inaccurate assumption that "a racially equitable society already exists"⁵⁹⁰—an assumption that many process-oriented theorists, myself included, are at pains to reject. Rather than deifying the framers' "perfect" but much amended creature, this section uses the framers' constitution-making insights about how to avoid the foibles of persons-as-imperfect-citizens merely to suggest post-constitution-making remedies for use when the process the framers created proves imperfect in practice. In particular, drawing upon de Tocqueville and modern feminist theory as well as the framers' constitution-making efforts, subsection two concludes that the preferred constitutional remedy is one that creates an *ethical situation* in which *external* constraints induce *empathy*. Subsection three then synthesizes modern philosophical descriptions of the preferred ethical situation, setting the stage for Part V, which shows how all-out desegregation emulates that preferred situation.

2. Notes Toward a Filled Lacuna. —

a. *External Constraints*. — Ex ante "remedies" that counter the tendency of citizens to abandon civic duty when it conflicts with self-interest or antipluralist prejudices fall into two categories: "'external check[s]'"—the "application of rewards and penalties . . . by some source other than the given individual himself"; and "'internal checks'"—the conscience (super-ego), attitudes, and basic predispositions."⁵⁹¹ The original framers are celebrated, of course, for preferring external checks and "distrust[ing]" internal ones.⁵⁹² Chief among the original framers' external checks, in addition to separated powers and federalism, are (1) frequent elections of representatives by majority

588. See supra notes 468–469, 478–483 and accompanying text.

589. E.g., J. Ely, supra note 105, at 100–01.

590. Crenshaw, supra note 3, at 1344.

591. R. Dahl, supra note 369, at 6, 18, 36, 82–83; accord *The Federalist* No. 51, at 320–22 (J. Madison) (C. Rossiter ed. 1961).

592. E.g., *The Federalist* No. 9, at 72–73 (A. Hamilton) (C. Rossiter ed. 1961); id. No. 10, at 80 (J. Madison); id. No. 48, at 308–11 (J. Madison); id. No. 51, at 320–22 (J. Madison); id. No. 57, at 350–51 (J. Madison); see J. Ely, supra note 105, at 90, 131–33, 136 n.*; Ackerman, *Discovering*, supra note 395, at 1024–31, 1048–49; Rossum, supra note 409, at 108; Sunstein, *Interest*, supra note 378, at 32–35, 40, 43–47. But see R. Dahl, supra note 369, at 18, 22, 76, 82–83, 134–37 (preferring internal checks); Rawls, supra note 343, at 1, 10–11, 23–24 (disapproving exclusive reliance on external checks).

vote, which check the tendency of rulers to tyrannize the ruled,⁵⁹³ and (2) the Madisonian "extended Republic," which limits the power of factions among the ruled to tyrannize each other by requiring each faction to join forces with others in order to achieve the required majority.⁵⁹⁴

When the latter external device failed to achieve its implied "equal protection" goal,⁵⁹⁵ particularly as to black citizens whom a persisting white majority persistently subordinated, the post-bellum framers turned to an internal check—the state's "duty" under the equal protection clause to accord equal concern and respect to all.⁵⁹⁶ As is often the case with internal constraints, however, there is good reason to doubt the clause's self-enforcing capacity. Rather, the Constitution's presumptive distrust of internal checks and the ante-bellum failure of pre-existing external checks justify the processualists' reliance upon judicial review to protect minority rights under the clause.⁵⁹⁷ More importantly for present purposes, when judicial review reveals persistent and society-wide apostasy from "equal concern" virtue, that same distrust and failure *also* justify going beyond the merely prohibitory remedies on which processual theorists have been content to rely. Instead of an injunctive reprise of the equal protection clause's thus far unavailing internal command to be virtuous, the theme of distrust supports a remedy for system-wide violations that reconstructs the offending political process and externally checks the propensity of citizens to incite corrupt, "we are better than they" decisions.⁵⁹⁸

This view sees the equal protection clause as embodying yet another economization: In normal times, the Constitution's usual preference for "hard" external constraints is suspended in favor of a "soft" internal duty of equal concern and respect; in abnormal times, however—i.e., upon proof of a system-wide default of that duty—the

593. See R. Dahl, *supra* note 369, at 13–14; J. Ely, *supra* note 105, at 77–78, 100–01.

594. E.g., R. Dahl, *supra* note 369, at 16, 18–19, 48, 51; J. Ely, *supra* note 105, at 79–80; Ackerman, *Discovering*, *supra* note 395, at 1025–31.

595. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 736–37 (1989) (Scalia, J., concurring in the judgment); J. Ely, *supra* note 105, at 80–81; Sandalow, *supra* note 121, at 1164; cf. Note, *A Madisonian Interpretation of the Equal Protection Clause*, 91 *Yale L.J.* 1403, 1429 (1982) (claiming that extended Republic largely achieved its equal protection policy).

596. See *supra* notes 419–422 and accompanying text (defining the "duty"); *supra* notes 423–425 and accompanying text (defining the "state"). The original Constitution's structural equal protection guarantee also failed because it externally constrained only the federal government, notwithstanding the framers' recognition of the susceptibility of state and local governments to majority tyranny over minorities. See *The Federalist* No. 51, at 320–22 (J. Madison) (C. Rossiter ed. 1961).

597. See sources cited *supra* note 510.

598. Outside the criminal justice area, in which repetitive appeals in multiple forums take the place of reconstructive remedies, see J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.2 (1988), the Constitution's other internal duties have proved less susceptible to system-wide default and less needful of processual remedies than the duty embedded in the equal protection clause.

courts must remedially reconstruct the political process by temporarily building in more durable, external protections against "we are better than they" reasoning.

b. *Empathy*. — What external constraint, then, should the courts use to reform lapsed citizens? To answer this question, I extract a concept of "induced empathy" from some old and new theorizing.

Among the Constitution's external antidotes to the citizenry's tendency to lapse from civic virtue is "virtual representation," or, better, *compelled* virtual representation.⁵⁹⁹ The Constitution's first privileges and immunities clause,⁶⁰⁰ for example, structurally compels in-staters to virtually represent the interests of out-of-staters by insisting that any burden the legislature places on out-of-staters also be placed on similarly situated—and *actually* represented—in-staters.⁶⁰¹ A remedial strategy of structurally compelled virtual representation is particularly suited to equal protection violations given that one theory of the clause, congenial to the theory I offer above, is that it creates an internal duty on the part of representatives virtually to represent the interests of citizens.⁶⁰² Accordingly, when a system-wide equal protection violation proves the citizenry viscerally incapable of abiding by its duty of virtual representation, a remedy that externally compels the kind of representation that the clause only internally encourages in normal times draws *ejusdem generis* support both from the virtual-representation-favoring clause itself and the *compelled*-virtual-representation-favoring Constitution as a whole.⁶⁰³

The analogy to old-fashioned virtual representation draws support from a later American fashion described in de Tocqueville's discussion

599. See J. Ely, *supra* note 105, at 82–84, 101, 170 (virtual representation links interests of persons with little political power to those with more). See generally Michelman, *supra* note 377, at 50–54 (discussing virtual representation theory). An example of uncompelled virtual representation is that of children by parents. See *supra* note 575.

600. U.S. Const., art. IV, § 2, cl. 1.

601. See J. Ely, *supra* note 105, at 83–84; see also *id.* at 97–98 & n.* (just compensation clause compels taxpayers virtually to represent condemnees); *Railway Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally"); *The Federalist* No. 57, at 352–53 (J. Madison) (C. Rossiter ed. 1961) ("as a . . . circumstance in the situation of the House of Representatives, restraining them from oppressive measures, . . . they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society").

602. See J. Ely, *supra* note 105, at 84.

603. By *compelling* virtual representation of political *participants* by their political *equals*, the remedy proposed here avoids the claim that it unpatriotically relies upon the distinct doctrine, in opposition to which we fought a Revolutionary War, of *voluntary* virtual representation of political *nonparticipants* by political *elites*. Compare *infra* Part V.A (illustrating compelled virtual representation) with Michelman, *supra* note 375, at 456–57 (criticizing pre-ante-bellum virtual representation).

of "How the Americans Combat Individualism by the Doctrine of Self-Interest Properly Understood."⁶⁰⁴ Ridiculing aristocratic myths about doing good without self-interest, de Tocqueville praised the more modest American route to virtue—the social construction of situations in which "enlightened self-love" leads persons to help one another.⁶⁰⁵ Rather than expecting virtue to radiate from within or replacing it with a fear of ex post punishment, the doctrine of self-interest properly understood prefers arrangements that induce the continuous, publicly italicized experience—and, eventually, the habit—of serving others' interests as a way of serving one's own.⁶⁰⁶ Not the invention of de Tocqueville the political philosopher, the doctrine was the discovery of de Tocqueville the social scientist. He found it at work "every day" in America: "At first it is of necessity that [Americans] attend to the public interest, afterward by choice. What had been calculation becomes instinct."⁶⁰⁷

These insights draw yet further support from newly fashioned feminist legal theory, most especially feminism's emphasis on the salutary "habit of putting myself in another person's place" and of taking the perspective of those on the bottom or margin.⁶⁰⁸ Applying this insight to the remedial problem at hand, what is needed are remedial "strategies for exposing [as merely] conceptions of reality" views that their holders treat as "natural" and for placing lapsed citizens in "the standpoint of someone who is committed to the moral relevance of contingent" others:

We need settings in which to engage in the clash of realities that breaks us out of settled and complacent meanings and creates opportunities for insight and growth. This is the special burden and opportunity for the Court: to enact and preside over the dialogue through which we remake the normative endowment that shapes current understandings.⁶⁰⁹

604. See A. de Tocqueville, *supra* note 346, at 525–27.

605. *Id.* at 525–26 (doctrine "turns private interest against itself"); accord *id.* at 510 ("ambition [to be elected to office] makes a man care for his fellows" by locating "his self-interest in forgetting about himself").

606. *Id.* at 527 (doctrine creates a "discipline"; it "does not lead the will directly to virtue [but] establishes habits which unconsciously turn it that way").

607. *Id.* at 525; accord *id.* at 512.

608. Marcus, *supra* note 367, at 42–43 (Gilligan); Matsuda, *supra* note 148, at 324–26; accord C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 24–39 (1982); Benhabib, *supra* note 367, at 155 ("take the standpoint of the 'particular other'"); Crenshaw, *supra* note 3, at 1349 & n.71, 1385–86; Minow, *supra* note 179, at 51, 62–63, 71, 74, 82 ("stop seeking to get close to the 'truth' and instead seek to get close to other people's truths"); see also J. Wilson, *supra* note 105, at 158 ("To identify, to put yourself in his shoes, is essentially to regard him as a being like yourself, whose aims and purposes are as valid as your own"); Sunstein, *supra* note 105, at 155 (citing J. Rawls, *supra* note 105, at 350) (via "political empathy," "assume the position of those who disagree"); G. Kateb, *supra* note 365, at 33 (via "receptivity," "lose oneself in appreciation and admiration or in empathy").

609. Minow, *supra* note 179, at 74, 76, 95.

Compelled virtual representation, self-interest properly understood, and induced perspectival openness intersect at the concept of empathy. What each concept calls for—following proof of a systematic breakdown in the political process and in its participants' ability to accord people different from the majority equal concern and respect—are structures and settings that make it rational for citizens to "think of themselves in the position of the class of people" whom they in the past have treated unfairly.⁶¹⁰

c. *Ethical Situation*. — The concept of structured-in empathy reveals that the dichotomy between external and internal controls need not be equated with a distinction between purely selfish and at least partly selfless behavior. Although some structural constraints—for example, separation of powers and federalism—do indeed use an official's self-aggrandizing activities to impose limits on the similarly selfish conduct of competing officials,⁶¹¹ other structural constraints—for example, compelled virtual representation—seek to induce virtuous or other-regarding behavior. This insight in turn leads me back to republican theory which, although associated with internal constraints of the "civic virtue" and "practical reason" sort, actually yields up the idea of externally imposed "'ethical situation[s]'"—as opposed to pure conscience—out of which spring the citizenry's capacity to be virtuous.⁶¹² Republican theory, that is, does not rely on citizens' natural proclivity to be good but rather on the "careful construction of special formal or ceremonial contexts designed to place the individual in the special citizen's role—to *force* that role on the individual by cultural means—on those special occasions when political, as distinguished from normally self-regarding private, action is in progress."⁶¹³ This concept of situationally enforced virtue on "special occasions" captures precisely the reformative remedial notion endorsed here.

Having discovered in the Constitution itself a preference for external structures that channel citizens' behavior in virtuous directions, having also discovered there as well as in wider theory an inclination, particularly in equal protection contexts, toward structured-in empathy, and finally, having addressed the idea of an ethical situation capable of achieving this mix of externally induced internal controls, we are now ready to state the general specifications for a reconstructive remedy. Upon finding that citizens have persistently and effectively in-

610. Karst, *supra* note 156, at 284.

611. See I. Kant, Kant on History 111–12 (L. Beck ed. 1963) (republican government "only a question of a good organization of the state, whereby the powers of each selfish inclination are so arranged in opposition that one moderates or destroys the ruinous effects of the other").

612. Michelman, *supra* note 377, at 26 (quoting Cornell, *supra* note 367, at 294).

613. Michelman, *supra* note 368, at 184 (emphasis added); accord, e.g., *id.* at 185–86 ("civic forum" in noticeably public sphere creates "consciousness of political life"); Pitkin, *supra* note 392, at 331 (polis "artificially create[s] equality of status as citizens"); *supra* notes 399–400 and accompanying text.

jected "we are better than they" opinions into the political process, the Court should endeavor to restructure that process and create new political settings in which the "we's" are impelled to assume the political standpoint of the "theys."

3. *The Preferred Ethical Situation.* — Although primarily the province of Republican thinkers at the level of practice, the ethical situation has occupied a wider range of thinkers at the level of theory. Thus, in deciding how to arrange social institutions to achieve a just distribution of rights, resources, and self-respect, political philosophers have long imagined ideal situations that to one degree or another bracket societal and genetic contingency and enable hypothetical participants to choose more or less impartially among competing social arrangements for themselves and for each other.⁶¹⁴ Because the contingencies these philosophers seek to neutralize often encompass the "normed" differences that the equal concern principle seeks to "denorm," and because some of these philosophers seek to neutralize contingencies precisely in order to permit interpersonal responsiveness and empathy, it stands to reason that their "ethical situation" thought experiments might increase the richness of the specifications generally sketched above for reconstructing corrupt political institutions so as to denorm racial differences and induce political empathy. Among modern conceptions of the preferred ethical situation, the most familiar is John Rawls's original position.⁶¹⁵

Although highly controversial when assigned other functions—not the least being its own justification and that of the principles of justice it claims to generate—Rawls's original position has considerable utility when applied to the modest, remedial task that I assign to ethical situation here. That task requires only what critics charge is the original position's sole capability—namely, to "model" (but not justify) artificial (but not spontaneously arising) social structures that foster right thinking as defined in polities already committed to liberal egalitarianism.⁶¹⁶ A remedy meeting the specifications of the original position thus commands our attention, not because it identifies an "Archimedean point of justification" whence universal principles of egalitarian justice naturally flow but only because it imposes conditions compelling empathic thinking of the sort that our legally ordained egalitarianism already de-

614. See J. Rawls, *supra* note 105, at 118–21 ("for each traditional conception of justice there exists an interpretation of the initial situation in which its principles are the preferred solution"); *id.* at 11 & n.4 (discussing social contract theory of Hobbes, Kant, Locke, and Rousseau); Dworkin, *supra* note 154, at 38.

615. See J. Rawls, *supra* note 105, at 20; see also *id.* at 15–16, 516, 518 (initial situation "central" to Rawls's whole theory and critical even if Rawls's specific principles of justice are not accepted).

616. Nagel, Rawls on Justice, *in* Reading Rawls, *supra* note 155, at 1, 14–16 (Rawls's original position models but does not justify a particular conception of justice); accord A. Gutmann, *supra* note 142, at 120, 168, 254 n.3, 267 n.94 (collecting and discussing critical articles).

mands.⁶¹⁷ The original position is heuristically useful, as well, because it posits ideal political deliberation by citizens themselves and not, as in other versions, by some more or less well disguised higher being.⁶¹⁸

Rawls's contractarian version of the ideal "initial situation"⁶¹⁹ imagines a setting that, by compelling ignorance on the part of citizen-participants about who they are and what they want, externally "forces" them to exhibit interpersonal receptivity and empathy in the process of reaching unanimous agreement on the basic principles of justice.⁶²⁰ Most particularly, upon joining the deliberations, the diverse participants in Rawls's imaginary pre-constitutional convention are enveloped in a "thick" "veil of ignorance" that renders them unaware of the class position and social status they occupy in the real world, their fortune in the distribution of natural assets and abilities, the differentiating aspects of their psychology, their particular conception of the good, and even to what society and to what generation they belong.⁶²¹ All they know is that objective and subjective contingencies exist in the world, that all persons have moral convictions of one sort or another, that all persons generally want more rather than less of certain "primary

617. A. Gutmann, *supra* note 142, at 120, 165-68; see J. Mashaw, *supra* note 105, at 194-95. Thus, even if the original position does not justify the dictates of the equal protection clause, see *infra* note 628 and accompanying text, it does provide a fitting model for equal protection remedies. See M. Sandel, *supra* note 105, at 31-32 (although not useful constructively because it assumes the existence of fallen conditions that a valid constructive theory would seek to overcome, original position does have "moral advantage" remedially because of "the repair it works on fallen conditions"). Put another way, I rely on Rawls here not as a philosopher of justice but as a technician of reparative empathy.

618. Cf. B. Ackerman, *supra* note 123, at 24-33, 57-66, 179, 233 (envisioning deliberations of baggage-less, hence positionally equalized, earthly colonizers bound via spaceship for an uninhabited planet and required—in order to allocate the planet's resources—to reach agreement by means of dialogue that the ship's all-dialogically-discerning Commander holds to a "neutrality" principle); R. Dworkin, *supra* note 330, at 227-38 (discussed *supra* notes 328-331 and accompanying text) (machine that perfectly counts citizens' preferences and in that way perfectly ascertains utility of competing proposals); J. Rawls, *supra* note 105, at 26-27, 185-87 (discussing utilitarian image of perfectly rational "impartial spectator" endowed "with ideal powers of sympathy and imagination" who "identifies with and experiences the desires of others as if [those] desires were his own"). See generally J. Rawls, *supra* note 105, at 187-90, 587 (criticizing impersonality of imagined participants in other theorists' ideal situations).

619. See J. Rawls, *supra* note 105, at 16-18, 121-22.

620. See *id.* at 12, 136-42. Rawls frequently adopts the language of compulsion, arguing, for example, that the veil of ignorance "forces" the participants "to abstract from the particulars of their plans of life" and "to take the good of others into account." *Id.* at 148, 187, 252-56, 516, 543, 584; see also Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. Phil.* 515, 520-24 (1980) (veil of ignorance and other constraints cause participants to forfeit some of their "full autonomy" in order to achieve the original position's purer "rational autonomy"—i.e., the desire and ability to make decisions as "free and equal moral persons" who are capable of devising their own distinctive visions of the good but are not in heteronomous thrall to any "particular [system of] ends").

621. Rawls, *supra* note 620, at 522-34, 549-50; accord J. Rawls, *supra* note 105, at 12, 137.

goods" (namely, income and wealth, power and authority, self-respect and esteem), and that those goods are in short supply.⁶²²

Eschewing heroic or divine internal demands of the sort the framers avoided and de Tocqueville ridiculed, Rawls insists that the initial participants be "mutually disinterested"—that they view themselves as equals entitled to press their own claims without any reason to disadvantage themselves in order to bring about greater satisfaction for any, or all, others.⁶²³ Nevertheless, the external constraint of compelled ignorance induces in the otherwise self-interested parties a surfeit of decisional risk aversion that causes each empathically to legislate from the perspective of the most oppressed person imaginable, into whose shoes each faces the prospect of being deposited after being kicked out of Independence Hall.⁶²⁴

Synthesized, Rawls's description of the preferred hypothetical position from which to legislate imagines an ethical situation that relies on innocuous, plausible, and "widely accepted" external constraints⁶²⁵ such as the veil of ignorance and mutual disinterestedness to put the participants in a position of equality. That position in turn "forces" citizens empathically "to take the good of others into account" given the possibility that each of the participants could shortly find herself translated into the position of any one of those "others."⁶²⁶ The preferred ethical situation thereby creates a "pure procedural justice" de-

622. J. Rawls, *supra* note 105, at 92–93; accord *id.* at 128, 137, 142, 206, 220, 256, 433, 544–46 (original parties know that they have moral convictions, but "they do not know [what those] convictions are"; also known are general facts about human history, politics, economic theory, social organization, and psychology). It is as if Rawls's original parties are stricken with amnesia, transported to a darkened movie theater, strapped into seats from which they cannot see themselves or anyone else, and shown a documentary on human history. By the end of the film, the participants know nothing about who they and their fellow movie-goers are but everything about who they could turn out to be once reoriented in time and place.

623. See *id.* at 14, 128–29, 144; see also *id.* at 584. The only exception to the mutual-disinterest requirement is that the original representatives know they have ties of affection to their children. *Id.* at 128, 583.

624. See J. Rawls, *supra* note 105, at 152–55 ("maximin" theory, which asserts that ignorance-veiled original participants will choose from among contingency-fraught alternatives the one with the least oppressive worst case). After reaching agreement on basic principles of justice, the Rawlsian original parties pass through two additional—constitutional and legislative—stages in which they apply the chosen principles of justice in the process of designing and imposing binding constraints on general social and political institutions, then use the basic principles of justice and basic political institutions to make specific distributional decisions. At each new stage, the veil of ignorance thins as the parties become aware first of their society's general and then of its specific time and place. The personal veil remains in place, however, until the legislative stage is completed and the participants are recalled to their respective places in society. See *id.* at 13, 195–200.

625. *Id.* at 13, 18, 521, 583–84.

626. *Id.* at 3, 130, 148, 187, 516, 543, 584; accord *supra* note 380 (original position does not *deny* but instead acknowledges and seeks to *denorm* differences by inducing persons to take seriously the points of view of others).

cision making mechanism that relies on a "correct or fair procedure," rather than on an independent criterion for the right result, to assure that the outcome, whatever it is, is also correct or fair.⁶²⁷

What Rawls's original position suggests about the preferred reformative remedy for endemic "we are better than they" political thinking is that: it should compel previously apostate citizens to check their worst antiegalitarian instincts at the door when they enter upon political deliberation; it should position them once inside so that they are situationally equal;⁶²⁸ and it should cause them while deliberating to intuit the position of the former victims of their antipluralistic defections.

Constructing an empathy-inducing ethical situation capable of bridging the remedial gap in process-oriented theory thus seems to require remedies satisfying six detailed specifications: First, the institutional setting should represent or model equality by positioning citizens equally in the decisional process.⁶²⁹ Second, the situational symmetry should be publicly announced and visible to all parties.⁶³⁰ Third, citizens should be bracketed, to the extent possible, not only from their differentiating attributes in the deliberative here and now but also from where they will be situated in the future vis-à-vis the trajectory of their allocative decisions.⁶³¹ For it is only when we cannot determine who will lose by our antiegalitarian defections that we are compelled to view the situation empathically—"from all social . . . points of view"—in order to preserve ourselves and the persons we

627. J. Rawls, *supra* note 105, at 86; accord *id.* at 120, 136, 256; Rawls, *supra* note 620, at 523. By making the "wide acceptability" justification, see *supra* text accompanying note 625, part of his basis for characterizing the original-position procedure as "fair" in the "pure procedural justice" sense, and by admitting that acceptability extends only to western democracies, Rawls's later works acknowledge that his "pure procedural justice" model is "fair" only in a culturally contingent sense and that the only outcomes among which it is "neutral" are those recognized as just in western liberal democracies. See Gutmann, *supra* note 114, at 312-14; Rawls, *supra* note 116, at 224-27; Rorty, *supra* note 115, at 18 n.12; *supra* notes 115, 374.

628. See J. Rawls, *supra* note 105, at 12, 19 ("to represent equality between human beings as moral persons, as creatures having a conception of their good"); Rawls, *supra* note 116, at 236-37 n.19 (discussing Dworkin) ("modeling the force of the natural right that individuals have to equal concern and respect in the design of political institutions that govern them").

629. See J. Rawls, *supra* note 105, at 12; Rawls, *supra* note 620, at 550. The setting not only should give all persons equal access to the dialogic podium, see J. Rawls, *supra* note 105, at 12, 118, 120, 136, but, to the extent possible, should obscure their social differences so that, politically, they resemble each other, behave similarly, and view themselves and each other independently of their own and the other's social position. See J. Rawls, *supra* note 105, at 511; Rawls, *supra* note 116, at 235-36.

630. J. Rawls, *supra* note 105, at 544-45.

631. *Id.* at 136-37; accord Gutmann, *supra* note 114, at 312 ("abstract from our particular but not our shared interests"). Even better, citizens should be blinded not to their differences but only to the differences' normative significance.

care for against the fallout from our unfair decisions.⁶³² Fourth, the situational conditions should attempt, notwithstanding the plurality of voices, to narrow areas of conflict and to emphasize those matters as to which the parties' considered judgments about just action "converge[.]"⁶³³ Fifth, the situational incentives to proper pluralist behavior should be "external."⁶³⁴ Rather than assuming that the parties automatically will adhere on demand to inner ethical motivations of an interracially altruistic or benevolent sort, the situational conditions should be such that the parties rationally *must* emulate actors having those ethical motivations even while in fact they are proceeding on the basis of their own "self-interest properly understood."⁶³⁵ Sixth and finally, is a preference for deliberative participation—for "voice" as opposed to literal or laconic "exit" as a means of expressing dissatisfaction with prior or proposed outcomes.⁶³⁶

It may seem as though I accord the philosophers' ethical situations a degree of concreteness and real-world relevance that the idealizations neither contemplate nor deserve. Even the philosophers, however, after acknowledging the "purely hypothetical" nature of their ideal situations, insist that "we *can* . . . simulate the reflections" of the ideal participants: "At any time we can enter the [veil of ignorance], so to speak, simply . . . by arguing for principles of justice in accordance with these restrictions."⁶³⁷ Still, when we try to simulate the ideal situation,

632. J. Rawls, *supra* note 105, at 148, 587; accord *supra* note 623. If achieved, a positionally enforced inability surgically to guide one's advantaging and disadvantaging missiles should (1) make racist or other political expressions of the "I am better than you, I deserve more than you" sort irrational as well as immoral, because "I" and "you" are for the nonce indistinguishable, see J. Rawls, *supra* note 105, at 12, 18, 131, 139, 149; and (2) make the parties leery of decisions that are likely to have *unevenly distributed* fallout ranging from good to very bad. See *supra* note 624.

633. See J. Rawls, *supra* note 105, at 517; Rawls, *supra* note 620, at 541–42; Rawls, *supra* note 343, at 18–23; see also Liebman, *supra* note 99, at 363 (discussing Bell, *supra* note 8) (desegregation should aim to cause interests of blacks and whites to "converge").

634. See *supra* notes 591–598 and accompanying text.

635. J. Rawls, *supra* note 105, at 583–84; accord, e.g., *id.* at 128, 148–49, 564–65 (achieve "effects of good will" without insisting upon so "strong a condition").

636. See, e.g., *id.* at 14, 19, 219, 221, 535–36 (virtues of participatory, if hypothetical, argument in original position; dialogic metaphors); *id.* at 263, 517 (requiring unanimity among original contractors, thus implicitly turning silence or withdrawal into voice and impelling parties seeking agreement to reason with and convince potential exiters); Rawls, *supra* note 620, at 540–41; see also B. Ackerman, *supra* note 123, at 14, 19 (emphasizing importance of dialogue in discovering preferred conception of justice); A. Hirschman, *Exit, Voice and Loyalty* (1970) (discussing interplay between "exit" and "voice" in economic context); authority cited *supra* note 401 (discussing importance of communal deliberations in republican theory).

637. J. Rawls, *supra* note 105, at 19, 120, 567 (emphasis added); accord *id.* at 139 ("one can at any time adopt [the original] perspective. It makes no difference when one takes up this viewpoint, or who does so"); Rawls, *supra* note 116, at 238–39 (original position as accessible as role of landlord in game of Monopoly); see also A. Gutmann, *supra* note 142, at 228 ("ideal theory of equality may be able to guide us in seeking just

we presumably will find "that our deliberations and judgments are influenced by our special inclinations and attitudes," thus leaving uncertain how successfully individual citizens truly can take the veil.⁶³⁸ The question remains, then, how to induce empathic political behavior "in the absence of a real world decision-making device analogous to a Rawlsian veil of ignorance."⁶³⁹ In the next Part, I argue that all-out desegregation performs just that simulative feat by adopting a "pure procedural justice" remedy that reconstructs the systemically corrupted political process and resituates its antipluralistically inclined participants so that they are subject to the six decisional conditions delineated above.

V. DESEGREGATION AS REFORMATION

A. *Veiling our Alter-Egos Behind the School House Walls*

Earlier, I listed three prerequisites for a reconstructive remedy.⁶⁴⁰ As we have seen, *segregation* satisfies the first two prerequisites: It causes harms to the political process that are both great and recurrent.⁶⁴¹

Desegregation satisfies the third reconstructive prerequisite: It provides the necessary alternative design for a properly functioning democratic political process free of self-destructively antipluralistic corruption. It does so by simulating the situational conditions of the original position.⁶⁴² While assuming that the critical segment of the political constituency in the present context—parents—are concerned solely to advance their own and their children's interests, desegrega-

solutions to some problems encountered within unjust societies such as our own"); M. Sandel, *supra* note 105, at 17, 41 (quoting J. Rawls, *supra* note 105, at 22, 587) (original position "'a conception that enables us to envision our objective from afar,' but not *too* far"; "a heuristic device"); Nagel, *supra* note 616, at 5 (original position "a way of recalling someone to . . . [moral] judgment").

638. J. Rawls, *supra* note 105, at 147.

639. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *Yale L.J.* 1651, 1652 (1988); accord B. Ackerman, *supra* note 123, at 33, 196-232, 331 (Rawls gives no reason to believe that "even at our most prophetic moments, we shall be able to distinguish the higher judge from our own, imperfectly suppressed, social selves"); Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in *Reading Rawls*, *supra* note 156, at 292, 295; Minow, *supra* note 179, at 32 & n.108, 60 n.240, 76.

640. See *supra* text following notes 510.

641. See *supra* notes 511-578 and accompanying text.

642. More accurately, it simulates the situational constraints that remain at the third, society-specific, distributionally focused legislative stage of the Rawlsian constructive process. See *supra* note 624. For other constitutional lawyers applying Rawlsian-type analysis to specific legal problems, see J. Masbaw, *supra* note 105, at 194-99; D. Richards, *The Moral Criticism of Law* 144-57 (1977); Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 *N.Y.U. L. Rev.* 715, 761 (1987); Macey, *Competing Economic Views of the Constitution*, 56 *Geo. Wash. L. Rev.* 50, 72-75 (1987); Michelman, *supra* note 155, at 319-20, 326.

tion veils those children—their parents' alter-egos—behind the walls of a racially integrated schoolhouse.

If the “all-out desegregation” plans ordered by the Court since *Green* can be said to entail any defining characteristic, it is that there be as substantial a condition of racial integration—i.e., school attendance by black and white children together—as the district's geography, demographics, and reasonable amounts of additional transportation permit.⁶⁴³ What is important, that is, is not precise district-wide racial balance but rather a condition in which as many children in the district as possible attend schools that are substantially, if not identically, racially mixed.⁶⁴⁴

This single requirement, moreover, reforms the corrupted political process in precisely the six-part manner prescribed in the last section.

643. See *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

644. See *id.* This requirement provides an evaluative complement to social scientific research supporting a “critical mass”—no less than a 20% proportion—of each race represented at each desegregated school. See *supra* note 3. Reformatory theory imposes only one other remedial requirement in addition to between-school integration, namely, the conventional post-desegregation ban on within-school segregation. See Dimond, *supra* note 123, at 52–53 & n.210 (citing cases); Heaney, *supra* note 49, at 819–25; Lawrence, *supra* note 134, at 374 n.270; Note, Teaching Inequality: The Problem of Public School Tracking, 102 Harv. L. Rev. 1318, 1325 (1989); see also Braddock & McPartland, *supra* note 142, at 66–67 (surveying literature) (cross-group contact “produces desegregation's major benefits for students,” so that desegregation makes little sense if resegregation into separate classrooms is extensive; nationwide study shows tracking not substantial impediment to desegregation). Maintaining high achievement levels among students typically targeted for upper tracks does not require tracking; maintaining high levels among children targeted for middle and lower tracks may forbid tracking because tracking deprives the latter children of what is potentially their most important learning resource, namely, their better-performing peers. See, e.g., J. Hochschild, *supra* note 7, at 70–79; J. Oaks, Keeping Track: How Schools Structure Inequality 93 (1985); Hawley & Smylie, *supra* note 9, at 286; Rosenbaum, Social Implications of Educational Grouping, 8 Rev. Res. Educ. 361, 363–69 (1980); Slavin & Karweit, Effects of Whole Class, Ability Grouped, and Individualized Instruction on Mathematics Achievement, 22 Am. Educ. Res. J. 351, 370–74 (1985); Note, *supra*, at 1327–34; West, ‘Tracking’ Hampers Minorities’ Access to Math, Science Careers, Study Finds, Educ. Week, Sept. 26, 1990, at 8, col. 5. For discussions of “cooperative learning,” an educational technique that assigns diverse groups of children to work together on projects requiring a variety of skills, at one or another of which nearly every child will do well and which appears to maximize the capacity of children to learn from each other and to promote high levels of achievement across traditional ability levels, see, e.g., E. Aronson, N. Blaney, C. Stephen, J. Sikes & M. Snapp, The Jigsaw Classroom 33 (1978); B. Johnson & R. Johnson, Learning Together and Alone: Cooperation, Competition and Individualization 99–104 (1975); Ames, Competitive Versus Cooperative Reward Structures: The Influence of Individual and Group Performance Factors on Achievement Attributions and Affect, 18 Am. Educ. Res. J. 273, 275 (1981); Cook, The 1954 Social Science Statement and School Desegregation, in Eliminating Racism, *supra* note 9, at 237, 250–53; Sharan, Cooperative Learning in Small Groups: Recent Methods and Effects on Achievement, Attitudes, and Ethnic Relations, 50 Rev. Educ. Res. 241, 245 (1980); *infra* note 683; see also J. Dewey, The School and Society 15–16, 117–18 (rev. ed. 1915) (anticipating this reform by 60 years).

Most especially, it veils the parties in ignorance in a manner suggested by two more of *Green's* famous phrases: It positions the citizen-constituents so that they cannot "racially identify" schools or the students in the schools; so that what before were either "white schools" or "black schools" are so racially obscured that all one can say about them now is that they are "just schools."⁶⁴⁵

By this means, to begin with, each parent-citizen is publicly positioned in relation to his or her child in a processually equal and symmetrical way with regard to a factor (race) that the antecedent proof of the system-wide, deep, and long violation has shown is important in those constituents' minds. The first two situational conditions (equal processual positioning and publicly announced equality) are present, therefore, inasmuch as, on this important criterion, the parents are represented solely as parents and not as parents advantaged or disadvantaged by the contingencies of their demographically divergent position or by genetic or historical accident.⁶⁴⁶

The third and most critical condition also is present. Because desegregation inextricably intermingles, hence effectively brackets, the racial identities of children behind the schoolhouse walls, the white parental constituency cannot take advantaging aim at their own children or disadvantaging aim at African-American children without creating an unacceptably high risk that the effects of their actions will fall equally on children of the other race.⁶⁴⁷ With the children desegregatively situated behind the schoolhouse walls, that is, constituents otherwise disposed to make decisions on a "mine is better than yours" basis find that they cannot select who is injured by their antipluralistic defections and do not know how the various alternatives will affect their own particular case. Consequently, they must evaluate principles empathically, based on how they influence each and every child as well as the

645. *Green v. County School Bd.*, 391 U.S. 430, 442 (1968). *Green's* "just schools" rhetoric was not meant to evoke images of colorblind admissions inasmuch as the "freedom of choice" procedure *Green* ruled unconstitutional was facially colorblind and was not found to be intentionally discriminatory. *Id.* at 439-41; see also *Keyes v. School Dist. No. 1*, 413 U.S. 189, 214 (1973) (following system-wide violation, district may not simply substitute colorblind neighborhood-schools plan for tainted plan). Rather, *Green* stands for the proposition that a "colorblind" but nondesegregative remedy does not reform the systemically corrupted political process and accordingly is probably the result of "we are better than they" political thinking, and in any event will stigmatize publicly as if it were the product of such thinking. Absent integrative effect, the colorblindness of decisions reached by political processes shown to be corrupted "root and branch" cannot confer the dignity that colorblindness entails in a just world and can only serve once again to stigmatize by racially separating.

646. See J. Rawls, *supra* note 105, at 529.

647. Just as the function of the equal protection clause "is largely" to require "that those who would harm others must at the same time harm themselves," J. Ely, *supra* note 105, at 170, so too is that the function of at least one equal protection remedy, namely, all-out desegregation.

general, school-wide and interracial, good.⁶⁴⁸

For this reason, as well as others discussed above and below, although I agree with Professor Bell in the epigraph that begins this Article that priority should be given to "desegregating not the students but the money and the control," I conclude that only by desegregating children (and, incidentally, benefiting them in the process⁶⁴⁹) can we desegregate the political process and *then* the money and control.⁶⁵⁰ Reconstructive theory, that is, promotes desegregation not because black children cannot learn unless seated next to white children in school but because persistently discriminatory white citizens cannot learn equal-concern virtue, and thus be moved to distribute educational resources fairly to black children, unless their own children sit next to black children in school. Equal Educational Opportunity theory notwithstanding, desegregation is not necessary to raise black children's educational boats on whites' rising educational tide,⁶⁵¹ but rather to raise the political consciousness of white parents by putting their children in the same educational boat as black children. Corrective theory notwithstanding, desegregation is not mainly needed because of its restorative impact on the stigmatized hearts and minds of black children but rather because of its transformative effect on the malignant hearts and minds of racist white citizens.

The fourth situational condition—narrowed area of conflict,

648. See J. Rawls, *supra* note 105, at 136–37. Desegregation thus has all the advantageous effects of the third ideal condition. First, parents are not in a position to tailor outcomes to their relative advantage. See *id.* at 139. Whatever advantages the members of the political majority choose—in the full flowering of their mutual disinterest—to visit upon their children's schools are visited equally upon the schools of the formerly disadvantaged race. Allocations based on racist doctrines accordingly "are not only unjust, they are irrational"—the more so because the harms attendant upon irrational behavior fall not on oneself but on one's children. *Id.* at 149. Second, given predictably high risk-averseness where one's children are concerned, there is especially good reason to expect the moderating impact of worst-case worries to obtain. See *supra* note 624.

649. See *infra* notes 665–666, 675–696 and accompanying text.

650. "[E]xperience continues to teach . . . that 'green follows white' (that is, in a society where whites remain the majority, the presence of whites in an institution protects that institution against racially unequal distribution of resources)." Gewirtz, Choice, *supra* note 49, at 776; accord W. Hawley, *supra* note 3, at 164–66; D. Kirp, *Just Schools: The Idea of Racial Equality in American Education* 43–46 (1982); Shane, *supra* note 52, at 1085–94. The absence of this equality-assuring condition in my view dooms gilded-ghetto remedies, for in the long run white taxpayers are less likely to gild someone else's schools—particularly those of a race against whom they have discriminated persistently in the past—than they are to gild their own children's (and, if integrated, everyone else's) schools. See *supra* note 139. Until African-American voters gain control of state legislatures and of districts in which their children may be a majority but they themselves are not, black-control remedies will face similar disabilities. See *supra* note 142 (paragraph (5)).

651. In fact, such modest rises as have occurred in national SAT and other test-score averages during the last two decades have resulted not from any improvement in the scores of whites but instead from substantial gains in the scores of blacks. See *infra* note 675.

broadened area of convergence—obviously is troublesome. Desegregation's selling point has not traditionally been its pacific effect on communities. Before explaining why I think desegregation's accomplishments in this regard have been substantially undersold, let me begin by identifying a proper baseline from which to measure reductions in conflict.

Recall, first of all, that the original position itself is remedial in the sense that it assumes and seeks to compensate for an imperfect world—one characterized by scarcity and "the fact of pluralism," hence by the potential for conflict and violence among people with different and conflicting goals and values. Moreover, one cannot accept the heuristic validity of the original position without also reaching two conclusions—(1) that plurality (as well as scarcity) is either a good thing or at least immutable, and, therefore, (2) that we should not spend our time trying to extirpate plurality but instead should try to ameliorate the conflict that plurality causes.⁶⁵² However controversial these two conclusions are in Rawls's case,⁶⁵³ they are not so in mine, given my interpretation of the equal protection clause as essentially demanding both conclusions. Further, whether or not Rawls intends to claim that the original position entirely ends conflict, for me—operating as I am in what by hypothesis is an unjust world characterized by system-wide violations of the "equal concern" principle—even a reduction in conflict satisfies the fourth criterion.

Recall, finally, the violational premises of a reformative remedy: The racist opinion emanating from many sources among the citizenry over a long period of time has intervened consequentially in the political process governing the schools.⁶⁵⁴ That intervention constitutes a serious, even dangerous, kind of conflict that violates the equal protection clause.⁶⁵⁵ It is the reconstructive remedy's task to do something about that conflict.⁶⁵⁶ The baseline from which to measure reduction of conflict, therefore, is the persistent and socially menacing interracial antagonism that the "system-wide violation" finding documents.

I realize that some people—perhaps, mostly white people⁶⁵⁷—will disagree with these premises. For them, the pre- and post-desegregation situation more accurately would be encapsulated by a statement such as the following: "A year ago, we all were getting along fine.

652. A person who believes that the highest calling in life is to make holy war against nonbelievers is unlikely to consider the original position's assumption of religious toleration a justifiable means of decreasing conflict. The analysis here accordingly applies only to societies in which holy warriors are few and far between and in which religious toleration, at least in public, is accepted. See *supra* notes 115, 374, 627.

653. See M. Sandel, *supra* note 105, at 30–35.

654. See *supra* notes 439–449, 511–520 and accompanying text.

655. See *supra* notes 62, 449–464, 505–509 and accompanying text. See generally *supra* notes 355–370 (segregation especially egregious equal protection violation).

656. See *supra* notes 510–578 and accompanying text.

657. See *infra* notes 667–668.

Then, a federal judge ordered our children bused to schools on the opposite side of town. All of a sudden, the whole community was disrupted, its citizens aroused and angry." It is my position, however, that any such statement is wrong by constitutional hypothesis because it manifests the speaker's (ongoing?) "racially selective sympathy and indifference" insofar as the black victims of the violation are concerned.⁶⁵⁸

I propose a different description of desegregation's likely and hoped for effects on existing conflict levels:

Prior to the decree, citizens were *not* getting along fine. A majority of them were inciting the political process to treat a minority as unworthy of equal concern and respect.

In the short run following the decree,⁶⁵⁹ the order is likely to cause anger and disruption. Some of that anger and disruption, in all probability, is but the public airing of the conflictual racist opinion that for so long silently corroded the political machinery from within. This component of the anger and disruption does not count as an increase in conflict because it antedated the remedy. At most, it places a limit on the extent to which desegregation can be said to have lessened conflict. Other aspects of the anger and disruption may reflect an increase in the prevalence or intensity of the racist opinion. When this conflict affects only the angered or disrupted holder of the racist opinion—i.e., when it merely shifts the impact of the conflict from the victim to the perpetrator of the violation—this conflict also does not count. When, however, this additional conflict feeds back into the political process and incites *additional* harms to blacks, then it counts.⁶⁶⁰ Yet another aspect of the anger and disruption is the reasoned response of citizens to the additional burdens that the order places on their lives.

Over the middle run—during the life of the decree—desegregation "externally" will reduce the extent to which the conflictual racist opinion intervenes in the political process for the reasons stated above and below. Over the long run, the decree has "internal," virtue-inculcating, or (using de Tocqueville's word) "habit"-forming effects that may reduce, more generally and permanently, the extent and intensity of interracial and other antipluralist conflict among the citizenry as a whole.

Viewed in this way, the questions raised by the fourth remedial criterion are these: How dangerous is the pre-existing antipluralist conflict? How likely and how large are the desegregatively inspired decrements in that conflict (limited by such obstinate conflict as per-

658. Brest, *supra* note 104, at 14–15; accord *supra* notes 470–472 and accompanying text.

659. See *infra* note 669 and accompanying text.

660. See Fiss, *supra* note 61, at 196–97 & n.6; see also Gewirtz, *Remedies*, *supra* note 49, at 598–99 (courts may leave out of remedial balance any disadvantages to whites, but not to blacks, caused by whites' racially motivated attitudes).

sists)? And, how likely, large, and dangerous are the desegregatively inspired increments in conflict?

I already explained why I think the conflict entailed by the system-wide violation is dangerous indeed and why I think the middle-term ameliorative capacity of the remedy is substantial.⁶⁶¹ I also earlier arrayed the empirical data showing that the time (childrens') and money (taxpayers') spent on desegregation-enhanced transportation and the incidence of desegregation-increased violence among children are in fact, if not in the wider public's consciousness, minor.⁶⁶²

There is, moreover, empirical support for the hypotheses that the entire range of desegregation-enhanced and revealed conflict is temporary and over the long haul rather limited, and that desegregation significantly ameliorates antipluralist conflict among blacks and whites over the long run. Thus, although desegregation's typically pre- and early-implementation racial conflicts are well known, some later-appearing and more permanent countervailing forces are not so well known, though they are now documented.⁶⁶³ On the question of the

661. See supra notes 449-464, 505-509 and accompanying text (dangers posed by systemic legislative racism and system-wide-segregation violations); supra notes 647-651 and accompanying text (capacity of desegregation to discourage legislative racism in sphere of public education).

662. See supra note 574. If the wider public's counterfactual beliefs stem from racially selective sympathy and indifference, the importance of those beliefs is limited. See supra text at note 658. What the "wider public" thinks may be misleading in any event, for opinion polls indicate that "the narrower public" that matters—participants in desegregation plans—ultimately comes to agree with the conclusions suggested by the empirical data, namely, that busing is not very costly and disruptive and that desegregated schools are no more unsafe than segregated ones. See infra notes 667-668.

663. The amount and quality of empirical research has increased significantly during the last 10 years. See Kennedy, supra note 64, at 1795-96 n.229, 1811 n.288, 1813 n.295 (offering explanation of hiatus in research in late 1960s and 1970s). Surveys of the available literature, running from *Brown* to the present, include: *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 494-95 n.11 (1954); Katz, Review of Evidence Relating to Effects of Desegregation on the Intellectual Performance of Negroes, 19 *Am. Psychologist* 388, 388-91 (1964); Bradley & Bradley, The Academic Achievement of Black Students in Desegregated Schools: A Critical Review, 47 *Rev. Res. Educ.* 381, 399-449 (1977); Crain & Mahard, Minority Achievement: Policy Implications of Research, in *Effective*, supra note 42, at 55, 56-70; D. Kirp, B. Levin, T. van Geel & M. Yudof, *Educational Policy and the Law* 495-507 (2d ed. 1982); Braddock & McPartland, supra note 142, at 6; Hawley & Smylie, supra note 9, at 284; Mayer & Jencks, Growing Up in Poor Neighborhoods: How Much Does It Matter?, 243 *Science* 1441, 1442 (1989) (summarizing C. Jencks & S. Mayer, The Social Consequences of Growing Up in a Poor Neighborhood: A Review (Center for Urban Affairs and Policy Research, Northwestern University, Apr. 1989)). Although within 20 years of *Brown*—but only a few years after desegregation actually began in earnest—proponents of desegregation found it "embarrassing to use time as an excuse," Fiss, *Fate*, supra note 63, at 768, the more recent increase in the amount and quality of research and its increasingly encouraging results counsel patience. So does history. See, e.g., C. Woodward, *Reunion and Reaction* 214 (1951) (tragically premature end to first Reconstruction due in part to absurdly impatient or disingenuous white assessments of progress of former slaves, barely a decade after emancipation).

disruptions and enhanced antiblack animosities that desegregation causes, consider that:

- Apparently no respectable study has ever claimed that desegregation or busing to achieve it decreases the academic accomplishments of white children on any known measure.⁶⁶⁴ At worst, desegregation academically is a wash for whites.
- In the years after desegregation takes place, school districts characteristically experience an educational renaissance characterized by curricular reform, modernized grade structures (e.g., middle schools in lieu of junior highs), revitalized teaching staffs, enhanced parental involvement and financial support for the schools, and—perhaps most importantly—a revived administrative bureaucracy.⁶⁶⁵ This effect has prompted Professor Bell and others to criticize desegregation as a screen for enhancing the educational opportunities for *white* children.⁶⁶⁶
- Over time, a substantial majority of the white citizens whose children are forced to ride buses and take other desegregative actions come to view their children's desegregation experiences positively, even when controls for self-selection are introduced.⁶⁶⁷ Indeed, whites who have been through desegregative busing are much more likely to support the remedy than are whites who have not experienced desegregation, which may explain why, in the last few years, the steadily rising percentage of young white adults entering college who favor busing has exceeded fifty percent.⁶⁶⁸

664. See, e.g., C. Jencks & S. Mayer, *supra* note 663, at 33, 45, 96; Hawley & Smylie, *supra* note 9, at 284; Mayer & Jencks, *supra* note 663, at 1443.

665. See Subcommittee on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess., Report on School Desegregation 10 (Comm. Print 1981); J. Hochschild, *supra* note 7, at 80–82 & nn.140–44 (disruption not an evil but rather desegregation's principal asset because it shakes up stultified bureaucracies, induces "organizational, curricular, and pedagogical improvements for all students," and generates funding); Hawley & Smylie, *supra* note 9, at 285; You Were Wrong, Mr. President, *supra* note 7; Sinclair, Desegregation's Quiet Success, *Wash. Post*, June 17, 1978, at A1, col. 4.

666. See, e.g., D. Bell, *supra* note 2, at 107–08; Monti, *supra* note 139, at 57–63.

667. See J. Hochschild, *supra* note 7, at 179–87 (1978–83 Harris surveys). As of 1983, 88% of white parents and 94% of African-American parents whose children were bused for desegregation purposes found the experience satisfying, while 64% of whites and 74% of African-Americans found it "very satisfying." *Id.*; accord Pettigrew, *supra* note 142, at 691 (reviewing attitudes studies that control for self-selection and pre-existing attitudes and conclude that participation in desegregation generally fosters favorable impression of the reform); Taylor, Sheatsley & Greeley, Attitudes Toward Racial Integration, *Sci. Am.*, June 1978, 41, at 44 (between 1963 and 1970 and between 1972 and 1976, percentage of southerners favoring school integration increased only 5% per year; between 1970 and 1972, when desegregation actually occurred throughout the South, support for integration increased 35% per year).

668. See, e.g., A. Gutmann, *supra* note 52, at 164–66 (1978 poll data) (although 85%–89% of whites in general population oppose busing, only 16% of whites and 8% of

- Increased white flight—mainly to the suburbs, and only modestly, it seems, to private schools—does occur the year before, the year of, and the year after desegregation.⁶⁶⁹ Thereafter, however, white loss normally drops off almost to pre-desegregation levels and in the case of certain kinds of plans appears to fall *below* pre-desegregation levels.⁶⁷⁰ Although the data are fragmentary, they create the possibility that, over the course of a decade or so, certain kinds of desegregation plans actually produce a net *gain* in the number of white children attending school in desegregated districts.⁶⁷¹ Moreover, white loss depends less on the amount of busing or the proportion of blacks in the schools

blacks whose children experienced desegregative busing found experience “not satisfactory”); Orfield, *supra* note 6, at 28 (1986 poll data) (although only 36% of white population has favorable attitudes towards busing, at least 50% of population under 30 does and 71% of parents in families a member of which was bused as a result of desegregation had “very satisfactory” experience with desegregation; ratio favoring desegregation in annual poll of 100,000 entering college freshmen climbed from 46% to 56% between 1980 and 1986).

669. E.g., F. Welch & A. Light, *supra* note 6, at 54–62 & Tables 19–22 (study’s limitations described *supra* note 10); see *id.* at 4, 13–15 & Tables 3–5; Rossell & Hawley, *Understanding White Flight and Doing Something About It*, in *Effective*, *supra* note 42, at 154, 166–69. White flight has characterized all American cities over the last several decades, and there is little evidence that desegregation is a principal cause. See Orfield, *supra* note 42, at 196–97 (public opinion data showing that parents consider cities unattractive places to raise children irrespective of desegregation). Indeed, some economists argue that white flight enhances municipal efficiency (given the high correlation between race and socio-economic status) because, all else equal, economically homogeneous populations encounter lower transactions and externality costs in reaching consensus on optimum levels of taxation and spending than do heterogeneous populations. See Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 415, 415 (1956); cf. Grubb, *The Dynamic Implications of the Tiebout Model: The Changing Composition of Boston Communities*, 10 *Pub. Fin. Q.* 17, 26–31 (1982) (Tiebout model predictions only partly borne out by experience in Boston area between 1960 and 1970). The appropriate white-flight measure for my purposes, therefore, is not the net amount of flight but the amount by which desegregation increases or decreases white flight.

670. See J. Hochschild, *supra* note 7, at 52; F. Welch & A. Light, *supra* note 6, at 48–68 (data summarized *infra* notes 671–673); Armor, *After Busing: Education and Choice*, *Pub. Interest*, Spring 1989, 2 at 24–27 (desegregation occasioned substantial white flight in some cities, but recent plans have “produced only minimal white flight”); Hawley & Smylie, *supra* note 9, at 291–92; see also Rossell & Hawley, *supra* note 669, at 167–69 (permanence of white flight is in doubt, given that much of flight is to private schools whence children may return to public schools in the years after implementation).

671. In its analysis of all-out desegregation plans using a combination of rezoning and magnet school techniques, the Reagan Administration study found that white enrollment loss was 2.98% per year prior to implementation and 9.02% per year during the year before, of, and after implementation, but declined to about one-third of one percent per year thereafter. See *supra* notes 10–16 and accompanying text. Applying these declines to the model district that the federal study uses for exemplary purposes—which had 50,000 white students in 1968 and implemented a desegregation plan in the fall of 1975—and adopting the study’s naive assumptions, see F. Welch & A. Light, *supra* note 6, at 49–51, one would project that, by the fall of 1985, the number of white

(the so-called "tipping point") than on the extent to which a plan promises that racial proportions and educational offerings will remain stable after the desegregation plan takes effect.⁶⁷² Even temporary white flight, by the way, is never so substantial that fewer whites and blacks attend school together after than before implementation.⁶⁷³ Fragmentary data also dispute the chestnut that desegregation-enhanced white flight decreases local tax support for schools.⁶⁷⁴

students enrolled in the district after desegregation would exceed the number that would have been enrolled in the district absent desegregation:

<i>White Enrollment</i>	1968	1974	1977	1985
<i>No Desegregation</i> (2.98% loss/year)	50,000	41,700	38,082	29,896
<i>Desegregation</i> (2.98%, then 9.02%, then .368% loss/year)	50,000	41,700	31,403	30,491

See *id.* at 55, 57, 95 & Tables 19, 19a, A4; see also *id.* at 57-63 & Tables 19-21a (aggregate postimplementation declines in white enrollment loss for plans implemented in Boston, Buffalo, Detroit, Indianapolis, Kansas City, Kansas, Los Angeles, Odessa, Pittsburgh, Rockford, San Francisco, St. Louis, Shreveport, and Seattle); Hawley & Smylie, *supra* note 9, at 290 (although desegregation's long-term effects are unclear, implementation of school desegregation plans seems to be associated with increases in housing integration); Rossell & Hawley, *supra* note 669, at 170-71 (except in districts with very high minority proportion, "short-term implementation losses appear to be compensated for by less than normal postimplementation losses").

672. See, e.g., J. Hochschild, *supra* note 7, at 60 & nn.64-65 (postdesegregation flight only "weakly related" to whether one's child will be bused); F. Welch & A. Light, *supra* note 6, at 7, 59, 62, 64 & Table 22 ("Countywide districts experienced much less enrollment loss than did other types of districts" although they utilized more busing and achieved "dramatic reductions in segregation"; little correlation between amount of desegregation achieved or mandatory busing used and amount of white loss suffered); Levine & Eubanks, *supra* note 9, at 46-47 ("tipping points" projected in 1960s and 1970s unduly low based on current experience); Orfield, *supra* note 42, at 202-07, 213 (white flight increases less because of numbers or percentages of races involved and more because of whites' fear that, once begun, racial change will turn neighborhoods all-minority; city-suburbs desegregation plans decrease white flight by increasing stability inasmuch as all schools in area will have similar, hence stable, racial enrollments notwithstanding movement of whites to suburbs); Rossell & Hawley, *supra* note 669, at 170-71.

673. See, e.g., F. Welch & A. Light, *supra* note 6, at 6, 56, 66-67 (even after accounting for white flight, "implementation of desegregation plans is usually associated with sharp reductions in segregation"; commonly used mandatory plans have much "larger desegregative effects than other plan types"; hypothesis that "desegregation efforts might trigger such a large exodus of white students that racial isolation actually increases" rejected); *id.* at 55, 58-59 & Tables 19-20a (combining all 109 plans examined, 300% increase in desegregation accompanied by drop in white enrollment of 6 percentage points more than would have occurred but for desegregation; among "pairing and clustering" plans, 1200% increase in desegregation accompanied by 4 percentage point drop in white enrollment).

674. E.g., Hawley & Smylie, *supra* note 9, at 289, 291.

What these data suggest via measures ranging from polls and ambulatory voting to analyses of desegregation's actual effects on white participants is that the interracial conflict and unhappiness caused by desegregative burdens on whites are modest and temporary, and that these effects might possibly be offset over the long haul as the attractions of desegregation-inspired educational improvements induce whites not only into the attitudinally pro-desegregation camp but also back into the urban public schools. At least as important, the renaissance effect, the fact that desegregation has some positive impact on black achievement and greater positive impact on blacks' educational and economic attainments after graduating high school, and the absence of any proof that white flight causes net integration to decline suggest that desegregation is not responsible for inspiring antiblack feeling that has a significant effect on the political process—or, at least, a *greater* effect than pre-existing racism has had.

On the questions whether desegregation externally forces greater concern and respect for blacks over the middle term and whether it causes "equal concern" virtue to be internalized and perhaps even to become habitual over the long term (proposition 4), the evidence again provides a basis for optimism:

- African-Americans benefit in several ways from desegregation, suggesting both that the political system governing schools works more effectively for them or less effectively against them and that over the long haul African-Americans who have experienced desegregation will have less cause for antiwhite feelings. Without doubt, desegregation improves black academic achievement. Although the extent of improvement is in doubt, the signs are hopeful, especially given the dearth of alternative educational interventions that work as well as desegregation.⁶⁷⁵ Among African-

675. See, e.g., *id.* at 284–85 (comprehensive review of literature, concluding that, regardless of type of study, "[d]esegregation is generally associated with moderate gains in the achievement of black students"; the most comprehensive and sophisticated study, synthesizing 93 earlier studies, finds effect "significant"; the 20 studies among the 93 that employed more sophisticated techniques all showed relatively large effects; "rigorous" studies showed "significantly positive effects"); see R. Crain, J. Hawes, R. Miller & J. Peichert, *Finding Niches: Desegregated Students Sixteen Years Later* 10–23, 51–54 (Rand Corp. Report No. R-3243-NIE, Jan. 1985) [hereinafter R. Crain]; R. Crain, *How Successful Are the Graduates of Project Concern?* 2–3 (1985) (release accompanying publication of R. Crain, *supra*) [hereinafter R. Crain, *How Successful*] (on file with the Columbia Law Review); R. Crain & J. Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment*, reprinted from Center for Social Organization of Schools, Report No. 359, *Three Reports: Effects of Employer Recruitment Methods, Employer Job Placement Decisions, and School Desegregation on Minority and Female Hiring and Occupational Attainment* 10–14, 25–29 (July 1985) (most sophisticated study yet, analyzing one of nation's longest running desegregation plans finding substantial gains in African-American achievement, some of highest shown by any study); A. Gutmann, *supra* note 52, at 161–67; J. Hochschild, *supra* note 7, at 91, 177; C. Jencks & S. Mayer, *supra* note 663, at 55–65 ("best estimates" of desegrega-

American children attending desegregated schools (controlling for socio-economic status, predesegregation achievement levels, and other relevant and measurable criteria), the likelihood of teenage pregnancy, dropping out, and delinquent behavior is substantially lower than among African-

tion's cumulative impact suggest that black students attending mostly white schools in North score "something like a third of a standard deviation higher on most tests" than do blacks in all-black schools; this improvement erases a third of overall difference between scores of Northern blacks and whites, hence desegregative gains "substantial"; 12 years in "predominantly white Northern school[s] probably has a substantial positive effect on black students' achievement"; no similar data available for South); Braddock & McPartland, *supra* note 142, at 6 (gains "strongest when desegregation begins in the early grades, has a metropolitan-wide plan, and takes place in predominantly white schools with a critical mass of black students"); Mahard & Crain, *Research on Minority Achievement in Desegregated Schools, in The Consequences of School Desegregation* 103, 121-25 (C. Rossell & W. Hawley eds. 1983) [hereinafter *Consequences*]; see also Braddock & McPartland, *supra* note 142, at 7 (blacks account for about 40% of recent overall gains in SAT scores; "most significant gains have come in the South, where school desegregation has had its greatest impact"); U.S. Dep't of Educ., *The Reading Report Card, 1971-1988: Trends from the Nation's Report Card 14-15* (1989) (in 1971, white high school students on average scored 53 points (10%) higher than blacks on prestigious testing group's 500-point reading scale; in 1988, the gap was 20 points (4%), notwithstanding increasing black retention rates that depress black averages; black improvement continues at time of stagnation in white scores); Carmody, *Minority Students Gain on College Entrance Tests*, *N.Y. Times*, Sept. 12, 1989, at A16, col. 4. Acknowledging that desegregation improves black achievement somewhat but questioning extent of improvement are: Armor, *The Evidence on Desegregation, in School Desegregation and Black Achievement 19-23* (Nat'l Inst. of Educ. 1984); Cook, *What Have Black Children Gained Academically from School Desegregation? Examination of the Meta-Analytic Evidence, in id.*, at 64-71; Krol, *A Meta Analysis of the Effects of Desegregation on Academic Achievement*, 12 *Urb. Rev.* 211, 220-24 (1980).

Desegregation may have a greater positive impact on I.Q. than on achievement tests. See Crain & Mahard, *supra* note 663, at 68-69 (desegregation raises black I.Q. scores, erasing "nearly half of the 'gap' " between blacks' predesegregation I.Q. scores and the national norm). Most educational researchers agree that the expectations teachers convey to students are a key factor in determining the impact of schooling on achievement. See, e.g., Edmonds, *supra* note 123, at 111-13, 115-16, 121; Pettigrew, *supra* note 142, at 696; Ratner, *supra* note 140, at 802-03 & nn.79-83; *Schools that Work*, *supra* note 140, at 17, 23-25; sources cited *infra* note 765. Because simply ordering teachers to raise their expectations for low-achieving children does not work, the problem has been to find means of structuring higher expectations into educational programs for such children. Unlike many other educational reforms, see *supra* note 142, desegregation at the classroom level accomplishes this task—and it does so in just the way Reformatory theory predicts, because teachers in integrated classrooms are less likely than ones in all-black classrooms consciously or unconsciously to convey low expectations to the class. See, e.g., Cohen, *Expectation States and Interracial Interaction in School Settings*, 8 *Ann. Rev. of Soc.* 209, 226-32 (1982); Hawley, *Equity and Quality in Education: Characteristics of Effective Desegregated Schools, in Effective*, *supra* note 42, at 297, 304 (teachers "less demanding of and responsive to minority children in segregated classrooms than in desegregated [ones]"); Hawley & Smylie, *supra* note 9, at 285 (studies of exemplary minority schools and educational innovations as yet provide little promise that this situation can be corrected without desegregation); Walzer, *supra* note 142, at 61-62.

American children in segregated schools.⁶⁷⁶ Blacks who graduate from desegregated schools (controlling for similar criteria) attend college, attend *four-year* colleges,⁶⁷⁷ get high marks from their professors,⁶⁷⁸ graduate from college,⁶⁷⁹ and enter predominantly white employment settings in greater numbers⁶⁸⁰ than do blacks who attended segregated public schools, and the former appear to receive higher average salaries as adults than do the latter.⁶⁸¹ While desegregation in the earlier grades has the greatest impact on academic achievement, desegregation at the secondary level may have the greatest impact on post-secondary educational and economic attainment.⁶⁸²

- Black and white adults who previously attended desegre-

676. See, e.g., R. Crain, *supra* note 675, at 13–17, 24, 26–27, 51 (black females' rate of pregnancy prior to age 18 reduced substantially; black males' drop-out rate reduced by one third to one half; black males' rate of delinquent behavior decreased by one third to one half); C. Jencks & S. Mayer, *supra* note 663, at 79, 84–85 (teenage pregnancy); Furstenberg, Morgan, Moore & Peterson, *Race Differences in the Timing of Adolescent Intercourse*, 52 *Am. Soc. Rev.* 511, 515 & Table 3 (1987); Mayer & Jencks, *supra* note 663, at 1442 (drop outs).

677. See Braddock & McPartland, *supra* note 142, at 8–9 (desegregation increases likelihood of attendance at four-year and desegregated colleges, controlling for academic credentials, social class, and college inducements; also increases likelihood that African-Americans major in fields that provide opportunities for higher paying jobs); R. Crain, *supra* note 675, at 10–23, 51; C. Jencks & S. Mayer, *supra* note 663, at 33–34; Thornton & Eckland, *High School Contextual Effects for Black and White Students: A Research Note*, 53 *Soc. Educ.* 247, 249–52 (1980).

678. See, e.g., R. Crain & J. Strauss, *supra* note 675, at 3; Crain & Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 *Soc. Educ.* 81, 98–99 (1978);

679. See, e.g., R. Crain, *supra* note 675, at 11–12, 51 (black male graduates of desegregated public schools are one and one-half to over two times more likely to complete college than graduates of segregated public schools, after proper controls); Camburn, *supra* note 142, at 558–60, 565–66 (recent national longitudinal study of graduating high school seniors desiring to go to college, concluding that "the higher the percentage of white students at an individual's [including an African-American individual's] high school, the greater the probability that the student [whatever his or her socioeconomic status] would finish [a four-year] college"); Mayer & Jencks, *supra* note 663, at 1442.

680. See Hawley & Smylie, *supra* note 9, at 290.

681. See, e.g., R. Crain & J. Strauss, *supra* note 675, at 13–14, 26–27, 34, 37 (black adults who previously attended desegregated schools one and one-half times (females) to three times (males) more likely to secure employment in higher paying occupations than those who attended segregated schools); Braddock & McPartland, *supra* note 142, at 63–64 (well-controlled study showing "statistically significant net income advantage to black male graduates of predominantly white colleges of nearly \$2500," with likelihood of attendance at such colleges being substantially increased by attendance at desegregated secondary schools); Datcher, *Effects of Community and Family Background on Achievement*, 64 *Rev. Econ. & Statistics* 32, 39 (1982); Mayer & Jencks, *supra* note 663, at 1443; Taylor, *supra* note 123, at 966–67 & nn.24–25; R. Crain, *How Successful*, *supra* note 675, Table 1. See generally Braddock, Crain & McPartland, *supra* note 156, at 261–64 (surveying desegregation's effects on adults).

682. See Braddock & McPartland, *supra* note 142, at 6, 9–10.

gated elementary and secondary schools (after proper controls) seem to be less likely to express negative views about members of the other race and are significantly more comfortable in integrated work and social settings than are black and white graduates of segregated schools.⁶⁸³ Likewise, black graduates of desegregated schools are less likely than graduates of segregated schools to believe that antiblack discrimination is widespread.⁶⁸⁴ Most heartening is evidence that, upon graduating from desegregated schools, both blacks (as to whom the evidence is stronger) and whites vote with their feet in ways that suggest that they carry "equal concern" virtue with them outside the public educational sphere—indeed outside the public sphere—and into their private lives: Members of both races who attended integrated schools (again, after proper controls) live in integrated neighborhoods and report having personal relationships with persons of the other race in significantly higher proportions than do blacks and whites who went to segregated schools.⁶⁸⁵

683. See, e.g., R. Crain, *supra* note 675, at 23–30, 51; A. Gutmann, *supra* note 52, at 161–63; J. Rosenbaum, L. Rubinowitz & M. Kulieke, *Low-Income Black Children in White Suburban Schools* (Center for Urban Affairs and Policy Research, Northwestern Univer., 1986); Braddock & McPartland, *supra* note 142, at 63, 68–69; McConahay, *Reducing Racial Prejudice in Desegregated Schools*, *in* *Effective*, *supra* note 42, at 30, 35; Schofield & Sagar, *Desegregation, School Practices, and Student Race Relations*, *in* *Consequences*, *supra* note 675, at 58, 91–99; Cooperative learning techniques, see *supra* note 644, are especially productive of positive interracial attitudes. See, e.g., Amir, *Contact Hypothesis in Ethnic Relations*, 71 *Psychology Bull.* 319, 328–30, 337–39 (1969); St. John, *The Effects of School Desegregation on Children*, *in* *Race & Schooling in the City* 84, 92–94 (A. Yarmolinsky ed. 1981); Slavin & Madden, *School Practices that Improve Race Relations*, 16 *Am. Educ. Res. J.* 169, 178–80 (1979).

684. E.g., R. Crain & J. Strauss, *supra* note 675, at 28.

685. See, e.g., R. Crain, *supra* note 675, at 24, 51; Braddock, Crain & McPartland, *supra* note 156, at 260 (surveying literature) ("Without exception," studies, nearly all produced in 1980s, show "that desegregation of schools leads to desegregation in later life—in college, in social situations, and on the job"); Braddock & McPartland, *supra* note 142, at 7–8; see also Hawley & Smylie, *supra* note 9, at 290 (school desegregation integrates more effectively than fair housing or fair employment programs); Hirsch, *supra* note 406, at 443 & n.96 ("vast" empirical literature documents capacity of community members over time, if exposed to previously excluded persons, to accept those persons as "enough 'like' themselves to merit inclusion").

If desegregation benefits black Americans, why do some black Americans—albeit in much smaller proportions than whites—oppose it? Compare Armor, *supra* note 670, at 27 (most blacks feel desegregative benefits in education outweigh costs) and sources cited *supra* notes 667–668 with, e.g., *Educ. Week*, Mar. 28, 1990, at 3, col. 1 (blacks opposed to busing ask to intervene in Georgia desegregation case). Black ambivalence towards desegregation no doubt stems from numerous factors, among them (1) the bad experiences blacks have suffered under ill-conceived and in some instances discriminatory desegregation plans, see, e.g., *supra* note 252; (2) the view of some African-American theorists and politicians—but, it is my impression, relatively few African-American parents—that the concentrations in black population that desegregation dissipates are black Americans' best hope of amassing political power at the local level and of

- Impressionistic evidence of the kinds of political alignments and outcomes that successfully reformative desegregation should produce has begun to appear. Among that evidence are: the recent nominations and elections of African-Americans to high statewide offices in the South, where desegregation has had its greatest impact;⁶⁸⁶ the failure of recent antibusing initiatives in cities undergoing mandatory desegregation;⁶⁸⁷ the surprising failure of busing to generate the kind of national political backlash that other 1960s

creating public schools that adequately and sensitively educate black children, compare sources cited *supra* notes 139–140 (favoring geographic concentration of African-American population as means of enhancing African-American political power) with sources cited *supra* note 142 (paragraph (5)) (discussing inability of African-American control of localities to overcome effects of white political power at regional, state, and national levels); and (3) black separatist values of the sort that pervasive white racism naturally produces but that, in my view, the equal protection clause condemns—along with white racism—when it motivates citizens' effective public actions, see *supra* Part III. In the last two regards, reconstructive desegregation will seem no more appealing than other versions because it not only mixes whites with blacks but does so in the politically reformative interest of whites as well as blacks. See generally Brooks, *supra* note 160, at 894–98 (summarizing and extending criticism of civil rights scholarship for paying too much attention to harms to political process and to citizens generally and too little attention to particular injuries of direct victims of discrimination).

686. See Oreskes, *Feinstein Wins Primary Race in California*, N.Y. Times, June 6, 1990, at A1, col. 1 (discussing, among other primary elections, nomination of Harvey Gantt to face Jesse Helms in North Carolina's 1990 senatorial race); Apple, *The 1989 Elections; Black Success with Measured Approach*, N.Y. Times, Nov. 8, 1989, at A1, col. 4 (Douglas Wilder's election as Governor of Virginia). Of particular note is the Democratic Party's nomination of Harvey Gantt for Senator of North Carolina. Mr. Gantt's election and successes as an African-American mayor of predominantly white Charlotte have been linked to improvements in race relations in that city accompanying its famous school desegregation case. See *You Were Wrong, Mr. President*, *supra* note 7, at A15, col. 3. On desegregation's impact on race relations in the South, see generally Talese, *Selma 1990: Old Faces and a New Spirit*, N.Y. Times, Mar. 7, 1990, at A1, col. 2 (appraising quarter century of progress in southern race relations and identifying goals not yet attained); *supra* notes 4–8 and accompanying text (social acceptability of school desegregation in southern communities).

687. For example, November 1989 and February and May 1990 elections in Cleveland, Seattle, and Denver, each dominated by divisive antibusing issues, produced outcomes that, on balance, favored the continuation of desegregation in those cities, revealed substantial interracial cooperation on school improvement initiatives, and, in Seattle, coincided with the election as mayor of a black desegregation supporter who ran against a white antibusing activist. See Schmidt, *Once Divided, Seattle Residents in Accord on Five Goals for Improving City's Schools*, *Educ. Week*, May 30, 1990, at 5, col. 1; *Educ. Week*, May 30, 1990, at 3, col. 1 (in midst of school desegregation controversy, Denver voters approve \$200 million bond issue for schools); *Seattle Voters Approve Levy: Board Backs Plan for Minorities*, *Educ. Week*, Feb. 14, 1990, at 2, col. 2; *Seattle Board Votes to Reject Controversial Anti-Busing Measure*, *Educ. Week*, Jan. 10, 1990, at 5, col. 1; Snider, *Opponents of Seattle 'Controlled Choice' Initiative Claim 'Victory' After Race Ends Too Close to Call*, *Educ. Week*, Nov. 15, 1989, at 5, col. 5; Snider, *Cleveland Voters Send Mixed Signals on Desegregation, Superintendent's Job*, *Educ. Week*, Nov. 15, 1989, at 5, col. 5.

and 1970s reforms faced in the 1980s;⁶⁸⁸ the significant increase in the number of black superintendents hired recently by predominantly white school boards;⁶⁸⁹ and the outspoken commitment to desegregation recently demonstrated by some white officials beholden to majority-white constituencies for their jobs.⁶⁹⁰ Finally, case studies have led some researchers to conclude that desegregation increases black political clout.⁶⁹¹

- The community-wide and participatory focus of recent educational and legal innovations may increase desegregation's politically reconstructive impact. By Reconstructive hypothesis, that impact should rise when parents increase the political attention they pay to schools in which their children are racially mixed.⁶⁹² Accordingly, by enhancing parental involvement in the schools, the wide adoption recently of "school-based management" initiatives should enlarge desegregation's reformative effect in districts where parentally managed schools are integrated.⁶⁹³ To like effect are two recent Supreme Court decisions preferring ancillary desegregation remedies that lead to the same outcomes as remedies the Court disapproved, but that assure broader participation in the political processes that lead to those

688. See *Armor*, *supra* note 670, at 25 (discussing failure of late 1960s and early 1970s antibusing sentiments to coalesce into national political movement during conservative ascendancy in 1980s).

689. See *Marriott*, *Great Expectations Hobble Black Superintendents*, *N.Y. Times*, Mar. 21, 1990, at B5, col. 3.

690. See sources discussed in *Liebman*, *supra* note 99, at 393 n.146, 395 & n.157; *supra* note 40. But see *DeParle*, *Killing Reveals Racial Divide Beneath Model Communities*, *N.Y. Times*, Apr. 30, 1990, at A1, col. 1.

691. See, e.g., *J. Raffel*, *supra* note 9; *Kirp & Jensen*, *supra* note 8, at 369-70; *Taylor*, *supra* note 123, at 975. Shifting theoretical emphases from Equal Educational Opportunity and Corrective to Reformative approaches might shift empirical emphases from desegregation's educational and demographic to its political effects, thus overcoming the paucity of research on this last issue.

692. Thus, once parents are situated so that their political activity vis-à-vis the schools induces interracial empathy, increases in that activity should increase empathy.

693. See sources cited in *Liebman*, *supra* note 99, at 394 n.150; *Selected Reading on Parental Involvement in Education*, *Educ. Week*, Apr. 4, 1990, at 24, col. 4; *supra* note 142. By advocating parental, not old-style "community," control, cf. *supra* note 142 (paragraph (6)) (discussing New York's and Detroit's disappointing experiences with decentralized schools), these initiatives ought to maximize desegregation's reformative impact by giving political power to the segment of the community that desegregation's political therapy most affects. For like reasons, desegregation plans ought themselves to maximize opportunities for postimplementation parental involvement in affected districts' wider affairs, for example, via districtwide public goal-setting exercises on the Seattle model, see sources cited *supra* note 687, citizen participation in monitoring school success, elective rather than appointive school board positions, and mixtures of at-large and single-member board positions that create opportunities for cross-racial representation without diluting the minority vote. Cf. *J. Hochschild*, *supra* note 7, at 93-112 (questioning utility of citizen involvement in preimplementation planning and postimplementation monitoring of desegregation plans).

outcomes.⁶⁹⁴

"[O]n balance," therefore, "and even though both massive and passive resistance have been more common than genuine efforts to make it work, school desegregation has benefited most of those who have experienced it."⁶⁹⁵ Moreover, "the preponderance of empirical evidence suggests that [desegregated] schools can contribute to reducing the social stigma of being black and raising the academic achievement of black children [and also] make both black and white students more comfortable in racially integrated settings."⁶⁹⁶ Without achieving the original position's freedom from conflict, therefore, desegregation seems "externally" to reduce antipluralist conflict (as defined above to include the conflict that pervades system-wide violations) during the life of the plan after its first year or two, and holds out a realistic hope that it will continue "internally" or habitually to reduce such conflict somewhat even after its implementation (if relatively lengthy⁶⁹⁷) ends.

Desegregation also supplies the fifth situational condition, by foregoing heroic assumptions about the parties' ethical motivations. To borrow President Eisenhower's famous response to *Brown*, reformatory desegregation does not attempt to "legislate morality"⁶⁹⁸ and only assumes bare (self-interested) rationality and intergenerational concern: So long as a parent cares to advance the interests of his or her child, the situational conditions do the rest of the work.⁶⁹⁹ White parents need not feel benevolent toward black children or even attend them at all—although there is the hope that, by acting in and through a political system in which blacks and whites are situated equally, both processually and with regard to their positionally induced goals, parents of both

694. See *Missouri v. Jenkins (Jenkins II)*, 110 S. Ct. 1651, 1663 (1990) (out of desire to let local government institutions function and to give those who caused the problem the responsibility to solve it, Court forbids district judge himself to order tax increase needed to fund desegregation plan but lets judge enjoin operation of state-law provision that prevented willing school board and majority of local electorate from adopting the needed increase); *Spallone v. United States*, 110 S. Ct. 625, 634 (1990) (overturning contempt fines against city legislators but approving stiff fines against city itself, which quickly forced legislators to comply with housing desegregation decree; fines against city preferred to those against legislators because former prompt legislative action based on constituents' and city's interests, while latter prompt action based on legislators' "personal interests").

695. Hawley & Smylie, *supra* note 9, at 281.

696. A. Gutmann, *supra* note 52, at 163; accord Hawley & Smylie, *supra* note 9, at 290; see also J. Dewey, *supra* note 123, at 20–21 (predicting this outcome 75 years ago).

697. See *infra* notes 805–828 and accompanying text.

698. See J. Wilkinson, *supra* note 1, at 24, 76 (Eisenhower's response to *Brown*); see also *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (law "powerless to eradicate racial instincts").

699. My point here is not that desegregation does or should encourage people to behave in self-interested ways but only that it does not and should not rely on them to do otherwise in the short run. Instead, like any external device worth its salt, desegregation simultaneously co-opts the motive force of self-interest while diverting self-interested behavior in virtuous directions.

racess over time will develop interracial fraternity as a by-product of the remedy.⁷⁰⁰

A related point emerges from the "pure procedural justice" aspect of the remedy. Desegregation has always been perceived as suspect because it is coercive, not only of local governments—whose status as proven violators is generally understood to justify the force⁷⁰¹—but also of white and some black families—whose "innocence" is said to make desegregation's assertedly coercive aspect problematic.⁷⁰² The theory presented here moderates this coercion problem in two ways.

First, as discussed above, the theory advanced here shows how *all* parties to the pervasively corrupt political process—citizen-constituents as well as officials—are in the same violational boat.⁷⁰³ Once viewed this way, moreover, desegregation turns out to be a bit less coercive than typically portrayed, even as to proven wrongdoers. To begin with, in Rawlsian terms, the loss in "full autonomy" caused by the situationally imposed conditions is justified because it calls forth a fuller flowering of each participant's "rational autonomy" (her ability to act, not as the vassal of her heteronomous prejudices but as a "free and equal moral person")⁷⁰⁴ and an egalitarian-premised, hence autonomy-protecting, pluralist political system.

This rationale will not appease unwilling participants in desegregation. They may feel slightly better, however, upon considering a second and somewhat more concrete aspect of desegregation's relation to autonomy. Once the "pure procedural justice" nature of desegregation becomes clear, we for the first time have a basis for recognizing the substantial degree to which desegregation *preserves* autonomy in a manner quite unlike a number of "imperfect procedural justice" remedies typically but inaccurately lumped together with desegregation, such as prison reform and school-finance remedies.⁷⁰⁵ For, unlike those remedies, desegregation is a fair-process, not fair-outcome, device. Once having made the political process governing schools fair, that is, desegregation leaves the participants free to pursue whatever goals through whatever means their (to be sure, positionally constrained) rationality

700. See A. de Tocqueville, *supra* note 346, at 512, 525–27; J. Rawls, *supra* note 105, at 148–49, 564–65, 583–84; *supra* notes 377–385 and accompanying text.

701. E.g., Gewirtz, Choice, *supra* note 49, at 786–87.

702. E.g., Dworkin, *supra* note 104, at 24–27.

703. See *supra* notes 386–438, 529–564, 574–577 and accompanying text.

704. See *supra* note 620.

705. See, e.g., D. Horowitz, *supra* note 281, at 10–12, 168–69; Chayes, *supra* note 122, at 48–51; Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 69–70 (1979); Goldstein, *supra* note 92, at 46–47 & nn.234, 236, 237; Note, *The Dual Role of the Structural Injunction*, 99 Yale L.J. 1983, 1983–85 (1990); see also J. Rawls, *supra* note 105, at 85–86 (imperfect procedural justice devices posit an independent standard for deciding which outcome is just but no procedure guaranteed to lead to that outcome).

recommends.⁷⁰⁶ Accordingly, by contrast to prison, mental-health, welfare, school-finance, and other institutional reform remedies, desegregation is unfairly included in the usual "illegitimacy" and "incompetence" critiques of judges-as-managers.⁷⁰⁷

Understood reconstructively, desegregation also escapes the charge that, by substituting judicial for political activism and national for local standards, the remedy weakens participatory democracy in one of the few spheres—i.e., public education—in which such democracy remains important in modern American society.⁷⁰⁸ Rather than supplanting republican democracy, reformative desegregation takes republicanism more seriously than it was being taken before in at least three ways. First, reformative desegregation refuses to economize ordinary citizens out of the process. Second, it recognizes that citizen-participants must pay the republican price of civic virtue (modernized, pluralized, and economized into a duty of "equal concern and respect") in return for the benefits of participation. Third, it takes steps following a finding that extra measures are needed both externally (in the short and middle run) and internally (in the long run, so we hope) to inculcate civic virtue among a constituency whose prior interventions in the political process have exhibited grievous derelictions of civic duty. Accordingly, although desegregation reconstructs local republican political processes, it does so according to the specifications of modernized republicanism, then turns the reformed process loose to make such de-

706. This point helps explain why the Court, the same year it decreed "all-out desegregation" in *Keyes v. School Dist. No. 1*, 413 U.S. 189, 214 (1973), refused to intervene in the school finance area in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See *supra* note 138. Unlike outcome-defining school-finance remedies, desegregation need not "circumscribe or handicap" (indeed, it often enhances, see *supra* note 665 and accompanying text) "the continued research and experimentation so vital to finding even partial solutions to educational problems and to keep abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 43; see also J. Ely, *supra* note 105, at 88 (judicial review works best when it "involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials").

707. See, e.g., A. Cox, *The Role of the Supreme Court in American Government* 107 (1976); D. Horowitz, *supra* note 281, at 278; P. Kurland, *Politics, The Constitution, and the Warren Court* 203 (1970); Diver, *supra* note 705, at 89; Elson, *supra* note 142, at 904-11; Glazer, *Should Judges Administer Social Services?*, *Pub. Interest*, Winter 1978, at 64, 78-79; see also *Missouri v. Jenkins*, 110 S. Ct. 1651, 1673, 1676-77 (1990) (Kennedy, J., concurring in part and dissenting in part) (cautioning against transforming desegregation into hands-on structural remedy). See generally Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 *Colum. L. Rev.* 784, 788-89 (1978) (analyzing expanding role of judiciary in reforming public institutions and services).

708. Making that charge are, e.g.: A. Gutmann, *supra* note 52, at 167-69 (desegregation poses "greatest dilemma of democratic education in our time:" albeit necessary to prepare children to be able political participants in future, it hampers democratic behavior in present by undermining community control); J. Hochschild, *supra* note 7, at 9-11, 40-45, 144-45, 199-200; M. Walzer, *supra* note 52, at 255; Glazer, *Towards an Imperial Judiciary?*, *Pub. Interest*, Fall 1975, at 104, 118.

cisions as its black and white citizen-participants choose. For African-American citizens, moreover, desegregation may for the first time *create* an ability to participate meaningfully in the process of locally governing the schools.⁷⁰⁹

Paradoxically, desegregation is conducive both to the sixth preferred situational criterion (“voice”) and to its conceptual opposite (“exit”). The voice consideration helps explain one of all-out desegregation’s most difficult puzzles from, say, the Corrective perspective: Why must newly formed all-white suburban areas within a district be included in the remedy when the district’s black schools may be integrated successfully without drawing on outlying whites? The preceding explanation of the political meaning of a “system-wide” violation⁷¹⁰ gives us part of the answer because the requisite process-permeating violation affords reason to believe that government decisions fostering the creation of all-white neighborhoods and schools are not “innocent.”⁷¹¹ More importantly here, the “voice” condition explains why even guiltless families need to be included in the desegregative remedy even though they are not arithmetically needed to integrate the blacks. For in order to ensure “voice” on the part of the white families that *must* be included in the remedy, its alternative, “exit” (in this context, “white flight”), must be discouraged.⁷¹² By removing the exit-inducing haven that excluding the outlying areas would create, the “all-out desegregation” plan embodies the “enforced voice” condition. Other things being equal, therefore, the larger the portion of the district the desegregation plan covers, the more voice (and the less exit) will result.⁷¹³

Regrettably, however, desegregation cannot maximize voice by minimizing exit, except in places—common in the South but only in a few parts of the North—where school districts encompass most of the metropolitan area.⁷¹⁴ In less-inclusive districts, desegregation at least temporarily may have the opposite, exit-inducing effect, as devotees of the racist opinion and parents fearful about their children’s safety and education abandon ship.⁷¹⁵ The data discussed above, however, in-

709. See Cavanagh & Sarat, *supra* note 281, at 409–10.

710. See *supra* notes 529–564 and accompanying text.

711. See *supra* notes 574–577 and accompanying text.

712. See A. Hirschman, *supra* note 636, at 33.

713. See F. Welch & A. Light, *supra* note 6, at 6, 41; Orfield, *supra* note 42, at 206–07; Rossell & Hawley, *supra* note 669, at 170, 175.

714. See, e.g., G. Orfield, *Must We Bus?* 411–13 (1978); sources cited *supra* note 713.

715. See, e.g., James, *supra* note 6, at 964, 975, 981; Orfield, *supra* note 42, at 213; Rossell & Hawley, *supra* note 669, at 170. Schools, like other public institutions, are ill-equipped and (given inelastic financing) ill-disposed to respond to exit, hence there is little reason to expect that voice-reducing exit will have the same salutary effects on schools as on profit-oriented firms. See A. Hirschman, *supra* note 636, at 51–52; Shane, *supra* note 52, at 1116.

cluding those generated by the Reagan Administration's white-flight study, suggest that desegregation-induced exit not only dissipates after three years to at most a trickle but that in some cases, it actually stops and is replaced with desegregation-induced white *entrance*.⁷¹⁶ Desegregation also may enhance voice in ways other than retarding exit or inspiring entrance.⁷¹⁷

Even in districts that do not encompass the metropolitan area or otherwise discourage flight and increase voice, this, at worst only modest, failure of the sixth condition comes nowhere near counterbalancing the substantial success desegregation displays in achieving the other five prerequisites to a reformed and pluralistically healthy political process. When, finally, I deny the doctrinal predicate to the nay-sayers' identification of "exit" as desegregation's achilles heel—namely, that *Milliken I* effectively forbade interdistrict relief—this moderate minus will narrow even further.⁷¹⁸

By situating black and white children together in positions of equality in schools and classrooms, desegregation places their citizen-parents in a position of publicly visible equality in the political process that governs the public schools (conditions 1 and 2); externally links the fate of the previously discriminatory white majority and its offspring to that of previously victimized blacks and their children so that action favorable to the former also favors the latter, action hurtful to the latter also hurts the former, and both groups, it is hoped, eventually internalize the conflict-quelling and difference—"denorming"⁷¹⁹ possibility of coincident interests (conditions 3-5); and creates conditions sufficiently conducive to voice and discouraging of long-term exit as to preserve the remedy's other accomplishments (condition 6). As long as the remedy remains in effect, therefore, it reforms the political process, assures that the products of that process will be fairer and in all likelihood more beneficial to African-American children than before, and—incidentally but not insignificantly—cures some of the developmental, psychological, and demographic harms caused by the previously corrupted political process. To this last-mentioned extent, moreover, reformative desegregation, as a by-product, enhances Equal Educational Opportunity and Integration as much as the Court heretofore has been willing to do without committing itself to those theories' perfectionist-seeming goals; is as reparative as so-called "narrowly" Corrective desegregation without wanting for an explanation of its manifest undercorrection and partial public-law redistribution; and it is more effectively Prohibitory

716. See *supra* notes 667-674 and accompanying text.

717. See Hawley & Smylie, *supra* note 9, at 285 (data suggesting that desegregation intensifies "community pressures for school performance" and generates more resources); *supra* notes 665-666, 675 and accompanying text (data suggesting that desegregation improves school performance, possibly as result of increased public concern).

718. See *infra* notes 829-872 and accompanying text.

719. See *supra* notes 367, 380, 384, 609, 614-615 and accompanying text.

and more justifiably Prophylactic than are the theories by those names.⁷²⁰

But, absent a commitment to coercive permanency, can desegregation reform the political process permanently? Apart from making the political process and its products fairer and curing some of the previously corrupted process's tainted products while the remedy lasts, can reconstructive desegregation inculcate "equal concern" virtue so that coercive (external) mechanisms may cease functioning, yet continue reforming? The jury is still out on these questions, it seems to me, although there are a couple of bases, some discussed above and some below, for a cautious optimism.

B. *Why Especially Schools?*

Although it happens in schools, desegregation is not a remedy for schools. At least not merely so. Rather, it is a surprisingly successful remedy for a mortally serious, infrastructure-threatening malfunction of a public institution more important even than the schools—our plurality-protecting democratic political system. In this one field of public education, that is—having first satisfied ourselves that systemic reconstruction is necessary because (1) the political system governing the schools is influentially processing racist preferences, and that (2) this

720. Unlike Corrective and Prohibitory theory, see *supra* notes 257–264, 311–322 and accompanying text, Reformative theory imposes only a modest "remedial limit," namely that desegregation be forsworn when the district(s) encompassing the discriminatory constituency do(es) not have a "critical mass" of black and white students. See *supra* notes 3, 590. The critical mass caveat, however, together with the intent and system-wide-discrimination requirements and the remedy's confinement to the constituency actually implicated in the violation, impose important limits on the likely scope of Reformative plans and may foreclose desegregation in some of the nation's largest cities. See Liebman, *supra* note 99, at 371; *supra* notes 541–564 and accompanying text; *infra* notes 851–872 and accompanying text. Reformative theory also is limited because it is not Redistributive: like Corrective, Prohibitory, Prophylactic, and some versions of Equal Educational Opportunity and Integrative theory, Reformative theory does not strike directly at the economic and demographic legacies of slavery and segregation that relegate many black Americans to a subordinate class in a physical ghetto. For the reasons given *supra* notes 156, 176–179 and accompanying text, however, I question the capacity of constitutionally redistributive strategies to fit our deepest cultural convictions; for the reasons given *infra* notes 745–767 and accompanying text, I believe that political reformation and consequent *democratically* implemented redistribution in the educational sphere provide our best hope—absent revision of our deepest convictions—of cabining and contracting the legacies of prior discrimination; for the reasons given in Liebman, *supra* note 99, I believe that litigatively enforcing the educational entitlements that many state legislatures recently have created provides a supplemental means of redistributing educational resources to the minority children promised those resources by the democratic process; for the reasons given *supra* notes 449–457 and accompanying text, I believe that if we do not carry on with the political reform begun in 1954 and supplement it with democratically implemented educational reform, then over the long haul we may have to reconsider our resistance to nondemocratically mandated redistribution or face violent social disintegration.

self-destructively antiegalitarian defect is pervasive and intractable, hence intrinsic to the system's original design—it turns out to be possible (3) judicially to redesign the failed process in a pluralistically, democratically (and, by the way, educationally) productive way.

Whether temporary or permanent, desegregation's success in this regard is no mean feat. For this first modern pluralist-democratic political system of ours has been assiduously computing racist preferences for 200 years now, notwithstanding a civil war, three constitutional amendments, periodic more or less organized interracial violence, and the development of a largely racially defined underclass that presents as big a domestic problem as the country now knows.⁷²¹ The problem, therefore, is worth—indeed it demands—a cure. Through desegregation, a part of that cure, temporarily at least, is at hand.

The difficult question, then, is not “Why School Desegregation?” but “Why Just Schools?”. After all, federal, state, and local political systems in the past have been found routinely to have discriminated and segregated in the fields of public employment,⁷²² housing,⁷²³ public transportation,⁷²⁴ recreation,⁷²⁵ and marriage,⁷²⁶ to name a few.⁷²⁷ Why not, then, job desegregation, golf-course desegregation, even marriage desegregation? In other words, why does the analysis here not lead us—instrumentally, it is true, but nonetheless directly—back to Universalism?

721. See, e.g., D. Bell, *supra* note 2, at 45–49; R. Farley & W. Allen, *supra* note 13, at 188–208; A. Gutmann, *supra* note 52, at 161 & n.78 (half of all African-American children live below the poverty line, one-fourth below half the poverty line; comparable figures for white children are one-fifth and one-twentieth); A. Pinkney, *The Myth of Black Progress* 111–29 (1984); W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* 63–89 (1987); Brooks, *supra* note 160, at 960–63; Orfield, *supra* note 6, at 27 (black children growing up in urban ghettos may be “more totally isolated from . . . mainstream . . . society and economy than were southern black children during Jim Crow segregation”); Pettigrew, *supra* note 142, at 674–86.

722. See, e.g., *United States v. Paradise*, 480 U.S. 149, 167–69 (1987); *Rogers v. Paul*, 382 U.S. 198, 200 (1965) (*per curiam*).

723. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284, 286 (1976); *Clients' Council v. Pierce*, 711 F.2d 1406, 1410–23 (8th Cir. 1983); *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1241 (6th Cir. 1974); *Young v. Pierce*, 544 F. Supp. 1010, 1013 (E.D. Tex. 1982).

724. See, e.g., *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956) (*per curiam*).

725. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 218–19 (1971) (swimming pools); *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir.), *aff'd*, 358 U.S. 54 (1958) (*per curiam*) (parks); *Holmes v. City of Atlanta*, 223 F.2d 93, 94 (5th Cir.), vacated, 350 U.S. 879 (1955) (*per curiam*) (golf courses); *Mayor of Baltimore v. Dawson*, 220 F.2d 386, 387 (4th Cir.) (*per curiam*), *aff'd*, 350 U.S. 877 (1955) (*per curiam*) (beaches).

726. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

727. See also *Bazemore v. Friday*, 478 U.S. 385, 386–88 (1986) (agricultural extension services; 4-H and Homemakers Clubs); *Lee v. Washington*, 390 U.S. 333, 333 (1968) (*per curiam*) (prisons); *Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963) (*per curiam*) (courtrooms).

For those of us who want to see racism removed from the political process governing every field, the answer to this question is disheartening. Remember that the goal of desegregation is to solve a specific (if immense) problem. That problem is the destruction of a political system in which autonomous but intensely plural adult citizens engage in successful social cooperation without destroying each other's autonomy in the process. A principal tenet of such a system is that the government cannot tell its adult citizens that they must work for it, live in its houses or anywhere else, play golf on its courses, or get married (much less to whom). In all *these* fields, that is, our exit and nonentrance options must be maintained absolutely, else the government would deny us our pluralistic right to define our own senses of self and our own plans of life.

Notice what this means. In order to use desegregation to cure the antipluralistic intervention of racism in the field of golf, for example, the government would have to engage in the equally antipluralistic sin of telling citizens *that* they must golf, *how* they must golf (publicly, not privately), and, accordingly, *where* they must golf. Short of that, the best the government through its judicial arm can do—in classically prohibitory fashion—is to tell citizens that, should they not decide to exit from the field of public golfing on municipal courses, they must be prepared to golf with members of whatever other races include public golfing devotees with access to public courses. Of course, should racist constituents thereafter desire to continue in their racist ways—for example, by diverting tax dollars from public golf courses or those located near black neighborhoods to improvements in municipal services out by the country club—they quite rationally can do so until they get caught again and get their wrists prohibitively slapped again. In this and many other fields of political concern, that is, there are no ready pluralism-preserving means of effectuating a desegregative cure for racism's antipluralist damage to the political system.⁷²⁸

Schools are different (as, to a lesser extent, are a few other spheres of public activity⁷²⁹). In the first place, schools involve children not

728. See also Liebman, *supra* note 99, at 363–64 (similar point illustrated with public employment example).

729. As discussed *infra* note 741; *infra* notes 819–828 and accompanying text, the political processes governing the armed forces and those governing the electoral system also may be amenable to politically reconstructive remedies. See also *Thornburg v. Gingles*, 478 U.S. 30, 35, 80 (1986) (single-member districts permitted to assure actual representation of many, and virtual representation of all, minority voters after racially polarized voting reveals absence of interracial equal concern on part of white citizen-voters); Liebman, *supra* note 99, at 412 n.214 (politically reformative uses of procedural due process remedies that effectively remand issues to legislature for reconsideration via a process forced to reckon with the interests of previously ignored plaintiffs). So, too, are the political processes governing subsidized housing. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284, 305–06 (1976) (dispersing subsidized complexes in white neighborhoods); *Young v. Pierce*, 640 F. Supp. 1476, 1482–83 (E.D. Tex. 1986), vacated on other grounds, 822 F.2d 1368 (5th Cir. 1987) (suggesting need for mandatory transfer policy

adults, so autonomy worries are lessened. Children are not autonomous. For a few years of their lives, they are subject to their parents' nearly absolute control with few or no exit options. Moreover, at age five⁷³⁰ that preadulthood parental control is coercively removed in one major respect and replaced by governmental control: Children are required—without *any* exit option—to go to school. At least through the eighth grade,⁷³¹ the government may—and nearly every state government in the country does—compel attendance at a state-accredited school.⁷³² By publicly providing that expensive service free of charge, moreover, the government discourages the partial exit option offered by private schools,⁷³³ and by forbidding private nonsectarian schools to discriminate on the basis of race while enjoining public financial aid to

to rearrange African-American and white households in existing public housing projects in thirty-six East Texas counties in order to integrate intentionally segregated complexes). On the other hand, the small proportion of the housing market controlled by the government, the wide range of private-housing exit routes, the problematic nature of privately enforced "integrative" housing quotas, see, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101-03 (2d Cir.), cert. denied, 488 U.S. 946 (1988), and the incomplete positional equality achieved by locating subsidized black renters and nonsubsidized white owners in the same neighborhoods and political constituencies help explain courts' reluctance to *order* blacks and whites to live together in the same complexes and neighborhoods, as opposed to ordering officials to adopt schemes that *encourage* the two races to do so. Even further afield, some of the Supreme Court's employment-discrimination decisions may be interpreted as permitting judicial and other remedial efforts to reform systemically racist *economic* institutions. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 729-30 (1989) (dicta) (local government may "remedial[ly]" reform local construction industry by spurring formation of minority-owned firms upon proof of widespread discrimination in that industry); *United States v. Paradise*, 480 U.S. 149, 154-66, 185 (1987) (plurality opinion) (upon proof of egregious discrimination in employment of black state troopers and massive resistance to lower courts' non-Reformatory remedies, Court permits race-conscious remedy that hastens placement of blacks in decision-making positions); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 448-49, 477 (1986) (futility of "endless enforcement litigation" along corrective and prohibitory lines following union's "long continued and egregious" discrimination permits order reforming union by requiring it to accept more African-American members); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)) (in order to reform economic system that theretofore imposed "cumulative and invidious burden" on black entrance to labor market, employers must accept into labor force blacks possessing essential job qualifications).

730. Or four. See *Early Schooling Is Now the Rage*, N.Y. Times Apr. 13, 1986, § 12 (Education Life), at 24, col. 1.

731. See *Wisconsin v. Yoder*, 406 U.S. 205, 221-27 (1972).

732. See, e.g., *Dimond*, supra note 123, at 40 & n.165 (citing statutes); Shane, *Compulsory Education and the Tension Between Liberty and Equality: A Comment on Dworkin*, 73 Iowa L. Rev. 97, 100-01 (1987). The Court has distinguished school desegregation from other potentially race-conscious remedies on the ground that the former merely substitute judicial for pre-existing legislative coercion while the latter initiate governmental coercion. See cases discussed in Liebman, supra note 99, at 365-66 & nn.72-74.

733. See *Bush Rejects Tax Break for Private School Cost*, N.Y. Times, Mar. 30, 1989, at A20, col. 3 (Bush Administration opposes tuition tax credits for cost of private

religious schools that discriminate, the government further narrows even that partial escape route in the respect relevant here.⁷³⁴ To this extent, therefore, elementary and secondary education in this country—even when carried on in so-called “private schools”—is substantially removed from the “private” and located in the “public” sphere.⁷³⁵

This treatment of children is not some antiautonomous blemish on an otherwise autonomous body politic. Rather, compulsory attendance at publicly sanctioned schools that are not entirely controlled by parents with homogeneous views of the good is a critical aspect of any thoroughly plural and autonomy-regarding society.⁷³⁶ By giving children the ability to select among a broader range of career and value options than their parents could hope to provide, schools *enhance* autonomy—indeed, *they make autonomy possible*—on the part of young adults otherwise imprisoned by social contingency.⁷³⁷ Thus, following the reproductive process—in which parental autonomy is supreme—its creation gradually takes on his or her own autonomy interest, which the parents and, as the child matures, the state share in representing and in protecting against the other representative’s tyranny.⁷³⁸ In this process, compulsory, publicly regulated education—the more so if it adheres to the “equal concern” principle in its administration and pedagogy—serves the crucial functions of (1) moderately expanding the limited set of life-plan possibilities that parents, family, and locality

education); supra note 670 (proportion of students attending private schools declined over last two decades).

734. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983) (Internal Revenue Code constitutionally forbids tax-exempt status to sectarian elementary, secondary, and post-secondary educational institutions that deny African-Americans admission); *Runyon v. McCrary*, 427 U.S. 160, 175–79 (1976) (upholding constitutionality of Civil Rights Act of 1861, 42 U.S.C. § 1981 (1988), insofar as it forbids private nonsectarian schools to deny blacks admission). Public education is thus not merely a “metonymic placeholder” for the activist welfare state, but rather its epitome. Cf. Ackerman, *Constitutional*, supra note 395, at 540 (public education context in *Brown* a symbol of, or “metonymic placeholder” for, modern welfare state).

735. See Liebman, supra note 99, at 369 & n.87 (broad public regulation of private schools); supra notes 495–499 and accompanying text.

736. See, e.g., J. Mill, *On Liberty* 175 (G. Himmelfarb ed. 1985); J. Dewey, supra note 644, at 16, 23–27, 115; J. Rawls, supra note 105, at 100–01; Dworkin, supra note 154, at 1; Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 *Phil. & Pub. Aff.* 338, 349 (1980); sources cited supra note 155.

737. See J. Dewey, supra note 123, at 20, 87 (“it is the office of the school environment” to see “that each individual gets an opportunity to escape from the limitations of the social group into which he is born, and to come into living contact with a broader environment”); A. Gutmann, supra note 52, at 30 (education “makes choice meaningful by equipping children with the intellectual skills necessary to evaluate ways of life different from that of their parents”); sources cited supra notes 155, 674.

738. See A. Gutmann, supra note 52 at 27–33, 42, 50–58, 69; M. Walzer, supra note 52, at 215–16; Liebman, supra note 99, at 365.

reveal to the child,⁷³⁹ and of (2) preparing the child for the "equal concern" duties of citizenship upon reaching adulthood.⁷⁴⁰

739. See A. Gutmann, *supra* note 52, at 33; sources cited *supra* notes 155, 674-676.

740. See, e.g., J. Dewey, *supra* note 123, at 21, 87, 119; A. Gutmann, *supra* note 52, at 32-33, 39, 46, 134, 162; M. Walzer, *supra* note 52, at 215-17. Counterbalancing the State's power in these respects is the citizen-parent's capacity—tempered by the "equal concern" principle—to govern the schools through local political activity and the parent's essentially untempered control over the child's activities outside of school. The fact that a child remains dependent upon (including for protection from the state) and partly definitive of her parents at the same time as her own individuality is blossoming makes unpalatable Plato's proposal that the state separate children from parents at birth and subject the former to an unqualifiedly virtuous education from the start. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); J. Dewey, *supra* note 123, at 88-91, 93-94; A. Gutmann, *supra* note 52, at 27 ("our good as parents, . . . not just the good of our children, [should] be considered in designing the educational system for our society"); Shane, *supra* note 732, at 102 (guiding upbringing of one's child a "core experience of self-avowal"). This same intertwining of needs and interests answers Aquinas's, Locke's, and Milton Friedman's proposals that *parents* exercise unlimited control over their children's education. See B. Ackerman, *supra* note 123, at 160-62 (criticizing Friedman); A. Gutmann, *supra* note 52, at 31-32 (criticizing Locke and Aquinas). At stake in this effort to untangle the intermingled interests of child, parent, and society is the proper resolution of a range of questions running from the constitutionality of "privatizing" public education via vouchers, see *supra* note 733, to that of compelling *public* education. My own view is that the extent of public control over the schools, the growing interest in professionalism within the schools, e.g., A. Gutmann, *supra* note 52, at 76-79, and the extent of the parents' ability to shape their children's destinies outside of school, e.g., *id.* at 50-58, 69, is such that the greater danger lies not in state tyranny over child or parent but rather in parental tyranny over the child. See B. Ackerman, *supra* note 123, at 160-62. To my mind, therefore, any change in the status quo ought not be in the direction of voucher systems but rather in the direction of compulsory public education. But see J. Chubb & T. Moe, *Politics, Markets, and America's Schools* 215-26 (1990). True, the Supreme Court seemed to reject the latter proposal in a series of decisions in the 1920s. See *Pierce v. Society of Sisters*, 268 U.S. at 535; *Bartels v. Iowa*, 262 U.S. 404, 411 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 401-03 (1923). But those decisions are ripe for reconsideration given: (1) their discredited, *Lochner*-era preoccupation with the economic autonomy of the plaintiff private *schools*, e.g., *Pierce v. Society of Sisters*, 268 U.S. at 535-36; see also *Bartels v. Iowa*, 262 U.S. at 412 (Holmes, J., dissenting) (criticizing majority's solicitude for economic rights); *Meyer v. Nebraska*, 262 U.S. at 399-400 (citing, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), and focusing in part on right of German teachers to pursue the occupation of their choice); (2) their concern more with the question whether the state may forbid private schooling (surely it may not) and less with the question posed here whether the state may insist upon public education during some part of the day, see *Pierce v. Society of Sisters*, 268 U.S. at 534-36 (although state may not put private and parochial schools out of business, it may "regulate . . . [.] inspect, supervise, and examine" all schools and teachers and prescribe secular curriculum for all children, including instruction in "good citizenship"); *Meyer v. Nebraska*, 262 U.S. at 401-03 (although state may not "interfere with the calling of modern language teachers" by forbidding private and parochial schools to conduct classes in languages of schools' choice, the "[p]ower of the State to compel attendance at some school[.] . . . to make reasonable regulations for all schools, including a requirement that they shall give instructions in English," and "to prescribe a curriculum for institutions which it supports" is not questioned); (3) the succeeding half century's firmer implantation of education in the "public" sphere, see *supra* notes

Desegregation of schools is not, therefore, uniquely required because schools are uniquely fit objects of universalization. Rather, desegregation is less problematically used to reform the political process governing schools than that governing most other social activity because, unlike other activity, education in our country is, and in any liberal state ought to be, universal.⁷⁴¹ Public education's universality, moreover, uniquely serves rather than destroys autonomy. So, too, does desegregation's autonomy-preserving reformation uniquely work without in the process requiring a qualitatively equal and opposite reduction in individual freedom. Accordingly, whereas prohibitory decrees must ineffectually suffice in most other areas subject to antipluralist legislative racism, reformative desegregation is uniquely capable of solving that problem "in the field of public education."⁷⁴² In the same way, Reformative theory finally answers the question Hannah Arendt posed thirty years ago concerning the curious choice of children as the vanguard in the figurative and literal battles against segregation.⁷⁴³ The theory also answers the related and heretofore equally perplexing question concerning the limitation of all-out desegregation remedies to the field of education.⁷⁴⁴

The subject-matter-specific solubility of what is a society-wide problem is, as I said, disheartening. We need not be totally despondent, however, for if we had to choose a single sphere of political concern in which to accomplish the most political reform by applying a thoroughly reconstructive remedy, education almost certainly would be that sphere. First, education is a principal concern of the political process—perhaps, as *Brown I* postulated, "the most important function of state and local governments."⁷⁴⁵ The \$231 billion spent annually on public elementary and secondary education accounts for one-third to one-half of the budgets of many local governments (by far their largest

495–499 and accompanying text; and (4) that period's reinvigoration of the equal protection clause and the recognition that unfettered parental control over the education of children can eclipse the development of young citizens' constitutionally mandated duty of equal concern and respect.

741. The only analogue to schools in this regard is the army, which was desegregated by presidential directive six years before *Brown* and remains today the most successfully integrated American public institution. See *A Common Destiny: Blacks and American Society 67–74* (G. Jaynes & R. Williams eds. 1989); see also Walzer, *supra* note 142, at 57 ("Except in armies and juries, adults are not coercively brought together by the state").

742. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 495 (1954); cf. *supra* note 729 (listing other fields in which reformative remedies sometimes are available).

743. See Arendt, *supra* note 172, at 50 (quoted *supra* note 172).

744. Struggling with the "Why just schools?" question are, e.g.: *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 736–37 (1989) (Scalia, J., concurring in judgment); Gewirtz, Choice, *supra* note 49, at 729–30; Minow, *supra* note 179, at 57 & n.229; Soifer, *supra* note 255, at 396–97; Yudof, *supra* note 61, at 411–19, 447.

745. *Brown I*, 347 U.S. at 493; accord *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); sources cited *supra* note 156.

single expenditure⁷⁴⁶), a substantial proportion of the people they employ,⁷⁴⁷ and over four percent of the gross national product.⁷⁴⁸ Looked at another way, public schools probably account for over three-fourths of all interactive encounters on any given (week) day between citizens and officials of government.

Second, education is a principal concern of every citizen, if measured only by the amount of time each of us, by law, must devote to it. The average child spends over 15,000 hours in public schools (assuming no extracurricular activities).⁷⁴⁹ Going to school is what most children "do" for twelve or thirteen (and soon to be fourteen⁷⁵⁰) years of their lives.⁷⁵¹ More importantly, going to school is what the average *parents'* children do during fully eighty percent of the time those children live at home. And there is no measuring the proportion of parents' political attention devoted to their children's welfare.⁷⁵² In short, viewed from its official top down or from its constituent bottom up, perhaps the largest and most important part of local political processes is the one most capable of being desegregatively reformed.

Third, elementary and secondary education is the most important sphere of ongoing community participation in politics in this country.⁷⁵³ Reforming citizenship in that sphere accordingly is likely to have a broader impact on more citizens than doing so in other spheres.

Fourth, citizens concerned with schools are likely, because of that

746. See, e.g., *Board of Educ. v. Nyquist*, 83 A.D.2d 217, 229, 443 N.Y.S.2d 843, 851 (1981), modified, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982) (28-45% of local tax revenues spent on education in various districts in New York).

747. This point, along with the autonomy-enhancing need for diversity in the public schools, helps explain why the Court treats faculty integration as a potentially important element in desegregation plans. See, e.g., *Rogers v. Paul*, 382 U.S. 198, 200 (1965) (per curiam); *Bradley v. School Bd.*, 382 U.S. 103, 105 (1965) (per curiam).

748. A. Gutmann, *supra* note 52, at 139; accord *id.* at 69; K-12 Spending Rises by 7.2 Percent to Record \$231 Billion for 1990-91, *Educ. Week*, Jan. 24, 1990, at 2, col. 3; State Investment in Education, *Educ. Week*, Jan. 24, 1990, at 3, col. 3 (state expenditures on education accounted for 33% of state spending in fiscal year 1988); U.S. Is Said to Lag in School Spending, *N.Y. Times*, Jan. 16, 1990, at A23, col. 1 (in 1985, United States spent 4.1% of its gross national product on elementary and secondary education); Education Secretary to Quit Reagan Cabinet Next Month, *N.Y. Times*, Nov. 9, 1984, at A1, col. 4 (quoting Secretary of Education Terrell Bell) ("education is so special that it ranks in priority alongside and possibly ahead of the Department of Defense").

749. See M. Rutter, B. Maughan, P. Mortimore, J. Ouston & A. Smith, *Fifteen Thousand Hours: Secondary Schools and Their Effects on Children 1* (1979).

750. See *supra* note 730 and accompanying text.

751. See, e.g., Walzer, *supra* note 142, at 58 ("the school years are long, a substantial part of a human life").

752. See, e.g., A. Gutmann, *supra* note 52, at 67, 73, 168-69, 282-91; J. Wilkinson, *supra* note 1, at 45; Walzer, *supra* note 142, at 58 (given "parental concern, educational debates have significant short-term results [and] are likely to generate adult political activity of a very intense kind").

753. See, e.g., A. Gutmann, *supra* note 142, at 177-78; Michelman, *supra* note 375, at 487-89; sources cited *supra* note 708.

concern, to care a great deal about other matters of political concern. Most parents want their children to attend schools in safe areas and, other things equal, prefer to live near those schools. Consequently, white constituents situated so that assertions of the racist opinion are irrational in regard to administering schools are also unlikely to inject such views into the political processes affecting public safety, municipal services, recreational facilities, and housing in the vicinity of the schools.⁷⁵⁴ It should be no surprise, therefore, that districts with stably integrated schools also tend to have significantly greater amounts of stably integrated housing near those schools.⁷⁵⁵ Accordingly, there is reason to expect that the desegregative reformation of the political process affecting schools will have significant reformational ripple effects elsewhere in the political process, at least when a majority of the constituency are, have been, or contemplate being parents.

Fifth, it is the egalitarian's hope, at least, that life in an equality-representing and empathy-inducing ethical situation can have a pluralistically educative effect on the people living it—that it can reveal connections fashioned out of our shared distinctness.⁷⁵⁶ Rawls, for example, predicts that the publicly visible and affirmed condition of processual equality in which he situates his original participants—and in which desegregation positions its participants insofar as racial equality is concerned—will “forge[] the basis of comity amidst the disparities that persist. Citizens [will be] able to recognize one another's good faith and desire for justice even though agreement may . . . break down . . . on many issues of policy.”⁷⁵⁷ De Tocqueville claims to have found “self-interest properly understood” actually producing such effects “every day” in ante-bellum America.⁷⁵⁸ We at least can hope, therefore, that, after being positioned for a time so that their habit is too harmfully irrational to be indulged in one sphere of political endeavor, habitués of the racist opinion may come to realize that they can survive without indulging it in other spheres as well. Lest this sound like pie in the sky, there is evidence that racist attitudes fade in the years following desegregation.⁷⁵⁹ Maybe we *can* legislate morality.

754. This point helps explain why courts often resist desegregation plans calling for closure of schools in black neighborhoods. See, e.g., *Valley v. Rapides Parish School Bd.*, 702 F.2d 1221, 1227 (5th Cir.), cert. denied, 464 U.S. 914 (1983); *Arvizu v. Waco Indep. School Dist.*, 495 F.2d 499, 504 (5th Cir. 1974); *Hoots v. Pennsylvania*, 539 F. Supp. 335, 340–41 (W.D. Pa. 1982), aff'd, 703 F.2d 722 (3d Cir. 1983). See generally Note, *supra* note 31, at 2009–12 (political science research demonstrating that schools issues often dominate politics affecting local agencies other than school boards).

755. See Hawley & Smylie, *supra* note 9, at 290 (surveying sources).

756. See *supra* notes 377–385, 604–607 and accompanying text.

757. J. Rawls, *supra* note 105, at 517.

758. See *supra* note 607 and accompanying text.

759. See *supra* notes 667–668, 683–685 and accompanying text. Compare *supra* notes 139–140 and accompanying text (Professor Bell's view that further desegregation is doomed because we societally have reached the point where the interests of the white middle class, which desegregation originally served, have now diverged from the

Sixth, whether or not parents are pluralistically educable, a liberal society assumes that *children* are. And just as desegregation positions parental constituents equally vis-à-vis their children, so, too, does it position the children equally vis-à-vis each other. We can hope, therefore—and here again the social scientific data is encouraging⁷⁶⁰—that desegregatively positioned children will matriculate to adulthood with more fully developed racial “bonds of civic friendship” than did previous, racially estranged and unequal, generations.

Finally, school desegregation may contribute to alleviating one of the broadest and most dangerous effects of the racist disorder affecting the political machinery as a whole, namely, its entrapment of some rural and central-city blacks in an adhesive culture of poverty, which seizes children at birth and thereafter constricts them at home, on the streets, and in such workplaces to which they are able to gain admittance.⁷⁶¹ A key element of persistently imposed poverty is an underdeveloped, indeed barely nascent, set of societal expectations for the culture's inhabitants. Nicholas Lemann provides a wrenching example: At Orr High School in the center of Chicago's ghetto the societal expectation reflected in what qualifies as an “A” composition in a sophomore English class is the ability to write one's name at the top of the page and anything—anything—somewhere else on the page.⁷⁶²

Desegregation provides a potential avenue of escape from this culture—perhaps the only escape route readily at hand.⁷⁶³ For it is now clear that “great expectations” for children are (1) by far the most educationally important resource dispensed by the public schools;⁷⁶⁴ (2) the resource that political systems corrupted by the racist opinion distribute to African-American children in by far the most inequitably low proportions;⁷⁶⁵ and (3) a resource that the white constituents of a

desegregative interests of blacks) with Liebman, *supra* note 99, at 362-63 and *supra* notes 377-385, 650, 652-697 and accompanying text (both constitutional duty of “equal concern” virtue and desegregation remedy for defaults of that duty designed, and have capacity, to *compel* white and black interests to converge).

760. See *supra* notes 683-685 and accompanying text.

761. See *supra* note 721 and accompanying text.

762. Lemann, *The Origins of the Underclass*, New Republic, July 1986, 52 at 59-63; see Kennedy, *supra* note 64, at 1761 n.68, 1768; *supra* note 675.

763. See generally Orfield, *supra* note 6, at 27 (discussing urgency of efforts to “place school desegregation in the forefront of national politics” given “deepening isolation of children growing up in inner city ghettos and barrios”).

764. See, e.g., Bell, *supra* note 140, at 126; Pettigrew, *supra* note 142, at 696; *supra* note 675 (citing educational research demonstrating important impact of teacher expectations on student achievement).

765. See, e.g., E. Leacock, *Teaching and Learning in City Schools* 16 (1969); Committee on Policy for Racial Justice, *supra* note 140, at 4, 16-17; Franklin, *supra* note 142, at x; Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 *Harv. Educ. Rev.* 411, 447-49 (1970); *supra* notes 644, 675; see *supra* notes 458-465 and accompanying text (segregation as “divide and demean” strategy generally).

desegregatively reformed political system find difficult to withhold from black children because doing so requires them to withhold it from their own children as well.⁷⁶⁶ Remember, too, that the schools' capacity to expand horizons and to neutralize social contingency is the reason why compulsory participation not only is not anathema to a liberal pluralist state but is essential to it.⁷⁶⁷ Accordingly, while there may be little reason for optimism that racially corrupted constituencies and political processes will find meaningful answers to persistent poverty among blacks, there is some reason to hope that desegregatively reconstructed political systems will begin to provide part of the answer in the schools.

C. *Some Other Philosophical and Doctrinal Advantages and Implications of Reformative Theory*

As I have proceeded, I have noted a number of moral and doctrinal problems that trouble the five competing theories but are solved by Reconstructive analysis: As a process-focused theory, reformative desegregation avoids the antiperfectionist critique of some versions of the Equal Educational Opportunity and Integration theories as well as their controversial commitment to "all-out" redistribution. It likewise answers, as those theories cannot, the "Why just intent?," "Why especially race?," and "Why especially segregation?" questions.⁷⁶⁸ Reformative theory's public-law bent also largely addresses the attacks made on the Correction theory from both the right and the left. Thus, it explains why transactions, error, and antiautonomy costs are imposed on persons who, for all Correction theory can explain, are "innocent third party nonviolators"⁷⁶⁹ while also eschewing an isolated-event-

766. See W. Hawley, *supra* note 3, at 164 (research showing that "teachers are generally less demanding of and responsive to minority children in segregated than in desegregated classrooms"); sources cited *supra* notes 644, 675 (research showing that simultaneously integrated and cooperative learning settings raise expectations for minority children and enhance their achievement levels).

767. See *supra* notes 736–740 and accompanying text.

768. Compare *supra* notes 134–179 and accompanying text (criticizing Equal Educational Opportunity and Integration theories for failing to explain desegregation decisions' emphasis on intentional discrimination, race, and racial segregation) with *supra* notes 439–483 and accompanying text (Reformation theory's explanation of decisions' emphasis on intent, race, and segregation); cf. *supra* notes 206–226, 342 and accompanying text (Correction and Prophylaxis theories' problems answering "Why just intent?" question).

769. Compare *supra* notes 231–248 and accompanying text (discussing difficulties Correction theory encounters in explaining and justifying desegregation because it concludes that desegregation burdens many people who are "innocent" and considers that outcome immoral) with *supra* notes 574–575, 701–707 and accompanying text (Reformation theory's explanations of why desegregation imposes few burdens on people who genuinely can claim to be innocent and why the burdens it does impose are justifiable). In so doing, Reformative theory also avoids Corrective theory's justification problems with—and all the other theories' criticisms of—the *Swann* and *Keyes* presumptions. Compare *supra* notes 143–148 and accompanying text (Equal Educational Opportunity theorists' criticism of *Swann* and *Keyes* presumptions) and *supra* notes 237–248 and ac-

specific remedy and adopting a systemically reconstructive one for what on analysis is a systemic malfunction of society's political processes.⁷⁷⁰ Reformatory theory also provides an answer, where the Correction and Prophylaxis theories cannot and where the Prohibition theory *will* not, to the question "Why (all-out) desegregation?"—as opposed, for example, to damages, negative injunctions or "gilded ghetto," "black power," and partial desegregation remedies.⁷⁷¹ In addition, the Reformatory theorist builds directly and naturally into his analysis what other theorists find embarrassing—for example, the role of the Massive Resistance era in causing the Court's desegregation doctrine to evolve,⁷⁷² the role of "green follows white" reasoning,⁷⁷³ and the courts' process reforming but not supplanting intrusion into the political sphere.⁷⁷⁴ It also explains why this society-wide problem receives treatment in the school arena that is so different from the treatment it receives in other spheres of political concern.⁷⁷⁵

Reconstructive analysis also solves the otherwise puzzling doctrinal conundrums posed by, for example, holdings that integration is critical but precise racial balance is not;⁷⁷⁶ evidence of discrimination by non-party, nonschool officials is relevant;⁷⁷⁷ outlying all-white portions of districts must be included in desegregation plans even when the white children there are not needed numerically to integrate African-American children in the district;⁷⁷⁸ and desegregation requires within- as well as between-school desegregation⁷⁷⁹ and the continued use of formerly all-black as well as all-white school buildings⁷⁸⁰ and prefers

comparing text (criticizing Correction theory's treatment of presumptions) with *supra* notes 565–573 and accompanying text (Reformatory explanation of presumptions).

770. Compare *supra* notes 249–284 and accompanying text (criticizing Correction theory's inaccurately episodic and individualistic view of violation and remedy) with *supra* notes 529–564, 579–590 and accompanying text (Reformation theory's socio-structural view of violation and remedy). Reconstructive theory also avoids the asymmetry accompanying process theory's frequent acceptance of paltry prohibitory remedies to cure pervasive processual violations. See *supra* notes 579–590 and accompanying text.

771. Compare *supra* notes 227–229 and accompanying text (Correction theory's inability to answer "Why just desegregation?" question) and *supra* notes 295–310 and accompanying text (Prohibition theory's rejection of desegregation as proper remedy) and *supra* notes 347–352 and accompanying text (Prophylaxis theory's inability to answer "Why just desegregation?" question) with *supra* notes 579–721 and accompanying text (Reformation theory's answer to "Why just desegregation?" question).

772. See *supra* notes 515–528 and accompanying text.

773. Compare, e.g., Yudof, *supra* note 61, at 439, 455 (suggesting that there is something unseemly about "green follows white" justification for desegregation) with *supra* note 650 and accompanying text (defending "green follows white" rationale).

774. See *supra* notes 705–707 and accompanying text.

775. See *supra* notes 722–744 and accompanying text.

776. See *supra* notes 643–644 and accompanying text.

777. See *supra* note 556.

778. See *supra* notes 712–713 and accompanying text.

779. See *supra* note 644.

780. See *supra* note 754.

plans assuring a so-called "critical mass" of members of each race in each desegregated school.⁷⁸¹ Reconstructive theory also makes it easier to understand, if not necessarily to satisfy, the intent test's requirement of "reading the mind of the school board."⁷⁸²

Let me make a few other claims on Reconstructive theory's behalf.

1. *Balancing Cardinals and Ordinals*. — The Equal Educational Opportunity and Correction theories run into difficulty because they rely on causal judgments regarding the relationship between segregation and below-average academic achievement, on the one hand, and discriminatory acts and segregative demographic conditions, on the other. These judgments have been branded as empirically uncertain and, accordingly, as too morally frail and unstable to serve as justifications for all-out desegregation; they are in any event exceedingly expensive for courts to make.⁷⁸³ The Reformative approach, by contrast, relies upon interpretive judgments—judgments of a sort that judicial factfinders have made from time immemorial, if not on so grand a scale, concerning the good or bad motivation of actors in public life and the fairness and unfairness of law-making and implementing procedures.

Reconstructive theory, however, does not leave the judge interpretively on her own. Rather, Reconstructive theory insists that, before the judge decides that a sufficiently "system-wide violation" has occurred to require system-wide reconstruction, the parties—in the manner of Professor Black in his famous article on *Brown*—must amass root-and-branch "evidence of what segregation means to the people who impose it and to the people who are subjected to it," and must prove that the particular political process as it actually has been functioning is not "'equal' in intent, in total social meaning [or in] impact."⁷⁸⁴

Relatedly, the Equal Educational Opportunity, Correction, and Prohibition theories have been obsessed with the admittedly "treacherous task" of balancing segregative harms to blacks against busing and other "transitional" costs that desegregation imposes on whites.⁷⁸⁵ How, for example, does one make the cardinal judgments necessary to compare the degree of educational or demographic harm suffered by a black child attending, for example, a seventy-five-percent black school, to those a white child faces if she is bused forty-five minutes each way to make the same school only forty-percent black?⁷⁸⁶ Reformative theory avoids this problem in two ways: First, the compulsion to balance these

781. See supra note 3; Crenshaw, supra note 3, at 1344.

782. See supra notes 466–483 and accompanying text.

783. See supra notes 150–153, 265–284 and accompanying text.

784. Black, supra note 123, at 426; see also supra text accompanying note 561 (example of interpretive judgment in trial judge's description of his findings in well-known desegregation case).

785. Fiss, supra note 61, at 196; accord, e.g., L. Graglia, supra note 55, at 262–77; Gewirtz, Remedies, supra note 49, at 633–42.

786. See, e.g., Fiss, supra note 49, at 36–39, 188–91; Gewirtz, Remedies, supra note 49, at 630–31. The difficulty of this enterprise is revealed by the thumb-on-scale

harms recedes, as I have noted, once it is realized that the deep, broad, and long systemic violation brooks few "third party nonviolators."⁷⁸⁷ Second, and more importantly, Reformatory analysis substitutes one evaluative ordinal judgment for the Equal Educational Opportunists', Correctivists', and Prohibitionists' scores of empirical cardinal judgments: Is a reformed, hence properly egalitarian and pluralistic, political process—achieved at a cost of assigning children to schools different from the ones to which they previously were assigned and the ones to which their parents, beforehand at least, preferred to see them assigned—better than one that generates ubiquitously, then relies determinatively upon, "my race is better than your race" opinions? It seems to me, moreover, that the answer to this ordinally simplified question is also relatively simple: Because the "extreme harmfulness" judgment regarding the intervention of the racist opinion in the political process is philosophically easy⁷⁸⁸ and in any event is embedded in the fourteenth amendment,⁷⁸⁹ the moral justification for the reform becomes clear and uncontroversial once plaintiffs, as required by *Keyes*, establish that the antipluralistic intervention is deep, wide, longstanding, and—short of systemic reconstruction—intractable. Finally, although important, the moral costs of reform turn out to be moderate and relatively short lived.⁷⁹⁰

2. *Choice*. — Until the Supreme Court effectively banned them as desegregatively ineffective in *Griffin* and *Green*, "voucher" and "freedom-of-choice" plans played an important role in school desegregation cases.⁷⁹¹ Recently, "choice" proposals have reappeared both inside and outside the desegregation context.⁷⁹² In the desegregation con-

measurement standard that both Professors Fiss and Gewirtz find it necessary to use. See Fiss, *supra* note 61, at 198; Gewirtz, *Remedies*, *supra* note 49, at 606-08.

787. See *supra* notes 574-577 and accompanying text.

788. See *supra* notes 505-509 and accompanying text.

789. See *supra* notes 484-485 and accompanying text.

790. See *supra* notes 574, 664-674 and accompanying text.

791. See J. Wilkinson, *supra* note 1, at 94, 97-109; Dimond, *supra* note 123, at 41 & nn.169-70; Gewirtz, *Choice*, *supra* note 49, at 741-49; *supra* notes 520, 525 and accompanying text.

792. Outside desegregation contexts, choice proposals call for ending mandatory assignments within or among districts or (via voucher systems) disbanding public schools altogether and allowing parents to choose among available public or private schools. See, e.g., J. Chubb & T. Moe, *supra* note 740, at 215-26; Boyd, *Public Education's Last Hurrah?: Schizophrenia, Amnesia, and Ignorance in School Politics*, 9 *Educ. Eval. & Pol. Anal.* 85, 92-99 (1987); Raywid, *Drawing Educators to Choice*, 2 *Metropolitan Educ. I*, 7-23 (1987); Wells, *Quest for Improving Schools Finds a Role for Free Market: Consumer's Choice in Public Education*, *N.Y. Times*, Mar. 14, 1990, at A1, col. 2; Snider, *Cavazos Couples Parental Choice, Site Management*, *Educ. Week*, Oct. 25, 1989, at I, col. 1; Perpich, *Choose Your School*, *N.Y. Times*, Mar. 6, 1989, at A17, col. 1; Fiske, *Parental Choice in Public Schools Gains*, *N.Y. Times*, July 11, 1988, at A1, col. 4; see also J. Coons & S. Sugarman, *Education by Choice: The Case for Family Control* (1978) (anticipating more recent proposals to establish voucher and other mechanisms for increasing parental choice in regard to schools children attend). But see *Educ.*

text, choice options range from the use of magnet schools as occasional "sweeteners" in mandatory desegregation plans,⁷⁹³ to plans that "magnetize" and insist upon a substantial degree of racial balance at most or all schools in the district,⁷⁹⁴ to more or less voluntary city-suburbs exchange and transfer programs,⁷⁹⁵ to proposals—most closely mirroring the former era's freedom-of-choice plans—that would supplant desegregation entirely with what amount to district-wide open admissions policies subject only to facilities-utilization and other not necessarily desegregative constraints.⁷⁹⁶

Nearly all the choice plans the courts actually have ordered in school desegregation cases—which typically require students to attend schools with children of other races but afford a certain amount of choice among integrated schools—cross Reformatory theory's desegre-

Week, Apr. 25, 1990, at 15, col. 5 (in Iowa, which recently opened enrollment in all its districts save those undergoing desegregation to students from other districts, less than a third of one percent of the State's students applied for transfer, among whom "about 77 percent" were seeking to escape districts with excessively small enrollments); Walker, *Business Leaders Challenge Bush's School Priorities: Emphasis on Choice Is Called Misplaced*, *Educ. Week*, Nov. 8, 1989, at 1, col. 1; Olson, *N.E.A. Opposes Mandated State, Federal 'Choice'*, *Educ. Week*, Aug. 2, 1989, at 8, col. 5; Jennings, *In Poll, Slim Majority of Board Chiefs Oppose Choice; 62% for Decentralizing*, *Educ. Week*, Mar. 8, 1989, at 5, col. 1. Choice plans promise to raise racial equity and segregation issues of their own, see, e.g., *Backlash Against Choice Plans Emerges Among Minorities*, *Educ. Week*, June 21, 1989, at 7, col. 1; Snider, *School Choice: New More Efficient 'Sorting Machine'?*, *Educ. Week*, May 18, 1988, at 1, col. 1.

793. See F. Welch & A. Light, *supra* note 6, at 94–96 (collecting plans).

794. See, e.g., *Jenkins v. Missouri*, 855 F.2d 1295, 1299–1301 (8th Cir. 1988), *aff'd* on other grounds, 110 S. Ct. 1651 (1990) (Kansas City); *Arthur v. Nyquist*, 712 F.2d 809, 811–13 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (Buffalo); Snider, *Seattle Happy With 'Choice' Plan*, *Educ. Week*, June 15, 1988, at 4, col. 1; see Price & Stern, *Magnet Schools as a Strategy for Integration and Reform*, 5 *Yale L. & Pol. Rev.* 291, 294 (1987).

795. Mandatory city-suburbs transfer plans include the one implemented in the Indianapolis area. See *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1112, 1116 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); see also *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 430, 436 (8th Cir. 1985) (*en banc*) (readjusting boundaries and providing special transfer programs and interdistrict magnet schools in lieu of requiring consolidation of three defendant school districts), *cert. denied*, 476 U.S. 1186 (1986); *Cunningham v. Grayson*, 541 F.2d 538, 540 (6th Cir. 1976) (interdistrict busing plan imposed to achieve greater racial balance), *cert. denied*, 429 U.S. 1074 (1977). Semi-mandatory plans (suburban districts must accept students who volunteer to transfer) include the plan implemented in St. Louis area. See *Liddell v. Missouri*, 731 F.2d 1294, 1308–09 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984). Wholly voluntary plans include the plan operating between Hartford and its suburbs. See R. Crain & J. Strauss, *supra* note 675, at 5–6.

796. See, e.g., *Armor*, *supra* note 670, at 30–36; *Armor, Unwillingly to School*, 18 *Pol'y Rev.* 99, 111 (1981); *Cuddy, A Proposal to Achieve Desegregation Through Free Choice*, *Am. Educ.*, May 1983, 25 at 25–31; *Dimond*, *supra* note 123, at 40–44 & nn.167–68; *Chancellor's Task Force on School Integration, Report on High School Admissions* (Nov. 10, 1988) (New York City).

gative threshold⁷⁹⁷ and warrant no special discussion here.⁷⁹⁸ My concern, instead, is with the notion that choice of schools is such an important consideration that, when the dictates of desegregation and choice clash, desegregation should give ground or give way.⁷⁹⁹ As I discuss above, although choice is "a fundamental value" in other walks of American life,⁸⁰⁰ it plays, and deserves, a less central role in American educational theory and practice. Choice recedes in importance in the educational sphere in large part because parents, not children, make the choices and because the tendency of parents to limit their children's choices justifies governmental compulsion.⁸⁰¹ More importantly, once the question of *whether* to attend schools (and, if so, whether to attend public schools⁸⁰²) is put to one side and the question of *which* public school to attend is taken up, it becomes clear that choice has had almost no role at all in this nation⁸⁰³—except, ironically, in school systems subject to desegregation decrees. As the latter caveat suggests, therefore, choice often may provide a desegregatively effective, if expensive, enticement for families that otherwise would exit the system; but as an alternative to (as opposed to a component of) mandatory desegregation, choice is a red herring.⁸⁰⁴

797. See *supra* note 3; *supra* note 644 and accompanying text.

798. See, e.g., cases cited *supra* notes 794–795.

799. E.g., Arendt, *supra* note 172, at 55 ("To force parents to send their children to an integrated school against their will means to deprive them of rights which clearly belong to them in all free societies—the private right over their children and the societal right of free association"); sources discussed *supra* notes 740, 796.

800. Gewirtz, Choice, *supra* note 49, at 782; accord *id.* at 730.

801. See J. Dewey, *supra* note 123, at 82–83 (public schooling necessary because "[f]amily life may be marked by exclusiveness, suspicion, and jealousy as to those without, [although it is] a model of amity and mutual aid within"); A. Gutmann, *supra* note 52, at 28–30; M. Walzer, *supra* note 52, at 214 (children "not enrolled [in school] but conscripted. Abolish the conscription, and children are thrown back, not . . . upon their own resources but upon the resources of their parents"); J. Wilkinson, *supra* note 1, at 173; see also Cottle, *Bus Start*, N.Y. Times, Mar. 9, 1975, § 6 (Magazine), at 20 (quoting an 11-year-old black youth from Roxbury explaining his understanding of busing: "Busing's just got to be, man. Got to be. . . . We got to open up ourselves, spread out. Get into this city, man. Move into all those places we can't go at night, you know. Go to good schools, live in good places like white folks got. . . . That's why they're busing us."). This is not to say that parents have no cognizable interest in their children's education but only that the parental interest competes with the child's and state's and is trumped by those interests in the matter of compulsory education and, if public schools are chosen, school assignments. See *supra* note 740.

802. See *supra* notes 733–734, 740.

803. See, e.g., *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring, joined by Burger, C.J., and Rehnquist, Powell, and O'Connor, JJ.) ("school boards customarily . . . designate the school that particular students may attend"); J. Wilkinson, *supra* note 1, at 109; Dimond, *supra* note 123, at 33, 44 ("the neighborhood school is the antithesis of free choice: it is the traditional method by which attendance at a particular school is now and always has been coerced").

804. Put bluntly, desegregation is important enough to justify bribing families with "choice" in order to make the remedy work better, see *supra* notes 711–718 and accompanying text; but choice is not important enough to justify making desegregation work

3. *Termination.* — Although the prevailing Correction theory makes clear that desegregation decrees are temporary, it has a great deal of difficulty explaining when the remedy should terminate.⁸⁰⁵ This is an important problem: The Supreme Court will confront the termination question this Term, its first direct foray into the desegregation field in a decade.⁸⁰⁶ Moreover, the Reagan and Bush Justice Departments have exploited Corrective confusion both by lacing their “model consent decree”—used, for example, in Phoenix and Bakersfield—with a presumptive three-year termination date and by encouraging school districts to seek termination of desegregation decrees on the theory that the districts have become “unitary.”⁸⁰⁷

The termination confusion is inherent in Corrective theory.⁸⁰⁸ Recall that to establish the existence of continuing demographic effects requiring correction, Corrective theory relies on a black-box presumption of continuing effects.⁸⁰⁹ If that presumption is preserved in the termination analysis—following the usual rule placing proof burdens on proven wrongdoers⁸¹⁰—then the decree may not expire as long as residential segregation persists, as it is likely to do at least partially for a long time to come.⁸¹¹ If, on the other hand, the presumption is foregone, the difficult-to-meet causal burden immediately switches back to the proven victims, and the Reagan-Bush Administrations’ three-year period suddenly looks about three years too long.⁸¹²

Reformative theory does not solve this problem, but it at least facilitates analysis. First, Reformative theory more clearly identifies what must be corrected before the remedy may terminate, namely, the proclivity of the political system at its constituent and official levels to rely upon the racist opinion as a basis for distributive decisions. Likewise, the length, depth, pervasiveness, and accusatory nature of the violation

less well simply in order to give the constituency whose racist choices prompted the remedy in the first place even more nonsituationally-constrained choice. See Armor, *supra* note 670, at 28–30 (public opinion data reflecting parents’ amenability to magnet options; magnet programs “often more expensive than regular school programs”).

805. Corrective analyses of termination include: Gewirtz, Choice, *supra* note 49, at 753, 789–98; T. Shaw, Unitary Status: Original Sin and Judicial Absolution, 29–38 (paper delivered at the National Conference on School Desegregation, Brookings Institution, Washington, D.C., Nov. 14, 1986); Note, Unitary School Systems and Underlying Vestiges of State-Imposed Segregation, 87 *Colum. L. Rev.* 794, 803 (1987).

806. See *supra* note 51 and accompanying text.

807. See Gewirtz, Choice, *supra* note 49, at 759, 790–91 & n.196; Note, *supra* note 805, at 798–99; *supra* note 4.

808. See generally Note, *supra* note 805, at 794–99 (conflicting lower court decisions; lack of guidance from Supreme Court).

809. See *supra* notes 237–245 and accompanying text.

810. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1789–90 (1989) (citing cases); *id.* at 1799–800 (O’Connor, J., concurring in the judgment).

811. See, e.g., Gewirtz, Choice, *supra* note 49, at 788–92, 796 & n.217; T. Shaw, *supra* note 805, at 36–38; sources cited *supra* note 258.

812. See Gewirtz, Choice, *supra* note 49, at 796 (termination analysis necessarily afflicted with Correction theory’s “empirical uncertainties”).

whose proof triggers a reconstructive remedy support placing the burden of proof of processual reform on the citizens and officials whose racist opinion so recently and thoroughly corrupted the political system.⁸¹³ Finally, given the "schools-only" reach of this solution to a societally pervasive problem, there is good reason to fear that the problem will prove persistent, if not as persistent as residential segregation. Hence, even accepting the reformability assumption underlying Reconstructive theory—that the six situational conditions for and incentives to egalitarian decision making can mature constituents' senses of political justice—and crediting the moderate amounts of empirical data tending to confirm that assumption,⁸¹⁴ it is unlikely that more or less permanent processual reform will occur before an entire generation of constituents has seen its children through desegregated schools and has seen those children reach the age when their own children enter school.⁸¹⁵

These reconstructive considerations suggest two things: First, the courts ought to be skeptical of efforts to abandon the reformed political structure for at least a generation. Second, before granting "unitary" status, the courts should require the defendants on behalf of their citizen-constituents to marshal sufficient objective evidence to convince the court that the citizenry no longer is disposed to incite the political system to act upon, and that the political system no longer is disposed to process, the racist opinion.

A necessary but not always sufficient component of proof that durable political reform has occurred is a showing that the desire to remove judicially imposed external barriers to the racist opinion is not the recrudescence of the political system's previous corruption but instead a product of equal concern and respect for affected persons.⁸¹⁶ In addition to making that showing, or as a means of making it, the courts should require the defendants to identify objective indicia of the political process's actual durable reform. Such indicia include the development of alternative external barriers to the racist opinion and of alternative means of inculcating "equal concern" virtue—for example, substitution of effective but less onerous school integration devices;⁸¹⁷ the growth of housing integration; the effective use of single-member

813. Advocating similar allocation of burden, but for different reasons, are: *id.* at 797; Note, *supra* note 805, at 815; T. Shaw, *supra* note 805, at 28; sources cited *supra* note 810.

814. See *supra* notes 665–671, 683–696 and accompanying text.

815. See also Lawrence, *supra* note 134, at 323, 330, 334 (psychological literature showing how children learn racism from parents); *supra* note 663 (disastrously premature termination of Reconstruction after half a generation). See generally Hirsch, *supra* note 406, at 443 (development of equal concern virtue a "slow and painful process").

816. See Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 *Harv. L. Rev.* 653, 665 (1987).

817. See, e.g., Seattle Happy With 'Choice' Plan, *Educ. Week*, June 15, 1988, at 4, col. 1.

voting districts; and a history of substantial minority representation among the leadership and staff of the various previously discriminatory agencies. Alternatively, defendants might point to an identifiable series of actions taken by or on behalf of the previously corrupted political constituency, but outside the judicially reformed sphere of education, that manifests respect for the needs of the community's minority members, is not obviously opportunistic, and for those and other reasons evidences the internalization and expression of "equal concern" virtue.⁸¹⁸

Illustrating the proper analysis of termination issues is a line of cases both inside and outside the school desegregation sphere that, while quite sensible in reconstructive terms, have caused a good deal of puzzlement among scholars operating from other theoretical viewpoints.⁸¹⁹ In all of these cases, the Supreme Court invalidated changes in the electoral or political structure that were not intentionally discriminatory in themselves (hence the scholarly puzzlement) but that occurred in political jurisdictions shown to have pervasively and systemically discriminated against minorities in the immediate past. In *Gaston County v. United States*,⁸²⁰ the Court invalidated a North Carolina county's apparently racially neutral reimposition of a literacy test for voting, citing the county's long history of school segregation.⁸²¹ In *United States v. Scotland Neck City Board of Education*,⁸²² and *Wright v. Council of Emporia*,⁸²³ the Court invalidated presumptively race-neutral efforts to deannex predominantly white portions of desegregating school districts based upon the harm deannexation would inflict upon ongoing efforts to remedy prior system-wide school segregation.⁸²⁴ Finally, in *White v. Regester*,⁸²⁵ the Court invalidated the race-neutral reapportionment via multimember districts of two Texas counties long governed by

818. In a surprisingly moderate amicus curiae brief filed in the termination case currently pending in the Supreme Court, see Snider, *supra* note 4, at 1, col. 5, the Justice Department has taken a position similar to the one advocated here. See Brief for the United States as Amicus Curiae at 14, 22-29 *Board of Educ. v. Dowell*, 110 S. Ct. 1521 (1990) (No. 89-1080), ("three broad inquiries should inform the question of unitariness: (1) whether the district has continuously complied with the desegregation decree in good faith; (2) whether the school district has abandoned any and all acts of intentional discrimination; and (3) whether the school district has eliminated, as far as practicable, the "vestiges" of prior discriminatory conduct.").

819. See, e.g., J. Wilkinson, *supra* note I, at 100-01, 124; Brest, *supra* note 104, at 26, 43-44; Freeman, *supra* note 98, at 1088-92; Kurland, *supra* note 55, at 158; Lawrence, *supra* note 134, at 320 n.7; Ortiz, *supra* note 123, at 1131-34.

820. 395 U.S. 285 (1969).

821. *Id.* at 293-94, 296.

822. 407 U.S. 484 (1972).

823. 407 U.S. 451 (1972).

824. *Scotland Neck*, 407 U.S. at 485, 489; *Emporia*, 407 U.S. at 455-56, 464-66; see also *Griffin v. County School Bd.*, 377 U.S. 218, 229-32 (1964) (without finding discriminatory intent, Court invalidates effort by Virginia county to close previously segregated schools now subject to desegregation order and to institute voucher program).

825. 412 U.S. 755 (1973).

political processes lacking any "good-faith concern for the political and other needs and aspirations of the [minority] community."⁸²⁶

Understood reconstructively, these decisions are not controversial. Each may be understood as the Court's refusal, following proof of a systemic political violation, to terminate a politically reconstructive "remedy" (unfettered access to the polls by African-Americans in *Gaston*,⁸²⁷ single-member voting districts in *White*,⁸²⁸ and reformatory desegregation in *Scotland Neck*, *Wright*, and *Griffin*) absent passage of sufficient time and presentation of sufficient evidence to convince the Court that external political reforms no longer were necessary. Accordingly, as difficult as may be the evaluative question posed in termination situations—whether the previously corrupted political process and constituency evince an externally structured or internally inculcated capacity, absent continued judicial reform, to render black persons equal concern—the Court at least has some experience answering the question.

826. *Id.* at 766–69; see also *Rogers v. Lodge*, 458 U.S. 613, 623–25, 627 (1982) (system-wide racist corruption of political process leads Court to invalidate at-large election system originally adopted without racial intent).

827. In *Gaston*, the remedy the Court continued was statutorily, not judicially or constitutionally, imposed by § 4(a) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(a). Section 4(a) requires certain jurisdictions to forego literacy tests unless they prove that the tests do not have the purpose or effect of denying African-Americans the right to vote. The question in *Gaston* was whether the district court properly looked beyond the purpose of the literacy test itself to the county's history of educational discrimination in determining the legality of the voting requirement. See *Gaston County v. United States*, 395 U.S. 285, 291–92, 293–95 (1969). By making the legality of reimposed literacy tests turn on the absence of a recent history of system-wide discrimination against blacks, the unanimous Court in *Gaston* interpreted § 4(a)'s temporary ban on literacy tests reformatively—i.e., as designed not only to ferret out literacy tests that themselves were discriminatorily imposed but also to increase the number of black voters and thereby to reform political processes that theretofore systemically had acted upon the racist opinion. See also *supra* note 729 (similarly reformatory interpretation of § 2 of Voting Rights Act, as applied in *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

828. *White* is not on its face a termination case. The two Texas counties involved had long used multimember districts for electing state representatives, and the Court itself initiated the single-member remedy in the case. Nonetheless, in context—the case involved Texas's first decennial reapportionment in the wake of the watershed "one-person-one-vote" ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964)—the Court's holding has termination and reformatory connotations as follows: Political jurisdictions like those involved in *White* with long histories of processing and acting upon the racist opinion, see *Graves v. Barnes*, 343 F. Supp. 704, 725–37 (W.D. Tex. 1972) (three-judge panel), *aff'd* in relevant part *sub nom. White v. Register*, 412 U.S. 755 (1973), thereafter have a continuing affirmative duty to reform themselves through available means, including via legally mandated periodic reapportionment procedures. Coming as the decennial reapportionment did so close upon the heels of the two counties' lengthy histories of racial and ethnic discrimination and in the absence of any proof of durable reform, that remedial duty persisted, and the counties accordingly had to adopt single-district apportionment schemes that served to enhance minority political power and in that way reform the corrupted political process.

D. Multi-District Reformation

One problem remains, a problem that foiled all five competing theories⁸²⁹ and that, absent a reformative solution, threatens the sixth ("voice, not exit") condition to effective Reconstructive desegregation.⁸³⁰ That problem, of course, is *Milliken v. Bradley I.*⁸³¹ There, the Supreme Court emphasized the principle that the nature and scope of the violation determine the nature and scope of the remedy.⁸³² The Court then overruled an order requiring suburban school districts outside of Detroit to participate in a remedy for a system-wide violation committed by the State of Michigan and the Detroit School Board within Detroit.⁸³³ As a result, thousands of admittedly discriminated-against black children in Detroit's eighty-percent-black system remained in all-black schools.

How, then, is it possible to square the no-desegregation decision in *Milliken I* with the all-out-desegregation decisions in *Swann* and *Keyes* decided before *Milliken I* and in the *Dayton II* and *Columbus* cases decided after it?⁸³⁴ It is possible by means of a straightforward application of Reconstructive theory.⁸³⁵

Consider the three toughest doctrinal questions in the interdistrict-desegregation realm: (1) Did *Milliken I* foreclose interdistrict desegregation relief entirely?⁸³⁶ If not, (2) does *Milliken I* at least require proof that any school board whose district is included in the remedy be guilty of wrongdoing,⁸³⁷ and (3) does the fact of segregation at present,

829. See supra notes 145-148, 167, 248, 256, 264, 295, 342 and accompanying text.

830. See supra notes 711-718 and accompanying text ("voice, not exit" prerequisite to effective reformative desegregation undermined if predominantly white suburbs are immunized from participation in desegregation plans).

831. *Milliken I*, 418 U.S. 717 (1974). The voluminous literature on *Milliken I* includes the sources cited supra note 49.

832. *Milliken I*, 418 U.S. at 738.

833. *Id.* at 725-27, 745-46, 753.

834. See supra notes 84-89 and accompanying text.

835. Reconstructive analysis also makes sense of—indeed, it accepts as a core proposition—the Court's own explanation for the divergent outcomes in *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406 (1977) (remedy limited to curing "incremental segregative effects") and *Dayton II* (ordering all-out desegregation). See *Dayton II*, 443 U.S. at 540-42. *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526 (1979) (three minor, chronologically and geographically isolated, violations found in *Dayton I* did not prove system-wide violation and intractability predicates to all-out desegregation, but predicates thereafter sufficiently established on remand); supra note 578.

836. See sources cited supra note 49.

837. Compare *Jenkins v. Missouri*, 807 F.2d 657, 673 (8th Cir. 1986) (plurality opinion of Gibson, J.), cert. denied, 108 S. Ct. 70 (1987) (culpability of suburbs required or a major consideration) and *J. Wilkinson*, supra note 1, at 222 (suburbs "need not be part of the cure" if not part of cause) with *Jenkins*, 807 F.2d at 689 (Arnold, J., concurring in part and dissenting in part) ("a school district can be made to participate in an interdistrict remedy even if it is not 'personally' guilty of violating the Constitution") and *id.* at 697-700 (Lay, C.J., dissenting) ("school districts which [are] not themselves

following proof of a violation in the past, in any way lessen a plaintiff's burden—in short, does the *Swann* presumption apply in interdistrict cases?⁸³⁸

1. *Is Interdistrict Desegregation Dead?* — Interdistrict desegregation is not dead. It lives quietly, for example, in metropolitan Wilmington,⁸³⁹ Little Rock,⁸⁴⁰ Indianapolis,⁸⁴¹ and Louisville;⁸⁴² suburban Pittsburgh⁸⁴³ and St. Louis;⁸⁴⁴ rural North Carolina,⁸⁴⁵ Arkansas,⁸⁴⁶ and Texas;⁸⁴⁷ and, in a peculiar form, in metropolitan St. Louis,⁸⁴⁸ Kansas City, Missouri,⁸⁴⁹ and Milwaukee.⁸⁵⁰

found to be constitutional violators [may] . . . be included in the interdistrict relief") and Note, *supra* note 254, at 340 ("official housing discrimination should [be] a basis for . . . desegregation remedies even if plaintiffs offer no proof of discrimination by school officials").

838. Compare, e.g., *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1113 (7th Cir.), cert. denied, 449 U.S. 838 (1980) (suggesting affirmative answer: *Swann* presumption *does* apply in interdistrict cases) and *Hoots v. Pennsylvania*, 672 F.2d 1107, 1121 (3d Cir.), cert. denied, 459 U.S. 824 (1982) (same) and *Evans v. Buchanan*, 582 F.2d 750, 765 (3d Cir. 1978) (en banc), cert. denied, 446 U.S. 916 (1980) (same) and *Cunningham v. Grayson*, 541 F.2d 538, 541-42 (6th Cir. 1976), cert. denied, 429 U.S. 1074 (1977) (same) with *Jenkins*, 807 F.2d at 670 (suggesting negative answer) and *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243, 1254 (5th Cir. 1981) (same).

839. See *Evans v. Buchanan*, 416 F. Supp. 328, 344 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3d Cir.) (en banc), cert. denied, 434 U.S. 880 (1977).

840. See *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 433 (8th Cir. 1985) (en banc), cert. denied, 476 U.S. 1186 (1986).

841. See *United States v. Board of School Comm'rs*, 637 F.2d at 1113.

842. See *Cunningham*, 541 F.2d at 540.

843. See *Hoots v. Pennsylvania*, 510 F. Supp. 615, 622 (W.D. Pa. 1981), *aff'd*, 672 F.2d 1107 (3d Cir.), cert. denied, 459 U.S. 824 (1982).

844. See *United States v. Missouri*, 515 F.2d 1365, 1370 (8th Cir.), cert. denied, 423 U.S. 951 (1975).

845. See *Turner v. Warren County Bd. of Educ.*, 313 F. Supp. 380, 386 (E.D.N.C. 1970).

846. See *Morrilton School Dist. No. 32 v. United States*, 606 F.2d 222, 228 (8th Cir. 1979) (en banc), cert. denied, 444 U.S. 1071 (1980); *Haney v. County Bd. of Educ.*, 429 F.2d 364, 372 (8th Cir. 1970).

847. See *United States v. Texas*, 321 F. Supp. 1043, 1059-62 (E.D. Tex. 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

848. See *Liddell v. Missouri*, 731 F.2d 1294, 1302-05 (8th Cir.) (en banc), cert. denied, 469 U.S. 816 (1984) (city-suburban interdistrict transfer plan established in part by voluntary agreement of participating districts and in part by court order requiring state to fund plan).

849. See *Jenkins v. Missouri*, 904 F.2d 415, 417 (8th Cir. 1990); *Jenkins v. Missouri*, 807 F.2d 657, 682-85 (8th Cir. 1986) (en banc), cert. denied, 108 S. Ct. 70 (1987) (state ordered to pay for tuition and transportation of white children from suburban districts who choose to attend magnet schools in city district and black children from city district who choose to attend, and are accepted for admission in, suburban districts); O'Connor, *New Era Dawns for District and for Transfer Students*, K.C. Star, Sept. 5, 1990, at A-1, col. 3 (first minority students from Kansas City begin attending school in suburban district under court-ordered interdistrict transfer plan).

850. See *Board of School Directors v. Thompson* (E.D. Wis. settlement agreement filed Aug. 10, 1988). Decisions denying interdistrict relief are *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324, 332-33 (4th Cir. 1984) (North Caro-

Interdistrict desegregation also lives on doctrinally. Contrary to Corrective and Prohibitory lore,⁸⁵¹ *Milliken I* is not a more or less misguided definitional balancing of the private-law costs and benefits of multidistrict desegregation relief for any and all kinds of segregation violations. Nor, notwithstanding the view of most Equal Educational Opportunity and Redistributive scholars,⁸⁵² did *Milliken I* for some other reason draw an inviolable line at the school district boundary. Rather, as most lower courts have recognized,⁸⁵³ the Supreme Court in *Milliken I* simply did not find present the first two prerequisites of a multidistrict, system-wide remedy. Thus, as the *Milliken I* majority repeatedly emphasized, with one minor exception, every violational act shown in that case (which involved only the Detroit city district until the trial judge discovered the suburbs during remedial proceedings) occurred within the boundaries of the Detroit School District, and the intended and actual locus of every effect of every violation in the case also was Detroit.⁸⁵⁴ To be sure, the State of Michigan was one of the agents

lina); *Taylor v. Ouachita Parish School Bd.*, 648 F.2d 959, 964 (5th Cir. 1981) (Louisiana); *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243, 1270 (5th Cir. 1981) (Alabama); *Bradley v. School Bd.*, 462 F.2d 1058, 1069 (4th Cir. 1972) (Virginia), aff'd by an equally divided Court, 412 U.S. 92 (1973); *Bronson v. Board of Educ.*, 578 F. Supp. 1091, 1108 (S.D. Ohio 1984); *Armour v. Nix*, No. 16708, slip op. at 33 (N.D. Ga. 1979), aff'd mem., 446 U.S. 930 (1980); *Tasby v. Estes*, 412 F. Supp. 1185, 1203-04 (N.D. Tex. 1975), aff'd in relevant part, 572 F.2d 1010 (5th Cir. 1978), cert. dismissed, 444 U.S. 437 (1980); see also *Berry v. School Dist.*, 698 F.2d 813, 817 (6th Cir.) (Michigan) (mandatory interdistrict relief denied because only minor interdistrict violation found), cert. denied, 464 U.S. 892 (1983).

851. See *supra* notes 264, 315 and accompanying text.

852. See sources cited *supra* note 49.

853. See sources cited *supra* notes 837-850.

854. See *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 724 (1974) ("Detroit-only" violation); *id.* at 730 n.11 (proof of de jure segregation offered only in regard to Detroit city district); *id.* at 735-36 ("no constitutional violation by the outlying districts had been shown and . . . no evidence on that point had been allowed"); *id.* at 739 (district court's findings of "condition of segregation were limited to Detroit"); *id.* at 745 ("The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools"); *id.* at 749 ("Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts"); *id.* at 751 (violation "within the city of Detroit produced de jure segregation within the city itself"); *id.* at 752 ("theory upon which the case proceeded related solely to the establishment of Detroit city violations" and "neither the parties nor the trial judge was concerned with a foundation for interdistrict relief"). The one exception to the Detroit-only character of the violation involved a predecessor district of one of the 85 suburban school districts included in the district court's remedial deliberations. See *id.* at 748. For a single year, that district transferred its black children to a black high school in Detroit. *Id.* Thereafter, the district was annexed to a nearby nearly all-white suburban district. *Id.* at 725 n.4, 749-50; see also *Missouri v. Jenkins (Jenkins II)*, 110 S. Ct. 1651, 1656 & n.3 (1990) (lower courts denied interdistrict relief because state operated segregated system "within the [urban district]" and violation produced no "lingering interdistrict effects" (emphasis added)); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 727 (1989) ("We have never approved the extrapolation of discrimination in one juris-

of those violations, but so far as the evidence in the case revealed, the constituents on whose behalf the State of Michigan, like the Detroit School Board, discriminated (i.e., all those in any way affected by the violation) lived within the Detroit School District.⁸⁵⁵ Accordingly, although there was indeed a system-wide violation found in *Milliken I* (and, to the extent possible given the demographics, remedied⁸⁵⁶), the political "system" found there to be corrupted by the racist opinion—

diction from the experience of another. See *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

855. See *Milliken I*, 418 U.S. at 750–51 (Michigan's violation "had no causal connection with the distribution of pupils by race between Detroit and the other school districts"; no evidence that state's conduct "within Detroit affected the racial composition of the school population outside Detroit" or that State's "activities within the outlying districts affected the racial composition of the schools within Detroit"). Although the district court record contained evidence of housing discrimination that may have extended beyond the boundaries of Detroit City, that evidence was not directed to establishing a violation occurring, benefiting, or harming persons outside Detroit's boundaries, see *supra* note 854, and was sufficiently elusive that the Sixth Circuit, although affirming the district court's interdistrict remedy and willing to rely on housing evidence in contemporary desegregation cases, see *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 184 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975), eschewed reliance on housing evidence in this case, see *Bradley v. Milliken*, 484 F.2d 215, 242 (6th Cir. 1973), rev'd, 418 U.S. 717 (1974). The *Milliken I* majority accordingly concluded that, "in its present posture, the case does not present any question concerning possible state housing violations." *Milliken I*, 418 U.S. at 728 n.7. There are several reasons for rejecting the view, see J. Wilkinson, *supra* note 1, at 223–24, that *Milliken I* forecloses evidence of official housing segregation in desegregation cases in favor of an understanding of *Milliken I* as permitting such evidence to establish the length, breadth, and depth of the relevant constituency's effectual injection of the racist opinion into the various political processes that affect the schools, see sources cited *supra* note 556. First, the majority opinion does not reject housing evidence or even repeat its earlier reservations about such evidence. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–23 (1971) (reserving housing question). Rather, among the circumstances the majority lists as justifying interdistrict relief are apparently *all* "racially discriminatory acts of the state [that] have been a substantial cause of interdistrict segregation." *Milliken I*, 418 U.S. at 745. Second, in joining the majority opinion and casting the deciding vote, Justice Stewart explicitly read the Court's opinion as permitting interdistrict relief when state officials "contributed to the separation of the races by . . . discriminatory use of state housing or zoning laws." *Id.* at 755 (Stewart, J., concurring). Third, a year later, the Court summarily affirmed a decision premising interdistrict school desegregation relief in part on local, state, and federal housing discrimination, *Buchanan v. Evans*, 423 U.S. 963, 963, aff'g mem., 393 F. Supp. 428, 434–38 (D. Del. 1975) (three-judge panel). Finally, a majority of lower courts that have addressed the question have allowed plaintiffs to rely, *inter alia*, on housing evidence to reveal the length, breadth, and depth of the political constituency's effectual racist inclinations. See sources collected in *Jenkins v. Missouri*, 807 F.2d 657, 687–90 (8th Cir. 1986) (Arnold, J., concurring in part and dissenting in part), cert. denied, 108 S. Ct. 70 (1987); Note, *supra* note 254, at 341–43 nn.5–18.

856. See *Milliken I*, 418 U.S. at 753 (remanding for prompt formulation of intradistrict decree); see also *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 279 (1977) (affirming appealed aspects of all-out desegregation plan).

i.e., the circuit of constituent impulses, consequent governmental acts, and segregative effects—extended no further than the constituency of the Detroit School District.⁸⁵⁷

Compare the Wilmington case,⁸⁵⁸ which classically illustrates a system-wide, deep, and long processual violation. There, in addition to the usual violation by the Wilmington district, the court found that: suburban districts before and after *Brown* racially segregated their schools by educating their white children at home and sending their black children to all-black schools in Wilmington; after explicit segregation ended in Wilmington, the surrounding white districts encouraged white children to transfer out of Wilmington's desegregating schools and into all-white suburban schools; state courts with jurisdiction throughout the area enforced racially restrictive covenants confining African-Americans within Wilmington and forbidding their movement to the suburbs, the State Real Estate Commission enforced the same policy by penalizing brokers who sold homes in white areas to black families, and the Federal Housing Administration did its part by refusing to provide mortgage-insurance subsidies to blacks or whites moving into integrated neighborhoods; the regional public housing agency explicitly segregated its facilities for years and thereafter built new facilities only in black areas in the city, notwithstanding that most of its multidistrict jurisdiction lay in white areas in the suburbs; the Wilmington school district, by shielding its outer areas from desegregation, placed the entire burden of desegregation on the white areas at the margin of the ghetto and precipitated the rapid flight of many of its white margin-area constituents to the suburbs; when the State passed legislation seeking school district consolidation, it excluded the substantially black Wilmington district from the universe of districts that the State Board of Education could consider as mandatory consolidation partners for the surrounding nearly all-white districts; and so on.⁸⁵⁹

As the district court and Third Circuit concluded, and as the

857. For the same reasons that courts may not use interdistrict remedies to cure intradistrict violations, they generally may not use politically reformative school desegregation remedies to cure politically corrupting nonschool segregation violations. In both cases, the remedy drafts one constituency to cure violations that almost certainly were committed by a different constituency. The requirement that the constituency affected by desegregation's politically reformative impact be the constituency guilty of segregating the schools also helps explain the courts' otherwise perplexing reliance at the liability phase, see Note, *supra* note 31; *supra* notes 254, 556, 855 and accompanying text, on some (i.e., schools-focused) but not other (i.e., nonschools-focused) instances of discrimination by nonparty and nonschool officials.

858. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.) (three-judge panel), *aff'd* mem., 423 U.S. 963 (1975).

859. See 393 F. Supp. at 432-38, 442-46; *Evans v. Buchanan*, 416 F. Supp. 328, 334-41 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3d Cir.) (en banc), cert. denied, 434 U.S. 880 (1977); *Evans v. Buchanan*, 582 F.2d 750, 762 n.11 (3d Cir. 1978) (en banc), cert. denied, 446 U.S. 923 (1980).

Supreme Court summarily affirmed a year *after* announcing *Milliken I*, the plaintiffs' proof of discriminatory behavior *on* a decidedly metropolitan basis, *in* one school district after another, *by* one governmental agency with area-wide jurisdiction after another, *from* one year to the next, and so on, made manifest that racial segregation within and between school districts in the Wilmington area was the chosen "policy" of a pervasively racially corrupted political process extending from the metropolitan-wide constituency up through three levels of government and back, from one end of northern New Castle County to the other, and from the Civil War to the present. In both *Milliken I* and the Wilmington case, therefore, the nature and scope of the violation—in the one case a corrupted single-district political process, in the other a corrupted multidistrict process—determined the nature and scope of the respective intradistrict and interdistrict reformative desegregation decrees.

Notice, too, how simply Reformative theory explains the otherwise curious intervention in *Milliken I* of an extended discussion of the history and practice of local control over education in Michigan and elsewhere in the nation.⁸⁶⁰ Taken to its conclusion, a dispositive concern for the value of local control over education would forbid desegregation entirely, for that remedy at the least takes the decision whether to segregate out of the hands of local officials and in most cases also deprives them of the critical authority to decide where to assign children to schools. On the other hand, the discussion of local control makes good sense, in a reconstructive light, if it is seen simply as in aid of efforts to determine precisely what constituency was antipluralistically at fault: Insofar as the violation occurred in the educational sphere, and an exclusively local constituency governs that sphere through its exclusively local representatives, we need look no further for the boundaries of the corrupted political process.⁸⁶¹

2. *Is Innocence Irrelevant?* — A suburban school board's "innocence" is relevant but may not be dispositive. Thus, the violational activity of a suburban school board on behalf of its constituency surely helps prove that the political system which includes that school board is racially corrupted.⁸⁶² But other evidence of systemic corruption also ought to suffice. Accordingly, if a group of citizens—as was true in a

860. See *Milliken I*, 418 U.S. at 741–44; cf. *id.* at 744 ("School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies.").

861. The decade-long trend in this country away from local control over schools may well increase opportunities for interdistrict violations and relief. See Liebman, *supra* note 99, at 380–81, 400, 416 & n.227. So might the onset of another of this country's periodic phases of school district consolidation. See Newman, School Consolidation Garnering Legislators' Attention, *Educ. Week*, Jan. 10, 1990, at 15, col. 1.

862. See *Milliken I*, 418 U.S. at 735–36, 745, 746, 748, 748–49, 752 (lack of proof of suburban districts' guilt included in disjunctive lists of evidentiary failings causing Court to deny interdistrict relief).

number of the suburban districts in the Wilmington case—choose to segregate the metropolitan area's schools and neighborhoods through their representatives in state educational agencies and in local, state, and federal housing agencies, the political-processual violation, hence the reformatory remedy, must be the same as if those constituents had advanced (or got caught advancing) their racist goals through local school officials as well.⁸⁶³ Once it is realized that desegregation of the schools is designed instrumentally to reconstruct the *political system* governing the schools, the innocence of officials at a given school or district is not dispositive as long as that school and district fall within the jurisdiction and were part of the focus of some broader political system found to be systemically corrupted in its treatment of that school or district. If that broader political system is sufficiently (i.e., deeply, widely, and lengthily) “guilty,” the fact that some of its agents and employees are not guilty cannot absolve the system from curing itself or being cured—using whatever components of the system are most able to assist in the task.⁸⁶⁴

Here again, several of *Milliken I*'s key passages come into reformatory focus. The *Milliken I* Court repeatedly notes the absence in the case of any proof of “substantial” interdistrict effects for which state actors—the suburban districts or any others—are invidiously responsible.⁸⁶⁵ Embedded in *Milliken I*'s intrinsically interpretive concept of “substantiality” is the interdistrict analogue of *Keyes*'s interpretive concern for “systemwide-ness.” The controlling issue, then, is not the status of the political agents through whom the antipluralist violation occurred but rather whether that violation was sufficiently wide, deep, and long to justify a systemically reformatory remedy encompassing

863. *Evans*, 416 F. Supp. at 340 (“[w]here the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the suburban districts cannot be predicated on their own purported innocence”); accord, e.g., *Hoots v. Pennsylvania*, 672 F.2d 1107, 1110–11, 1119–20 (3d Cir.), cert. denied, 459 U.S. 824 (1982); *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1112–16 (7th Cir.), cert. denied, 449 U.S. 838 (1980); *Morrilton School Dist. No. 32 v. United States*, 606 F.2d 222, 225, 227–29 (8th Cir. 1979) (en banc), cert. denied, 444 U.S. 1071 (1980). But see contrary sources cited supra note 837.

864. See supra note 556. Indeed, the local school officials in the Virginia and South Carolina (but not the Kansas) cases consolidated in *Brown* were “innocent” insofar as it was not them but state legislators who had mandated segregation. This fact, of course, did not stop the Court from ordering local officials to cure the violation.

865. *Milliken I*, 418 U.S. at 745 (proof insufficient because no showing that “racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation”); id. (plaintiffs must prove “violation within one district that produces a significant segregative effect in another district”); id. at 748 (“no showing that either the State or any of the 85 outlying districts engaged in activity that had a cross-district effect”); id. at 749 (“Where the schools of only one district have been affected, there is no constitutional power in the courts to decree [interdistrict] relief . . .”); see *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243, 1256 (5th Cir. 1981) (emphasizing substantiality requirement).

those agents, the constituency they served, and the schools and districts that they governed or helped control.⁸⁶⁶

3. *Is Continuing Segregation Irrelevant?* — The analysis in the last section suggests how uncontroversial and even unnecessary the *Keyes* presumption⁸⁶⁷ becomes in inter- (and intra-) district Reformatory analysis. Assume the plaintiffs establish that legislative racism inundated a given single- or multi-school-district constituency and many of its governmental representatives, and that much of the action those representatives undertook was intended to, and in fact did, segregate the area's neighborhoods and schools. At that point, *either*: (1) the processual character of the violation is sufficiently clear to require systemic reform, regardless of whether the plaintiffs have shown (or the Court has had the patience to let them show) that every decision made by every official within that system was corrupted; *or* (2) one could say that, given proof of a system-encompassing violation, additional proof that other officials within the system simultaneously took other, similarly segregative-in-fact actions creates a presumption that those actions also were purposively segregative. Either approach is reasonable, it seems to me, with the only difference being that the latter, presumption-dependent approach favors the *defendants*. Only the latter approach, that is, affords defendants or white intervenors an opportunity to avoid inclusion in a remedy by showing that the political process, albeit corrupted "root and branch," nonetheless was capable in one instance or another of making segregative-in-fact decisions on the basis of neutral reasoning. Once plaintiffs have identified the relevant "system" or "process" and shown it to be comprehensively and intractably corrupted by the racist opinion, it is not controversial to reform the entire system. Surely, therefore, a remedial approach is not *especially* controversial because it affords participants in the system an opportunity to distance themselves or individual segregative-in-fact decisions affecting them from the racist corruption.⁸⁶⁸

The *Swann* presumption actually does relieve plaintiffs of a meaningful part of their burden. It allows a systemically comprehensive antipluralist violation at Time A, plus proof of comprehensively segregative-in-fact decision making by and within the same political process at some later Time B, plus an absence of corrective action in between Times, to create a presumption that Time A legislative racism has persisted through Time B. As discussed above, the time- and money-saving aspects of this discrimination-then/discrimination-now presumption are well justified both by the device's truth-serving rea-

866. See, e.g., *supra* text accompanying note 859.

867. See *supra* notes 565-573 and accompanying text.

868. Reformatively understood, the *Keyes* presumption does not extend the geographic area of the violation but rather the court's assumptions about the violation's ubiquity within the area already shown by plaintiffs to be governed by an antipluralist political system.

sonableness and its allocation of error costs to participants in the wrongdoing system.⁸⁶⁹ The over 200-year history of this Republic leaves no room for controversy that a political process *shown by actual proof* to be pervaded by legislative racism at a given point in time remains dangerously susceptible to the same corruption thereafter, if its decisions are shown to be comprehensively producing the same segregative-in-fact results some years later and if the process is not shown to have reformed itself in any appreciable way in the meantime. Nor is there any reason to treat interdistrict cases differently in this respect from intradistrict ones. Indeed, the willingness of constituents to inject their racist opinions into the deliberations of a geographically and substantively wider collection of public institutions at Time A should make us *more* comfortable assuming that segregative-in-fact actions by the same collection of institutions at Time B is not fortuitous.

Here, however, I would not deem it fair (as I would with the *Keyes* presumption) to dispense with a rebuttal opportunity altogether. For the idea of reformability should encourage the courts to hope, if not expect, that discrimination-then does not conclusively bind a system to discrimination-now. Accordingly, the defendants or intervening segments of their constituency should retain the opportunity to show that time has scrubbed the racist-opinion out of the political process, notwithstanding its continued segregative-in-fact operation.

4. *How Likely Is Interdistrict Relief?* — Although interdistrict relief doctrinally survives *Milliken I*, as accordingly does the *possibility* of desegregation for millions of urban African-American children, the *likelihood* of multidistrict relief is in doubt. On the one hand, pervasive governmentally implemented discrimination is no stranger in this country and no respecter of school district boundaries.⁸⁷⁰ Moreover, the occasions for interdistrict constituencies to mobilize in aid of racist goals are probably proliferating as local control over education wanes and interest in consolidating school districts begins to rise.⁸⁷¹ On the other hand, the Reformatory theory's tough requirement that the plaintiffs locate all persons included in the remedy within a political constituency actually found guilty of intentional and system-wide discrimination assures that interdistrict relief will not come easily, cheaply, or in all likelihood, frequently. The most that can be said from a Reformatory perspective, therefore, is that cross-district desegregation remains available to urban black communities that are victimized by pervasive cross-district corruption of the political processes governing their schools and that can muster the will and resources to expose it.⁸⁷²

869. See *supra* notes 565–573 and accompanying text.

870. See *supra* notes 258, 449–457, 529–535 and accompanying text.

871. See *supra* note 861.

872. Among the major desegregation lawsuits now pending or being considered by potential plaintiff groups, see *supra* notes 25–41 and accompanying text, those in

CONCLUSION

You may think I've cheated. Anyone can make a solution look simple and important by sufficiently upping the problematic ante; and I have, indeed, tried to show that the problem in the desegregation cases is about as menacing in its systemic destructiveness as is imaginable—not simply to schools and to black children, but to all of us and to our pluralistic polity as well. But that *is* the problem that systematic racism poses to this country, and if we are serious about solving it, then desegregation *is* a relatively simple (not to mention the *only*) solution. For, by simply and naturally situating citizens vis-à-vis their integratively en-schooled children in a difference en-veiling “ethical situation,” and in the process making legislative racism irrational, desegregation finds a way where none has been found before to exorcise that shameful and mutually destructive evil from our political midst.

Charleston, Hartford, Kansas City, Memphis, Nash County, and St. Paul, and the initiatives in Arkansas, Connecticut, and Mississippi have interdistrict implications.