

## Introduction to Con Law II

This course discusses busing, the compulsory integration of school children out of their neighborhoods to increase racial mixing – a process that may well have potential for social disruption and dissolution equaling that of the Vietnam War. Busing has only become an issue because it has been imposed on us by the Supreme Court – the least accountable and least representative institution of government. This has all been done in the name of the Constitutional law. Greater even than the decision is the fact that such a decision was not only made, but that it prevailed.

### **Why have a constitution at all?**

- Create govt. *Could create w/o – processes would instead be changed by ordinary political process.*
- Protect rights.
- Structural defects in majority rule. *Focused groups getting their way at expense of others.*

*Graglia: Real reason for new govt – create common economic market, provide for defense.*

### **Where do “rights” come from?**

- Creator. *But this is controversial.*
- Legal term, legally protected interest. The Const. creates rights. *Graglia: but why would people (who are the sovereign) choose to restrain themselves by creating rights and putting them in a constitution? The argument that people are choosing to restrain themselves from making bad decisions in a “fit of passion” is not a good reason. The people still have the power to change the Const. A sovereign can never really restrain itself.*

People have attitude that const'l rights are good, but they forget that such rights preclude certain policy choices.

*Graglia: of course, our Const. precludes very few policy choices. Const'l law is a fraud. It has nothing to do with the Constitution, but rather misrepresentations of the Const. Most “Constitutional rights” have been created by the Supreme Court. They aren't in the document. To a large extent, all the Const'l law we have today is based on misrepresentations of the 14<sup>th</sup> am.*

### **Problems with Interpretation: Originalism and Judicial Review**

Const'l law is the product of judicial review, the power of judges to nullify the acts of other government officials on the ground that they are unconst'l.

- *Constitutionalism:* Holding things unconst'l when they actually are not const'l.
- *Judicial Activism:* Holding things const'l or unconst'l when they aren't.

*Const. Is what the judges say it should be. This is illustrated by the fact that the same Const permitted racial discrimination in schools, then prohibited it, and now requires it.*

Const. should be interpreted by determining and implementing the Framers' intent

- If we don't know if a policy choice was precluded, then it's not.
- The norm is democracy, representative government. In cases of doubt, norm should prevail.
- If we don't know what intent was, then Const. has nothing to say on the matter.

*Legislatures, not the courts, should decide what policy choices will be. Judicial review is not provided for in the Constitution and was not contemplated at the Constitutional convention. Such a large grant of authority would surely have been mentioned.*

## Introduction to Con Law II

### *Objections to Originalism*

- We shouldn't be governed by the dead hand of the past
  - *Invalid when used to justify creation of novel restrictions in the name of the Const.*
  - *It is valid when made to justify judicial refusal to intervene in political change*
- The Framers' intent is often unworkable.
  - *If it isn't known w/ assurance that Framers precluded a policy choice, then it isn't.*

### **Justice Brennan: The Const. of the US: Contemporary Ratification**

- Not possible to find original intent of framers (and arrogant to try) (*Graglia: What can reading and interpreting mean EXCEPT to try and gauge intention of writer*)
- Judges do what they want (*Graglia: Can't call it unConst'l if can't find it in Const.*)
- Shouldn't be ruled by "dead hand of the past" (*Graglia: Why are we under a Const. then?*)

*Graglia: Brennan has made more decisions affecting our lives than any other individual in the past few decades. He has led many Supreme Court decisions making many policy decisions (and overruling others) for our country. Justices shouldn't have this kind of power when they are not elected by the people.*

## Civil Rights Legislation

### **13<sup>th</sup> Amendment (1865)**

“Neither slavery nor involuntary servitude” . . .”Congress shall have power to enforce. . . .by appropriate legislation”

### **Civil Rights Act of 1866**

Passed based on 13<sup>th</sup> am., attempting to overcome black codes in South. Gave blacks the same rights as whites (own land, sue and be sued) Vetoed by Johnson (13<sup>th</sup> am. didn't justify) veto overridden, but fear that Johnson was right.

*Political climate at that time: Republicans feared losing Congress to the south. (Add 13 seats) Freeing blacks meant they counted as full person for taxation and representation purposes. Solved by only counting those allowed to vote towards population for representation purposes.*

### **14<sup>th</sup> Amendment (1868)**

Passed to overcome Const'l question. Constitutionalize 1866 Civil Rights Act and enact Republican agenda into law. Placed 3 limitations on the states *From this time on, Const'l Law based largely on what these amendments do or don't mean.*

- States can't abridge privileges and immunities of citizens of U.S.
- Can't deprive a person of life, liberty or property without due process of law
- Equal protection clause (*the only new clause, really – discussed below*)

### **Privileges and Immunities Clause**

The clause was essentially read out of the 14<sup>th</sup> am. almost immediately by the 1<sup>st</sup> case to address it:

Slaughterhouse Cases (1872) White butchers challenged a LA zoning law that put them out of business. The challenge was based on the 13<sup>th</sup> and 14<sup>th</sup> ams.

*How to interpret privileges and immunities clause?*

The fundamental rights belonging to the citizens of all free governments (e.g. protection by the govt, to acquire/possess property, to pursue and obtain happiness).

- This interpretation covers all civil rights. If this great restriction is placed on the states, the Court would become a perpetual censor upon all legislation of the states.

**-- OR --**

The privileges and immunities clause protects what the rest of the Const. protects. I.e. adds NOTHING and makes it redundant!

- This so-called interpretation reads the clause out of the Const.

*Faced with this all or nothing choice, the Court chooses nothing, so as to avoid becoming a perpetual censor upon the state legislatures. Court rejected the butchers' taking and Equal Protection Claim, stating the clause only applies to discrimination based on race.*

## Civil Rights Legislation

### *Due Process Clause*

Due process should simply mean procedural regularity. People are not to be punished except in accordance with established judicial procedure. This is an important limitation, but it is taken for granted in America where people don't get thrown in jail at random.

*This should essentially be a non-operative clause, but the courts have added to it. Hence the creation of substantive DP.*

IMPORTANT IN THIS PROCESS IS THE INCORPORATION DOCTRINE: :THE BILL OF RIGHTS IS MADE APPLICABLE TO THE STATES BY INCORPORATING IT INTO THE 14<sup>TH</sup> AM. THERE IS NO BASIS FOR THIS!!

*Substantive Due Process:* DP clause requires that all laws be fair, reasonable. However, not only must procedures be fair, but substance of law must be fair.

*Graglia: This seems to be contradictory term: substantive process as opposed to procedural process? Doesn't procedural process seem repetitive? Are we using natural law here to define fairness and justice in general? What does this possibly mean?*

**History:** During early 19<sup>th</sup> century, justices were for economic freedom – began to disallow regulation of economic areas by govt. i.e: law that can't manufacture cigars in apartments – courts says this violates DP.

- “Substantive DP era” -- Railroad cases began it
- Court: laws exceeded the police power which must have limits
- Court invalidated approx. 180 laws during this period.
- Ended DP review of economic legislation in 1937 with *West Coast Hotel*.

**Test:** 1) end must be appropriate and legitimate; 2) the act must have a direct relation as a means to an end.

Lochner v. NY (1905) Famous case during this era – NY state law limiting bakers to working 60 hrs/wk. Court held the statute unconst'l; it interferes with right to K → part of liberty protected by 14<sup>th</sup> am. States are limited to health, welfare and safety and bakers' health is not at issue here.

- Court is basically saying that any socialistic measure (aimed at equality) is unconst'l
- These laws were intended to help employee's have more bargaining power
- Court is strongly suspicious that this law is concerned with above, so holds unconst'l

*Harlan's Dissent* : We should only hold things unconst'l that “palpably and plainly” exceed legislative power. (*Graglia: Great Rule! Never happens*)

*Holmes Dissent:* The majority's opinion is decided on economic theory which is not in the Const. Majority should not be able to embody its opinion in law. (*Graglia: weakens stmt by adding, “unless it can be said that a rational and fair man would admit that the statute infringes fundamental principles.” He would force his opinion on us, albeit not as quickly.*)

West Coast Hotel v. Parrish: End of substantive DP; court's withdrawal is analagous to withdrawal from commerce clause in NLRB. Year before: min. wage law is held unconst'l. Court now reverses its position. Hughes opinion doesn't just say that states have the right to make policy; instead he goes on about how this law is in the public interest. *Graglia: his is about whether the law is const'l or not and it is not about his opinion.*

DUE PROCESS SHOULDN'T BE IMPORTANT, BUT IT HAS BECOME SO. WE HAVE BASICALLY RETURNED TO ANOTHER ERA OF SUBSTANTIVE DUE PROCESS.

## Civil Rights Legislation

### *Equal Protection Clause*

Basic civil rights can not be denied to any person based on race or ethnic group. Laws should be enforced equally. What does this mean? It can't mean simply equal administration. It is easy, for example, to equally administrate a statute prohibiting assault unless it's a white hitting a black.

**What does it mean to “discriminate”?** Notice differences; classify; categorize. Not necessarily *per se* bad. In some cases the law must discriminate. What, if anything, can be a restriction on classifications?

- Alike in regard to relative rule of law. *Hard to define who is alike and unlike.*
- All discriminations require justifications because equality is the norm. Rational Basis Review: classifications must be reasonable. *Not that this is really a useful requirement. Determining reasonableness is a value judgment. Court determination at expense of majority's power to live by it's own rules.*
- Restriction must be related to purpose of rule. *But purpose must be allowable as well.*

Hypo: We don't want mischievous driving.

We don't want to allow dangerous drivers to drive.

Reasonable classification and purpose in terms of the law.

*What we really have is an age requirement. The classifying trait is no longer congruent with harm we are trying to avoid.*

Over-inclusive v. under-inclusive classifications

- Over-inclusiveness justified by administrative convenience. Doesn't serve public interest to exclude those that aren't harmful; however, it is within legislative power to use most probable predictor of trait.
- Under-inclusiveness doesn't cover others who may contribute to harm. Hard for those who should be covered, but aren't, to complain about the classification.

Yick Wo v. Hopkins First case to give substance to equal protection. Law forbidding Chines laundries held unconstitutional. Equal protection places limit on what sort of discriminations law can make.

*Equal Protection clause applies to content of laws, not just procedure.*

*Graglia: Equal protection is really an empty concept because all laws discriminate. Really just another tool for judges to make policy. There is always a relation between law and its purpose (but distinguish purpose from purported purpose).*

Smith v. Calhoun Trucks of certain weight must have special brakes except for farmers' trucks. Attacked as under-inclusive, but upheld. The classification of the law relates to purpose: safety and farmer subsidization.

Williamson v. Lee Optical Upheld Oklahoma law forbidding opticians from fitting or duplicating lenses without a prescription. Changed requirement from reasonable to a “minimum rationality” standard. A law is rational if it could make sense. *Really no test at all.*

DUE TO SUPREME COURT JUSTIFICATIONS, ESSENTIALLY NOTHING LEFT OF REQUIREMENT THAT LAW BE REASONABLE IN TERMS OF PURPOSE.

## Equal Protection Clause

### *The “Middle Years” – The Rational Basis Test*

The older standard had been one of reasonableness, now it turns to a rational basis test. Later, the court would turn to the new standard of Brown, reasonableness again.

Cleburne v. Cleburne Living Center Classification is based on mental ability. Court claims to be applying the rational basis test, yet the statute fails. *But the Rational basis test is a test that can not be failed!*

**1<sup>st</sup> test: Rational Basis Test.** Classification rationally related to legitimate state interest.

- How serious is the harm of the classification v. how serious is the harm we are seeking to avoid? (i.e. letting blind people drive.)

**2<sup>nd</sup> Test: Strict Scrutiny Test:** Used where suspect criterion is involved or when what is involved is a fundamental value. *Reverse presumption of const'lity*

- Only uphold where it is shown to serve a compelling state interest.
- Serve purpose in most narrow, tailored way possible.

**3<sup>rd</sup> Test: Intermediate Scrutiny:** used for gender discrimination. Close call if it is a “suspect class” for purposes of strict scrutiny.

- Substantially related to sufficiently important state interest.

*Stevens (concurring):* Balancing test should be used – only question is whether gains of classification outweigh harms; still use a rational basis test. (But he still thinks it fails!)

*Dissent:* The legislature doesn't have to convince the court of the rationality of ruling. The court shouldn't disallow a policy judgment of the legislature.

Railway Express v. NY Statute stating that owner of vehicle can not have advertising on the vehicle unless he is advertising his own goods. *Classic illustration of court's withdrawal from substantive DP review and equal protection review.*

*Due Process Challenge:* court holds that it is not its function to pass judgment on the wisdom of the legislature. Rational-basis review used. Only overrule if obviously false and irrational. *Note: no law stricken down on basis of rational-basis review since 1937.*

*Equal Protection Challenge:* Is there a rational relation b/w classification and purported purpose? Court holds that statute is under-inclusive and does not cover all distractions on the road that the legislature was seeking to avert. The legislature may address problems one at a time.

*Ownership of ad is not related to how big a distraction the ad is. If asserted purpose is safety, this seems to have no relation to purpose. Senseless, arbitrary legislation, but the court doesn't care. They contend legislature may have had rational reason. The real reason these laws are upheld is because the real purpose of the law is always met.*

*Jackson (concurrence):*

- More sympathetic to EP challenge. There is no better protection against tyranny than that the law apply broadly, not just to one group of people. *Real reason: Newspapers wanted to drive other advertisers out of business, while advertising themselves.*
- Equal protection should say law is too narrow, broaden the class. Here, distinction is that it is appropriate to distinguish between people who do something for hire and people who do something for themselves. Self-interest v. getting paid.

## Equal Protection Clause

### Early Race Cases

Strauder v. W. Virginia Statute discriminates on basis of: race, citizenship, nationality and age. Only white males can sit on a jury. D claims that he was denied a right to a jury by his peers. *Note: not even clear that D had standing on this issue.*

- If claim is that **black representation necessary for D to get fair trial**, then he has standing. Must show that blacks different from whites. If they are different, is discrimination acceptable?
- Claim actually raised was that **blacks denied interaction in political process**. No standing on this issue; a black denied jury duty needed for this claim.

*Due Process Claim:* How did this get to be a DP claim if DP just means follow established procedure? Improperly and surprisingly, there is a const'l claim for DP based on unfairness here. DP has evolved to include notions of fairness.

Why is it unfair to D that others excluded from Jury?

- Whites prejudiced against blacks. *Graglia: but at that time, whites were often more lenient on "black on black" crime than black juries.*
- Law must be reasonable; related to purpose. *It is difficult to challenge on basis of unreasonableness if goal is competent jurors. At this time, whites more educated. This is an over-inclusive law, but that is acceptable for administrative convenience.*

*Majority Opinion/Equal Protection Claim:* Court upholds equal protection claim; says that it will liberally construe in accordance with the spirit of the amendment. ("liberal construction; activist court out to do good").

*Graglia: Spirits are hard to pin down! How can you do this? Purpose of Congress is to go as far as it actually went. To go further is to distort the purpose of Congress. Best evidence of what is meant is what is said. The court's construction makes the 14<sup>th</sup> am. into a general prohibition of racial discrimination, something it was not meant to be. It doesn't even say anything about race. Not meant to end all discrimination. Note that 15<sup>th</sup> am. was needed to give blacks the right to vote.*

## Equal Protection Clause

### Early Race Cases

#### Strauder v. W. Virginia (cont'd)

Ex Parte Virginia (companion case) Fields' dissent: Discusses 13<sup>th</sup> and 14<sup>th</sup> ams. separately. 13<sup>th</sup> am. only covers civil rights. Political rights are not covered. What about 14<sup>th</sup> am.?

#### 14<sup>th</sup> Amendment

- **Grants citizenship.** *Not enough. Women can't vote or be on juries. Doesn't grant political rights.*
- **Privileges and Immunities Clause.** *Doesn't grant political rights, either. According to Slaughter House, only grants rights you have as citizen of U.S. Even if SH is wrong, never contended that jury service is among fundamental rights protected. After all, women are citizens, but they can't serve on juries.*
- **Due Process Clause.** *Not enough. Means you should be punished under regular administration of law.*
- **Equal Protection Clause.**
  - *Universality of law renders P's position untenable. Law also excludes women and children, non-residents, etc. Can't claim he was denied EP of laws. There are many discriminations.*
  - *Only designed to secure civil rights. States are to determine to whom political rights are to be entrusted!*
  - *Besides, D's argument leads to the conclusion that whites should be excluded from juries. If whites are not to be trusted, then you shouldn't have ANY whites on the jury – DP claim of unfairness seems to require an all black jury. Once you accept this, you have to have a whole separate system for each race.*
  - *What is the purpose of the law? Is the classification reasonably related? The law was actually supposed to help blacks (White jurors more lenient; better educated).*

*Graglia: Concurs in results reached, but criticizes rationale*

- Equal protection: state must treat people equally, but can discriminate if reasonable and related to purpose of law
- Purpose of law wasn't to get knowledgeable jurors, but to keep blacks from participating in government. The purpose and the law fit perfectly.
  - Argument of court that unfriendly classification by race is impermissible and prohibited by Equal protection clause is wrong.
  - Historically invalid. Ratifiers allowed racial discrimination in voting, etc.
  - If 14th protected political rights, 15th amendment was unnecessary
- Arguments supporting Strauder: 14th only applies to civil rights, but 15th prohibits discrimination in granting political rights. Whole gamut covered now.
- Furthermore proposition from Strauder that government can't discriminate on basis of race would support Brown

## Racial Segregation

### “Separate but Equal”

Plessy v. Ferguson Is a law compelling the separation of blacks and whites in RR cars const'l where the cars are required to be separate but equal? Court says concept of equality is not violated by compulsory separation, based on precedent. Equal before the law does not mean equal rights. *So what does it mean under that interpretation? Basically, enforce whatever rights they do have.*

14<sup>th</sup> am. is supposed to enforce absolute equality of races before the law. This statute doesn't exclude blacks, just separates them.

- Distinctions made must be reasonable.
- Court misconstrues Strauder.
  - Strauder merely holds that a law that disadvantages blacks is against the 14th amendment. This law treats blacks just like whites because cars are of equal quality. “Separate but equal.” Blacks are not being discriminated against.
  - Requirement of Strauder is absolute equality before the law and equal opportunity for advancement and progress. *Separate IS unequal.*

P's argument: Separation of cars implies inferiority. *Court: this is simply the construction that blacks put on it. The meaning of 14<sup>th</sup> am. is that blacks can not be disadvantaged against whites, which they are not here. Whites can't go into black car, either.*

*But, really, doesn't everyone know that the purpose of the statute is to keep blacks out of white cars and not the other way around? Blacks are disadvantaged more than whites are disadvantaged. Also, blacks are only 12% of population – they are confined to riding with 12% of the population. They are also confined to riding with those with lower amounts of education, social status, etc. Whites are not disadvantaged in this way. Separate is unequal by definition.*

*Harlan (dissent): This violates 13th am.; riding a RR car is a civil right, statute should be overturned based on a defense of equality. This is a badge or vestige of slavery.*

THIS CASE GAVE ENORMOUS IMPETUS TO MOVEMENT TO SEPARATE EVERYTHING FOR BLACKS AND WHITES. VASTLY EXPANDED. SERVES AS AN ARGUMENT AGAINST JUDICIAL REVIEW. NO MATTER WHICH WAY THEY DECIDE, THEY GIVE IMPETUS TO SOCIAL MOVEMENTS. VALIDATES ONE VIEWPOINT.

Cumming v. Richmond Cty Bd of Educ. No violation of 14th am. in refusal of courts to enjoin operation of white school until one built for blacks.

Berea College v. Kentucky Statute requiring private schools to segregate upheld.

Gong Lum et al. v. Rice Last case to deny relief to complaining P. Court unanimously upheld segregation against a Chinese girl in a black school. Court holds *stare decisis* – it has been settled for a long time.

Court says this decision is “not as difficult as Plessy”

- Age of those affected. *We wouldn't subject children to trauma of racial mixing.*

THESE DECISIONS SENT THE NAACP ON A CAMPAIGN TO UNDO THE SEPARATE BUT EQUAL DOCTRINE, BY CHALLENGING SEGREGATION IN HIGHER EDUCATION, AN ARENA WHERE IT WOULD BE MORE DIFFICULT TO SATISFY THE “SEPARATE BUT EQUAL” DOCTRINE. TELLINGLY, THEIR CAMPAIGN WAS AIMED AT THE JUDICIARY, NOT THE LEGISLATURE. THE FIRST FRUITS OF THIS CAMPAIGN WERE GAINES

## Racial Segregation

### “Separate but Equal” (cont’d)

State of Missouri ex. rel Gaines Suit brought in Missouri (less resistance). Case involving discrimination in law school admissions. Pending establishment of black law school, blacks are given tuition grant for black school in adjacent state. At this time, the court was still applying the separate but equal doctrine, even at the higher education level.

Why bring suit in area of higher education?

- Economically not as feasible to create “separate but equal” facilities
- Some argument that it doesn’t apply?

Court holds that the point is not whether opportunities are “just as good.” This is beside the point. The facilities are in another state. *Graglia: what kind of const’l principle is this? No claims are made about inconvenience or value, just that it is offered in another state. What is actually happening is that they are prohibiting racial discrimination.*

- Held that equality is irrelevant and black can not be denied privilege offered to whites by reason of his race
- Relief granted, however, affirmed “separate but equal” doctrine – not required to admit to white school, just to provide black facilities
- In line with Sipuel v. Board of Regents. Oklahoma not required to admit black to white law school, but must provide black facilities as soon as they are provided for whites

Sweatt v. Painter Black is denied admission to UT. Is it const’l for a state to deny admission to someone on grounds that he is black?

Didn’t consider Plessy or its application at law school. Instead considered whether facilities are in fact equal. They were held not to be. Need to consider ALL factors:

- Intangibles: reputation, alum, etc.
- Tangibles: faculty, library, etc.

Steps to apply here:

- Plessy: Certainly can’t exclude unless there is an equal facility somewhere else.
- Gaines: Can’t send out of state for equal facilities AND NOW ADD
- Painter: Facilities must really be equal. *Note: the Court should decide as little as possible in any given case. They could have ended the case on the first two points here, which they should have done. Instead, they added this extra criteria.*

McLaurin v. Oklahoma State Regents (companion case) Black was allowed in, but had to have separate eating times, table in library, etc. Intent was to relax restrictions, but court holds this insufficient. Blacks are still handicapped in ways that whites are not. Court notes difference (const’lly) between prohibiting him from sitting with whites and whites choosing not to sit with him voluntarily. 14th amendment precludes difference in treatment based upon race.

THIS GOES A LONG WAY TOWARDS ENDING SEGREGATION, BUT STILL DID NOT HAVE AS BIG AN IMPACT AS ONE MIGHT HAVE EXPECTED. THE “BIG” CASE IS NOT UNTIL BROWN.

# Racial Segregation

## *Desegregation v. Compulsory Integration*

Brown v. Topeka Board of Education Involved state laws requiring separation of races in the schools.

**Historical Context:** unsurprising. Country on course towards desegregation with prior court rulings. Other areas, such as baseball and armed forces, were already desegregated. Court could have been viewed as giving support to forces that were in retreat throughout the country – a mark of approval similar to that in Plessy.

**Shenanigans on the Supreme Court:** Argued in 1952, but Justice Vinson died and was replaced by Justice Warren. Case was re-argued. Court wanted arguments on 14<sup>th</sup> am. to determine original intent. History related was revisionist:

- *Graglia says history is to historians as law is to lawyers. A storehouse of knowledge to be selectively raped to achieve a goal*
- Alfred Kelly wrote an article saying 14<sup>th</sup> am. may have prohibited school segregation at time it was passed. Later admitted that he made it all up.
- Alex Bickel researched 14<sup>th</sup> am. for Frankfurter and concluded that it didn't prohibit school segregation.

*Chief Justice Warren demanded a unanimous decision to avoid weakening impact of decision and dividing the country.*

**Decision:** Precise holding: where blacks denied admission to public schools in their community based on race, such segregation violates the Equal Protection Clause of the 14<sup>th</sup> am.

- 14<sup>th</sup> am. history on intent inconclusive. *Graglia: Wrong! Public debates urges allowance of school discrimination laws. All states had segregation laws and understood this would continue.*
- The court interprets Strauder:
  - Holding means that there should be no legislation unfriendly to blacks.
  - Segregation is discrimination and unfriendly to blacks. Blacks are disadvantaged because they are in the minority.
  - Separate but equal is a legal fiction. Never true in reality. Plessy standard can never be met.
- The court interprets Plessy:
  - It was not overruled, but was distinguished as a transportation case. *They are just seeking to maintain the fiction of stare decisis. They should have held Plessy to be inconsistent with Strauder and overruled it.*
  - Court claims to be applying separate but equal doctrine; grade school separation is inherently unequal.
- The court interprets Gong Lum v. Rice & Cumming:
  - Can't distinguish as transportation case as with Plessy
  - Court says that this case didn't involve the separate but equal doctrine. *The problem with this is that the holding was based on Plessy*
- The court interprets Sweatt v. Painter & McLaurin:
  - Stands for proposition that black law schools are not equivalent; this reason applies even more to grade schools. *Graglia: Wrong! Can have similar grade schools b/c there are no real intangible differences in grade schools, as there are in law schools.*

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

#### Brown v. Topeka Board of Education (cont'd)

**The infamous footnote: Footnote 11.** The court claims that grade schools are not equivalent b/c **blacks are impeded from learning** in a segregated situation

- Court **cites social science** to support holding. Clark study: white/black children shown white/black dolls. Asked 1) which one looked like them; 2) which one they liked best.
  - In segregated schools, black kids liked white dolls better. Clark said supported proposition that segregation denied equal schools. Most sociologists would say this study proves nothing.
  - Later, Clark's own data showed that blacks in non-segregated schools preferred white dolls more often. Clark changed tune, says this shows that they accept their inferior status. **He is clearly result-oriented.**
- Use of this data **made Brown vulnerable**. South brought in cases showing that segregation was good for blacks. Educator testified that good for children to learn from same-race teachers re: culture, norms; they understand child's manner of learning. 5<sup>th</sup> circuit rejected pseudo-scientific data, rendering FN 11 worthless.

*Graglia: truth of the matter is that there were no facts then and none now to show that segregation in and of itself impedes education of blacks. For judges to presume to decide such a difficult issue as mental and developmental needs of children is to be disrespectful of difficulty of issue.*

#### **Justifying Brown from Strauder: how it should have been done.**

- Strauder held that 14<sup>th</sup> and 15<sup>th</sup> ams. collectively prohibit all governmental discrimination on the basis of race. 14<sup>th</sup> (civil rights) + 15<sup>th</sup> (political rights) = all rights relating to govt. *While this is not completely right (given that ratifiers discriminated), stare decisis (especially given age of opinion) would allow us to follow.*
- Brown merely prevents governmental discrimination in schools and, as such, flows from Strauder. Segregation discriminates based on face of the statute; it does disadvantage blacks. *See Graglia's lack of opportunity argument.*

*Besides, a serious insistence on equality in education would make segregation impractical or impossible.*

#### **What is the meaning of Brown? Two options:**

- Segregation denies equal educational opportunity to blacks because they learn less in segregated schools; therefore, an all-black school must be unconst'l. Impact is even worse when done under authority of law. So racial segregation = unconst'l and compulsory integration is required. **OR**
- No racial discrimination by government. Schools not required to integrate, just can't discriminate. **Better interpretation.**

#### **Consider:**

- Bolling → court says Brown means government can not discriminate.
- Brown II → Racial discrimination in public education is unconst'l.
- *It seems that the real meaning of Brown is that there is to be no racial discrimination by the government. Consider the trend in cases below.*

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

#### Brown v. Topeka Board of Education (cont'd)

Bolling v. Sharpe (companion case). Decided separately from Brown because 14<sup>th</sup> am. only applies to states and not to Wash. D.C. or federal govt.

- Separate but equal argument unconst'l because it violates the 14<sup>th</sup> am.
- DP clause of 5<sup>th</sup> incorporates the Equal Protection Clause of the 14<sup>th</sup>! Converse of normal incorporation doctrine – makes the 14<sup>th</sup> apply to the federal government.

#### *Justifying Bolling*

- Brings back substantive DP (strict scrutiny standard; can't limit liberty except for legit./reas. govt. action). *What if you argued that govt. objective is to make society more peaceable by segregating?*
- Court feels that it is unthinkable that a lesser duty would be imposed on federal government than on the states. *It is thinkable because K clause only applies to states, not to fed. If truly unthinkable, should have left to legislature; give them a chance to do good. In practical sense, ends up being right b/c Congress repealed all DC segregation laws after this opinion.*

The problem with Bolling is that it undercuts idea that law is applied to facts.

- Credible argument that 14<sup>th</sup> am. is violated by state segregation
- Not credible to say that segregation violates DP clause of 5<sup>th</sup> am. It was adopted in 1791 when slavery was explicitly provided for in Constitution.
- Supreme Court gives demonstration that const'l law is fictional and integrity and truth are merely barriers in reaching desired result.

SEGREGATION WAS CHALLENGED IN THE SOUTH IN ALL AREAS AFTER THIS DECISION – IE. TRANSPORTATION, ENTERTAINMENT, ETC. IN EVERY CASE THE SUPREME COURT DID AWAY WITH SEGREGATION. IT NEVER WROTE AN OPINION, JUST CITED BROWN. CLEARLY BROWN NOT LIMITED TO EDUCATION. ALL THAT TALK OF MINDS & HEARTS WAS SUPERFLUOUS.

Brown II This case is the decree from Brown I. Reargued the next year, rather than deciding at the same time. Court holds that the requirement of Brown isn't compliance, but a prompt and reasonable start towards ending racial discrimination.

*Courts decision interpreted as vacillation – uncertainty that new law would prevail. It's a mistake for a lawmaking institution to make its uncertainty manifest. Lower courts in difficult position of dealing with opposition to ending segregation without a mandate of higher authority.*

Supreme Court makes it clear that there is no deadline to comply

- Gives leeway for administrative issues. *How long should this really take anyway? Many districts integrated long before Brown 2 heard.*
- "As soon as practicable" or "with all deliberate speed." *Caused confusion/litigation. Contributed to the development of desegregation plans. Can always make argument that "isn't practicable." Can always argue over whether speed is reasonable.*
- Ridiculous. In the year that had passed, segregation ended almost immediately in all but 8 Southern states. Clearly, it was feasible administratively. (Actually, it was probably easier to just have one – rather than two – zoning plans for school districts.

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

#### Brown v. Topeka Board of Education (cont'd)

*Some of the Ps of Brown never had their rights enforced; Supreme Court effectively denied their right to relief by this decree. If Const. Is violated, remedy should be enforced immediately.*

- *Courts refusal to grant individual relief utilized very classification by race it was condemning.*
- *Essentially ignore need of individual in favor of supposed interest of racial group.*
- *Subtly saying that blacks have rights as race, but not as individuals.*

Decision is clearly a retreat from the earlier decision. What was the Court afraid of?

- *Ike from Kansas, and he thought Brown was wrong. Possibility that states wouldn't desegregate; executive wouldn't enforce. Court felt that this was safer than having opinions publicly flouted, probably. (But enforcement isn't the Court's responsibility!)*
- *Being Statesman like and giving the South time to adjust. But Supreme Court justices are judges, not politicians.*
- *Fear that the South would abolish public schools. There is no const'l requirement that the state provide schools, but it is true that the South could make the remedy worse than the illness when poor black kids are stuck w/o money to go to school.*

*Decree should have been a simple requirement of ending of racial discrimination and ending the assignment of kids based on race.*

FOLLOWING BROWN, THERE WAS A DECADE OF HESITATION. THE COURT SIMPLY REFUSED TO TAKE FURTHER ACTION, ALTHOUGH IT WOULD HOLD SEGREGATION UNCONSTITUTIONAL SIMPLY BY CITING BROWN (SEE ABOVE). THE NEXT CASE HEARD ON DESEGREGATION WASN'T UNTIL 1958.

No doubt at time that, although discrimination to be gradually ended, there is no requirement of integration . In 8 southern state, alternative means of assigning kids (while getting same result) enacted.

Cooper v. Aaron (1958) School district made gestures of compliance. Considered a plan to end desegregation using neighborhood assignments. This was more than most of the South was doing. Plan used downward stair-step method. Desegregate 12th grade 1st year, then 11th, etc.

Principle of Brown reaffirmed, but also clear that states don't have to desegregate right away.

*This opinion only one given in names of all nine Justices. Ordinarily, just says "per curiam," no signature. First opinion where Court explicitly says that its interpretation of the Const. Is the law of the land. Although, as a practical matter, the Const. Has always been what the Supreme Court says it is.*

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

Shuttlesworth v. Birmingham Board of Education (1958) Doctrinally more important than Cooper. The Southern reaction to Brown had been that border states complied, but the deep south just ignored and resisted the decision. Schools switched from assignment by race to assignment based on “the school you went to last year” and other factors essentially ensuring that integration wouldn’t happen.

#### ***What is our test to determine racial discrimination?***

- Can’t merely be whether law is racist on its face (although laws that are can be found discriminatory, of course). It would be too easy to circumvent rule.
- Law affecting races differently can’t be the test – lots of things have disparate impact despite fact that they are neutral.
- Purpose can’t be the test, because it is hard to determine mental state. Besides, it’s the **effect** that matters.

#### ***Graglia’s rationality Test***

- Adverse racial impact
- No non-racial justification

***Pupil Placement Plans:*** Supposedly assigned kids non-rationally and with individual attention to what was best for child. Such individual attention is really non-feasible. In reality, kids being assigned by race, but with “right” to request transfer to another school.

- If request to transfer not granted, had to follow appeals process through school. THEN could sue. By then, you had probably graduated.
- Result was token integration in border states, none at all in South.

District court held pupil placement plans const’l. Pupil Placement Plans meet Brown requirement of what is non-racial assignment. *Really this isn’t true, since one test used was that no child should be forced to attend racially mixed school for psychological reasons.*

*If this is compliance with Brown, then Brown doesn’t require much! Opponents of desegregation gave a big sigh of relief. This decision gave impetus to movement to avoid integration through token measures such as pupil placement plans. Made worse by fact that Ps required to exhaust administrative remedies – usually graduated first.*

IN THE EARLY 1960S, SOME DISTRICT COURTS BEGAN TO REALIZE THAT MINIMUM COMPLIANCE WITH BROWN REQUIRED MORE THAN THIS. GEOGRAPHIC ASSIGNMENTS IN SOUTH WOULD HAVE PRODUCED MORE INTEGRATION THAN ANY OTHER PLAN. IN RURAL SOUTH, BLACKS AND WHITES LIVED IN SAME AREAS.

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

Goss v. Board of Education of Knoxville (1963). Pupil placement plan provides for geographic assignments with provisions for students to transfer if they wish and: 1) their race is in the minority; and 2) plan assigns them to school previously serving only students of the other race. School argues that the plan is not discriminatory because it treats each race equally: anyone may opt out.

#### **Decision:**

- Using race as criterion for granting transfer is no less unconstitutional than assigning them based on race in the first place.
- Affirms that Brown is simply prohibition of use of race in making school assignments

#### **Still facing the issue: what does Brown mean?**

- Racial discrimination by government is prohibited!
- No longer dealing with “separate but equal” issue of Plessy (although case was never explicitly overruled)

*Clearly, this is explicit racial classification – court holds it unconstitutional.*

COURT NOTED THAT TIME IS RUNNING OUT. HEREAFTER, THE PACE OF THE COURT'S DECISIONS QUICKENED.

Prince Edward County Case involving one of the 4 defendants of Brown, but 10 years later. State's answer to Brown had been to repeal compulsory education laws and to abolish the public school system. State instead gives tuition grants for children to attend private schools, which do segregate.

#### **Are these schools still private?**

- Little difficulty with idea that prohibition of discrimination by state includes prohibition of direct and substantial state financial support of discrimination **but the court goes even further...**
- Judge ordered levy of taxes and opening of schools. *There is no constitutional requirement of public school education, yet the court finds one anyway.*

*Graglia: How can this be? Isn't the court supposed to be the least dangerous branch? How can it order levy of taxes and expenditure of funds? AND the judge's orders were obeyed without question! What stronger indication is there of the court's power?*

Alexander v. Homes County Board of Education Finally gives definitive answer to question of delay. Orders that every school district must terminate dual school systems at once and to hereafter operate only unitary schools.

#### **The time for all deliberate speed is over!**

The court finally ends a question that should never have been – when to comply with Brown. Unfortunately, question answered too late for a return to the apparent simplicity of Brown requirement. What was the result of this 10 years of hesitation and confusion?

- View of federal district court judges, their role in society, and what they are allowed to do has changed. School districts were under the supervision of the local judge.
- Results were disappointing to civil rights activists. Very little integration actually taking place.
  - For instance, D.C. complied immediately, yet there was little integration due to the pattern of residential segregation.
  - In those areas where integration resulted, whites typically took kids out of public school and sent them to private school.

# Racial Segregation

## *Desegregation v. Compulsory Integration (cont'd)*

### **1964 Civil Rights Act**

Act ratifies the decision in Brown. The mood of the country had changed to such a point that Congress was finally able to overcome the Southern filibuster. The act even extended to discrimination in public accommodations. First major Civil Rights Act since 1875. There was a big debate over whether to base it on the 14<sup>th</sup> amendment or the Commerce Power. It was based on the Commerce Power (and partially on the spending power). It prohibits:

- *Title 7 – Discrimination in Employment*
- *Title 6 – Discrimination in Higher Education*
- *Title 4 – Discrimination in Education*

***How did racial segregation end so quickly then?*** Title 4 does nothing more than prohibit discrimination.

- The Act authorizes the Attorney General to bring suit for the 1<sup>st</sup> time. (Before, the only suits brought were by the AACP and ACLU)
- Title 6 says that any group, etc. receiving federal funds may not discriminate. *The Elementary & Secondary Education Act makes money available to public schools. Basically enforced by threatened removal of funds (spending power as opposed to commerce clause).*

### ***The End of Segregation, but the Beginning of another Fight***

- Need to distinguish between de facto racial separation (not required by law) and racial segregation (assignment of children to separate schools based on race; compulsory).
- By 1966 or 67, there was little to no use of racial discrimination in schools. Shouldn't the fight be over? Instead, it turned into another fight. *There was no more segregation, but still separation. How to end this?*

### ***Legislative History***

- Opponents: Courts will pervert requirement into one for integration, actually causing racial discrimination by making integration compulsory.
- Proponents: This is ridiculous! Added definition of desegregation to Act specifically stating that assignment must be w/o regards to race. Could not be clearer. Added redundant clauses→ the Act is not meant to allow assignment by race in any way, shape or form.

*As a result, legislation includes clause that transportation of students from one school to another shall not be required to achieve racial balance.*

STILL CIVIL RIGHTS ACTIVISTS WERE NOT SATISFIED MERELY WITH ENFORCING THE ACT. PEOPLE WHO CARE SO DEEPLY ABOUT AN ISSUE ARE LIKELY TO CARRY IT TO WHAT SEEMS TO EVERYONE ELSE TO BE A RIDICULOUS EXTREME. HENCE, THE FIGHT MOVED TOWARDS WHETHER OR NOT TO REQUIRE COMPULSORY INTEGRATION.

DESPITE LEGISLATIVE HISTORY AND REPEATED PROVISIONS IN ACT THAT RACIAL DISCRIMINATION PROHIBITED AND NO REQUIREMENT FOR INTEGRATION COULD BE MADE, THE OFFICE OF EDUCATION (SUPPORTED BY THE COURTS) SOON DID JUST THAT.

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

**HEW's General Statement of Policies ("the guidelines")** The complexity and confusion inherent in Brown II were transferred to the administration of the Act. Three methods of compliance with Title 6:

- Written assurance that discrimination not practiced
- Submit final order of court requiring elimination of dual system
- Submit adequate desegregation plan

### **U.S. Civil Rights Commission Report (1966)**

- Displeased with progress of desegregation
- Merely ending discrimination not enough for these professional desegregators
- Recommendation: Means of desegregation other than non-racial assignments permissible if greater integration results. Freedom of choice plans should be revised to make sure that substantial integration achieved.

*Congress limited Act to ending desegregation, yet Civil Rights Commission essentially recommended that HEW abuse its authority and impose requirement of integration*

*Imposing requirement of integration was deliberate task. Required redefining "segregation" and "desegregation." No longer means non-racial assignment, but racial assignment if greater integration results! Accomplished in part under cover of need for a desegregation plan – another consequence of the earlier decade of delay.*

U.S. v. Jefferson County Board of Education HEW claims that freedom of choice is OK if it is "working." (i.e. producing integration) South protests: HEW is using the Civil Rights Act just as proponents promised they **wouldn't**; they are threatening to remove funds if there is no compliance with HEW guidelines.

Opinion by Judge Wisdom (5<sup>th</sup> Circuit). Without this opinion, it is likely there would never have been busing. Without busing, affirmative action would not have been possible. He held not only that HEW was justified in issuing its guidelines, but that they set forth minimum standards as matter of constitutional law.

*Graglia: Wisdom claims that assignment by race should be required where integration is not occurring naturally – this is a new requirement, and yet he calls it the holding of Brown!*

### **What is the logic used?**

- Brown prohibits segregation. To prohibit segregation is to require desegregation. *Graglia: this might be true logically, but rhetorically, you move from a negative to a positive requirement.*
- To require desegregation is to require integration. Therefore, Brown requires integration. Therefore, the Const. Requires integration. *Graglia: Really, we should say that Brown prohibits mandatory integration since it prohibits racial discrimination or assignments based on race. Mandatory integration is unconst'l.*
- Requiring integration, according to this reasoning, is no change from Brown. Therefore, little justification required.

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

#### U.S. v. Jefferson County Board of Education (cont'd)

##### **Argument that Brown requires racial mixing:**

- Discussion in case re: psychological harm. In grade school, racial separation is never equal and always harmful.

##### **Argument that Brown prohibits mandatory integration:**

- Real meaning of Brown is that government may not racially discriminate

##### **Argument that Brown does neither?**

- The question wasn't before the court.
- The premise of Brown is that racial discrimination to separate the races is not const'l; does it follow that racial discrimination to mix races is similarly unconst'l? *It doesn't follow. It is just a different question – one that was addressed by the Civil Rights Act of 1964, which could not be more clear! This decision failed to keep faith with an Act of Congress.*

*Opinion was adopted by Supreme Court, overruling conflicting circuit court decisions. Why would the Supreme Court refuse to review the case?*

FOR 10 YEARS AFTER BROWN, COURT HAD BEEN AFRAID TO ACT. NOW IT HAS NEW FEELING OF MORAL MOMENTUM – ANYTHING CAN BE DONE WITH MORE LAW. THE FOLLOWING CASE, GREEN SETS OFF NEW ROUND OF LITIGATION

Green v. County School Board of New Kent County County with two schools, one on each side of town. Population is 50% black/50% white, but there are more black children. Pre-Brown schools had been segregated racially; post-Brown, used pupil placement laws. Board then adopted freedom of choice plan acceptable to Office of Education, stipulating that it really was free choice. Remained separated, largely due to free choice. Dist. Ct. approves of plan, 4<sup>th</sup> circuit approves with minor revisions. Supreme Court unanimously reverses.

##### **Free transfer is unconstitutional.**

- Puts burden on parents and kids (and not on school board) to transfer. *How can free choice ever be a burden?*
- Constitutes an invitation by the board for students to return to comfort and security of old racially segregated schools. *Basically, racist since lets whites escape. Free transfer could operate to desegregate; without it, district would be all black. At least this way, some blacks can transfer to white school.*
- Cites Brown II w/o mentioning Brown I—no discrimination in violation of Brown I found.

##### **Consider:**

“School boards. . .operating state-compelled dual systems were. . .clearly charged with 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.”

- Dual system no longer meant schools to which children had been assigned according to race. ***It now meant insufficient racial mixing.***
- Brennan contends that new plan must convert white schools and black schools to “just schools.” BUT requirement is really racially mixed schools to a greater degree than would result merely from ending segregation.

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

#### Green v. County School Board of New Kent County (cont'd)

##### ***Reasoning of Green***

- NAACP stipulates that there is no racial discrimination here.
  - Lower courts say clearly constitutional under Brown.
  - Supreme Court reverses, but only 2 honest alternatives to find unconst'l: school does not racially discriminate; we have a new requirement.
- Court says old Brown requirement is still in force.
  - Doesn't say that desegregation means integration b/c of need for equal opportunity (would be equivalent to saying that black schools are inferior; this is racist!). Instead, holds that requirement is a unitary system. Here it is not unitary because it is not integrated.
  - Dual system means one where there is racial separation. Meaning of "dual system" is changed from state enforced segregation to one without sufficient racial mixing.
  - The requirement is no longer racial desegregation, but eliminating racial separation. Assign kids by race rather than ignoring it.
- Doesn't order integration, but says problem is not enough integration.

##### ***What is the requirement after Brown according to the court?***

- Brennan says requirement is to end discrimination, but this isn't really true. The requirement, although he won't say it, is integration.
  - He wants to dismantle the dual system
  - Desegregation applies where there is racial segregation, but integration goes further – applies where there is racial separation. Integration = as much racial mixing as possible whereas desegregation is only as much as needed
- Brennan justifies compulsory integration as remedy for past segregation.
  - Remedy rationale means that we should use only as much racial mixing as there would have been without segregation.
  - Requiring racial discrimination to undo racial discrimination.
  - How can we tell kids to remedy wrong imposed on different kids yesterday? How do you remedy injury to A by B by helping C to detriment of D?
  - Problems:
    - Not true that schools racially separate due to segregation; schools racially separate all over country due to residential patterns.
    - Doesn't matter anyway; should ask if benefits exceed cost; is integration good social policy?
    - Requires modification of principle that government can't decide how to treat people based on their race. Can't racially discriminate to separate, but it can discriminate to mix. Abandoning principles is costly.

##### ***Two Alternative Interpretations:***

- School board can not use freedom of choice in assignment when a simpler method (neighborhood assignment) will produce greater integration. **OR**
- Must take steps to reduce segregation. *The question left open is how much integration we must have. Swann answers later: near perfect integration.*

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

#### Green v. County School Board of New Kent County (cont'd)

##### ***Why Move from Brown Requirement? Why deny doing so?***

- *It appeared that requirement only applied in the South – north thought south deserved whatever it got. If court had been honest/required integration, would apply nationwide; all schools would be unconst'l. Impractical. Would require moving kids significant distances in cities.*
- *Supreme Court did not have to justify a new requirement – if they had held that requirement was integration, they would have to explain this. Equal Protection Clause requires equal opportunity, but this would require court to note inferiority of black schools.*
- *Instead of modifying Brown, leaned on it. Although it really was a modification. Court held that Brown says you can not racially discriminate to segregate, but you can to integrate.*
- *Used language of Civil Rights Act of 1964. Const. Requires desegregation and so does CRA.*

Raney v. Board of Education of Gould School District (companion case to Green). Annual freedom of choice plan. Dist ct/8th circuit affirmed. Supreme Court reverses. Court holds that free transfer plan is unconst'l, inadequate to convert to a unitary system.

Monroe v. Board of Commissioners of City of Jackson (companion case to Green). School is in city, not rural like the other two. Neighborhood assignment plan with free transfer provision. Supreme Court reversed holding of 6th circuit that constitution required only the end of racial discrimination, not the taking of steps to increase integration.

Court holds that neighborhood assignment is const'l, but that free transfer is not – permits reversion to the comforts of the old system/undoes neighborhood assignment. *Graglia: not necessarily true because could cause integration beyond neighborhood assignment. Blacks could choose to go to white school outside neighborhood.*

School district also notes that without free transfer, whites would probably leave altogether. Court holds this to be racist, because gives whites the option to escape blacks by leaving – shows bad faith of school district; white flight shouldn't be used as an argument.

*Graglia: All that can be learned from this case is tht 85% black schools are unacceptable. Supreme Court refused to say what the requirement is now.*

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

Green v. County School Board of New Kent County (cont'd)

#### **Supporting Green & Raney with Brown prohibition of discrimination (Graglia)**

a/k/a *Why the Supreme Court did not need to require integration and racial considerations in assignment of students to invalidate free choice or free transfer plans.*

- **Such assignment practices are racially discriminatory in themselves** and offered opportunities for racial discrimination that would be difficult to detect.
- **Freedom of choice does not really offer a choice** when you are coming from a segregated system. System involves explicit racial choice; choices made on racial basis – that is racial discrimination b/c blacks will continue to choose their old schools. *Courts shouldn't be so condescending; blacks can choose for themselves.*
- **Unconst't on prophylactic grounds** (i.e. reasons prevent proper action). Rule is no racial discrimination; this includes arrangements leading to or creating an invitation to racial discrimination (such as freedom of choice).
- **Freedom of Choice has racial impact because it minimizes racial mixing.** The statute explicitly speaks of race and has racial impact. Effects are predictable – racial separation. Racially discriminatory if no non-racial motive.

BUT Freedom of Choice is arguably non-discriminatory!

- Serves legitimate interests: freedom, choice – this is a value judgment. Which is more important? Racial impact or freedom and choice?
- Court's ruling is condescending to blacks. Can they not choose for themselves?
- Maximizes integration and has no adverse racial impact – those trying to avoid integration will do so by other legal means, such as moving to another school district.
- Monroe should not be able to argue against freedom of choice. Without it, all blacks would be in one school. Finding freedom of choice unconst'l in Monroe makes it clear that the real requirement is integration.

***Difference between requirement of integration and one of desegregation:*** Both require racial assignment to increase mixing, but :

- **Desegregation/Remedy Theory:** Only applies where there has been segregation; the requirement is the amount of racial mixing necessary to overcome segregation. *The remedy theory is factually invalid. Steps to correct a situation existing everywhere regardless of whether segregation existed in the past is not justifiable as a remedy. Secondly, the cause is irrelevant. If integration is a social good, then it should not rely on remedy rationale.*
- **Integration:** Schools must be racially mixed under all circumstances. If they aren't take steps to integrate.

*The court moved from (1) not prohibiting racially discriminatory assignment TO (2) prohibiting racially discriminatory assignment TO (3) requiring racially discriminatory assignment.*

#### **The Aftermath**

*Graglia: The change to a requirement for integration shows that fads and fashions are more likely to influence judges than people as a whole. Affects the basic question of why a self-governing people have const'l limits.*

- *Const'l rights are protected against other interests. Can't decide issue; already protected.*
- *Why foreclose ourselves from making current decisions w/ current values instead of being ruled by dead hand? Hamilton Fed. 78: tie hands so don't decide in a moment of passion.*
- **The problem is that nothing restrains judges from fits of passion.**

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

AFTER GREEN, CASES DECIDED FAST AND FURIOUSLY FROM “MORAL RIGHTEOUSNESS” PERSPECTIVE.

Dominion v. Lightfoot town boundaries changed from square shape to “squiggle” shape – all blacks outside of city limits; only 4 whites excluded.

Is this racial discrimination? *Supreme Court: Yes!*

- Clear disparate racial impact
- No apparent non-racial justification

*If non-racial justification (make city look like eagle), then this is value judgment. Which is more important? Resist temptation to look into people's minds to see if sincere.*

U.S. v. Montgomery County Board of Education Faculty desegregation case. This issue also ignored during the period of “all deliberate speed.” Court holds that it is no longer enough that desegregation has ended. Must end racial imbalance, reflect composition of district as a whole.

District court imposes strict racial quotas, goes beyond Green. 5th circuit denies precise ration requirement, but Supreme Court reinstates district court order. It is the responsibility of the school board to achieve integration as quickly as possible.

- Brown prohibits racial discrimination by government; should apply to faculty as well.
- Justice Black: it is “good to decide case with feelings we have about this one.” Remedy for past discrimination. *What kind of constitutional principle is this?!?!*

*There is no requirement of racial balance, yet we are requiring it anyway as a remedy. Why isn't remedy merely to end assignment based on race? How do you remedy past discrimination through a different type of racial assignment? This marks the first time that the court directly orders racial discrimination.*

*Graglia: How did we get this far from Brown? Where are the repeated unanimous holdings that are referred to?*

Alexander v. Holmes Cty Bd of Educ Reverses the 5th circuit (typically the leader on these cases). Appeal involving 33 school districts with freedom of choice plans. Had to litigate all over after Green. State agreed to come up with integration plan, but not for this school year – it was July. HEW agrees, district court agrees, 5th circuit agrees, Supreme Court reverses. “The time for delay is now over!”

#### ***Why must this be done immediately?***

- Court wanted to make sure that Nixon's “southern strategy” (campaign promise of 1968 – no busing) did not work. Court didn't want to make it look like Nixon could make a difference in DOJ and HEW policy.
- *Note that even the HEW and DOJ agreed that school needed more time. This case was not about delay, but about a school district dealing with the manifestations of Green.*

## Racial Segregation

### *Desegregation v. Compulsory Integration (cont'd)*

Carter v. West Feliciana Parish School Board Is merger of students from 16 school systems required in mid-term? 5th circuit: merger of everything but students is required. Supreme Court: merge everything immediately to get rid of racial imbalance, despite the fact that it is in the middle of the year. *This is judicial terrorism!!*

*How the justices fell:*

- *Harlan and White*: Concurred – put in effect w/in 8 weeks
- *Black, Douglas, Brennan & Marshall* – concurrence is retreat from Alexander
- *Burger, Stewart* – Dissent – 5th circuit more familiar with situation

Northcross v. Board of Education of Memphis In wake of Green, district judge ordered geographical assignments. NAACP opposed, seeking further relief. They wanted a “unitary system” (what this really means is a perfectly balanced school system such that school population proportionately similar to district as a whole).

*The 6th circuit dares the Supreme Court to actually say that the new requirement is forced integration. Focuses on what the Court said, not what it did.*

- Definition of unitary system is incorrect; really means no racial assignment.
- Supreme Court has not announced that requirement is racially balanced schools.
- Denied further relief

#### **Reaction of the Supreme Court**

- Finds “much error” but affirms anyway.
- Burger: unitary system is necessary for integration to remove past effects of segregation
- Brennan doesn’t want unitary system to be defined and have schools recognize that constitution requires integration. Memo: “any realistic definition by Sup. Court of unitary system would be a retreat from Brown and any other type of definition would be too impractical.” *Must be dishonest and not define it!!*
- Meaning of Green, Raney and Monroe still in doubt; what needs to be done is unclear.
- Burger: incompetently concurs that unitary means no exclusion because of race. *Not correct. This was stipulated in Green, yet it was still unconst. Graglia: precisely what unitary was not!*

#### **Interpretation by 5th Circuit of Green and its offspring**

*Wisdom: all black schools unconstitutional in South. Racial transfer required (contradicting Goss) Racial quotas for faculty and staff required*

*5th Circuit panel: read Green as narrowly as possible (ignoring J. Wisdom). Freedom of choice is no good, but neighborhood assignment is OK*

*Later panels: gerrymander districts to change racial composition. (princeton pairing plan, clustering)*

## Requirement of Busing

### *The First Case*

Swann v. Charlotte-Mecklenberg Case involving 2 school districts in NC that merged (71% white & 29% black) District used neighborhood assignment, resulting in all-black schools. District court held schools in compliance with Brown. 4th circuit affirmed. Case brought back in 1969 and argued before a new judge who required integration. School had the misfortune to get new judge at each level. Affirmed at each level, but for different reasons.

**District Court (MacMillan) Analysis** – focus on improving black academic performance.

- School district in full compliance with Brown, but the rules have changed since Green. *But didn't Green purport to be merely enforcing Brown?*
- Not desegregated because schools not racially balanced. Blacks not doing well academically.
- Solution: put blacks with whites. *But how can he purport to know what will improve academic performance? This is not integration as a remedy for past segregation, but to improve educational performance. Many schools that are black now were not black under the dual system – remedy rationale would have failed.*

School district responds by creating a new plan. Districts shaped like pie wedges. 9 of 10 high schools 19-36% black, but one (never previously segregated) school is 90% white, another jr high is mostly black, and most elementary schools are majority white. *District court rejects plan, orders redrawing of districts: use satellite zoning. Required busing of 20,000 students at great cost. Judge holds plan must be maintained. If whites leave, keep re-drawing lines.*

**Fourth Circuit Analysis** – focus on overcoming effect of racial discrim. in black neighborhoods.

- Affirmed except as applied to elementary schools, but on new theory. Never mentions academic performance or Green remedy rationale. *Why is busing good for high school kids, but not for elementary school kids?*
- The court discusses the racial discrimination that caused residential segregation:
  - Racial covenants *But they were disallowed in Shelley v. Kramer*
  - FHA positively favored racially separated housing – more or less an official policy
  - School boards placed schools in middle of black neighborhoods *Graglia: putting schools where they are needed is discrimination?*
  - *Graglia: these official forms of discrimination are surely trivial, not the real cause. Isn't the cause irrelevant anyway? There are racially segregated communities. The question is what to do about it. People are just looking for moral justifications for what they want to do.*

### **Shenanigans on the Court**

- The original vote was 5-4 for busing, but changed to 6-3 for busing. *How did this happen?*
- Chief Justice thinks he can ameliorate the damage of what the court is doing by switching sides. Write the majority opinion.
- Court says it is remedying discrimination by school authorities, not discrimination in general. Integration only has to be done once – once school is desegregated, it is done. Contrary to holding of district court, requiring this year after year. *How is this possible? Just for 1 year? Really, the question is, when can you stop the busing?*

## Requirement of Busing

### *The First Case*

#### Swann v. Charlotte-Mecklenberg (cont'd)

**Supreme Court Analysis** (Burger) – Affirm, but not because necessary to close education gap or b/c of official discrimination.

- If there is racial segregation why not end it by moving people. If residents are racially segregated, then don't base on residency. Can't move people out of their homes, but you can move their kids. BUS THEM!
- The objective is to remove all vestiges of state-imposed segregation. *Graglia: the objective has nothing to do with what they are really doing.*
- Violation isn't that schools are separate, but if they are segregated. . . BUT THEN he says – school authorities can seek racial balance in order to prepare students to live in a pluralistic society. *Overrules Brown. Courts can't seek racial balance, but schools can?!?! Isn't this inconsistent with 1964 Act? We are supposed to assign without regard to race.*
- Court claims not to reach question of whether racial discrimination by those other than school authorities requires remedial action to desegregate (basis for 4th circuit holding).
- There is no requirement of racial balance; however, it is OK for school board to have a ratio requirement (busing is OK). *What?!?!*

*Burger goes back and forth inconsistently. The existence of some small number of 1 race schools does not equal segregation BUT school authorities must take great pains to achieve greatest possible degree of desegregation – i.e. integration (what they mean, but aren't saying).*

#### **Disposing of the Civil Rights Act**

- Congress was defining, not limiting. *So says the Court.*
- Congress defining of discrimination was to only apply to de facto, not de jure, segregation. *Court pulls this idea out of thin air.*
- Says Title 4 doesn't prohibit court-ordered busing. *True, but only b/c law can't limit court's ability to interpret constitution.*
- CRA doesn't require racial balance, but doesn't preclude it either (differs from Jefferson County). *The problem is that these provisions were intended as limits.*

#### **What is desegregation?**

- Can't mean racial balance – would have to apply to the North as well.
- Have schools balanced as they would have been without segregation. No requirement of particular degree of integration.
- Despite this, judge says 29% to 71% is required and Supreme Court affirms. Findings include false statements that school had been segregated since 1969 and that board defaulted in presenting an acceptable plan.
- One-race school is not unconst'l, but existence of all-black school is presumption that district acting unconst'lly. BOP is on the school board to show not the results of past discrimination.

*Burger ends opinion by stating that racial balance doesn't have to be permanent. Annual adjustments not required.*

#### **Were there any real differences between Burger's opinion and the Brennan opinion that would have been?**

- Preserves remedy rationale, although it contradicts the facts of the case. Limits integration to the south. *Brennan would likely have done the same, however.*
- Approved of dist. court reqmt of racial balance by any means. *How can you get worse?*

## Requirement of Busing

### *The First Case*

#### Swann v. Charlotte-Mecklenberg (cont'd)

Whenever Supreme Court gives remedy rationale, any serious evaluation of busing ends.

- Once kids are mixed, the const'l violation is cured. Only have to make unitary once.
- Mobile society – once mixed, doesn't have to stay that way.
- Problem created today: how long to keep busing. Inconsistency in argument that integration is worth doing, but not maintaining.

*MacMillan's interpretation of Supreme Court opinion. Took it as affirming him completely, ignored the part about just integrating once. School district didn't appeal b/c MacMillan dangerous judge to appeal (he would get mad and take it out on the party).*

Davis v. Board of School Commissioners of Mobile (companion case). Involved much blacker school in Mobile, AL. Blacks in residential area of city, rural area is white. Geographical assignments with gerrymandered districts to increase racial mixing was required. Plan resulted in more racial mixing than would have existed w/o segregation, although some schools still all black.

District court approves school's plan, but Burger reverses.

- He focuses on application to elementary schools, takes unusual step of considering evidence of what happened under plan.
- Used evidence of white flight to condemn the school board. It served as justification for further measures. School board should have considered busing and split zoning.

Winston-Salem/Forsyth County Board of Education v. Scott School system similar to that in Swann except that racial imbalance and need for desegregation is much greater. District judge (pre-Swann) orders desegregation by neighborhood assignment. 4th circuit (post-Swann) reverses, orders busing. School district applies for stay of order to Burger, who denies.

***Burger's Opinion.*** Takes back everything he said in Swann!

- No reason why geographical assignment isn't OK. Original zones drawn without regard to race. There are safety considerations involved in regard to transportation, economic factors, etc. Importance of neighborhood schools. No proof that schools responsible for segregation in housing.
- Burger criticizes district judge for looking at Swann facts. Look at language, not facts. Lets you get around results.

### ***Aftermath of Swann***

Court has been through 3 rounds of school race questions: 1) Brown: cannot discriminate based on race; 2) Green allowing neighborhood assignment; and 3) Swann requires busing. Still 2 unanswered questions: does this apply to the North? How do you define the district?

Two views of Swann: look at facts, require racial balance (unlimited requirement) OR look at words, racial balance not required (limited desegregation requirement).

## Requirement of Busing

### ***Defining the School District: The First Problem***

Scotland Neck v. Board of Education City wanted to split schools off from county system, but this would result in more racial imbalance. District court held the split unconstitutional because result would be to make black schools blacker – would create refuge for white students and interfere with desegregation of county school system. The 4th circuit reverses: racial impact is minimal, justifiable as it increases quality of education. Supreme Court: split enacted with intent of creating refuge for white students. *If requirement is racial imbalance, then clearly this move is unconst'l. BUT the requirement is undoing effects of segregation – must justify on this ground.*

Wright v. Council of City of Emporia Splitting one district into two. District court enjoined on grounds that it would reduce proportion of whites in county schools and increase proportion in city schools. 4th circuit reversed – sound educational reasons for splitting; minimal racial impact. Supreme court reversed. School districts will be prohibited from splitting were split would leave one of the parts with a larger proportion of blacks than it would have had otherwise.

*Brennan* – const'lly prohibited from splitting because of need for dismantling dual system, not simply because of disparity in racial balance.

*Burger, Blackmun, Powell, Rehnquist* – majority went beyond Swann; geographic assignment prima facie const'l. *Burger's dissent inconsistent with his opinion in Swann*

School Board of Richmond v. State Board of Education of Virginia 56% white system in 1954, but it was 70% black by 1969. At this point, Richmond tried to halt growth toward all-black system and annexed surrounding (white) areas. NAACP brought case to prevent annexation (wanted city to be all black so they could run it). NAACP lost, but percentage remained the same, because whites moved further out.

***District Court Ruling:*** Orders Richmond to merge with 2 outer counties. Requirement is to get highest degree of desegregation and must do this by capturing surrounding whites. Desegregation = mixing races to have majority white district.

#### ***4th Circuit Reversal:***

- Majority white schools are not const'lly required. Need only desegregation to remove effects of past segregation. Const. Requires highest degree of segregation possible, but not integration. Dual system should be dismantled, use integration as a remedy.
- No requirement of majority white or racially balanced districts (Majority white schools to give better educational opportunity to blacks is not required.)

***Supreme Court affirms (where equally split – lower court aff'd):*** Powell member of Richmond school board, excuses himself

- No opinion, so no indication of how justices split
- Taken as hopeful sign that 4 justices voting against measure to increase integration. People guessed that Powell would have voted against consolidation.
- Thought that requirement may not apply to North.
- Requirement is to undo const'l segregation, which means that very little would actually take place.

## Requirement of Busing

### *Busing Spreads North*

If requirement is integration, there is no basis to require only in the South. BUT the Court never says that the Const. Requires integration, although this is what their actions imply. If requirement is desegregation (as their words say), then how can one apply it to areas outside the South which had not practiced de jure segregation?

WHEN DENVER SCHOOL DISTRICT CHALLENGED, MANY THOUGHT COURT WOULD COME CLEAN AND ADMIT THAT REAL REQUIREMENT IS INTEGRATION - -DIDN'T HAPPEN.

Spencer v. Kugler (same time as Keyes, below) Schools racially imbalanced due to fact that school district lines coincide with town boundaries. (All black town surrounded by all-white towns.) NAACP wanted either re-districting or mixing to achieve racial balance (busing).

*If districts could be merged, this was a good opportunity to do so. They were very close together. Appellate court found that racial imbalance was not due to state-imposed segregation. Since there is no requirement of integration, case dismissed.*

*Supreme Court affirms dismissal, showing that desegregation rationale still important.*

Keyes v. Denver Colorado const. Explicitly prohibited racial discrimination; also had a law prohibiting racial discrimination in public accommodations which was passed in 1895. Colorado was a leader in this area (few blacks) as opposed to Mississippi (the most blacks). Denver was condemned because so eager to advance racial integration. Head of school board was a black woman; integration started voluntarily before it was ever required.

**Facts:** Blacks 10% of Denver; concentrated in one core area. This area became increasingly black. *Note: never had segregation, so proves all-black schools were solely due to residential patterns.*

- Denver school board refused to put a school in a black area b/c it would be all black. Then formed Committee on Equal Opportunity to study racial factors in Denver. Received recommendation for schools built with race in mind: achieve heterogenous school communities. Use satellite zoning and busing. *Racial discrimination to increase integration.*
- School board proposal was rejected by voters. They didn't want busing. Voted in trustees who would rescind busing resolution.
- Supporters of busing brought suit.

## Requirement of Busing

### *Busing Spreads North (cont'd)*

#### Keyes v. Denver (cont'd)

##### ***District Judge Opinion:*** (Activist)

- Park Hill schools are unconst'lly segregated now that busing has been rescinded. Concentration of blacks and Hispanics denies them equal opportunity.
- Judge says Brown prohibits all segregated schools (i.e. all black)
- Judge purports to recognize difference b/w de jure and de facto segregation, but in effect none is shown in what he says.
- Park Hill schools are de jure segregated b/c of recission – deliberate act to keep schools black. It is enough that board knew of effect of its actions.
  - If resolution implemented, schools would be racially balanced.
  - Twisted reasoning b/c requirement is now that: if schools are all black, no const'l requirement to do anything BUT if you try to alleviate problem and then stop, that is de jure segregation.
  - Reasoning unfortunately had Supreme Court authority (Reitman: Calif law prohibiting discrimination in housing was overruled by Const. Amendment. Supreme Court upheld decision finding amendment unconst'l.)
  - *Graglia: What are the characteristics of unconst'l segregation as opposed to mere racial separation? Court blurs the distinction.*
    - Could say: purposeful, deliberate action. *But all separation is result of deliberate board action. Neighborhood assignments always intentional. People know many things w/o intending them.*
    - Test for segregation should be that separation must be result of racially discriminatory Board action. (explicit on face OR disparate impact and no justification). Hard cases where there is a justification.
- Black schools are not de jure segregated b/c recission didn't apply to them. Judge finds them unconst'l anyway based on inferior education.
  - Illogical b/c willful, deliberate act of board to NOT include them in resolutions. Also deliberately drew boundaries, etc.
  - Ordered revised educational program, including culture and language courses.
  - Core doesn't have to desegregate as quickly b/c not result of de jure segregation.

##### ***Appellate Court Opinion (10th Cir.)*** Affirmed district court only as to finding that de jure segregated, but used a different theory.

- Park Hill schools are de jure segregated b/c of location of Barrett school, which was built in mostly white area at time of construction (but later all-black).
  - Racial discrimination b/c it was knowable that area would be all-black later! Located boundary at one location, when moving it over a few streets would have ensured some whites. Also, would have relieved over-crowding.
  - *Graglia: really not true. Area to east was already going black. There was a non-racial justification – dangerous street for kids to cross. Requires a value judgment. Which is better? Also, both areas over-crowded.*
  - Lots of districts crossed road. *Could show that safety not valued much, but also note that 2 districts crossing road were built when road less crowded.*
- School de jure segregated based on Barrett school construction despite fact that district court based finding only on recission

## Requirement of Busing

### *Busing Spreads North (cont'd)*

#### Keyes v. Denver (cont'd)

SCHOOL BOARD PETITIONS FOR CERT DENIED. RESULT IS THAT COMPULSORY INTEGRATION MOVES TO AREAS THAT NEVER HAD SEGREGATION AND COURT NEVER ADDRESSED THE QUESTION!! SUP. CT SHOULD HAVE GRANTED CERT. BUT. . .CERT GRANTED TO PLAINTIFFS APPEALING REVERSAL OF DE JURE SEGREGATION FOR "CORE AREA" SCHOOLS. 10TH CIRCUIT REVERSAL REVERSED. REMANDED FOR FURTHER PROCEEDINGS.

**Supreme Court majority opinion** (Brennan) Court says all of Denver must be desegregated, not on basis of unequal opportunity, but by saying that "core areas" de jure segregated since Park Hill (adjacent all-black area) was de jure segregated. *Reverses appellate court and allows integration in core schools using desegregation remedy rationale. Claims to be enforcing Brown!*

- Brennan says Hispanics are identifiable class under the 14th amendment, like blacks.
  - Brennan won't allow mixing of blacks and hispanics to satisfy requirement.
  - Brennan is really seeking soci-economic integration. Moving blacks to white schools will close academic gap.
  - Court can't order economic equality which is only thing that correlates with academic performance. Claims racial integration since they can order this.
- Finding of de jure segregation in core schools (w/o using inferior education theory). Showing de jure segregation in substantial areas supports finding that another portion is also de jure segregated. Two ways to do this:
  - "Common sense" to know that if school board is segregating in one area, then racial impact on other areas. If deliberate segregation in Park Hill caused separation in core area, then can impose desegregation. *If add blacks to A, should subtract from B, but Brennan says it adds to B. Also, core schools were black long before this.*
  - Intent to segregate in meaningful portion of school system creates presumption that any other racial separation is not result of accident.
    - Thus, distinction b/w de facto and de jure segregation is intent *But school boards are composed of many people over many years.*
    - Burden of proof on school board to disprove presumption. *Graglia: i.e. they must show they did all they could to achieve racial balance. Requirement is really racial balance. Impossible to meet burden; race-neutral explanation will not be good enough.*

*Graglia: What is meant by intent/purpose? Even if we knew what to look for, how do we know when we find it? Why do we care about state of mind? Results matter, not intent.*

- Can't mean deliberate – all acts done deliberately.
- By intent, Brennan really means 'does separation exist due to discrimination?'. All school board actions intentional. Really, was action one of official discrimination?
- Question is really one of justification in terms of cost-benefit analysis. Masks policy determination as one of fact. Policy decisions should be made by legislature.
- Shows constitutional law is a fraud. Brennan ties law and morality together, deliberately conceals what he is doing by masking as question of fact.

## Requirement of Busing

### *Busing Spreads North (cont'd)*

#### Keyes v. Denver (cont'd)

##### **Problems with Brennan's Reasoning:**

- Dist. judge didn't find de jure segregation except on basis of rescission. Real prob.; this is why Brennan denied cert on this question. There was no segregation—school board had taken steps to integrate. Residential patterns caused separation.
- Even if Park Hill de jure segregated, this fact couldn't cause separation in core area because core existed before Park Hill
- Court stayed with de facto/de jure distinction and remedy rationale b/c didn't want to admit that real goal behind integration is socio-economic integration. Also, did not want to modify great Brown decision.

*Brennan's opinion requires desegregation in an area that was never segregated. Honest way to do this would be to say that const'l requirement is integration. However, Brennan sticks to the desegregation rationale.*

**Supreme Court concurrence** (Douglas) *Joins opinion even though he is really dissenting; this way court can't overrule decision by saying it was a mere plurality later.*

- Sees no difference b/w de facto and de jure segregation; distinction should be abolished. *At least he is honest.*
- Test should be that racial separation itself is unconstitutional. *Although he undercuts honesty by saying still looking for racial discrimination, though that shouldn't matter with a test of racial separation. Doesn't even try to justify new test of integration.*

##### **Supreme Court concurrence/dissent** (Powell)

- Court is being dishonest. Not enforcing Brown, but Green, which transformed Brown into const'l doctrine of affirmative action.
  - Requirement of aff action can't be justified as reqmt of desegregation based on need to remedy segregation.
  - New requirement confirmed by Swann. School districts must alleviate separation not caused by de jure separation as well.
- Drop de jure/de facto segregation distinction.
  - Integrate everywhere. Not perf. Balance/ faculty integration, equal facilities.
  - Use integration as "plus factor" for zoning and building new schools. Increase integration within reason. *As opposed to old way of making decisions minimizing mixing when given an option. Middle class saw correlation b.w race and pverty, didn't want kids associating with poor.*
- Justifies integration requirement with prophylactic explanation
  - Require integration to guarantee no discrimination. *Still using invalid remedy rationale; separation due to residential patters, not de jure separation.*
  - No guidance given as to what standards school boards must live up to
  - Racial separation is prima facie evidence of segregation *Ignores his own residential explanation Rationale is not believable – no reason to believe Denver/Detroit boards practicing discrimination*
- Criticizes intent standard: proof is elusive. Allows judge's opinion to determine outcome. *Powell thinks busing is unreasonable (const'' right to go to neighborhood school). Hard to fault him, but it cuts against his requirement of integration.*
- **Problems:** Gives no guidelines for schools - further litigation. Sacrifices valuable principle of no racial discrimination by govt w/o meaningful substitute in its place

## Requirement of Busing

### *Busing Spreads North (cont'd)*

#### Keyes v. Denver (cont'd)

##### **Supreme Court dissent** (Rehnquist)

- Brown says don't assign kids based on race, but now we are. Compulsory integration doesn't follow Brown.

##### *Case remanded to district judge.*

- Says Sup. Ct. found dual system and supported his fact finding. *Wrong. They denied cert on that issue.*
- School board unable to show that separation in core not due to its acts. *This is always true.*

*Result: Denver quickly became more black. White enrollment decreased. Colorado amended its Const. To deprive Denver of right to annex. Whites moved to suburbs.*

##### **Effect of Keyes**

- Requires racial balance
- Every city in country is de jure segregated and subject to busing requirements
- Only qualifying factor is desegregation remedy rationale, which could potentially limit busing to de jure segregated areas. Makes busing alternative subject to change if get judge how says "past vestiges of segregation" have ended

### ***Achieving Racial Balance After the Whites Left***

Milliken v. Bradley 1970 (beginning of litigation), schools were 64% black (now 90%). Had state civil rights commission before Feds did; took race into account to integrate in 1966. In 1970, legislature passed law rendering busing plans void. Board rescinded the plan. *Case is significant because it was a replay of Keyes and Rochmond.*

Keyes – applying desegregation remedy to city never segregated. Detroit had never been segregated; however, it had a plan to voluntarily mix which it then rescinded. Found to be de jure segregation. *But there was never official racial discrimination!*

Richmond – district judge is able to order inter-district remedy. There is no requirement to merge school districts. Sup. Ct. took the remedy rationale seriously.

## Requirement of Busing

### *Achieving Racial Balance After the Whites Left (cont'd)*

#### Milliken v. Bradley (cont'd)

**District Judge's Opinion** Two step process in desegregation remedy rationale ("just enforcing Brown"): (1) find violation; and (2) remedy it with integration.

- Finding the Violation
  - Wants to deal with school segregation on no-fault basis. *Graglia: life is cost/benefit analysis. If separation is evil, then only question is whether it is worth-while to end it.*
  - Integration performs social task. *But judges are not agents of social change!*
  - Must play the "segregation game" (go through formalities of finding de jure segregation). *Doesn't find any, but calls it that anyway. Schools separated according to residential patterns, not de jure segregation.*
    - Adopts test of foreseeable consequences, finds de jure segregation by school board. *School board was committed to integration!*
    - Finds de jure segregation by state through passage of Act 48. *Does this to justify inter-district busing. Sufficient state action has already been found.*
- The Remedy of Compulsory Integration
  - Must do 2 things: end segregation (assign by race to separate); assignment by race to make schools as integrated as they would have been if no const'l violation of de jure segregation had occurred.
  - Adds new requirement to rationale that can't have majority black schools and must have majority white schools. Can't desegregate a majority black school system. Remedy is to create majority white school district by capturing districts around Detroit.
  - Throws in (1) must hire black teachers/admin in suburbs; (2) change discipline codes; (3) implement diversified curriculum

#### **Court of Appeals, 6th Circuit**

- Criticizes district judge for not allowing suburban school districts to be represented when consolidating into one super district, but affirms finding of de jure segregation
- Court twists factual situation in confirming finding of de jure segregation:
  - Detroit let kids from all black area (w/o high school) attend Detroit schools. *Would never have done this if discriminating.*
  - Court determined that suburban districts refused to take kids, Detroit refused to bus kids to majority white schools. *Not mentioned by District court.*
  - Court is looking for an inter-district violation so they can justify inter-district remedy. *Affirms on basis of this violation. Without inter-district busing, will have all white schools surrounding all-black schools.*
  - *Graglia: So what? This is what desegregation rationale allows*

*Outcome is so incredible that it looked like Congress would pass anti-busing legislation, but then.*

..

## Requirement of Busing

### ***Achieving Racial Balance After the Whites Left (cont'd)***

#### Milliken v. Bradley (cont'd)

**Supreme Court majority opinion (Burger)** (Only looks at remedy step, since finding of violation not appealed – once again, Sup. Ct. avoids addressing question of how desegregation requirement imposed on system that was never segregated.)

- Takes remedy rationale of Green and Swann seriously. Elimination of majority black schools required remedy of de jure segregation; dismantle dual system.
- No inter-district violation found, so no inter-district busing allowed
  - Must show official racial discrimination
  - Suburbs not even a party to the case
  - De jure segregation could only be found in Detroit, not inter-district
- Remedy must be limited to violation it is supposed to cure.
  - Schools will not be segregated (as dissent insists) just separated.
  - Racial imbalance is not unconst'l. just segregation.
  - Const'l requirement can't be majority white schools–systems in Green, Emporia, and Scotland Neck were majority black, bused within majority black district.
  - Const'l reqmt can not depend on whether there are whites nearby to be captured.
- Only violation in District, so limit remedy to Detroit (i.e Richmond). Carver school, only instance of inter-district violation, is not in findings. Even if it was, no evidence that this segregation caused racial situations b/w suburbs and Detroit.
- The Requirement:
  - remedy segregation;
  - restore victims to position would have been in w/o discrimination;
  - differences b/w reqmt of desegregation and reqmt of integration: desegregation requirement not necessary until find violation (official action); integration – only have to do what is necessary to remedy past violation

**Supreme Court dissent (Douglas)** (repeats position in Keyes)

- No de jure/de facto distinction
- If doing integration for its own sake, say so! *BUT THEN takes it all back!*
- Won't say why integration is the requirement, but talks about racial discrimination by officials. Justifies integration as remedy. Inconsistent with his previous de jure/de facto distinction

**Supreme Court dissent (White and Marshall)** Simple condemnation of racial imbalance, but unwilling to depart from desegregation remedy rationale of Green, Swann/ Keyes. *Inconsistent*

- Makes up findings of massive de jure segregation, although there was no history of racial discrimination in the district. Need to show how bad they are to justify remedy.
- Accuses majority of finding district lines sacrosanct. *Wrong. If inter-district violation, then cross lines, but if not, you can't.*
- Majority opinion is “mockery” of Brown *Brown made racial discrimination illegal.*
- Claim to be only requiring remedy, yet they haven't shown violation between districts. Says there was a deliberate plan to keep blacks and whites isolated from each other. *The problem is, the district judge didn't find this, as the dissent claims.*

**Results:** Worst of both possible worlds. Busing blacks in black school system, just making system blacker. Only busing where majority black schools. NAACP lost, so decisions turned against busing (Pasadena, Dayton) Later, in Columbus, Blackmun switched sides, putting law back to Keyes standard. Now issue is when can you stop busing? (Swann: after dismantle dual system, have unitary system).

## Requirement of Busing

### ***Compelling Integration: A Self-Defeating Requirement***

#### ***The Value of Brown and the Obstacles it Presented***

Brown is most easily justified on the principle that all race discrimination is evil and prohibited. This principle proved, however, to be greatest obstacle in justifying the Supreme Court's decisions requiring racial discrimination in order to promote racial mixing.

*Supreme Court has never admitted that its goal is really being achieved through this new requirement. They've never justified compulsory integration on its own merits. They disguise it as "just enforcing Brown"*

#### ***The Disastrous Results***

Reintroduces race as a permissible and sometimes constitutionally required basis for government action.

Consider:

DeFunis v. Odegaard Admission denied to qualified Jew; admit less qualified minorities.

- Lower court held unconst'l based on Brown
- Wash. Sup. Ct. reversed, relying on Green and Swann
- Sup. Ct. dismissed case as moot since P admitted. *Dissent: Douglas says open use of racial discrimination by state officials is unconst'l (but does poor job of distinguishing from previous integration decisions). He relies on distinction b/w grade school (everyone goes) and higher education (fixed # of slots).*
  - *Graglia: tantamount to separate-but-equal*

*Compulsory integration requirement is self-defeating. It tends to decrease racial mixing and it creates a dangerous political issue that stir forces to regress from progression towards racial equality. How can racial equality be obtained in such an environment?*

#### ***What were the costs of abandoning neighborhood schools?***

Busing doesn't introduce integration, but rather separation (white flight, private schools). People don't want to mix their kids with students who perform poorly (socio-economic factors at work here, although blacks are usually poorer on average).

*Idea is really to promote socio-economic integration, but race is used as acceptable proxy for poverty.*

Supposed gains:

- Racial integration. *Problem is that racial integration generally viewed as a cost. This isn't racism, so much as it is "classism." Both blacks and whites object. Point of being rich is to avoid the poor. This is capitalism. Socialist philosophy sounds good, but isn't productive. Self-interest sustains business, which serves common good.*
- Close the academic performance gap. *Not just reason for trying, but reason why it will meet with resistance. Studies aren't encouraging that integration encourages strong study habits passed from one to another.*

Actual costs:

- Less racial harmony; white flight
- Time and money (transporting kids around town) *Infringement on personal liberty.*
- Comfort and security of familiar surroundings, closeness to home, etc
- Bus-scheduling interferes with extra-curricular activities
- Limits parent participation in school

## Other Uses of Racial Preferences

### *Employment*

Griggs v. Duke Power Co. Employer used IQ test and required high-school degree to qualify for upper-level jobs. *This is education discrimination, which serves a valid purpose.* However, rule created for affects or “disparate impact” standard

*This case did for Title 7 what Green and Swann did for Titles 4 & 6 – it turned the issue from a prohibition against something into a requirement to do something. This case set employment criteria in regards to race and sex discrimination.*

**Supreme Court unanimous decision (Burger)** Prohibits race and sex discrimination in regards to employment.

- Creates disparate-impact standard for racial discrimination under Civil Rights Act
  - Problem: not required by CRA Legislative history attests to this
  - Opponents to CRA afraid that Title 7 would be interpreted to disallow standardized rjmts. Proponents said this was silly. Griggs ignores this.
- Test for race discrimination: is there a disparate impact? *Doesn't have to be racially discriminatory on its face.* Establishes prima facie case of discrimination. Puts burden on employer to show that there was a business necessity.

*Rather than disavowing ruling, Congress amended Title 7 to expand coverage. Griggs is still wrong. The amendment, not the case, was the proper way to do this. Easier to defeat legislation than to pass it. CRA only passed because it was assured that the Griggs result would not happen. Hard to martial forces to overcome once Supreme Court has handed down a decision like this.*

#### **Graglia's critique:**

- Should only find racial discrimination where disparate impact and no non-racial justification. *Not burden on employer to show non-racial justification.*
- What it takes to show non-racial justification is now determined by zealots at the EEOC, who believe that all employment criteria are ruses to exclude blacks.
- This decision spawned endless litigation, created industry in test validation. Must show standard is job-related.

**Results of Griggs** Valid employment criteria dropped where blacks excluded. Must hire quotas because mere fact that no blacks hired is grounds for a lawsuit.

*But see Wards Cove v. Antonio cut back on effects of Griggs. Mere fact that work force is racially imbalanced doesn't create a prima facie case. Must also show that some standard excludes blacks disproportionately.*

## Other Uses of Racial Preferences

### *Employment (cont'd)*

Washington v. Davis Test was used that disproportionately excluded blacks. Literacy test for candidates to enter DC police school. There was no Title 7 question, since it is not applicable to DC. The statutory claim was under 42 USC §1981 (Civil Rights Act); there is also an EP claim.

Court holds that disparate impact test of Griggs is not the true constitutional test. There must also be discriminatory intent. *Graglia: What do you mean intent? Presumed to intend effects.*

- Statute discriminatory if it is discriminatory on its face or has racial intent or purpose. *Problem with intent requirement: one is presumed to intend necessary and foreseeable results of action. Why do we care? Shouldn't we just care about impact?*
- White doesn't seem to understand how a race-neutral standard can be racially discriminatory. Use rational basis test.
- Statute neutral on face, but has disparate impact. *Is this discriminatory? Is there a non-racial justification? Some legitimate purpose justifying effect? This is the real question!*

### ***Intent Test of Washington and Disparate Impact Test of Griggs***

- Griggs – burden is on the defendant to justify a business necessity
- Washington – burden is on the P to show the test is not justified.

### ***Racial Preferences/Quotas: From Prohibiting to Requiring Racial Discrimination***

Griggs Court disallowed the use of ordinary employment criteria since it disproportionately disqualified blacks, converting the Title 7 requirement that employment decisions be race neutral into requirement that no decision be made without taking race into account. Need to avoid racial imbalance.

Motorola An intelligence test can not be used where a disproportionate number of blacks fail to pass.

### *“Business Necessity” – Before 1991*

- Griggs – didn't give a definite formulation. Just stated that it must have relationship to employment performance. Not enough that employer believes that requirements will improve overall quality of work force. *How can an employer show that high school grad is better? Why should he have to?*
- Later cases apply disparate impact test: employer has burden of justifying
  - Albermarle Paper Co. v. Moody – tests must be predictive of or significantly correlated with important elements of work behavior relevant to job
  - Dothard v. Rawlinson – height/weight reqmt for (female) prison guard not shown as necessary
  - NYC Transit Authority v. Beazer – Employee use of drugs prohibited, but disparate impact (more black methadone users). Amazingly, claim is upheld by the lower court. Non-conductor jobs adequately performed even on the drug! *The Supreme Court reversed this holding.*
  - Watson v. Ft. Worth Bank & Trust – disparate impact standard applicable even to subjective or discretionary employment criteria. Employer meets BOP if show “legitimate business reasons.” The std/proof shouldn't provide incentive to introduce quotas prohibited by 1964 Act
  - Wards Cove Packing v. Atonio Precipitating cause of 1991 Civil Rights Act. Ps failed to establish prima facie disparate impact b/c failed to compare racial makeup of work force with makeup of relevant labor pool. Requirements:
    - Identify specific practice challenged and show that it created disparate impact;
    - Employer can rebut prima facie case: show legit. employment goals (reasoned review: insubstantial will not suffice, but it doesn't have to be essential either.)
    - Ultimate BOP still rests on P.
    - *An outraged dissent disputed each point. Their position would require rewriting of Act.*

## Other Uses of Racial Preferences

### *Employment*

1991 ACT ADOPTED TO OVERCOME “WEAKENING OF SCOPE AND EFFECTIVENESS” OF CIVIL RIGHTS PROTECTIONS BY WARD’S COVE. ADOPTED DISPARATE IMPACT THEORY – FOR FIRST TIME, CONGRESS IS TO THE **LEFT** OF THE COURT. NOTE: THE 1990 ACT WAS VETOED BY BUSH, AN OVERRIDE FAILED BY 1 VOTE. HE SIGNED THE 1991 ACT.

#### *“Business Necessity” – After 1991*

- Defendant employers have burden of proof to justify challenged practices, but affirms that P must identify such practices and their impact first.
- What is the burden of justification?
  - Demonstrate relation to job, consistent with business necessity.
  - Affirm definitions of business necessity prior to Ward’s Cove *But how was it changed? It was essentially an affirmation of Watson and Beazer, both pre-Ward’s Cove cases. How do you reconcile this? (This was a point that the Bush administration relied upon in signing the bill.)*
  - Provides that term is to be understood as if it had no legislative history, despite fact that it was debated for two years.
  - Seems likely that meaning of business necessity can continue as if the 1991 act had not intervened – except that passage of the Act was construed as victory for the liberals.

#### **Gains by Liberals Through 1991 Act**

- Codified disparate impact test, converting Title 7 of the 1964 Act from prohibition of discrimination to requirement of preferences.
- BOP placed on employer – basic offense no longer discrimination, but lack of balance.

-- -- BUT -- --

- May have achieved nothing in seeking to weaken business necessity requirement
- Court faced with question of how to deal with dishonest legislation not openly stating objective of sponsors – It is a statute at war with itself. Unable to openly support racial preferences.
- Congress did not state how loss in efficiency is to be balanced with racial integration.
- Race norming prohibition was the only real Civil Rights protection.

RANDOM TANGENT OF GRAGLIA’S – TO SHOW POWER OF JUDICIAL ACTIVISM MAYBE?

#### **Note Two Significant Changes By Court in Recent Years:**

- Cutting back significantly on Griggs – requirement for business justification easier to meet.
- Held Religious Freedom Restoration Act unconstitutional
  - Trend had been that if pass law interfering with religion, state may not enforce except with justification.
  - Wisconsin v. Yoder Law requiring schooling of children until they are 17 can not be applied to the Amish; religious exemption.
  - Smith No religious exemption from laws. *Graglia says this is judicial inactivism. Not sure why.*
  - RFRA passed by Congress in response to Smith, but to no avail apparently.

## Other Uses of Racial Preferences

### *Racial Preferences in Higher Education*

Regents of the Univ. of Cal. V. Bakke (1974) Raises the question of affirmative action in higher education. Title 6 prohibits racial discrimination by any institution receiving federal funds. U.C. Davis/medical school admissions – set aside 16 of 100 places for minorities. Minorities are not qualified, while Bakke is highly qualified. California Supreme Court held admissions policies unconstitutional.

#### **Supreme Court Split (4-4-1)**

**The Facts:** 1971-1974 – “disadvantaged admissions”

- 21 blacks admitted
- No whites admitted
- 31 Mexican-Americans admitted
- 1 Black, 6 Mexican-Americans gained regular admission
- Asians high in both groups: 44 regular and 37 disadvantaged admissions

*We're not talking about tipping the scales here, but about abandoning standards. Blacks averaged 22 percentile, GPA of 2.2.*

#### **Stevens, Rehnquist, Steward & Burger Opinion**

- Straight-forward, honest opinion. School takes federal funds. Bakke is excluded based on his race. This state discriminatory action is illegal.
- Basic constitutional rule: don't decide const'l questions unless necessary. UC Davis' admissions policies prohibited by Title 6 of CRA. No need to consider anything further.

#### **Brennan, Blackmun, Marshall, White Opinion** (All 4 signed, as in Cooper)

- Congress meant to enact an Equal Protection Clause when it enacted Title 6 – Title 6 is cryptic; doesn't mean what it says. It is not meant to prohibit anything not prohibited by Const; therefore, Title 6 = Equal Protection Clause.
- Equal Protection constitutional question must be faced.
  - Discrimination against whites; not a suspect class – don't apply strict scrutiny standard. Don't need a compelling state interest. *Real question is not whether whites are suspect class, but if race is suspect classification.*
  - Use intermediate test instead. Impt government interest; classification furthers that interest. This classification is justifiable as a remedial measure.
    - Government purpose = cure chronic & substantial underrepresentation. *This is no argument at all. Racial discrimination for its own sake! Why do we need proportionality? When does this happen in real life?*
    - Remedy effects of past discrimination (remedy rationale). *But does this really help? This is a program for advantaged, not disadvantaged people! Help them learn to read and write first.*

#### **Powell Opinion – the deciding vote.**

- Agrees that Title 6 not violated. *He could have ended aff. action if he had stopped here.*
- Rejects lower standard for const'l review. Same test should be used for blacks and whites. *Well then Bakke should win, because the strict standard scrutiny has not been passed!*
- Powell introduces the idea of diversity being a legitimate 14th amendment goal. Race can be taken into account as “plus factor” *Inconsistent with his earlier assertions of equality before the law.*

## Other Uses of Racial Preferences

### Affirmative Action

Granting benefits to one race necessarily disadvantages the other. Prohibiting racial discrimination is a moral principle, requires balancing. Assuming that we should discriminate if benefits outweigh costs, affirmative action should still be ended. There are no benefits and very real costs to this system.

### Disadvantages

- Back to a society operating on basis of race
- Race valid criteria for discrimination
- Racial characteristics relevant to law.
- Unqualified in minority in direct competition with qualified majority → frustration
- Casts doubt on achievements of all minorities.

### Why do People Support Affirmative Action?

- Liberal argument that blacks grossly underrepresented
  - *Graglia: That's no answer. Doesn't answer question of why we need more.*
  - Liberals: Underrepresentation is attributable to discrimination
  - *Graglia: No, due to other factors. They don't perform as well academically.*
  - Liberals: IQ Tests aren't valid – they're biased.
  - *Graglia: Real question is whether they predict performance, which they do. They tend to overpredict rather than underpredict, actually. If we have affirmative action, how much will we need? Tiebreaker is one thing, but preferences create an unequal playing field.*
- Makes up for disadvantage
  - *Graglia: Why not use disadvantage then, rather than race proxy. Not all, and not only, blacks are disadvantaged. Blacks actually benefiting from affirmative action are the middle class, not children of the poor.*
  - Can't use disadvantage as criteria: actually more disadvantaged whites than blacks (Brennan)
  - *Graglia: It is neo-slavery. We want to see black faces, so we buy the best qualified ones.*
  - Liberals: Whites left to their own devices will keep blacks down
  - *Graglia: Not so! Most whites want to see blacks do well. We live in a just & fair society.*
- Diversity
  - *Graglia: Why is this needed? Creates bad incentives – rewards being different. Better predictors of diversity; race is a poor proxy.*
- Greater availability of professional services to members of preferred groups
  - *Graglia: Availability of services determined by economics, not race. They care about the color of your money, not your skin! No evidence that minority professionals serve their racial groups for less money. Minorities will refuse to accept services of majority only if they are racist; will not accept services of minority professionals if they are not qualified.*
- Role Models
  - *Graglia: We don't need unqualified role models. This depends on black youths being fooled – not realizing that their models received positions due to race, not qualifications.*
- Reduces racial stereotypes.
  - *Graglia: Not so! Always suspect lesser standard used.*
- Make up sins of the past
  - *Graglia: Slavery ended 100 years ago; segregation ended 35 years ago. Affirmative action has been here for 20 years. How much atonement is necessary?*
  - *Asians were discriminated against; they didn't need help*
  - *People bearing the harm weren't the ones who discriminated. People receiving the benefit didn't bear the original harm of discrimination.*

## Other Uses of Racial Preferences

### ***Affirmative Action (cont'd)***

Adarand Constructors v. Pena (1995) Concerns DOT contract awarded to a minority subcontractor. Primary contractor hired him, rather than P, because he received an additional payment for hiring a minority. Does statute discriminate on basis of race in violation of Equal Protection clause?

Failure to produce majority opinion has left the standard unresolved in past cases

- Bakke – No opinion for the court. Concurring opinion said guarantee of Equal Protection can not mean one thing for 1 individual and another for someone else.
- Fullilove – Any preference based on race must be given searching examination of objectives and of whether limited use of racial criteria permissible.
- Wygant – plurality opinion. Strict Scrutiny test should be used.

Issue partially resolved in Croson. Strict scrutiny of race-based action required by state and local governments. No opportunity to declare standard of review under the 5th amendment.

Three general propositions/ racial classifications through Croson

- Skepticism of preferences
- Consistency among races
- Congruence b/w 5th and 14th amendments

*Ps entitled to strict scrutiny review. District court didn't do that so remand. Overrule Metro Broadcasting, case after Croson.*

**Concurrence (Scalia)** Government can never have compelling interest in discrimination on basis of race in order to “make up” for past discrimination in opposite direction. There can be no such thing as a creditor or debtor race under our Constitution.

### **Concurrence (Thomas)**

- Good intentions, but government can't const'lly make distinctions based on race. Irrelevant whether racial classifications help or oppress
- Racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. Teaches minorities that they can't compete without indulgence from majority. Stamps them with badge of inferiority.

## Other Uses of Racial Preferences

### *Affirmative Action (cont'd)*

Hopwood v. State of Texas Race Norming used in law school admissions. White applicants who were denied admission brought lawsuit.

**District Court Opinion** Held program (mostly) valid as a remedy.

- Evaluated under correct standard – strict scrutiny. Compelling government interest was held to be diversity and remedying past effects of discrimination. UT has a bad reputation with blacks; perceived as a hostile environment. *Graglia: after 20 years of preferences?*
- Part of program failed narrowly tailored requirement – part giving minority applicant pool a “plus” was upheld; however, different admission committees for discretionary zone applicants was held unconst'l. Must compare minority and majority applicants at some point.
- No compensatory or punitive damages awarded. No injunctive relief.

**Fifth Circuit Opinion** Essentially overrules Bakke

- Strict Scrutiny applies.
  - Diversity is not a compelling state interest, it was simply a notion of Powell's.
  - It was only accepted as a compelling interest once – in Metro Broadcasting – but that case has been overruled.
  - The use of race to achieve diversity undercuts the goal of the 14th amendment – the end of racially motivated state action.
- Remedy rationale: Take as seriously as they did in Adarand
  - Specific injury – prior discrimination by governmental unit. The court erred by expanding this to include all public education in Texas. The law school is the relative government unit.
  - Present effects being remedied – mere knowledge of historical fact is not sufficient to support his requirement. The environment is no longer hostile.
  - Tailored remedy? No, 2/3 of blacks are from out-of-state. How is this a remedy for anything in Texas?

*The purpose of the Equal Protection clause is to prevent states from purposefully discriminating on the basis of race. Render race irrelevant in governmental decision-making.*

- *UT may not use race as a factor in its admissions. The Ps may reapply to the law school; the district court must reconsider the question of damages.*