Equal Protection and Race

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ANNOTATIONS

Overview

The Fourteenth Amendment "is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation."[1660] Thus, a state law that on its face discriminated against African-Americans was void.[1661] In addition, "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[1662]

Education

Development and Application of "Separate But Equal".— Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race,[1663] but the Court in *Plessy v. Ferguson*[1664] adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts.[1665] *Plessy* concerned not schools but a state law requiring "equal but separate" facilities for rail transportation and requiring the separation of "white and colored" passengers. "The object of the [Fourteenth] [A]mendment was

undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power."[1666] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[1667]

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African-Americans and sent to school with them rather than with whites,[1668] and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for African-Americans.[1669] And no violation of the Equal Protection Clause was found when a state law prohibited a private college from teaching whites and African-Americans together.[1670]

In 1938, the Court began to move away from "separate but equal." It held that a state that operated a law school open to whites only and did not operate any law school open to African-Americans violated an applicant's right to equal protection, even though the state offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the state.[1671] When Texas established a law school for African-Americans after the plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.[1672] Equally objectionable was the fact that when Oklahoma admitted an African-American law student to its only law school it required him to remain physically separate from the other students.[1673]

Brown v. Board of Education.—"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[1674] which involved challenges to segregation *per se* in the schools of four states in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867 . . . or even to 1896," but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the Equal Protection Clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[1675]

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." In any event, however, the lower courts were to require compliance "with all deliberate speed."[1676]

Brown's Aftermath.—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock.[1677] In the main, these years were taken up with enactment and administration of "pupil placement laws" by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, and which required the exhaustion of state administrative remedies before each pupil seeking reassignment could bring individual litigation.[1678] The lower courts eventually began voiding these laws for discriminatory application, permitting class actions,[1679] and the Supreme Court voided the exhaustion of state remedies requirement.[1680] In the early 1960s, various state practices—school closings,[1681] minority transfer plans,[1682] zoning,[1683] and the like—were ruled impermissible, and the Court indicated that the time was running out for full implementation of the *Brown* mandate.[1684]

About this time, "freedom of choice" plans were promulgated under which each child in the school district could choose each year which school he wished to attend, and, subject to space limitations, he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered.[1685] Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate[1686] led to a change of attitude in the lower courts and the Supreme Court. In *Green v. School Board of New Kent County*,[1687] the Court posited the principle that the only desegregation plan permissible is one which actually results in the abolition of the dual school, and charged school officials with an affirmative obligation to achieve it. School boards must present to the district courts "a plan that promises realistically to work and promises realistically to work *now*," in such a manner as "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[1688] Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students, but also the merging into one system of faculty,[1689] staff, and services, so that no school could be marked as either a "black" or a "white" school.[1690]

Implementation of School Desegregation.—In the aftermath of *Green*, the various Courts of Appeals held inadequate an increasing number of school board plans based on "freedom of choice," on zoning which followed traditional residential patterns, or on some combination of the two.[1691] The Supreme Court's next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[1692]

In the October 1970 Term the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[1693] undertook to elaborate the requirements for achieving a unitary school system and delineating the methods which could or must be used to achieve it, and at the same time struck down state inhibitions on the process.[1694] The opinion in *Swann* emphasized that the goal since *Brown* was the dismantling of an officially imposed dual school system. "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie*case of violation of substantive constitutional rights under the Equal Protection Clause is shown."[1695] Although "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," any such situation must be closely scrutinized by the lower courts, and school officials have a heavy burden to prove that the situation is not the result of state-fostered segregation. Any desegregation plan that contemplates such a situation must before a court accepts it

be shown not to be affected by present or past discriminatory action on the part of state and local officials.[1696] When a federal court has to develop a remedial desegregation plan, it must start with an appreciation of the mathematics of the racial composition of the school district population; its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point.[1697]

Because current attendance patterns may be attributable to past discriminatory actions in site selection and location of school buildings, the Court in *Swann* determined that it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote desegregation and undo past official action; in this remedial process, conscious assignment of students and drawing of boundaries on the basis of race is permissible.[1698] Transportation of students— busing—is a permissible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy may be inadequate due to past discrimination. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students; when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts.[1699] Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.[1700]

Northern Schools: Inter- and Intradistrict Desegregation.— The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections, required the development of standards for determining when segregation was *de jure* and what remedies should be imposed when such official separation was found.[1701]

Accepting the findings of lower courts that the actions of local school officials and the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court in *Milliken v. Bradley*[1702] set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban school districts. The basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district.[1703] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[1704] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task that few, if any, judges are qualified to perform and one that would deprive the people of control of their schools through elected representatives.[1705] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[1706]

"The controlling principle consistently expounded in our holdings," the Court wrote in the *Detroit*case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[1707] Although this axiom caused little problem when the violation consisted of statutorily mandated separation,[1708] it required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory, but official action operated to the contrary. At first, the difficulty was obscured through the creation of

presumptions that eased the burden of proof on plaintiffs, but later the Court appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes v. Denver School District*.[1709] The lower courts had found the school segregation existing within one part of the city to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that, when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived. The burden then shifts to the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[1710]

Keyes then was consistent with earlier cases requiring a showing of official complicity in segregation and limiting the remedy to the violation found; by creating presumptions *Keyes* simply afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the "controlling principle" of school desegregation cases, the Court appeared to move away from the *Keyes* approach.[1711] First, the Court held that federal equity power was lacking to impose orders to correct demographic shifts "not attributed to any segregative actions on the part of the defendants."[1712] A district court that had ordered implementation of a student assignment plan that resulted in a racially neutral system exceeded its authority, the Court held, by ordering annual readjustments to offset the demographic changes.[1713]

Second, in the first *Dayton* case the lower courts had found three constitutional violations that had resulted in some pupil segregation, and, based on these three, viewed as "cumulative violations," a district-wide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'"[1714] The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."[1715] The Court then sent the case back to the district court for the taking of evidence, the finding of the nature of the violations, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal from Columbus, Ohio.[1716] Following the Supreme Court standards, the *Dayton* district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decisubject fore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it

was subject to an "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."[1717] Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be used to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards.[1718] The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.[1719]

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the *Detroit* case, the Court unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who had been subjected to past acts of *de jure*segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.[1720]

The broad scope of federal courts' remedial powers was more recently reaffirmed in *Missouri v. Jenkins*.[1721] There the Court ruled that a federal district court has the power to order local authorities to impose a tax increase in order to pay to remedy a constitutional violation, and if necessary may enjoin operation of state laws prohibiting such tax increases. However, the Court also held, the district court had abused its discretion by itself imposing an increase in property taxes without first affording local officials "the opportunity to devise their own solutions."[1722]

Efforts to Curb Busing and Other Desegregation Remedies.— Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for *de jure* racial separation in the public schools, both North and South. Busing of school children created the greatest amount of controversy. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the more recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that courts must observe limits occasioned by the nature of the educational process and the well-being of children,[1723] and subsequent cases declared the principle that the remedy must be no more extensive than the violation found.[1724] Congress enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage, have been largely ineffectual.[1725] Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both Houses.[1726]

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for *de jure* segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other remedies in Washington State and California.[1727] Voters in Washington, following a decision by the school board in Seattle to undertake a mandatory busing program, approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students' course of study; there were so many exceptions, however, that the prohibition in effect applied only to busing for racial purposes. In California the state courts had interpreted the state constitution to require school systems to eliminate both *de jure* and *de facto* segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment, and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure, and, with near unanimity of result if not of reasoning, it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation—and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.[1728] The Court discerned no such impediment in the California measure, a simple repeal of a remedy that had been within the government's discretion to provide. Moreover, the state continued under an obligation to alleviate *de facto* segregation by every other feasible means. The initiative had merely foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.[1729]

The Court subsequently declined to extend the reasoning of these cases to remedies for exclusively de facto racial segregation. In *Schuette v. Coalition to Defend Affirmative Action*,[1730] the Court considered the constitutionality of an amendment to the Michigan Constitution, approved by that state's voters, to prohibit the use of race-based preferences as part of the admissions process for state universities. A plurality of the *Schuette* Court restricted its prior holdings as applying only to those situations where state action had the serious risk, if not purpose, of causing specific injuries on account of race.[1731] Finding no similar risks of injury with regard to the Michigan Amendment and no similar allegations of past discrimination in the Michigan university system, the Court declined to "restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended."[1732] The plurality opinion and a majority of the Court, however, explicitly rejected a broader "political process theory" with respect to the constitutionality of race-based remedies. Specifically, the Court held that state action that places effective decision making over a policy that "inures primarily to the benefit of the minority" at a different level of government is not subject to heightened constitutional scrutiny.[1733]

Termination of Court Supervision.—With most school desegregation decrees having been entered decades ago, the issue arose as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in *Oklahoma City Board of Education v. Dowell*,[1734] upon a showing that the purposes of the litigation have been "fully achieved"—*i. e.*, that the school district is being operated "in compliance with the commands of the Equal Protection Clause," that it has been so operated "for a reasonable period of time," and that it is "unlikely" that the school board would return to its former violations. On remand, the trial court was directed to determine "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [*de jure*] discrimination had been eliminated to the extent practicable."[1735] In *United States v. Fordice*,[1736] the Court determined that Mississippi had not, by adopting and implementing race-neutral policies, eliminated all vestiges of its prior *de jure*, racially segregated, "dual" system of higher education. The state also, to the extent practicable and consistent with sound educational practices, had to eradicate policies and practices that were traceable to the dual system and that continued to have segregative effects. The Court identified several surviving aspects of Mississippi's prior dual system that were constitutionally suspect and that had to be justified or eliminated. The state's admissions policy, requiring higher test scores for admission to the five historically white institutions than for admission to the three historically black institutions, was suspect because it originated as a means of preserving segregation. Also suspect were the widespread duplication of programs, a possible remnant of the dual "separate-but-equal" system; institutional mission classifications that made three historically white schools the flagship "comprehensive" universities; and the retention and operation of all eight schools rather than the possible merger of some.

Juries

It has been established since *Strauder v. West Virginia*[1737] that exclusion of an identifiable racial or ethnic group from a grand jury[1738] that indicts a defendant or a from petit jury[1739] that tries him, or from both,[1740] denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment.[1741] Even if the defendant's race differs from that of the excluded jurors, the Court held, the defendant has third-party standing to assert the rights of jurors excluded on the basis of race.[1742] "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[1743] Thus, persons may bring actions seeking affirmative relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.[1744]

A*prima facie* case of deliberate and systematic exclusion is made when it is shown that no African-Americans have served on juries for a period of years[1745] or when it is shown that the number of African-Americans who served was grossly disproportionate to the percentage of African-Americans in the population and eligible for jury service.[1746] Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that it had not practiced discrimination; it is not adequate that jury selection officials testify under oath that they did not discriminate.[1747] Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices that made discrimination easy to accomplish,[1748] it has not outlawed discretionary selection pursuant to general standards of educational attainment and character that can be administered fairly.[1749] Similarly, it declined to rule that African-Americans must be included on all-white jury commissions that administer the jury selection laws in some states.[1750]

In *Swain v. Alabama*,[1751] African-Americans regularly appeared on jury venires but no African-American had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential African-American jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the African-Americans in the particular case was permissible, the Court held, regardless of the prosecutor's motive, although it indicated that the consistent use of such challenges to remove African-Americans would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no African-American had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, the defendant's claims were rejected.

The *Swain* holding as to the evidentiary standard was overruled in *Batson v. Kentucky*, the Court ruling that "a defendant may establish a *prima facie* case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial."[1752] To rebut this showing, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[1753] In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[1754] Such a rebuttal having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'"[1755] "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous,"[1756] but, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[1757] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[1758] and by a defendant in a criminal case,[1759] the principal issue in these cases being the presence of state action, not the invalidity of purposeful racial discrimination.

Discrimination in the selection of grand jury foremen presents a closer question, the answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus, the Court "assumed without deciding" that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers.[1760] That situation was distinguished, however, in a due process challenge to the federal system, where the foreman's responsibilities were "essentially clerical" and where the selection was from among the members of an already chosen jury.[1761]

Capital Punishment

In *McCleskey v. Kemp*[1762] the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky*by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.[1763] "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[1764] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry.[1765]

Housing

Buchanan v. Warley[1766] invalidated an ordinance that prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and that prohibited whites from doing so where the greater number of houses were occupied by blacks. Although racially restrictive covenants do not themselves violate the Equal Protection Clause, the judicial enforcement of them, either by injunctive relief or through entertaining damage actions, does.[1767] Referendum passage of a constitutional amendment repealing a "fair housing" law and prohibiting further state or local action in that direction was held unconstitutional in *Reitman v. Mulkey*,[1768] though on somewhat ambiguous grounds, whereas a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found not to violate the Equal Protection Clause.[1769] Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.[1770] Provision of publicly assisted housing, of course, must be on a nondiscriminatory basis.[1771]

Other Areas of Discrimination

Transportation.—The "separate but equal" doctrine won Supreme Court endorsement in the transportation context,[1772] and its passing in the education field did not long predate its demise in transportation as well.[1773] During the interval, the Court held invalid a state statute that permitted carriers to provide sleeping and dining cars for white persons only,[1774] held that a carrier's provision of unequal, or nonexistent, first class accommodations to African-Americans violated the Interstate Commerce Act,[1775] and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.[1776] *Boynton v. Virginia*[1777] voided a trespass conviction of an interstate African-American bus passenger who had refused to leave a restaurant that the Court viewed as an integral part of the facilities devoted to interstate commerce and therefore subject to the Interstate Commerce Act.

Public Facilities.—In the aftermath of *Brown v. Board of Education*, the Court, in a lengthy series of *per curiam* opinions, established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function.[1778] A municipality could not operate a racially segregated park pursuant to a will that left the property for that purpose and that specified that only whites could use the park,[1779] but it was permissible for the state courts to hold that the trust had failed and to imply a reverter to the decedent's heirs.[1780] A municipality under court order to desegregate its publicly owned swimming pools was held to be entitled to close the pools instead, so long as it entirely ceased operation of them.[1781]

Marriage.—Statutes that forbid the contracting of marriage between persons of different races are unconstitutional,[1782] as are statutes that penalize interracial cohabitation.[1783] Nor may a court deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[1784]

Judicial System.—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[1785] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[1786] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[1787]

Public Designation.—It is unconstitutional to designate candidates on the ballot by race[1788] and apparently any sort of designation by race on public records is suspect, although not necessarily unlawful.[1789]

Public Accommodations.—Whether discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960s, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation.[1790] Passage of the Civil Rights Act of 1964 obviated any necessity to resolve the issue.[1791]

Elections .—Although, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress,[1792] the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well.[1793] Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.[1794]

"Affirmative Action": Remedial Use of Racial Classifications

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account when formulating and implementing a remedy to overcome the effects of past discrimination. Often the issue is framed in terms of "reverse discrimination," in that the governmental action deliberately favors members of one class and consequently may adversely affect nonmembers of that class.[1795] Although the Court had previously accepted the use of suspect criteria such as race to formulate remedies for specific instances of past discrimination[1796] and had allowed preferences for members of certain non-suspect classes that had been the object of societal discrimination,[1797] it was not until the late 1970s that the Court gave plenary review to programs that expressly used race as the primary consideration for awarding a public benefit.[1798]

In *United Jewish Organizations v. Carey*,[1799] New York State had drawn a plan that consciously used racial criteria to create districts with nonwhite populations in order to comply with the Voting Rights

Act and to obtain the United States Attorney General's approval for a redistricting law. These districts were drawn large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.[1800]

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, Justice White argued that compliance with the Act necessarily required states to be race conscious in the drawing of lines so as not to dilute minority voting strength. Justice White noted that this requirement was not dependent upon a showing of past discrimination and that the states retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[1801]

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the state had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength, because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[1802]

It was anticipated that *Regents of the University of California v. Bakke*[1803] would shed further light on the constitutionality of affirmative action. Instead, the Court again fragmented. In *Bakke*, the Davis campus medical school admitted 100 students each year. Of these slots, the school set aside 16 of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places. Twice denied admission, Bakke sued, arguing that had the 16 positions not been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.[1804]

Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications, however, could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down a remedial racial classification that stigmatized a group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[1805]

Justice Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past

societal discrimination.[1806] Justice Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.[1807]

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the result in *Bakke*. In *Fullilove v. Klutznick*,[1808] the Court, still lacking a majority opinion, upheld a federal statute requiring that at least ten percent of public works funds be set aside for minority business enterprises. A series of opinions by six Justices all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[1809]

Taken together, the opinions established that, although Congress had the power to make the findings that will establish the necessity to use racial classifications in an affirmative way, these findings need not be extensive nor express and may be collected in many ways.[1810] Moreover, although the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving open the way for programs of a scope sufficient to remedy all the identified effects of past discrimination.[1811] But the most important part of these opinions rested in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. The Court rejected arguments that minority beneficiaries of such programs are stigmatized, that burdens are placed on innocent third parties, and that the program is overinclusive, so as to benefit some minority members who had suffered no discrimination.[1812]

Despite these developments, the Court remained divided in its response to constitutional challenges to affirmative action plans.[1813] As a general matter, authority to apply racial classifications was found to be at its greatest when Congress was acting pursuant to section 5 of the Fourteenth Amendment or other of its remedial powers, or when a court is acting to remedy proven discrimination. But a countervailing consideration was the impact of such discrimination on disadvantaged non-minorities. Two cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[1814] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In *United States v. Paradise*,[1815] the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees.[1816] By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, because the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[1817]

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J. A. Croson Co.*,[1818] the Court invalidated a minority set-aside requirement that holders of construction contracts with the city subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the city's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC*[1819] applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that

are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[1820]

In *Croson*, the Court ruled that the city had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task."[1821] The overinclusive definition of minorities, including U. S. citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," also "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past discrimination against non-blacks in the Richmond construction industry.[1822] It followed that Richmond's set-aside program also was not "narrowly tailored" to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur "from anywhere in the country" could obtain an absolute racial preference.[1823]

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an "enhancement" for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a "distress sale" transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore "the imprimatur of longstanding congressional support and direction."[1824]

Metro Broadcasting was noteworthy for several other reasons as well. The Court rejected the dissent's argument—seemingly accepted by a *Croson* majority—that Congress's more extensive authority to adopt racial classifications must trace to section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.[1825] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest.

The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena*[1826] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefitted by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed."[1827]

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It

engendered some surprise, then, that the Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger*,[1828] and *Gratz v. Bollinger*.[1829]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (*e. g.*, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e. g.*, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." Although, the policy did not limit the seeking of diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[1830]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[1831] As the university did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the university's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.[1832]

The law school's admission policy in *Grutter*, however, can be contrasted with the university's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was that an applicant would be entitled to 20 points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[1833]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's decision in *Bakke*. Although Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[1834] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an "underrepresented minority" group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity.[1835]

The Court subsequently revisited the question of affirmative action in undergraduate education in its 2016 decision in *Fisher v. University of Texas at Austin*, upholding the University of Texas at Austin's (UT's) use of "scores" based, in part, on race in filling approximately 25% of the slots in its incoming class that were not required by statute to be awarded to Texas high school students who finished in the top 10% of their graduating class (Top Ten Percent Plan or TTPP).[1836] The Court itself suggested that the "sui generis" nature of the UT program,[1837] coupled with the "fact that this case has been litigated on a somewhat artificial basis" because the record lacked information about the impact of Texas's TTPP,[1838] may limit the decision's value for "prospective guidance."[1839] Nonetheless, certain language

in the Court's decision, along with its application of the three "controlling factors" set forth in the Court's 2013 decision in *Fisher*,[1840] seem likely to have some influence, as they represent the Court's most recent jurisprudence on whether and when institutions of higher education may take race into consideration in their admission decisions. Specifically, the 2016 *Fisher* decision began and ended with broad language recognizing constraints on the implementation of affirmative action programs in undergraduate education, including language that highlights the university's "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances"[1841] and emphasized that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement."[1842] Nonetheless, while citing these constraints, the 2016 *Fisher* decision held that the challenged UT program did not run afoul of the Fourteenth Amendment. In particular, the Court concluded that the state's compelling interest in the case was not in enrolling a certain number of minority students, but in obtaining the educational benefits that flow from student body diversity, noting that the state cannot be faulted for not specifying a particular level of minority enrollment.[1843] The Court further concurred with UT's view that the alleged "critical mass" of minority students achieved under the 10% plan was not dispositive, as the university had found that it was insufficient,[1844] and that UT had found other means of promoting student-body diversity were unworkable.[1845] In so concluding, the Court held that the university had met its burden in surviving strict scrutiny by providing sworn affidavits from UT officials and internal assessments based on months of studies, retreats, interviews, and reviews of data that amounted, in the view of the Court, to a "reasoned, principled explanation" of the university's interests and its efforts to achieve those interests in a manner that was no broader than necessary.[1846] The Court refused to question the motives of university administrators and did not further scrutinize the underlying evidence relied on by the respondents, which may indicate that there are some limits to the degree in which the Court will evaluate a race-conscious admissions policy once the university has provided sufficient support for its approach.[1847]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[1848] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be "de facto" racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[1849] As in *Bakke*, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

In an opinion by Chief Justice Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[1850] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating "de facto" racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,[1851] suggested in separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[1852] As Justice Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice Roberts' opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.[1853]

[1660] Strauder v. West Virginia, 100 U.S. 303, 306–07 (1880).

[1661] Strauder v. West Virginia, 100 U.S. 303 (1880) (law limiting jury service to white males). Moreover it will not do to argue that a law that segregates the races or prohibits contacts between them discriminates equally against both races. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting blacks from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks where blacks were predominant). *Compare*Pace v. Alabama, 106 U.S. 583 (1883) (sustaining conviction under statute that imposed a greater penalty for adultery or fornication between a white person and a Negro than was imposed for similar conduct by members of the same race, using "equal application" theory), *with* McLaughlin v. Florida, 379 U.S. 184, 188 (1964), *and* Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting theory).

[1662] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (discrimination against Chinese).

[1663] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67–72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1880); *Ex parte* Virginia, 100 U.S. 339, 344–45 (1880).

[1664] 163 U.S. 537 (1896).

[1665] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[1666] Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Id. at 552, 559.

[1667] 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African-Americans with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Id. at 552, 559.

[1668] Gong Lum v. Rice, 275 U.S. 78 (1927).

[1669] Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[1670] Berea College v. Kentucky, 211 U.S. 45 (1908).

[1671] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[1672] Sweatt v. Painter, 339 U.S. 629 (1950).

[1673] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[1674] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in Bolling v. Sharpe, 347 U.S. 497 (1954).

[1675] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

[1676] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[1677] Cooper v. Aaron, 358 U.S. 1 (1958).

[1678] *E.g.*, Covington v. Edwards, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir.), *cert. denied*, 361 U.S. 818 (1959); Dove v. Parham, 271 F.2d 132 (8th Cir. 1959).

[1679] *E.g.*, McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960); Green v. School Board of Roanoke, 304 F.2d 118 (4th Cir. 1962); Gibson v. Board of Pub. Instruction of Dade County, 272 F.2d 763 (5th Cir. 1959); Northcross v. Board of Educ. of Memphis, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

[1680] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[1681] Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964) (holding that "under the circumstances" the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant/tax credit programs making an official connection with the "private" schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, *see* Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962).

[1682] Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.

[1683] Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).

[1684] The first comment appeared in dictum in a nonschool case, Watson v. City of Memphis, 373 U.S. 526, 530 (1963), and was implied in Goss v. Board of Educ. of City of Knoxville, 373 U.S. 683, 689 (1963). In Bradley v. School Bd. of City of Richmond, 382 U.S. 103, 105 (1965), the Court announced that "[d]elays in desegregating school systems are no longer tolerable." A grade-a-year plan was implicitly disapproved in Calhoun v. Latimer, 377 U.S. 263 (1964), vacating and remanding 321 F.2d 302 (5th Cir.

1963). *See* Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

[1685] *E.g.*, Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), rev'd on other grounds, 382 U.S. 103 (1965); Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967).

[1686] Pub. L. 88–352, 78 Stat. 252, 42 U.S.C. §§ 2000d *et seq.* (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to afford guidance to state and local officials in interpretations of the law and were accepted as authoritative by the courts and used. Davis v. Board of School Comm'rs of Mobile County, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

[1687] 391 U.S. 430 (1968); Raney v. Gould Bd. of Educ., 391 U.S. 443 (1968). These cases had been preceded by a circuit-wide promulgation of similar standards in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *modified and aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[1688] *Green*, 391 U.S. at 439, 442 (1968). "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the 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." Id. at 437–38. The case laid to rest the dictum of Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution "does not require integration" but "merely forbids discrimination." *Green* and Raney v. Board of Educ. of Gould School Dist., 391 U.S. 443 (1968), found "freedom of choice" plans inadequate, and Monroe v. Board of Comm'rs of City of Jackson, 391 U.S. 450 (1968), found a "free transfer" plan inadequate.

[1689] Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).

[1690] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *mod. and aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[1691] Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); Brewer v. School Bd. of City of Norfolk, 397 F.2d 37 (4th Cir. 1968); Clark v. Board of Educ. of City of Little Rock, 426 F.2d 1035 (8th Cir. 1970).

[1692] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). The Court summarily reiterated its point several times in the Term. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970); Northcross v. Board of Educ. of Memphis, 397 U.S. 232 (1970); Dowell v. Board of Educ. of Oklahoma City, 396 U.S. 269 (1969).

[1693] 402 U.S. 1 (1971); *see also* Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971).

[1694] McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

[1695] 402 U.S. at 18.

[1696] 402 U.S. at 25–27.

[1697] 402 U.S. at 22–25.

[1698] 402 U.S. at 27–29.

[1699] 402 U.S. at 29–31.

[1700] 402 U.S. at 31–32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id. at 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.

[1701] The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979). As early as *Ex parte* Virginia, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

[1702] 418 U.S. 717 (1974).

[1703] 418 U.S. at 745.

[1704] 418 U.S. at 741–42.

[1705] 418 U.S. at 742–43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id. at 294, and in still others paired the two reasons. Id. at 296.

[1706] Milliken v. Bradley, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id . at 757, 762, 781.

[1707] 418 U.S. at 744. *See* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in *Milliken*).

[1708] When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[1709] 413 U.S. 189 (1973).

[1710] 413 U.S. at 207–11. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id. at 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id. at 217, 236 (concurring and dissenting). *See* his opinion in Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (concurring).

[1711] Of significance was the disallowance of the disproportionate impact analysis in constitutional interpretation and the adoption of an apparently strengthened intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). This principle applies in the school area. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977).

[1712] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[1713] 427 U.S. at 436.

[1714] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (quoting Hills v. Gautreaux, 425 U.S. 284, 294 (1976)).

[1715] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permitted by *Keyes*. Justice Brennan, the author of *Keyes*, concurred on the basis that the violations found did not justify the remedy imposed, asserting that the methods of proof used in *Keyes* were still valid. Id. at 421.

[1716] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[1717] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (quoting Green v. School Bd. of New Kent County, 391 U.S. 430, 437–38 (1968)). *Contrast* the Court's more recent decision in Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam), holding that adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4–H Clubs was sufficient even though single race clubs continued to exist under that policy. There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools. Id. at 408 (concurring opinion of Justice White, endorsed by the Court's per curiam opinion).

[1718] 443 U.S. at 461–65.

[1719] 443 U.S. at 465–67.

[1720] Milliken v. Bradley, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id. at 288–91.

[1721] 495 U.S. 33 (1990).

[1722] 495 U.S. at 52. Similarly, the Court held in Spallone v. United States, 493 U.S. 265 (1990), that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[1723] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30–31 (1971).

[1724] Milliken v. Bradley, 418 U.S. 717, 744 (1974).

[1725] *E.g.*, § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. § 2000c–6, construed to cover only *de facto*segregation in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in Drummond v. Acree, 409 U.S. 1228 (1972) (Justice Powell in Chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (1974), 20 U.S.C. §§ 1701– 1757, *see especially* § 1714, interpreted in Morgan v. Kerrigan, 530 F.2d 401, 411–15 (1st Cir.), *cert. denied*, 426 U.S. 995 (1976), and United States v. Texas Education Agency, 532 F.2d 380, 394 n.18 (5th Cir.), *vacated on other grounds sub nom.* Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 108, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460, 42 U.S.C. § 2000d, upheld against facial attack in Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

[1726] *See, e.g.,The 14th Amendment and School Busing: Hearings Before the Senate Judiciary Subcommittee on the Constitution*, 97th Congress, 1st Sess. (1981); and *School Desegregation: Hearings Before the House Judiciary Subcommittee on Civil and Constitutional Rights*, 97th Congress, 1st Sess. (1981).

[1727] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). The decisions were in essence an application of Hunter v. Erickson, 393 U.S. 385 (1969).

[1728] Washington v. Seattle School Dist., 458 U.S. 457, 470–82 (1982). Justice Blackmun wrote the opinion of the Court and was joined by Justices Brennan, White, Marshall, and Stevens. Dissenting were Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger. Id. at 488. The dissent essentially argued that because the state was ultimately entirely responsible for all educational decisions, its choice to take back part of the power it had delegated did not raise the issues the majority thought it did.

[1729] Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535–40 (1982).

[1730] 572 U.S. ___, No. 12–682, slip op. (2014).

[1731] The plurality opinion was written by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito. Justice Scalia authored an opinion concurring in judgment, joined by Justice Thomas, arguing that *Seattle School District*and the case on which it was based should be overturned in their entirety. *Schuette*, slip op. at 7–8 (Scalia, J., concurring in judgment). Justice Breyer also wrote an opinion concurring in judgment that the Michigan amendment did not violate the Equal Protection Clause. Specifically, Justice Breyer relied on the facts that (1) the amendment forbid racial preferences aimed at achieving diversity in education (as opposed to remedying past discrimination); (2) the amendment was aimed at ensuring that the democratic process (as opposed to the university administration) controlled with respect to affirmative action policy; and (3) the underlying racial preference policy had been adopted by individual school administrations, not by elected officials. *Id.* at 5 (Breyer, J.,

concurring in judgment). Justice Sotomayor, joined by Justice Ginsburg, dissented. *Id.* at 5, 22 (Sotomayor, J., dissenting). Justice Kagan recused herself.

[1732] *Id.* at 3–4 (plurality opinion).

[1733] *Id.* at 11 (plurality opinion).

[1734] 498 U.S. 237 (1991).

[1735] 498 U.S. at 249–50.

[1736] 505 U.S. 717.

[1737] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See Ex parte* Virginia, 100 U.S. 339 (1880). In Hernandez v. Texas, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans to be a denial of equal protection, a ruling it reiterated in Castaneda v. Partida, 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[1738] Bush v. Kentucky, 107 U.S. 110 (1883); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972).

[1739] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[1740] Neal v. Delaware, 103 U.S. 370 (1881); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Patton v. Mississippi, 332 U.S. 463 (1947); Coleman v. Alabama, 377 U.S. 129 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 385 U.S. 538 (1967).

[1741] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. Cassell v. Texas, 339 U.S. 282 (1950); Alexander v. Louisiana, 405 U.S. 625 (1972); Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).

[1742] Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). *See also*Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in

1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.

[1743] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970).

[1744] Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970).

[1745] Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942).

[1746] Pierre v. Louisiana, 306 U.S. 354 (1939); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); Alexander v. Louisiana, 405 U.S. 625 (1972). For an elaborate discussion of statistical proof, *see* Castaneda v. Partida, 430 U.S. 482 (1977).

[1747] Norris v. Alabama, 294 U.S. 587 (1935); Eubanks v. Georgia, 385 U.S. 545 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Turner v. Fouche, 396 U.S. 346, 360– 361 (1970).

[1748] Avery v. Georgia, 345 U.S. 559 (1953) (names of whites and African-Americans listed on differently colored paper for drawing for jury duty); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of African-Americans were marked with a "c").

[1749] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331–37 (1970), and cases cited.

[1750] 396 U.S. at 340–41.

[1751] 380 U.S. 202 (1965).

[1752] 476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93–94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[1753] 476 U.S. at 98 (1986). The principles were applied in Trevino v. Texas, 503 U.S. 562 (1991), holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. In

Hernandez v. New York, 500 U.S. 352 (1991), a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. The *Batson* ruling applies to cases pending on direct review or not yet final when *Batson* was decided, Griffith v. Kentucky, 479 U.S. 314 (1987), but does not apply to a case on federal *habeas corpus* review, Allen v. Hardy, 478 U.S. 255 (1986).

[1754] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a habeas corpus action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 337–38. Justice Breyer, joined by Justice Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson's* test and the peremptory challenge system as a whole." Id. at 344.

[1755] Rice v. Collins, 546 U.S. at 338 (citations omitted). "[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution." Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (citation omitted). To rule on a *Batson* objection based on a prospective juror's demeanor during *voir dire*, it is not necessary that the ruling judge have observed the juror personally. That a judge who observed a prospective juror should take those observations into account, among other things, does not mean that a demeanor-based explanation for a strike must be rejected if the judge did not observe or cannot recall the juror's demeanor. Thaler v. Haynes, 559 U.S. ___, No. 09–273, slip op. (2010).

[1756] Federal courts are especially deferential to state court decisions on discriminatory intent when conducting federal *habeas* review. Felkner v. Jackson, 562 U.S. ___, No. 10–797, slip op. at 4 (2011) (per curiam) (citation omitted)..

[1757] *See, e.g.*, Foster v. Chatman, 578 U.S. ___, No. 14–8349, slip op. at 10–23 (2016) (applying the three-step process set forth in *Batson* to allow a death row inmate to pursue an appeal on the grounds that the state court's conclusion that the defendant had not shown purposeful discrimination during voir dire was clearly erroneous given that the prosecution's justifications for striking African-American jurors, while seeming "reasonable enough," had "no grounding in fact," were contradicted by the record, and had shifted over time); Snyder v. Louisiana, 552 U.S. 472, 483 (2008) (finding the prosecution's race-neutral explanation for its peremptory challenge of an African-American juror to be implausible, and that this "implausibility" was "reinforced by the prosecutor's acceptance of white jurors" whom the prosecution could have challenged for the same reasons that it claimed to have challenged the African-American juror); Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) (finding discrimination in the use of

peremptory strikes based on various factors, including the high ratio of African-Americans struck from the venire panel, some of whom were struck on grounds that "appeared equally on point as to some white jurors who served").

[1758] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[1759] Georgia v. McCollum, 505 U.S. 42 (1992).

[1760] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

[1761] Hobby v. United States, 468 U.S. 339 (1984). Note also that in this limited context where injury to the defendant was largely conjectural, the Court seemingly revived the same class rule, holding that a white defendant challenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting black defendants from "the injuries of stigmatization and prejudice" associated with discrimination. Id. at 347.

[1762] 481 U.S. 279 (1987). The decision was 5–4, with Justice Powell's opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.

[1763] 481 U.S. at 294. Dissenting Justices Brennan, Blackmun and Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. Id. at 340, 347–48, 366.

[1764] 481 U.S. at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or to the nature of the offense; the Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. Id. at 296.

[1765] The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. 481 U.S. at 296 n.17.

[1766] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

[1767] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953). *Cf.* Corrigan v. Buckley, 271 U.S. 323 (1926).

[1768] 387 U.S. 369 (1967).

[1769] James v. Valtierra, 402 U.S. 137 (1971). The Court did not perceive that either on its face or as applied the provision was other than racially neutral. Justices Marshall, Brennan, and Blackmun dissented. Id. at 143.

[1770] Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), 82 Stat. 73, 42 U.S.C. §§ 3601 *et seq*.

[1771] *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

[1772] Plessy v. Ferguson, 163 U.S. 537 (1896).

[1773] Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala.) (statute requiring segregation on buses is unconstitutional). "We have settled beyond question that no State may require racial segregation of interstate transportation facilities. . . . This question is no longer open; it is foreclosed as a litigable issue." Bailey v. Patterson, 369 U.S. 31, 33 (1962).

[1774] McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

[1775] Mitchell v. United States, 313 U.S. 80 (1941).

[1776] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

[1777] 364 U.S. 454 (1960).

[1778] *E.g*., Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[1779] Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee but the Court thought the city was still inextricably bound up in the operation and maintenance of the park. Justices Black, Harlan, and Stewart dissented because they thought the removal of the city as trustee removed the element of state action. Id. at 312, 315.

[1780] Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in effectuating the testator's intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the Equal Protection Clause. Justices Douglas and Brennan dissented. Id. at 448, 450.

[1781] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there

was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African-Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. at 231.

[1782] Loving v. Virginia, 388 U.S. 1 (1967).

[1783] McLaughlin v. Florida, 379 U.S. 184 (1964).

[1784] Palmore v. Sidoti, 466 U.S. 429 (1984).

[1785] Johnson v. Virginia, 373 U.S. 61 (1963).

[1786] Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[1787] Lee v. Washington, 390 U.S. 333 (1968); Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga.), *aff'd*, 393 U.S. 266 (1968).

[1788] Anderson v. Martin, 375 U.S. 399 (1964).

[1789] Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of whites and African-Americans in voting, tax and property records).

[1790] *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

[1791] Title II, 78 Stat. 243, 42 U.S.C. §§ 2000a to 2000a–6. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, *see* the opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[1792] *See* "Federal Remedial Legislation," *infra*.

[1793] *E.g.*, Hadnott v. Amos, 394 U.S. 358 (1971); Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).

[1794] *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); Rogers v. Lodge, 458 U.S. 613 (1982).

[1795] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial

discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id. at 280 n.8. In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. *Accord*, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

[1796] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[1797] Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

[1798] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974), but the Court did not reach the merits.

[1799] 430 U.S. 144 (1977). Chief Justice Burger dissented, *id.* at 180, and Justice Marshall did not participate.

[1800] For a detailed discussion of the use of racial considerations in apportionment and districting by the states, see *infra* Amendment 14: Section 1: Rights Guaranteed: Fundamental Interests: The Political Process: Apportionment and Districting.

[1801] 430 U.S. at 155–65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

[1802] 430 U.S. at 165–68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. *Id.* at 168. Justices Stewart and Powell concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. *Id.* at 179.

[1803] 438 U.S. 265 (1978).

[1804] Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964, which bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance, outlawed the college's program and made unnecessary any consideration of the Constitution. *See* 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d–7. These Justices would have admitted Bakke and barred the use of race in admissions. 438 U.S. at 408–21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger). The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the Equal Protection Clause proscribed. 438 U.S. at 284–87 (Justice Powell), 328–55 (Justices Brennan, White, Marshall, and Blackmun). They thus reached the constitutional issue.

[1805] 438 U.S. at 355–79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Id. at 359.

[1806] 438 U.S. at 287–320.

[1807] *See* 438 U.S. at 319–20 (Justice Powell).

[1808] 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, id. at 522, while Justice Stevens dissented in another. Id. at 532.

[1809] 448 U.S. at 517.

[1810] Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled, but that they have some such power seems evident. 448 U.S. at 473–80. The program was an exercise of Congress's spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress's regulatory powers, which in this case undergirded the spending power, and found the power to lie in the Commerce Clause with respect to private contractors and in section 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[1811] 448 U.S. at 484–85, 489 (Chief Justice Burger), 513–15 (Justice Powell).

[1812] 448 U.S. at 484–89 (Chief Justice Burger), 514–515 (Justice Powell), 520– 521 (Justice Marshall).

[1813] Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that
"the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play

a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency) (emphasis in original). The constitutionality of the agency's plan was not challenged. *See*id. at 620 n.2.

[1814] 476 U.S. 267 (1986).

[1815] 480 U.S. 149 (1987).

[1816] 476 U.S. at 294. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved. 476 U.S. at 274–76 (opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor).

[1817] 480 U.S. at 182–83 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (opinion of Justice Brennan), id. at 189 (Justice Stevens).

[1818] 488 U.S. 469 (1989). *Croson* was decided by a 6–3 vote. The portions of Justice O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice Rehnquist and by Justices White, Stevens, and Kennedy. The latter two Justices joined only part of Justice O'Connor's opinion; each added a separate concurring opinion. Justice Scalia concurred separately; Justices Marshall, Brennan, and Blackmun dissented.

[1819] 497 U.S. 547 (1990). This was a 5–4 decision, Justice Brennan's opinion of the Court being joined by Justices White, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Scalia and Kennedy, and Justice Kennedy added a separate dissenting opinion joined by Justice Scalia.

[1820] 497 U.S. at 564–65.

[1821] 488 U.S. at 501–02.

[1822] 488 U.S. at 506.

[1823] 488 U.S. at 508.

[1824] 497 U.S. at 600. Justice O'Connor's dissenting opinion contended that the case "does not present 'a considered decision of the Congress and the President.'" Id. at 607 (quoting *Fullilove*, 448 U.S. at 473).

[1825] 497 U.S. at 563 & n.11. For the dissenting views of Justice O'Connor *see* id. at 606–07. *See also Croson*, 488 U.S. at 504 (opinion of Court).

[1826] 515 U.S. 200 (1995). This was a 5–4 decision. Justice O'Connor's opinion for Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

[1827] 515 U.S. at 227 (emphasis original).

[1828] 539 U.S. 306 (2003).

[1829] 539 U.S. 244 (2003).

[1830] 539 U.S. at 316.

[1831] 539 U.S. at 335.

[1832] *Grutter*, 539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant's race or ethnicity is the defining feature of his or her application." Fisher v. Univ. of Tex. at Austin (*FisherI*), 570 U.S. ___, No. 11–345, slip op. at 10 (2013) (citation omitted). In its 2013 decision in *Fisher*, the Court did not rule on the substance of the challenged affirmative action program and instead remanded the case so that the reviewing appellate court could apply the correct standard of review. However, the Court issued a subsequent decision in *Fisher* addressing the Texas program directly. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. ___, No. 14–981, slip op. (2016).

[1833] 539 U.S. at 272–73.

[1834] 438 U.S. at 317.

[1835] 438 U.S. at 284–85.

[1836] *Fisher II*, slip. op. at 3–4.

[1837] *Id.* at 8.

[1838] *Id.* at 10.

[1839] *Id.*

[1840] Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. ___, No. 11–345, slip op. at 10 (2013). The first of these principles is that strict scrutiny requires the university to

demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Id.* at 7. The second principle is that the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an "academic judgment" to which "some, but not complete, judicial deference is proper." *Id.* at 9. The third is that no deference is owed in determining whether the use of race is narrowly tailored; rather, the university bears burden of proving a non-racial approach would not promote its interests "about as well" and "at tolerable administrative expense." *Id.* at 11.

[1841] *Fisher II*, slip op. at 10.

[1842] *Id.*

[1843] *Id.* at 11–13. On the other hand, the Court emphasized that the university cannot claim educational benefits in "diversity writ large." *Id.* at 12. "A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Id.* The Court also noted that the asserted goals of UT's affirmative action program "mirror" those approved in earlier cases (e.g., ending stereotypes and promoting cross-racial understanding). *Id.* at 13.

[1844] *Id.* at 13–15. The Court further emphasized that the fact that race allegedly plays a minor role in UT admissions, given that approximately 75% of the incoming class is admitted under the 10% plan, shows that the challenged use of race in determining the composition of the rest of the incoming class is narrowly tailored, not that it is unconstitutional. *Id.* at 15.

[1845] *Id.* at 15–19.

[1846] *Id.* at 13 ("Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record").

[1847] *Id.* at 13–14.

[1848] 551 U.S. 701 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[1849] In Seattle, students could choose among 10 high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall white/nonwhite racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's black enrollment to fall below 15 percent or exceed 50 percent. Id. at 2749.

[1850] 127 S. Ct. at 2753–54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." Id. at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

[1851] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial categories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

[1852] 127 S. Ct. at 2760–61. Some other means suggested by Justice Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[1853] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .'").