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I. INTRODUCTION: THE FUTURE OF *E PLURIBUS UNUM*

Ethnicity—the classification of people into groups based upon physical characteristics, common origins and shared cultures—is a defining characteristic of the American nation. It remains the central problem that preoccupies us eleven score years after a self-appointed group of white Anglo-Saxon men declared not merely that all men were created equal[1] but that this fact was self-evident. Since 1776 the United States has been engaged in a painful and still-incomplete struggle to give effect to the central meaning of that astonishing declaration.[2]

Whatever the United States is, it most certainly is not and never was the mere elevation of a tribe to sovereign status. It is not even the sharing of sovereignty by geographically proximate indigenous peoples, as is, for example, the case in, say, Nigeria and India. Rather, the United States is something altogether different: a 200-year old political and social experiment based upon an agglomeration of voluntary immigration, involuntary immigration, and indigenous peoples. Few can doubt that the experiment has been vastly more successful for the first group than for the

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1. One can, of course, debate whether the Declaration's implicit exclusion of women and arguably implicit exclusion of blacks and Native Americans is a flaw that wholly or partly disqualifies it from present-day commendation. One can perhaps forgive this flaw by viewing the Declaration in the context of the broad sweep of prior history as well as in light of subsequent events. In the opinion of this writer, it is precisely this broad-based perspective that should inform the history and social studies curriculum of the public schools.

2. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); MARY FRANCES BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA (1994); W.E. BURGHARDT DUBOIS, THE SOULS OF BLACK FOLK (1903); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS (1954-1965 (1987); GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992); MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964).

second and third groups; equally incontrovertible is the fact that the *overall* success of the experiment relies to a large extent on the state's position with regard to the economic, social, and cultural aspects of ethnicity.[3]

Beyond these broad points of agreement, consensus has become increasingly difficult. To begin with, state treatment of ethnicity arguably depends upon how the various ethnic groups themselves desire to be treated and even whether members of ethnic groups identify themselves primarily by their group membership.[4] Neither of these attributes is easily measured nor are they fixed over time.[5] Even assuming conclusive resolution of these questions is possible, there remain the even more difficult policy questions arising from a conflict between the principle of individual non-discrimination and the principle of differential treatment of ethnic groups.[6] It may be that no satisfactory resolution of these conflicting principles is possible: a choice simply must be made.[7]

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3. *See generally* Donald Horowitz, *Democracy in Divided Societies*, 4 J. DEMOCRACY 18 (1993) (discussing the requirements for democracy in ethnically diverse societies, using the examples of the former Soviet Union, the former Yugoslavia, and several African nations).

4. *See* Michael Walzer, *Pluralism: A Political Perspective, in* HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 781, 786-87 (Stephan Thernstrom et al. eds., 1980) (discussing ethnic identification in a pluralistic society).

5. *See id.*

6. In the Declaration of Independence we encounter one of the first statements of these two separate but related principles of equality and liberty, juxtaposed in a way that seems to imply that one principle flows from the other. "All men are created equal" yet each man "is endowed with certain unalienable rights." One principle does indeed flow from the other; yet there is an inherent tension between equality and liberty. *See generally* DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION (Nicolaus Mills ed., 1994).

7. The profound moral and legal difficulties implicit in this policy choice are amply demonstrated in the Supreme Court's tortuous and shifting jurisprudence on the subject of racial preferences. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (holding that minority preferences in federal contracting are subject to strict scrutiny and overruling *Metro Broadcasting* (5-4 decision)); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (subjecting minority preferences in the award of broadcast licenses by federal government to intermediate scrutiny and upholding them as constitutional); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding unconstitutional local government public construction set-aside program for minority construction contractors); United Steelworkers of America v. Weber, 433 U.S. 193 (1979) (construing § 703 of Title VII of the Civil Rights Act of 1964 as permitting private, voluntary race-conscious affirmative action plans); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (holding special admissions program for minority applicants to graduate school unconstitutional, but an admissions program that takes into account the race of an applicant as one factor among many would be

For much of our history these questions were not explicitly resolved in part because of a program of invidious discrimination against certain groups[8] and in part because there existed a contra-ethnic ideology, almost religious in fervor, which held that the United States was not about a "search for roots" but rather an "escape from origins."[9] It is an ideology summed up in the national credo still emblazoned on our currency and public buildings: *E Pluribus Unum.* As a matter of law, the program of state-sponsored invidious discrimination has ended.[10] As a matter of public attitude and government policy, the ideology of *E Pluribus Unum* is under siege.[11] These two historical trends are no doubt in some way related.

There are some who argue, with some justification, that the ideology of *E Pluribus Unum* is closely linked to the social policy identified with Jim Crow and George Armstrong Custer, among other icons of white male dominance.[12] Surely the rise in ethnic consciousness (a social phenomenon which developed in tandem with the demise of the more virulent forms of legal ethnic discrimination) has led, in turn, to a more positive self-image among many Americans, and to the establishment of new and useful forms of political and social association.[13] Just as surely, the new ethnic consciousness has led to a re-examination of widely held assumptions about our history and to long-overdue recognition of the role and contribution of members of ethnic minority groups.[14]

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constitutionally permissible).

8. *See generally* KLUGER, *supra* note 2.

9. ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 2 (1991).

10. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 243 (codified at 42 U.S.C. §§ 2000a *et seq.*) (prohibiting racial discrimination in employment, public education, and public accommodations); Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Gayle v. Browder, 352 U.S. 903 (1956) (invalidating racial segregation of public buses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (invalidating racial segregation of public beaches).

11. *See, e.g.*, RICHARD BERNSTEIN, DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA'S FUTURE (1994); JIM SLEEPER, THE CLOSEST OF STRANGERS: LIBERALISM AND POLITICS OF RACE IN NEW YORK (1990).

12. *See, e.g.*, MOLEFI KETE ASANTE, THE AFROCENTRIC IDEA 21-34 (1987); HACKER, *supra* note 2, at 172-73.

13. *See* Walzer, *supra* note 4, at 783-85 (discussing pluralism in "practice" by various nations).

14. *See, e.g.*, FREEDOM'S PLOW: TEACHING IN THE MULTICULTURAL CLASSROOM (Theresa Perry & James W. Fraser eds., 1993); NAT'L CTR. FOR HISTORY IN THE SCHOOLS, UNIV. OF CA., L.A., NATIONAL STANDARDS FOR UNITED STATES HISTORY: EXPLORING THE AMERICAN EXPERIENCE 3 (1994) [hereinafter NAT'L HISTORY STANDARDS]; N.Y. STATE SOCIAL STUDIES REVIEW AND DEV. COMM., ONE NATION,

Yet, like most complex ideologies, *E Pluribus Unum* has positive as well as negative attributes—just as surely as a heightened ethnic consciousness has negative as well as positive attributes. In the words of one commentator, the "cult of ethnicity"[15] taken too far in the public realm leads to a breakdown of national identity, a division of society "into distinct and immutable ethnic and racial groups, each taught to cherish its own apartness from the rest."[16] As another commentator has pointed out, "every viable nation has to have a common culture to survive in peace. . . . [O]ne need look no further than [the former] Yugoslavia, the [former] Soviet Union or Canada to see the accuracy of this proposition."[17] The ideology of *E Pluribus Unum*, shorn of its negative attributes noted above, can encompass multiculturalism ("Pluribus") while still emphasizing our peculiar national character, shared ideals, and common aspirations ("Unum").

An intellectual struggle is underway to redefine our national identity. "[T]he struggle [to establish the primacy of ethnic identity] is taking place . . . in many arenas—in our politics, our voluntary organizations, our churches, our language—and in no arena more crucial than our [in] system of education."[18] In some respects the struggle itself is a measure of the vitality of our institutions and the continuing importance of the First Amendment to protect and promote speech vital to the future of our nation's social and political life. But in other respects, notably the controversy over the content of the public educational curriculum, the debate raises fairly novel and troubling questions about the scope of the First Amendment because the object of the debate is precisely to shape the content of *government speech* and to shape such speech in ways that may threaten core constitutional values.[19]

This article seeks to examine the important emerging issue of radical ethnocentric curriculum in the public schools and proposes a rationale for judicial review of such curriculum. The rationale is based upon the application of fundamental constitutional principles embedded in the First and Fourteenth Amendments. The rationale is also based on the premise that, throughout our history, the judiciary has played a unique and dynamic role in promoting the stability and integrity of our political

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MANY PEOPLES: A DECLARATION OF CULTURAL INDEPENDENCE 1-8 (1991) [hereinafter ONE NATION].

15. SCHLESINGER, *supra* note 9, at 2.

16. ONE NATION, *supra* note 14, at 45 (dissenting comment of Arthur M. Schlesinger, Jr.).

17. *Id.* at 39 (dissenting comment of Professor Kenneth T. Jackson).

18. SCHLESINGER, *supra* note 9, at 2.

19. *See infra* notes 79-80 and accompanying text.

institutions.[20] It is argued that the developing struggle over radical ethnocentric curriculum in our public schools merits a principled judicial response to assure the integrity of our public educational institutions through the enforcement of core constitutional values.

II. RADICAL ETHNOCENTRIC CURRICULUM IN THE PUBLIC SCHOOLS AND ITS THREAT TO CORE CONSTITUTIONAL VALUES

Over the past twenty years an increasing number of states have revised standards for history and social studies curriculums in their public schools by requiring the curriculums to include material about the roles and contributions of women and minority racial and ethnic groups to the history of the United States.[21] The revised standards result in part from new historical scholarship and teaching methods[22] and in part from the increasing political pressure of various ethnic groups and organizations,

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20. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995) (delineating the limit of Congress's power under the Commerce Clause); United States v. Nixon, 418 U.S. 683 (1974) (delineating limit of presidential "executive privilege"); New York Times v. United States, 403 U.S. 713 (1971) (upholding newspaper's right to publish, without prior restraint, information concerning U.S. military operations deemed confidential by the government); Baker v. Carr, 369 U.S. 186 (1962) (establishing one person-one vote principle); Brown v. Board of Educ., 347 U.S. 483 (1954) (holding unconstitutional state-sponsored segregation of public schools); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (delineating the limit of the President's authority under the War Powers of the Constitution); Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment's free speech clause against the states by incorporating it into the Fourteenth Amendment); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (early and crucial delineation of scope of federal power); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1819) (judicial review of state laws); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (judicial review of federal statutes).

21. Some states have enacted statutes prescribing a multicultural curriculum. *See* MICH. STAT. ANN. § 15.41173 (Callaghan 1987) ("The appropriate authorities of a public school of the state shall give special attention and consideration to the degree to which instructional materials that reflect our society, either past or present, including social studies textbooks, reflect the pluralistic, multiracial, and multiethnic nature of our society, past and present. . . ."); CONN. GEN. STAT. ANN. § 10-18a (West 1986) ("[E]ach local or regional board of education shall . . . select those [materials] which accurately present the achievements and accomplishments of individuals and groups from all ethnic and racial backgrounds and of both sexes."); NEB. REV. STAT. § 79-213(2) (1994) ("[A]ll American history courses . . . shall include and adequately stress contributions of all ethnic groups (a) to the development and growth of America into a great nation, (b) to art, music, education, medicine, literature, science, politics, and government, and (c) the war services in all wars of this nation.").

22. *See* Carol Gluck, *History According to Whom? Let the Debate Continue*, N.Y. TIMES, Nov. 19, 1994, at A23.

educators, and parents.[23] Today there is broad agreement among scholars and educators that a multicultural approach to teaching United States history, consistent with high standards of scholarship, accuracy, and balance (admittedly a tall order), represents a marked improvement over prior curriculum approaches that tended to exclude or minimize the roles and contributions of racial and ethnic minorities and women.[24]

But while most can agree on multiculturalism in principle, few can agree on what the concept means in practice. In many states, particularly populous and ethnically diverse states such as New York and California, multiculturalism has inspired a heated and at times vociferous debate on culture, ethnicity, and the very meaning and purpose of teaching history in the public schools.[25] Textbooks are now scrutinized for passages that are insensitive or offensive to one or another ethnic group and for adequate treatment of issues of particular ethnic concern.[26] Curriculum offerings are under constant review in an effort to effectuate the optimal balance between American history and the history of various regions of the world, and among the various subjects and chronological periods of American history.[27]

The process is largely a healthy one and, it could be argued, the very essence of democracy. A multiethnic nation is struggling quite literally to define itself—and is doing so through school board elections, public hearings and on-going dialogue.[28] The debate, for the most part, is "uninhibited, robust, and wide-open."[29]

And yet, like most political processes, the public debate on multiculturalism carries with it certain hazards. Because both race and education are central to the American experience, the consequences of bad policy outcomes from the multiculturalism debate will be politically

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23. *See* Robert Reinhold, *Class Struggle: Cowgirls and the Bantu Migration: In Its Controversial New Textbooks, California is Rewriting History*, N.Y. TIMES, Sept. 29, 1991, § 6 (Magazine), at 26; Sam Howe Verhovek, *Plan to Emphasize Minority Cultures Ignites a Debate*, N.Y. TIMES, June 21, 1991, at A1.

24. *See* Verhovek, *supra* note 23.

25. *See* Reinhold, *supra* note 23, at 27-29; Verhovek, *supra* note 23, at B4. *See also* ONE NATION, *supra* note 14.

26. *See* Reinhold, *supra* note 23, at 46.

27. *See id.*

28. *See* Gluck, *supra* note 22. Indeed an observer of the American political scene may note with regret that so few other pressing political and social issues receive the same intense level of public discussion as does the debate of multiculturalism in the public schools.

29. These famous words of Justice Brennan are often invoked to indicate that the political process safeguarded by the First Amendment is, in fact, working. *See* New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

divisive and deeply felt. And because race and education occupy a central position in American constitutional law,[30] the consequences of bad policy may have constitutional dimensions. Unfortunately, the debate already has begun to produce its share of bad policy.[31]

The rallying cry of multiculturalism began as a response to what has come to be known as Eurocentrism—the under-representation of non-European ethnic cultures in the public school curriculum.[32] Yet under the same rallying cry of multiculturalism, some scholars, educators, and local school boards are advocating a new curriculum that may pass over into an ethnocentrism of its own.[33] In fact, some black leaders and educators now openly embrace ethnocentrism in the form of an educational discipline or philosophy known as Afrocentrism.[34]

Although many other racial and ethnic minorities are active in lobbying for curriculum that promotes their respective ethnic histories,[35] the Afrocentric education movement seems to represent a special case with respect to the scope of its own ambitions and the controversy surrounding some of its claims.[36] For example, one black educator argues that a comprehensive Afrocentric education for black public school children is necessary because black children have different "learning styles" from white children.[37] Another black educator distinguishes between "skills education" and "political education" and stresses the importance of the latter over the former.[38] He further argues that, for black children, "political education has to be a total quest for liberation[,]" which is something "white society can't give [them]."[39] Consistent with this thinking, a number of school boards in predominantly black inner cities have established not merely Afrocentric courses or curriculum but entirely separate public schools in which Afrocentric principles and subject matter

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30. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

31. *See infra* notes 37-51 and accompanying text.

32. *See* Andrew Hacker, *Trans-National America*, *in* N.Y. REV. OF BOOKS, Nov. 22, 1990, at 19.

33. *See* Michel Marriott, *Afrocentrism: Balancing or Skewing History?*, N.Y. TIMES, Aug. 11, 1991, § 1, at 1. *See generally* GOING TO SCHOOL: THE AFRICAN-AMERICAN EXPERIENCE (Kofi Lomotey ed., 1990) [hereinafter GOING TO SCHOOL].

34. *See* Marriott, *supra* note 33. *See generally* GOING TO SCHOOL, *supra* note 33.

35. *See* Reinhold, *supra* note 23, at 27-29.

36. *See* Marriott, *supra* note 33, § 1, at 18.

37. Dirk Johnson, *Milwaukee Creating Two Schools For Black Boys*, N.Y. TIMES, Sept. 30, 1990, § 1, at 1, 26 (statement of Dr. Jawanza Kunjufu).

38. Kofi Lomotey, *An Interview with Booker Peek*, *in* GOING TO SCHOOL, *supra* note 33, at 14-15.

39. *Id.*

are emphasized throughout the school's curriculum.[40] For example, Milwaukee has established two "Schools of African American Immersion" aimed primarily toward "at risk" black male students.[41]

Another controversial aspect of the Afrocentric education movement relates to some of the historical claims put forth by some scholars which, in turn, have been incorporated into some Afrocentric teaching materials.[42] A collection of essays on African-American subjects prepared for use in the public schools of Portland, Oregon credits ancient Egyptians with paranormal powers such as spiritual healing and attributes to Africa "fully and without qualification" the discovery of time; the control and use of fire; the development of tool technology, language and agriculture; the invention of advanced aeronautics, such as actual working gliders; and the development of a theory of evolution.[43] Gilbert T. Sewall, editor of *Social Studies Review*, a professional publication, states that "[s]ome of the[] claims [contained in the Portland essays] are false[]" and "others cannot be verified."[44] Another essay in the Portland collection claims that Europe stole its civilization from Africa and then engaged in malicious representation of African society and people as part of a conspiracy.[45] The Portland essays reportedly have become the inspiration for Afrocentric curriculum in Milwaukee, Indianapolis, Pittsburgh, Washington, D.C., Richmond, Atlanta, Philadelphia, Detroit, Baltimore, Camden, and other cities.[46]

Most disturbingly, some Afrocentric scholars and educators have propounded the theory that blacks are a genetically superior race, and have espoused this theory in some public schools, notably those of Atlanta

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40. Milwaukee, Detroit and Seattle have established Afrocentric schools. *See* Constantine Angelos, *School Faces Challenge of its Life*, SEATTLE TIMES, Nov. 21, 1993, at B1; Johnson, *supra* note 37; Thomas Toch, *Afrocentric Schools: Fighting a Racist Legacy*, U.S. NEWS & WORLD REP., Dec. 9, 1991, at 74; Laurel S. Walters, *The Plight of Black Male Schools*, THE CHRISTIAN SCI. MONITOR, Sept. 9, 1991, at 8.

41. *See generally* Steven Siegel, *Race, Education and the Equal Protection Clause in the 1990s: The Meaning of* Brown v. Board of Education *Re-Examined in Light of Milwaukee's Schools of African-American Immersion*, 74 MARQ. L. REV. 501 (1991).

42. Michel Marriott, *As a Discipline Advances, A Debate on Scholarship*, N.Y. TIMES, Aug. 11, 1991, § 1, at 18.

43. *See* Bernard R. Ortiz de Montellano, *Melanin, Afrocentricity, and Pseudoscience*, *in* 1993 YEARBOOK OF PHYSICAL ANTHROPOLOGY 36-55 (1993) (noting Hunter H. Adams's textbook, AFRICAN AND AFRICAN-AMERICAN CONTRIBUTIONS IN SCIENCE (1990)).

44. Marriott, *supra* note 42, at 18 (statement of Gilbert T. Sewall, editor of *Social Studies Review*).

45. *See* Ortiz de Montellano, *supra* note 43, at 36-37.

46. SCHLESINGER, *supra* note 9, at 35-36.

and Detroit.[47] This theory of inherent racial superiority is based on the fact that blacks possess a higher concentration of melanin—a component of skin pigmentation—than other races, and that a high concentration of melanin supposedly makes possible superior mental and cognitive abilities.[48] The scientific basis for the Afrocentric theory of melanism has been largely discredited.[49] However, even if melanism has at least some basis in science, the teaching of this theory or any theory of inherent racial superiority[50] as fact has no place in the public schools.[51]

Most Afrocentric scholarship is not false, misleading or racist, but, as the above examples demonstrate, there is cause for concern over what might be termed "radical Afrocentric curriculum" which appears motivated by rhetorical or ideological purposes. The reasons for such

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47. *See* Leon Jaroff, *Teaching Reverse Racism*, TIME, Apr. 4, 1994, at 74-75.

48. *Id.*

49. Ortiz de Montellano, *supra* note 43.

50. Although theories asserting a scientific basis for claims of inherent white racial superiority have had a long and dishonorable history in this country, I am not aware of any reported instance in which such theories have been expressly incorporated into the public school curriculum. *See generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981). However, it is worth noting that a widely-publicized, bestselling book published in 1994 entitled *The Bell Curve* makes the claim that intelligence as measured by IQ testing is "substantially inheritable," and that the lower average IQ scores of blacks as compared to whites and Asians suggest that blacks, on average, are biologically inferior in intelligence to other racial groups. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 298-315 (1994) [hereinafter THE BELL CURVE]. Herrnstein and Murray also suggest that government intervention, including public education, is largely ineffective in helping to raise the performance and life prospects of those that do not perform well on intelligence tests. *Id.* at 436-45. In view of this claim, and leaving aside for a moment other moral, legal and scientific considerations, it would be profoundly ironic and even conceptually incoherent if Herrnstein and Murray's perspectives were incorporated into the curriculum of a public school. Yet given the wide attention accorded *The Bell Curve*, it is perhaps not too soon to raise the question of whether the teaching of Herrnstein's and Murray's theory of modern eugenics as fact in a high school biology or social studies class would offend the Constitution. Thus, Herrnstein and Murray's theory of eugenics and the Afrocentric theory of melanism are treated together, *infra* Part II.B, in which I propose a constitutional standard that proscribes the teaching of doctrines of inherent racial superiority as fact in the public schools.

51. *See infra* notes 123-63 and accompanying text.

excesses in the public school curriculum are cogently described by historian Arthur Schlesinger:

> Like other excluded groups before them, black Americans invoke supposed past glories to compensate for real past and present injustices. Because their exclusion has been more tragic and terrible than that of white immigrants, their quest for self-affirmation [has been] more intense and passionate. . . . [D]octrinaire ethnicity in general and the dogmatic black version in particular raise questions that deserve careful and dispassionate examination.[52]

Schlesinger does not specify precisely who should undertake the careful and dispassionate examination. In the following pages I will argue that it may be appropriate and indeed desirable for the judiciary to undertake this examination in cases in which doctrinaire ethnicity appears to implicate core constitutional values.

III. JUDICIAL REVIEW OF RADICAL ETHNOCENTRIC CURRICULUM: PROPOSED CONSTITUTIONAL STANDARDS

Although judicial review of radical ethnocentric curriculum could be characterized as a major expansion of judicial power, so too can it be characterized as operating largely within the confines of existing Supreme Court authority. This is true because the subject matter lies peculiarly at the nexus of several of the most important strands of constitutional jurisprudence. These strands, despite recent changes in the Supreme Court's composition and outlook, retain their essential vitality.

What follows is decidedly not a new program for comprehensive judicial oversight of the schools. It is rather a more limited proposal for judicial review of three discrete failures of educational policy-making, all of which are associated with ethnocentric curriculum. These policy failures, examples of which were provided in the preceding section, may be described for our present purposes as *first*, secular educational material that the state asserts is true but, in fact, is demonstrably false; *second*, the teaching of theories of inherent racial superiority as fact; and *third*, the establishment of schoolwide ethnocentric curriculum that promotes racial segregation. As will be shown, each of these policy failures represents a threat to core constitutional values and, as such, are appropriate subjects for judicial review.

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52. SCHLESINGER, *supra* note 9, at 36, 38-39.

A. *The Constitution Prohibits the State From Teaching Curricular Material Which the State Asserts is True But Which, in Fact, is Demonstrably False*

1. Sources of Authority

In this section I argue that the Constitution prohibits the state from teaching curricular material which the state asserts is true but which is demonstrably false. For purposes of this discussion I assume that the curricular material in question is not clearly religious in nature and therefore such teaching would not otherwise implicate the First Amendment's Establishment Clause.[53] In formulating a standard I look to the First Amendment's free speech guarantee and to the branch of substantive due process recognized in *Meyer v. Nebraska*.[54] This well-settled authority provides a firm foundation for the principle that government cannot teach secular curricular material and assert that such material is true when, in fact, the material is patently false.

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53. It is, of course, true that the boundary of subject matter implicated by the Establishment Clause is not well-defined. *See, e.g.*, Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977); George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). Nevertheless, although some curricular material that the state claims is true, but which is demonstrably false, could be clearly implicated by the Establishment Clause (for example, a claim that human beings appeared only 5000 years ago and that such appearance resulted from "instantaneous creation," see Edwards v. Aguillard, 482 U.S. 578, 591 n.11 (1987)), other material may well be implicated by my proposed standard but fall outside the subject matter traditionally associated with the Establishment Clause. For example, a textbook used in many public schools contains the assertion that ancient Egyptians were "psychotronic engineers" who were endowed with powers of extrasensory perception. *See* Ortiz de Montellano, *supra* note 43, at 47-52. *See also supra* notes 43-46 and accompanying text and *infra* note 120. Significantly, the school textbook *itself* characterizes the above claim as based on science. *Id.* Under these circumstances, it would be inappropriate to classify the subject matter of the claim as "religious" and subject the claim to Establishment Clause analysis. Moreover, some demonstrably false claims could be expected to fall clearly outside the subject matter previously recognized by the Supreme Court as "religious" within the meaning of the Establishment Clause. In my view, selective expansion of the Establishment Clause to reach these allegedly scientific claims contained in curricular material is less desirable than the recognition of a clear constitutional principle that the state may not teach curricular material that it asserts is true, but which is demonstrably false.

54. 262 U.S. 390 (1923).

a. The Free Speech Clause of the First Amendment

Over the past seventy years the Supreme Court has transformed the First Amendment into a powerful shield against government control over individual thought, belief, and expression. The First Amendment's free speech guarantees extend to those who seek to overthrow the government,[55] to those who release confidential information that may significantly disrupt the government,[56] to those who burn the American flag as a form of protest,[57] to nude dancers,[58] to lawyers,[59] even to convicted felons.[60] Notwithstanding this broad reach, the First Amendment's Free Speech Clause has been applied sparingly and inconsistently to a realm declared by the Supreme Court to be a "symbol of our democracy[,] . . . the most pervasive means for promoting our common destiny[,]"[61] and a place where "[t]he vigilant protection of [our] constitutional freedom[] is nowhere more vital . . . ."[62] That paradoxical realm is the public school classroom.

Although the Supreme Court has held that students do not "shed their constitutional rights . . . at the schoolhouse gate[,]"[63] in practice, the public school classroom in general (as distinct from other school programs and activities such as, for example, the school library)[64] and secular curriculum in particular have been a virtual constitutional black hole in which government has been accorded nearly complete license to practice

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55. Dennis v. United States, 341 U.S. 494 (1951) (holding that suppression of speech or the press is unconstitutional unless the speech or publication creates a "clear and present danger" to the security of the United States government).

56. New York Times v. United States, 403 U.S. 713 (1971). Justice Black wrote that it would make a "shambles of the First Amendment" to enjoin the publication of a newspaper unless the government met the heavy burden of justifying its restraint. *Id.* at 714-715.

57. Texas v. Johnson, 491 U.S. 397 (1989).

58. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

59. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (permitting certain types of lawyer advertising). *See* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (applying heightened scrutiny standard under the First Amendment's commercial speech doctrine to uphold 30 day waiting period for attorney direct mail solicitation).

60. Turner v. Safley, 482 U.S. 78 (1987).

61. McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

62. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

63. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

64. *See* Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion) (stating that school boards may not remove books from school libraries for reasons that violate students' First Amendment right to receive information).

content-based and viewpoint-based discrimination.[65] Perhaps only in this realm could a statute survive judicial scrutiny when such statute *prohibits* material which "'speaks slightingly of the founders of the republic . . . or which belittles or undervalues their work.'"[66]

There are, of course, compelling reasons for the seemingly anomalous treatment of public school secular curriculum. First, the purpose of public education is the "inculcat[ion] [of] fundamental values necessary to the maintenance of a democratic political system . . . ."[67] It would be difficult, if not impossible, for government to fulfill this function in the elementary and secondary schools without practicing content and viewpoint discrimination. Second, education in this country traditionally has been controlled by local, elected school boards which presumably are uniquely well-situated to devise a curriculum that reflects and distills these fundamental values.[68] Judicial review of the public school secular curriculum—even if limited to subject matter that directly implicates core constitutional values—raises the specter of a transfer of ultimate curricular authority from elected school boards to judges who are neither experts in

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65. *Cf.* Board of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional the compulsory flag salute and Pledge of Allegiance in public schools). The *Barnette* Court used sweeping language to indicate the constitutional infirmity of compelled speech:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642. Ironically, it could be argued that elementary and secondary education consists in large part of compelled speech, albeit in a considerably more subtle and less draconian form than that embodied in the flag salute and pledge. Notwithstanding the *Barnette* Court's sweeping language condemning the prescription of "what shall be orthodox in politics, nationalism, religion or other matters of opinion," the *Barnette* rule against compelled speech in the public schools has never been directly applied to any other aspect of public school curriculum, pedagogy or activity. So although Justice Jackson could not think of an "exception" to the rule against compelled speech in the public schools, it turns out that the *Barnette* flag salute rule is itself an exception to the general rule that the state may prescribe what is orthodox in its curriculum. *Id.*

66. Johnson v. Stuart, 702 F.2d 193, 194 (9th Cir. 1983) (quoting OR. REV. STAT. § 337.260 (1981)). The court only reached the issue of the plaintiff's standing to sue and the provision apparently was never litigated on the merits.

67. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

68. *See* Board of Educ. v. Pico, 457 U.S. 853, 891-92 (1982) (Burger, C.J., dissenting).

pedagogy nor necessarily responsive to the needs and aspirations of the community.[69]

Notwithstanding these generally compelling prudential considerations, it can be argued that judicial review under the First Amendment of curriculum that is demonstrably false may be appropriate and necessary, and comports with existing Supreme Court authority.[70] A state's communication of false information to public school students violates the students' First Amendment freedoms of speech, inquiry, and (non-religious) belief[71] as well as the right to receive information.[72] Under these circumstances, judicial review is appropriate because courts have a duty to intervene in secular educational matters when basic constitutional values are directly and sharply implicated[73] in order to "safeguard the fundamental values of freedom of speech and inquiry and of belief."[74]

The Supreme Court has repeatedly acknowledged the special role of the public schools in preparing youth for citizenship and full participation in a democratic society. The school is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[75] The classroom is a "marketplace of ideas[]" and "[t]he Nation's future depends upon leaders trained through wide exposure to [these ideas]."[76] Given the special responsibility of the state to inculcate youth,[77] it would be a breach of the state's responsibility and a threat to core constitutional values embedded in the First Amendment[78] and in the

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69. *Id.* at 890-91.

70. *See infra* notes 72-80 and accompanying text.

71. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

72. *See* Board of Educ. v. Pico, 457 U.S. 853, 866-68 (1982) (plurality opinion) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Martin v. Struthers, 319 U.S. 141, 143 (1943)).

73. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

74. *Id.*

75. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

76. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

77. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (citing *Brown*, 347 U.S. at 493).

78. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

Constitution itself[79] if the state through its public schools communicated information that is demonstrably false.

The Court's 1991 decision in *Rust v. Sullivan*[80] may raise a question about the continuing vitality of constitutional limitations with respect to government's choice of content in government-sponsored speech. In *Rust*, the Court upheld federal regulations prohibiting abortion counseling in connection with a federally financed family planning program, notwithstanding the fact that the prohibition curtailed the speech of the nonprofit health care organizations that receive funding under the program as well as the staff of these organizations.[81] Such curtailment of speech is constitutional, the Court noted, since the government may "make a value judgment favoring [a] childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[82] Read broadly and without qualification, *Rust* may suggest that government has a free hand in determining conditions of sponsorship of another's speech or the content of government speech. Fortunately, the *Rust* Court expressly prohibits such broad governmental discretion in cases in which government "'discriminate[s] invidiously . . . in such a way as to ai[m] at the suppression of . . . ideas.'"[83] Moreover, *Rust* can be distinguished in that it pertains to a speech *restriction* as a condition of receipt of government funds;[84] in no sense can it be read as allowing government to communicate demonstrably false information. Finally, *Rust* is about a restriction on speech in the context of a government-funded family planning program; its application to the public schools would be inconsistent with the Court's repeated pronouncements with respect to the constitutionally guaranteed academic freedom of teachers,[85] the constitutional right of students to receive information[86] and the special responsibility vested in government to inculcate youth.[87] In the school

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79. "[A]nd secure the Blessings of Liberty to ourselves and *our Posterity* . . . ." U.S. CONST. pmbl. (emphasis added).

80. 500 U.S. 173 (1991).

81. *Id.* at 192-200.

82. *Id.* at 192-93 (citation omitted).

83. *Id.* at 192 (quoting Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983); Cammarano v. United States, 358 U.S. 498, 513 (1959)).

84. *Id.* at 192-200.

85. *See* Ambach v. Norwick, 441 U.S. 68, 78-79 (1979); Keyishian v. Board of Regents, 385 U.S. 589, 602-04 (1967).

86. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (citations omitted); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citations omitted).

87. *See, e.g.*, *Ambach*, 441 U.S. at 76-77.

setting, *Rust*'s "free hand" doctrine must give way to at least minimal respect for these core constitutional values. The communication of demonstrably false information to public schools violates these values.

b. The Due Process Clause of the Fourteenth Amendment

In *Meyer v. Nebraska*,[88] the Supreme Court struck down a statute forbidding the teaching of any language other than English before the eighth grade.[89] The Court based its decision on an expansive definition of the liberty interest guaranteed by the Fourteenth Amendment's Due Process Clause:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of [an] individual . . . to acquire useful knowledge . . . . Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts . . . . The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.[90]

Although the substantive due process principles upon which *Meyer* was based have been largely repudiated by the Court,[91] *Meyer* itself survives as a crucial underpinning to the Court's modern substantive due process jurisprudence.[92]

The continuing vitality of *Meyer* was affirmed in *Epperson v. Arkansas*[93] in which the Court struck down on other grounds a statute prohibiting the teaching of the theory of evolution in the public schools.[94] Because the *Epperson* Court's decision rested on the Establishment Clause,[95] the Court noted that "[f]or purposes of the present case, we need not re-enter the difficult terrain [of *Meyer*]. . . . *We need not take*

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88. 262 U.S. 390 (1923).

89. *Id.*

90. *Id.* at 399-400 (citation omitted).

91. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-6 (1978) (discussing the decline of economic substantive due process).

92. *See id.*

93. 393 U.S. 97 (1968).

94. *Id.* The Court struck down the law as a violation of the First Amendment's mandate of government neutrality regarding religion, which is applied to the States through the Fourteenth Amendment. *Id.* at 109.

95. *Id.* at 106-09.

advantage of the broad premise which the Court's decision in Meyer furnishes . . . ."[96] *Meyer* also has been noted with approval in cases ranging from the right of students to challenge a school board's removal of books from the school library[97] to the right of married couples to use birth control.[98]

The broad powers of *Meyer* have remained largely dormant in the school setting because subsequent decisions have been based largely on the First Amendment, which was incorporated against the states four years after *Meyer* was decided.[99] Most school controversies capable of resolution under *Meyer* are also capable of resolution under the First Amendment's guarantees of freedom of speech, inquiry and (non-religious) belief, and the modern Court has clearly preferred the latter jurisprudence over the former.[100] Yet, as noted above, the Court has never repudiated the "broad premises" of *Meyer*.[101]

It is noteworthy that the Supreme Court recently has applied *Meyer's* useful knowledge standard in an important decision concerning public school curriculum, although *Meyer* itself was not expressly acknowledged in the decision because (one suspects) the curriculum dispute implicated religious matters and (as was the case in *Epperson v. Arkansas*[102]) the Court felt more comfortable resting its decision exclusively in the Establishment Clause. In *Edwards v. Aguillard*[103] the Court struck down a Louisiana statute forbidding the teaching of the theory of evolution unless accompanied by instruction in the theory of "creation science." The Court determined that the purpose of the law was not secular,[104] a finding sufficient to invalidate the law under Establishment Clause

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96. *Id.* at 105-06 (emphasis added).

97. Board of Educ. v. Pico, 457 U.S. 853, 863 (1982) (plurality opinion).

98. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

99. *See* Fiske v. Kansas, 274 U.S. 380 (1927).

100. *See* TRIBE, *supra* note 91.

101. *See id.* Even the present members of the Court who have repudiated the furthest extension of modern substantive due process—the right to an abortion recognized in *Roe v. Wade*—continue to regard *Meyer v. Nebraska* as a significant and valid exemplar of substantive due process. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (Rehnquist, C.J., dissenting, joined in part by White, Scalia, and Thomas, JJ.). Justice Scalia, who has most consistently and forcefully argued for a narrow view of substantive due process, has referred to *Meyer v. Nebraska* as "an established part of our constitutional jurisprudence." Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (Scalia, J.).

102. 393 U.S. 97 (1968).

103. 482 U.S. 578 (1987).

104. *Id.* at 585-86.

principles.[105] This determination of legislative purpose derived in large measure from a statement of the statute's sponsor, who declared that his "preference would be that neither creationism nor evolution" be taught.[106] The Court expressly condemned this statement because "such a ban on teaching does not promote—indeed, it undermines—the provision of a comprehensive scientific education."[107] The Court's conclusion can be fairly characterized as an application of the "useful knowledge" standard at a crucial stage in its analysis of the constitutionality of a state law governing curricular content in the public schools.

The constitutionally guaranteed right "to acquire useful knowledge"[108] implies not merely that the state is prohibited from unduly restricting an entire sphere of useful knowledge from the schools (for example, teaching foreign languages before the eighth grade or teaching the theory of evolution as part of a comprehensive scientific education) but also that the state is prohibited from affirmatively diffusing material that is not "useful knowledge." For this formulation to fall within prudential bounds and not transform courts into super-boards of education,[109] a court's ability to pass on material that is not useful knowledge should be limited strictly to educational material that the state asserts is true but, in fact, is demonstrably false. Such materials, by definition, cannot be defended as useful knowledge where the sphere is public education and the speaker is the state itself.[110]

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105. In order for a statute to survive an Establishment Clause challenge, "the statute must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion; . . . [and it] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (citations omitted). In *Edwards*, the Court determined that the Louisiana statute was inconsistent with the first of the three *Lemon* principles, a determination that was sufficient to invalidate the statute. *Edwards*, 482 U.S. at 594. The continuing vitality of the *Lemon* principles is in doubt. *See* Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992) (acknowledging that the Court remains deeply divided on the continuing vitality of the *Lemon* principles, but leaving reconsideration of these principles to another day).

106. *Edwards*, 482 U.S. at 587 (quoting Senator Keith).

107. *Id.*

108. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

109. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting); Board of Educ. v. Pico, 457 U.S. 853, 885 (1982) (Burger, C.J., dissenting).

110. *Cf.* New York Times v. Sullivan, 376 U.S. 254, 271-73 (1964). (holding that the First Amendment protects speech concerning public officials notwithstanding such speech contains factual errors). The *New York Times* doctrine applies to private speakers, not the state itself. See *infra* note 146 for a discussion of the special category of speech that has been termed "government speech." See *infra* note 153 for a discussion of the complex and unsettled question of whether classroom speech of public

2. The Standard as Applied

There are those who may argue that a court is not technically competent to enforce a standard prohibiting the state from teaching curricular material which the state asserts is true but which is demonstrably false. In fact, courts are often called upon to make qualitative judgments concerning the reliability of expert claims in the different but analogous context of evidentiary determinations under Federal Rule of Evidence 702.[111] If anything, judicial determinations of scientific validity under Rule 702 ordinarily could be expected to draw upon far more difficult and complex technical subject matter because most disputes arising under Rule 702 turn on whether to admit into evidence "novel" scientific information or techniques.[112] By contrast, a standard of demonstrable falsity implies consideration of well-established rather than novel scientific propositions, because the latter propositions, by their very nature, will seldom be either demonstrably true or demonstrably false. This distinction was recognized in the leading Supreme Court decision construing Rule 702:

> Although the *Frye* decision [Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)] focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply

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school teachers should properly be accorded some First Amendment protection notwithstanding the fact that the teachers in this setting are undoubtedly state actors for purposes of the Fourteenth Amendment. Even assuming definitive resolution of this question in the affirmative, First Amendment principles would provide little support for a teacher to assert that particular curricular material is true when such material is, in fact, demonstrably false. *See supra* notes 71-79 and accompanying text. Moreover, my proposed standard of demonstrable falsity would, in practice, substantially comport with the *New York Times* standard of "actual malice" (assuming the latter standard applies at all to the classroom speech of public school teachers and assuming further that the teacher's speech implicates the subject matter protected by such standard); that is, a teacher who asserted that particular curricular material is true when such material is demonstrably false would almost certainly be found to have made such assertion with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80.

111. FED. R. EVID. 702 provides "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

112. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796 n.11 (1993) (stating that under Federal Rule of Evidence 702, "well-established propositions are less likely to be challenged than those that are novel.").

> specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. *Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. Rule Evid. 201.*[113]

In most cases, a curriculum review standard of demonstrable falsity could be expected to comport with the standard governing judicial notice under Federal Rule of Evidence 201 in that proof of demonstrable falsity would usually require reliance on facts which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[114] Put another way, a standard of demonstrable falsity requires proving the negative of the disputed proposition, which is usually possible only if an inconsistent proposition is demonstrably true and, if so, the latter proposition is usually of a type capable of being judicially noticed under Rule 201.[115] For these reasons, the proposed curriculum review standard as applied could be expected to implicate only the most extreme and unsupported claims,[116] and judicial decision-making under the standard would be well within the experience and technical competence of the judiciary.

It may be instructive to apply the proposed standard to an example of curricular material developed by those espousing radical ethnocentric views. An Afrocentric textbook incorporated into the curriculum of the public schools of Atlanta, Detroit, Portland, and Washington, D.C.,

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113. *Id.* (emphasis added).

114. FED. R. EVID. 201(b).

115. The inconsistent proposition capable of being judicially noticed would most likely be "theories that are so firmly established as to have attained the status of scientific law." *Daubert*, 113 S. Ct. at 2796 n.11. See *infra* note 120 and accompanying text for an enumeration of scientific theories that are flatly inconsistent with certain scientific claims made by various Afrocentric scholars, including claims in Hunter H. Adams's *African and African-American Contributions in Science* (1990), a text used in the public schools of Atlanta, Detroit, Portland, Washington, D.C. and several other major cities in the United States.

116. For example, a standard of demonstrable falsity, supported by well-established scientific theory, would be sufficient, in all likelihood, to implicate Adams's claim that ancient Egyptians had "psychotronic engineers" who were endowed with powers of extrasensory perception. Ortiz de Montellano, *supra* note 43, at 47-49 (citing Adams's claims of psychic powers held by ancient Africans). *See infra* notes 118 & 120 and accompanying text.

among other cities,[117] states without clear attribution that ancient Egyptians had "psychotronic engineers" who were endowed with powers of extrasensory perception.[118] This curricular material has no apparent basis in science,[119] and cannot be said to "promote . . . a comprehensive scientific education" within the meaning of *Edwards*.[120] In the face of curricular material of this nature and in light of the failure of state or local school authorities to remedy these clear lapses in educational judgment, the judiciary should step into the breach and enforce the constitutional principles articulated in *Meyer* and *Edwards*.[121] Alternatively, a court may rely on constitutional principles grounded exclusively in the First Amendment, such as a student's First Amendment right to receive information.

B. *The Constitution Prohibits the State From Teaching Theories of Inherent Racial Superiority as Fact*

In this section I argue that the Constitution proscribes teaching theories of inherent racial superiority as fact in public schools. I contend that this constitutional standard as applied would implicate two theories of

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117. Ortiz de Montellano, *supra* note 43, at 36.

118. *See id.* at 47-49 (citing Adams's textbook).

119. Bernard Ortiz de Montellano assessed the scientific validity of some of the claims made by various Afrocentric scholars, including those made in Adams's *African and African-American Contributions in Science*. *See supra* note 43; *see also supra* notes 42-46, 112-13 and accompanying text. Referring to the claims of Adams and others that ancient Egyptians and other African peoples possessed powers of extrasensory perception, which, among other things, enabled them to make astronomical discoveries without telescopes and to predict the future, Ortiz de Montellano states:

> There is no physical evidence for the existence of ESP or psychic powers. Their existence, in fact, would violate several fundamental principles of physics. Rothman . . . points out that ESP would violate the Lorentz Invariance, i.e., that nothing can travel faster than light, and the Principle of Causality, i.e., that a cause must always come before its effect. Sirius is more than 8 light years away. In the case of an Egyptian oracle, either the psychic energy and the information would have to travel almost instantaneously, clearly violating the Lorentz Invariance, or the question and its answer would require 16 earth years to do the round trip even if they traveled at the speed of light. . . . Furthermore, parapsychologists claim that there is no diminution in signal strength with distance, despite the Inverse Square Law, another principle of physics that requires a diminution of a force by a factor equal to the square of the distance from its source.

Ortiz de Montellano, *supra* note 43, at 49.

120. Edwards v. Aguillard, 482 U.S. 578, 587 (1987).

121. *See supra* notes 70-79 and accompanying text.

inherent racial superiority that have gained wide notoriety: the Afrocentric theory of melanism[122] and the theory of modern eugenics most prominently articulated by Charles Murray and Richard Herrnstein in their book *The Bell Curve*.[123] The Afrocentric theory of melanism is already being taught in some public schools, notably those of Atlanta and Detroit, and Fort Lauderdale.[124] Although I am not aware of any reported instance of "modern eugenics" being taught in the public schools, the extraordinary attention[125] accorded to the subject resulting from the 1994 publication of *The Bell Curve* suggests that it is not too soon to raise the question of whether the teaching of this subject as part of a high school biology or social studies class would offend the Constitution.

It is important to make clear at the outset of this discussion that this standard, to be consistent with the speech protective principles at the heart of the First Amendment, must be exceedingly narrow.[126] Thus, the standard seeks to exclude from the public school curriculum only the teaching of a theory of inherent racial superiority as fact. This proposed standard does not touch public higher education, where "inculcating

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122. *See supra* notes 47-51 and accompanying text.

123. *See* THE BELL CURVE, *supra* note 50.

124. *See* Jaroff, *supra* note 47, at 74-75.

125. *See, e.g.*, *The 'Bell Curve' Agenda*, N.Y. TIMES, Oct. 24, 1994, at A16; Jason DeParle, *Daring Research or 'Social Science Pornography?'*, N.Y. TIMES, Oct. 9, 1994, § 6, at 48; Richard Lacayo, *For Whom the Bell Curves*, TIME, Oct. 24, 1994, at 66; Charles Lane, *The Tainted Sources of 'The Bell Curve,'* N.Y. REV. OF BOOKS, Dec. 1, 1994, at 14; *Race & I.Q.*, THE NEW REP., Oct. 31, 1994, at 4-37 (a compendium of critical responses to THE BELL CURVE, including pieces by Stanley Crouch, Henry Louis Gates, Jr., Nathan Glazer, Andrew Hacker, Ann Hulbert, John Judis, Randall Kennedy, Charles Lane, Michael Lind, Walter Lippman, Glenn Loury, Richard Nisbett, Hugh Pearson, Martin Peretz, Dante Ramos, Jeffrey Rosen, Alexander Star, Leon Wieseltier and Alan Wolfe); James Ridgeway, *Behind the Curve: Tracing the Roots of Charles Murray's Race Management*, THE VILLAGE VOICE, Nov. 15, 1994, at 15-16.

126. If the proposed standard were the result of a statute and not grounded in the Constitution, it would be subject to the overbreadth and vagueness doctrines of the First Amendment, which generally require that a statute be drawn with "narrow specificity," NAACP v. Button, 371 U.S. 415, 433 (1963), so as not to chill constitutionally protected speech. The proposed standard, which is grounded in the Fourteenth Amendment, does not *necessarily* implicate the First Amendment's overbreadth and vagueness doctrines in that a court could simply conclude that the principles underlying the Fourteenth Amendment take precedence over those underlying the First Amendment. However, I will argue that the proposed standard takes full account of countervailing First Amendment principles. *See infra* notes 132, 150-63, 166-67, and accompanying text.

fundamental values"[127] is *not* the overriding educational mission and, more importantly, the scope of educators' academic freedom is far broader than that traditionally accorded teachers of elementary and secondary schools.[128] The proposed standard also does not encompass a public school teacher's out-of-class writings, speeches or political association.[129] The standard does not seek to implicate a teacher's mere use of a racial epithet even if motivated by racial animus, although such use of an epithet may be subject to sanction on other grounds.[130] Finally, the standard does not necessarily preclude any curricular treatment or classroom discussion of doctrines of inherent racial superiority, as long as the curriculum or the teacher does not maintain that such doctrines are to be accepted as "fact."[131]

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127. Ambach v. Norwick, 441 U.S. 68, 77 (1979). The inculcation of fundamental values is the object of elementary and secondary schools, not of higher education.

128. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967) (need for open-ended inquiry in university renders unconstitutional statute that prohibits state university employment of Communist Party members); Sweezy v. New Hampshire, 354 U.S. 234, 235 (1957) (need for open-ended inquiry in university renders unconstitutional statute requiring oath of state loyalty). Gregory A. Clarick, *Public School Teachers and The First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 718 n.151 (1990) ("The Supreme Court has focused on the need for open-ended inquiry at the *university level* because it sees such toleration as the fount of valuable scholarship.") (emphasis added). By contrast, the Court has never applied this rationale of academic freedom to elementary and secondary schools.

129. *See, e.g.*, Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992) (upholding First Amendment right of a white university professor to express racist views against blacks in published writings); Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 565 (1968) (upholding First Amendment right of a teacher to criticize the administrative and budgetary practices of his public employer in an editorial published in a local newspaper).

130. Words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not constitutionally protected. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Even if a teacher directed an abusive remark to a student that would not be considered a "fighting word" within the meaning of *Chaplinsky*, school administrators should be able to discipline a teacher who makes this type of remark, especially if clearly irrelevant to the subject matter of instruction. *See, e.g.*, Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) (holding that a college teacher had no First Amendment right to use profane language in the classroom, because it "constituted a deliberate superfluous attack on a 'captive audience' with no academic purpose or justification.").

131. In formulating this standard, I considered and rejected a broader standard which would have proscribed government advocacy or endorsement of a theory of racial supremacy in the public schools. In my view, this broader standard would have raised significant vagueness and overbreadth concerns, see *supra* note 128, and might thereby chill a teacher's treatment of difficult and controversial subject matter. For example, a

1. Sources of Authority

In fashioning a constitutional standard applicable to this difficult and complex subject matter, it is appropriate to begin by noting the inapplicability of my earlier proposed constitutional standard grounded in the First Amendment and the Due Process Clause: that is, that the Constitution prohibits the state from teaching curricular material which the state asserts is true but which, in fact, is demonstrably false. For a variety of scientific and epistemological reasons, a standard of

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teacher subject to the broader standard might be reluctant to even mention various aspects of slavery, the Jim Crow period, the Ku Klux Klan or other white supremacist movements for fear that mere mention or discussion could be construed as advocacy or endorsement. By contrast, the standard I adopt, proscribing only the teaching of theories of inherent racial superiority as "fact," is narrowly tailored and abridges no more speech than necessary. For purposes of the standard, the term "inherent" means a genetic or biological basis for a particular alleged racial characteristic. Thus, a teacher who compares or contrasts social or cultural traditions associated with various racial or ethnic groups would not, without more, implicate the standard. Similarly, a teacher who presents comparative social science data correlated by race or ethnicity would not, without more, implicate the standard. An express reference to the genetic or biological basis for the alleged difference would be necessary to bring the standard into play, and even then the teacher would need to expressly characterize the genetic or biological basis as "fact." By a teacher's express characterization of a theory of inherent racial superiority as "fact," I mean a teacher's unqualified statement that the theory is true as well as the teacher's omission of any substantial reference to competing claims made by other relevant scientific theories that enjoy some degree of support within the scientific community. For a more detailed discussion of the standard as applied to various types of curricular material, see *infra* notes 164-179 and accompanying text.

I recognize that many subjects are routinely taught in the public schools and presented as "facts" even if they do not meet the standard that I would apply in the special case of theories of inherent racial superiority. For example, many conclusions of social scientists may be presented as "fact" (especially in the less academically rigorous environment of elementary and secondary schools as distinguished from higher education) even if such conclusions represent only the best available thinking on the subject and are not empirically proven (if that were even possible) or conclusions in which statistical uncertainty is less than (say) five percent. Yet presentation of these social science conclusions as "fact" does not necessarily offend legal, moral, or educational norms. For an analogous treatment of the issue of certainty of scientific knowledge in a different context, see FED. R. EVID. 702 and the standard governing the admission in evidence of scientific knowledge set forth in Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2793-96 (1993) (holding that "general acceptance" by the scientific community is not a necessary precondition to the admissibility of scientific evidence in the federal courts). *See also supra* notes 112-17 and accompanying text. However, in the special case of theories of inherent racial superiority, I argue that the Constitution requires a higher "burden of proof" before such material may be included in the public school curriculum.

demonstrable falsity does not generally lend itself to the subject matter under consideration. Theories of inherent racial superiority—whether IQ-based theories claiming white superiority or melanin theories claiming black superiority—cannot be said to be demonstrably true or demonstrably false in the same way that a claim concerning a recent historical event or observable scientific phenomenon can be said to be demonstrably true or false. The lack of certainty associated with theories of inherent racial superiority arises in part because our current state of scientific knowledge does not permit us to determine what proportion of intelligence is due to heredity and what proportion is due to environmental factors.[132] Moreover, with respect to theories of racial superiority based upon the IQ measure of intelligence, such theories assume that there is such a thing as quantifiable general intelligence; that IQ tests measure it accurately and objectively; and that it is largely genetic, highly resistent to change and unevenly distributed among the races.[133] It may be that claims concerning neuroscience, genetics, intelligence and population groups will *never* be subject to a high degree of epistemological certainty because of the number of extrinsic variables, the difficulties of measurement and the problems of defining population groups.[134] For all of these reasons, the possibility of showing that a particular theory of inherent racial superiority is not merely false, but demonstrably false, is remote. Thus, my earlier proposed standard that prohibits the state from teaching curricular material which is demonstrably false cannot be expected to be generally applicable to this subject matter.

Although the teaching of a theory of inherent racial superiority as fact in the public schools probably does not violate the substantive due process principles of *Meyer v. Nebraska*[135] or the First Amendment right to receive information,[136] such teaching nevertheless is inconsistent with other key constitutional provisions. First, such teaching violates the Equal Protection Clause in that the government through its curriculum is quite

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132. The authors of *The Bell Curve* concede this point, but maintain that the genetic component of intelligence is sufficiently important to affect an individual's life prospects independent of environmental factors. *See* THE BELL CURVE, *supra* note 50, at 311-15.

133. *See* GOULD, *supra* note 50, at 146-233.

134. *Id.* at 322-23; *see* WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 269-71 (1994). Because my purpose is only to show that theories of inherent racial superiority are not demonstrably true or false, and that the essential validity or non-validity of such theories are not subject to any overwhelming scientific consensus, it is unnecessary to assess the scientific basis, if any, of each assumption underlying the claims made by these theories.

135. 262 U.S. 390 (1923); *see supra* notes 89-111 and accompanying text.

136. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion); *see also supra* notes 71-98 and accompanying text.

literally making invidious race-based classifications in the absence of a compelling state interest.[137] Alternatively, even if the mere act of teaching theories of racial superiority in the public schools is not *itself* an act of governmental race-based discrimination, it can be understood as a government action which has a "significant tendency" to promote private discrimination based upon race in violation of the Equal Protection Clause.[138] Finally, the teaching of racial superiority can be understood as violating a central purpose of public education *itself*, which the Supreme Court has accorded a constitutional dimension.[139]

a. The Equal Protection Clause

The teaching of a theory of racial superiority as fact in the public schools can be fairly characterized as a race-based classification by government, which is generally forbidden by the Equal Protection Clause,[140] unless such an act can be supported by a compelling state interest.[141] Moreover, the prevention of racial discrimination in education is a special concern of the Equal Protection Clause,[142] and the

137. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); *see also infra* notes 141-49 and accompanying text.

138. Norwood v. Harrison, 413 U.S. 455, 466 (1973); *see infra* note 149.

139. *See infra* notes 142-47 and accompanying text.

140. *See Korematsu*, 323 U.S. at 216.

141. I would argue that in this context a compelling state interest would arise only if a theory of inherent racial superiority were shown to be demonstrably true or supported by an overwhelming consensus of the scientific community. In that event, the compelling state interest would be the "truth" of the theory, and, under those circumstances, the teaching of the theory in the public schools would be constitutionally permissible. However, as I noted earlier, the current state of scientific knowledge on this subject provides scant support for any theory of inherent racial superiority and, moreover, the subject matter itself resists and probably precludes a high degree of epistemological certainty at any time in the future because of the number of extrinsic variables, the difficulties of measurement and the problems of defining population groups. *See supra* text accompanying notes 134-36.

142. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983) ("[R]acial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."). In fact, the Supreme Court determined in a rare instance in which it was compelled to rank constitutional obligations, that the government's duty to counter racism in education is even more important than the government's duty to disassociate itself from religion in education. Thus, the Equal Protection Clause prohibits the government from loaning textbooks to racially discriminating private schools but not to private religious schools. *Compare Norwood*, 431 U.S. at 471 *with* Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).

proposed proscription of the teaching of racial superiority as fact in the public schools is a necessary and appropriate extension of that concern. The Supreme Court's decision in *Brown v. Board of Education*,[143] narrowly construed, may stand only for the unconstitutionality of state-sponsored racially segregated public schools, but it is worth recalling that the decision was premised, to a great extent, in the expressive element of the forbidden conduct. The "message" of racial segregation was white supremacy and black inferiority, and it was this message that led the Court to conclude that separate schools were inherently unequal and violative of the Equal Protection Clause.[144] If this implicit message expressed by the

143. 347 U.S. 483 (1954).

144. "To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of *inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494 (emphasis added). The State's teaching of racial superiority as fact would presumably generate a feeling of inferiority to the disfavored race in a much more direct and literal way. *See also* Loving v. Virginia, 388 U.S. 1, 7 (1967) (striking down state miscegenation statute on equal protection grounds in part because the legislative purpose in enacting such statutes was "an *endorsement* of the doctrine of 'White Supremacy'") (emphasis added). For further discussion of *Brown*'s antidiscrimination principle and its close connection to the expressive element of *de jure* racial segregation, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-44 (1990). Professor Lawrence states: "*Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the notion that black children are an untouchable caste, unfit to be educated with white children. Segregation serves its purpose by conveying an idea . . . . Therefore, *Brown* may be read as regulating the content of racist speech [in the sphere of public education]." *Id.* at 439-40. Professor Lawrence's theory of *Brown* is fundamentally sound, but his application of the theory to "racist speech" by students and faculty in public universities is dangerously overbroad. *Id.*, at 449-57. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990).

It might be argued that *Brown* supports a standard that prohibits teaching theories of inherent racial superiority as fact only when the theory disfavors African-Americans. But even teaching a theory that the black race is genetically endowed with certain superior mental and cognitive abilities relative to other races (for example, the Afrocentric theory of melanism) could be said to offend a major premise of *Brown* itself, that is, *Brown*'s view of education as a "foundation of good citizenship" and as "a principal instrument in awakening the child to cultural values." *Brown*, 347 U.S. at 493. These educational purposes are directly undercut by the State teaching a theory of inherent racial superiority as fact, regardless of which race is favored or disfavored. *See infra* notes 158-63 and accompanying text.

Moreover, the selective proscription of theories of inherent racial superiority based upon their content (and keeping in mind that these theories generally can be said to be neither demonstrably true nor false) would also offend the First Amendment, assuming that the speech in question can be characterized as private speech (for example, teachers' speech, which enjoys some degree of First Amendment protection notwithstanding

segregated schools of, for example, Topeka, Kansas in 1954 had also been made explicit through the adoption of curriculum that advocated white supremacy or other racist doctrine, it would be hard to imagine how such curriculum would not have been struck down by the *Brown* Court without so much as changing a word of the Court's opinion as written.

Even if one chooses not to accept this concededly expansive interpretation of *Brown*, it would be difficult to avoid the conclusion that the Equal Protection Clause's clear proscription of government conduct supporting invidious racial discrimination does not also implicate *government speech*[145] supporting the same forbidden purpose.[146] By

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teachers' status as government employees). *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992) (holding that government may proscribe certain categories of speech but, in doing so, may not engage in content discrimination *within* the category of proscribable speech).

145. The Supreme Court has expressly recognized a category of speech it calls "government speech" and has determined that this category lies wholly outside of the First Amendment. *See* Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). Although *Mergens* arose in the context of the First Amendment's religious clauses, there is no reason to believe that the Court's simple classification of speech as either governmental or private does not apply in other contexts as well. Professor Nadine Strossen, in discussing the constitutional issues raised by campus "hate speech" codes, would preserve the *Mergens* classification of speech and recalibrate the countervailing constitutional interests as follows: "Paraphrasing [the *Mergens*] language and applying it to the campus hate speech context, one could say, 'There is a crucial difference between *government* speech endorsing racism, which the Equal Protection Clause forbids, and *private* speech endorsing racism, which the Free Speech Clause protects.'". Strossen, *supra* note 145, at 545. Professor Strossen also acknowledges, however, that her general formulation as applied to the speech of public university faculty members would require further modification in order to recognize their free speech rights notwithstanding their status as government employees. *Id.* at 506 n.103.

146. It is true that the Supreme Court has never expressly held that the Equal Protection Clause is applicable to government speech. However, the Court has made the conceptual leap from the proscription of conduct to the proscription of speech in other contexts, including those in which the First Amendment is more clearly and directly applicable. For example, the Court has held, in an entirely different legal context, that the government may proscribe private discrimination in the workplace even though such discrimination contains elements of speech as well as conduct. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (recognizing Title VII claim based on sexual harassment causing a hostile workplace environment with no consideration of First Amendment issues). The fact that the proposed standard proscribing the teaching of inherent racial superiority as fact has a constitutional rather than statutory basis and implicates government rather than private action would seem to provide an even stronger foundation upon which this standard may implicate certain forms of speech as well as

analogy, First Amendment jurisprudence teaches speech and conduct are part of a continuum of action.[147] Thus, in the same way that First Amendment jurisprudence is centered on the protection of speech but may on occasion extend its protection to conduct when such conduct is imbued with an expressive element; so Fourteenth Amendment jurisprudence that is centered on the proscription of discriminatory governmental conduct may extend its proscription to certain forms of speech (that is, discriminatory speech attributable to the government itself) when the speech is imbued with an expressive element identical to that conveyed by the prohibited conduct. It would be logically inconsistent for a court to conclude otherwise.[148]

b. The First Amendment

Of course, the recognition of a Fourteenth Amendment right to be free of certain racially discriminatory government speech may lead inevitably to a conflict between the First and Fourteenth Amendments in individual cases.[149] This is so, even though, at least in theory, *government* speech

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conduct. If teacher in-class speech is understood as private speech and not government speech, *Meritor* and other Title VII decisions are even more applicable to the legal context under consideration. *See infra* note 153 and accompanying text.

147. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (burning of an American flag is symbolic speech); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing of a black armband by public school students is symbolic speech); United States v. O'Brien, 391 U.S. 367 (1968) (burning of a draft card is symbolic speech).

148. Even if it could be argued that teaching a theory of inherent racial superiority as fact is neither government conduct nor speech *amounting to a race-based classification* proscribed by the Equal Protection Clause, such teaching could be viewed alternately as a government action having "significant tendency" to promote private discrimination based upon race and therefore would violate the Equal Protection Clause on this ground alone. *See* Norwood v. Harrison, 413 U.S. 455, 466 (1973). In *Norwood*, the Supreme Court held a government program was unconstitutional because it aided private schools which racially discriminated. The Court emphasized that the government may not indirectly promote racial discrimination even if the government itself is not a party to such discrimination. *See id.* The state's teaching of theories of inherent racial superiority as fact would undoubtedly promote private acts of racial discrimination.

149. The fact that the proposed standard may, in particular cases, require a court to balance the conflicting requirements of the First and Fourteenth Amendments is not necessarily fatal to its establishment. On the contrary, a court may simply decide that the requirements of the Fourteenth Amendment take precedence over those of the First (as distinguished from a situation in which there is a conflict between the First Amendment and a statute, in which a court is required to conclude that the First Amendment takes precedence over the statute, unless the latter is in furtherance of a compelling state interest).

(that is, speech attributed to government itself as distinct from speech attributed to a government employee such as a teacher, who *may* retain a right of free speech guaranteed by the First Amendment independent of, or even arising out of, the employer-employee relationship) lies wholly outside the domain of the First Amendment.[150] But, as a practical matter, one would expect that a court's determination of the threshold question of attribution of the action to the government will turn on the nature of the action: if the action is conduct rather than speech, the court will more likely attribute the action to the government because many types of government conduct can be clearly understood as the product of official consideration and ratification. Conversely, if the action is primarily speech, in the sense of the spoken word, such action by definition originates in an individual who may or may not be an agent of the state. Moreover, even if the individual may be regarded as an agent of the state for *some* purposes, he may not necessarily be regarded as an agent of the state for purposes of the particular speech under consideration.[151] Speech by its very nature tends to be a spontaneous act of an individual and, as such, is often more difficult to be characterized as the product of government action or ratification.

The foregoing considerations apply with special force to the public education setting, in particular classroom teaching, where the concept of academic freedom has been enshrined in the First Amendment, notwithstanding the fact that a public school teacher in her official capacity is undoubtedly a "state actor" for purposes of the Fourteenth Amendment. In this setting a direct conflict of constitutional imperatives is unavoidable. For this reason, the application of the proposed standard to teacher's in-class speech merits careful consideration.

(1) The Special Problem of the Abridgement of Teachers' In-Class Speech

Although the Supreme Court has never directly addressed the extent of the free speech rights of public school teachers in the classroom,[152]

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150. *See supra* note 129.

151. For a discussion of this point as it applies to public school teachers, see *infra* note 153 and accompanying text.

152. In the absence of clear Supreme Court authority with respect to the free speech rights of public school teachers in the classroom, the lower federal courts have adopted broadly inconsistent standards that draw upon various strands of First Amendment jurisprudence, principally the right of teachers and public employees generally to speak on "matters of public concern," the limited free speech rights of public school *students* in the classroom and other school-sponsored activities, and conceptions of educators' academic freedom developed in contexts other than the public school classroom. These

strands of First Amendment jurisprudence can, at best, be applied by analogy to the qualitatively different context of the classroom and, as will be shown, the process of analogy falls short of defining or resolving the unique set of constitutional issues arising from a public school teacher's in-class speech.

1. The public employee free speech standard

In Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968), the Supreme Court upheld the First Amendment right of a teacher to criticize the administrative and budgetary practices of his public employer in a letter to the editor of a local newspaper. In deciding that the teacher could not be sanctioned, the Court balanced the interest of the employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The *Pickering* test, which also applies to public employees other than teachers, can be understood as generally protecting the expression of public employees when such expression is made outside the scope of employment. It can also be understood as protecting the expression of public employees made within the scope of employment, but under much narrower circumstances, since expression in this context may impair the efficiency of government operations. *Id.* Subsequently, the Court has made clear that public employees with a policy-making or public contact role bear a greater "burden of caution . . . with respect to the words they speak . . . ." Rankin v. McPherson, 483 U.S. 378, 390-91 (1987). The Court has not yet distinguished between the personal and official speech of policy-making and public contact employees, but it can be presumed that the official speech of a public employee in direct contact with members of the public would be afforded little, if any, protection, at least under *Pickering* and its progeny. Thus, the *Pickering* test, established in a decision that upheld a teacher's out-of-class private speech, is largely irrelevant to the alternative context of in-class speech.

The Court's most recent pronouncement in the area of First Amendment rights of public employees may appear at first glance to be relevant to the issue under consideration in that the case implicates the free speech rights of a professor at a public university. *See* Jeffries v. Harleston, 21 F.3d 1238, 1242 (2d Cir. 1994) (holding that "hateful and repugnant" remarks made as part of a speech by Professor Leonard Jeffries of the City University of New York were entitled to some First Amendment protection), *vacated and remanded*, 115 S. Ct. 503 (1994) (mem.). However, the case arose solely from Professor Jeffries's *out-of-classroom speech.* Moreover, Jeffries's First Amendment claim was based on the relation of the speech to the university's subsequent decision to remove Jeffries as a department chairman, a disciplinary action which, in any event, had no effect on Jeffries's classroom duties or expression. *See* Jeffries v. Harleston, 52 F.3d 9, 14 (2d Cir. 1995). The Supreme Court's decision, issued without an opinion, vacated the Second Circuit's decision upholding the free speech rights of Jeffries and affirming the trial court's reinstatement of Jeffries as department chairman. *Harleston*, 115 S.Ct. at 503. The Court remanded the case "for further consideration in light of Waters v. Churchill, 114 S. Ct. 1878 (1994)." *Id.* at 503. The Second Circuit, on remand, reversed its earlier decision and entered judgment for the university defendants. *See Harleston*, 52 F.3d at 10 (holding that, under *Waters*, the First Amendment did not prevent the university from removing Jeffries as a department chairman because the action was motivated by "a reasonable belief" that the speech would cause disruption of university operations). In reaching its conclusion, however,

the Second Circuit noted that Jeffries's academic freedom was not at issue because the university's action did not affect his status as a tenured professor, and that the university "ha[s] not sought to silence him, or otherwise limit his access to the 'marketplace of ideas' in the classroom." *Id.* at 14-15 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). The Second Circuit's decision suggests, then, that classroom speech is subject to an entirely different standard than *Pickering*. In sum, the Supreme Court decisions generally affecting the First Amendment rights of public employees do not shed much light on the special First Amendment concerns, including academic freedom, that may affect the classroom speech of public school teachers and university professors.

2. The public school student free speech standard

In Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), the Supreme Court held that educational administrators may regulate student speech in school sponsored activities as long as the administrators' "actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Although the decision arose from editorial restrictions imposed by school administrators on the school newspaper, the *Hazlewood* Court made clear the standard should also apply to other school-sponsored expressive activities that "bear the imprimatur of the school." *Id.* at 271. In reaching this conclusion, the Court relied on the public forum doctrine, and reasoned that the student newspaper was not a limited public forum that by policy or practice was intended for indiscriminate use by students, but was rather a "supervised learning experience for journalism students." *Id.* at 270. Applying the Court's public forum analysis to classroom instruction, the very essence of a supervised learning experience, it is impossible to avoid the conclusion that educators may restrict student free speech rights in the classroom when such restrictions are reasonably related to legitimate pedagogical concerns. On the other hand, *Hazlewood* does not directly address the question of whether educational administrators may restrict *teachers'* free speech rights in the classroom or in other educational settings. On its face this question would appear to be different in many significant respects from the question decided in *Hazlewood*. Nevertheless, many lower federal courts have applied the *Hazlewood* standard to cases implicating the free speech rights of teachers. *See, e.g.*, Silva v. University of New Hampshire, 888 F. Supp. 293, 313 (D.N.H. 1994); Bishop v. Aronov, 926 F.2d 1066, 1073 (11th Cir. 1991); Roberts v. Madigan, 921 F.2d 1047, 1056-57 (10th Cir. 1990). Because teachers' free speech interests and their legal relation to a school administration are so dramatically different from those of students, the *Hazlewood* standard, standing alone, cannot adequately address the constitutional issues implicated in the regulation of teachers' in-class speech.

3. General conceptions of academic freedom grounded in the First Amendment

The Supreme Court has recognized a broad First Amendment right of academic freedom, but such recognition has arisen exclusively in contexts other than classroom teaching. In *dicta* the Court has articulated a sweeping conception of academic freedom that seemingly embraces the activities of educators inside and outside the classroom. *See, e.g.*, Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . ."); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (citations omitted) (teachers require the utmost "'free play of the spirit'"); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)

it has in *dicta* articulated a sweeping conception of academic freedom that seemingly embraces the activities of educators inside and outside the classroom.[153] If one gives the fullest possible reading to this *dicta*, it may appear that the application of the proposed standard to a public school teacher's in-class speech would pose a difficult and unavoidable conflict of constitutional imperatives.

In fact, the proposed standard as applied to a public school teacher's in-class speech is consistent with the principles of the First Amendment in that the standard is narrowly tailored and abridges no more speech than necessary. Thus, the standard respects fully the First Amendment principles that disfavor vagueness and overbreadth. To the extent that the standard could, in a particular case, be construed as abridging the speech of a teacher, such abridgement would be in furtherance of the compelling

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("Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate . . . ."). The lower federal courts have on occasion relied on this *dicta* in deciding cases implicating teachers' free speech rights in the classroom. *See, e.g.*, Dube v. State Univ. of N.Y., 900 F.2d 587, 597-98 (2d Cir. 1990) (applying *dictum* of *Shelton* and holding that generalized First Amendment conception of academic freedom extends to a professor of a state university); Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass. 1971) (applying *dictum* of *Keyishian* and holding that generalized First Amendment conception of academic freedom extends to secondary school teacher), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala 1970) (same). While this *dicta* does make clear that a general conception of academic freedom is grounded in the First Amendment, it provides little if any practical guidance as to the circumstances under which a teacher's academic freedom should give way to the legitimate conflicting interests of educational administrators (who, after all, are *also* vested with academic freedom grounded in the First Amendment) or indeed of conflicting considerations of a constitutional order. *See Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

In sum, the First Amendment status of teachers' in-class speech is complex and unsettled. Some commentators have proposed new constitutional standards that would help resolve the ambiguities and provide a coherent balancing of the often conflicting interests of administrators, teachers, students and the public. *See, e.g.*, Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990); William H. Daughtrey, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. RICH. L. REV. 233 (1990); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990).

In any event, the proposed standard proscribing teaching a theory of inherent racial superiority as fact is narrowly tailored and would abridge no more speech than is necessary. Thus, the standard would respect the academic freedom of teachers in the classroom and elsewhere. *See supra* notes 127-32 and accompanying text.

153. *See supra* note 153.

state interest of racial non-discrimination,[154] and thus could be upheld under a strict First Amendment reading. The fact that the standard embodies a principle or power of the Constitution itself is the strongest possible evidence that it furthers a compelling state interest[155] for purposes of the First Amendment. In sum, the standard is responsive to the concerns of the First Amendment and has been fashioned in such a way as to minimize the potential conflict between the First and Fourteenth Amendments.

(2) Additional First Amendment Considerations: The Proposed Standard as a Bulwark to the Supreme Court's Conception of Public Education as an "Assimilative Force" of Constitutional Dimension

The Supreme Court has recognized "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests. . . . [P]ublic school teachers . . . perform[] a task 'that goes to the heart of representative government'"[156] by means of "inculcating fundamental values necessary to the maintenance of a democratic political system . . . ."[157] These observations suggest an explicit link between the role and purpose of public schools and the important First Amendment goals of representation reinforcement and the integrity of the democratic political process.[158]

Then too, public schools promote other constitutional goals that can be understood as arising from principles at the core of both the First and Fourteenth Amendments. In particular, "public schools [are] an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground."[159]

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154. "[R]acial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

155. *See* Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (upholding compulsory exclusion of persons of Japanese ancestry as arising from the constitutional war power of Congress and the executive branch).

156. Ambach v. Norwick, 441 U.S. 68, 75-76 (1979) (quoting Sugarman v. Douball, 413 U.S. 634, 647 (1973)).

157. *Id.* at 77.

158. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

159. *Ambach*, 441 U.S. at 77. *See also* Brown v. Board of Educ., 347 U.S. 483, 493 ("[Education] is the very foundation of good citizenship . . . a principal instrument in awakening the child to cultural values . . . . ").

Accordingly, "a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught."[160] Surely, the teaching of a theory of inherent racial superiority as fact is directly contrary to this understanding of the special role and purpose of the public schools in the constitutional order.[161]

2. The Standard as Applied

In the foregoing discussion I have tried to make clear that a constitutional standard prohibiting the teaching of inherent racial superiority as fact is not inconsistent with established First and Fourteenth Amendment principles. In particular I have argued that the constitutional standard is narrowly tailored to achieve a compelling governmental interest—indeed an interest secured by the Fourteenth Amendment itself[162]—and abridges no more speech than necessary.[163] I recognize, though, that there are those who will argue that any regulation of speech in this sensitive area, no matter how narrowly tailored, would carry with it inherent overbreadth[164] and vagueness[165] difficulties, and

160. *Ambach*, 441 U.S. at 80.

161. On the other hand, the Supreme Court also has on occasion expressed a view of public education as a "marketplace of ideas" in which students are "trained through wide exposure to . . . [a] robust exchange of ideas . . . ." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969) (citing Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967)). This conception of the First Amendment and its application to the public schools is significantly different than the application referenced above. *See supra* note 153 and accompanying text.

162. *See supra* notes 141-49 and accompanying text.

163. *See supra* notes 127-32 and accompanying text.

164. An overbroad statute, regulation or other action of the government is "designed to burden or punish activities which are not constitutionally protected, but [the action] includes within its scope activities which are protected by the First Amendment." Hill v. City of Houston, 764 F.2d 1156, 1161 (5th Cir. 1985) (citation omitted); *see* NAACP v. Button, 371 U.S. 415, 432 (1963); Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). Strictly speaking, the overbreadth doctrine does not necessarily apply to my proposed standard, since the standard derives from the Constitution itself. However, I have applied the overbreadth doctrine and other First Amendment principles to the proposed standard in an effort to show its consistency with other constitutional values and to avoid difficult and unresolved jurisprudential issues associated with the ranking of constitutional values.

165. The void-for-vagueness doctrine requires that government action affecting expression, association and other First Amendment rights must be drawn with "narrow specificity" because "[t]he threat of sanctions [against the exercise of these rights] may deter their exercise almost as potently as the actual application of sanctions." *Button*,

consequently would chill vital classroom speech and academic freedom generally. For example, an argument could be advanced that the mere existence of a standard proscribing the teaching of inherent racial superiority as fact may cause a twelfth-grade social studies teacher to avoid any classroom discussion of comparative social practices or customs associated with various racial or ethnic groups for fear that such discussion may implicate issues within the standard. Although this view may appear plausible in the face of a standard that would restrict (however narrowly) the academic freedom of high school teachers in public schools, in fact the extreme narrowness of the standard would permit virtually unfettered classroom discussion. To understand why this is so, it is necessary to examine carefully the standard as applied and, in particular, to recognize that the application of the standard is constrained by the particular meaning that I ascribe to the various qualifying terms employed in the standard.

In proposing a constitutional prohibition against teaching *inherent* racial superiority as fact, I have stressed that "inherent" for my purposes means a genetic or biological basis for a particular alleged racial characteristic.[166] Thus, a teacher who compares or contrasts social or cultural traditions associated with various racial or ethnic groups would not, without more, implicate the standard. Similarly, a teacher who presents comparative social science data correlated by race or ethnicity would not, without more, implicate the standard. An express reference to a genetic or biological basis for the alleged difference would be necessary to bring the standard into play, and even then the teacher would need to expressly characterize the genetic or biological basis as "fact."[167] For example, a teacher who recites the Murray-Herrnstein thesis—that there is a correlation between performance on IQ tests and biological intelligence, and that there is a further correlation between biological intelligence and racial groups[168]—would not necessarily implicate the standard, so long as the teacher does not expressly characterize the Murray-Herrnstein thesis as "fact."[169]

By a teacher's express characterization of a theory of inherent racial superiority as "*fact*," I mean the teacher's unqualified statement that the theory is true as well as the teacher's omission of any substantial reference

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371 U.S. at 433.

166. *See supra* notes 132-35 and accompanying text.

167. See *infra* text accompanying notes 172-75 for the meaning imputed to the term "fact."

168. *See* THE BELL CURVE, *supra* note 50, at 298-315.

169. See *infra* text accompanying notes 172-75 for the meaning imputed to the term "fact."

to competing claims made by other relevant scientific theories that enjoy some degree of support within the scientific community. In formulating this aspect of the standard, I recognize that many scientific theories as taught in the public schools may be presented as "fact" and without qualification even when such theories are subject to considerable dispute within the scientific community.[170] With the exception of the teaching of curricular material which a school board or teacher asserts to be true but in fact is demonstrably false[171] and the teaching of a theory of inherent racial superiority as fact,[172] I do not propose to curtail the authority of school boards or the academic freedom of teachers to present curricular material in any way they deem appropriate, including, for example, the presentation of scientific theories in a simplified manner without reference to competing or inconsistent scientific theories. However, in the special case of teaching theories of inherent racial superiority as "fact," the standard proposed in this section would impose affirmative obligations to teach the subject matter in a particular way (if indeed a school board or public school teacher chooses to teach the subject matter at all). Thus, under the standard, a teacher who elects to refer to the Murray-Herrnstein eugenics theory or the Afrocentric melanist theory may not teach such theories without qualification or discussion of other competing or inconsistent theories. In sum, the standard would do no more than impose a higher degree of academic rigor—a pedagogical form of the "fairness doctrine"[173]—if a school board or public school teacher

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170. *See supra* note 132.

171. *See supra* text accompanying notes 53-122.

172. *See supra* text accompanying notes 123-63.

173. The Fairness Doctrine refers to a former policy of the Federal Communications Commission that imposed an affirmative obligation on broadcast licensees to provide "coverage of vitally important controversial issues of interest in the community served by the licensees and . . . a reasonable opportunity for the presentation of contrasting viewpoints on such issues." Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985). The Supreme Court upheld the Fairness Doctrine as consistent with the requirements of the First Amendment in view of the special characteristics of the broadcasting medium and the need to preserve the medium as a "marketplace of ideas in which truth will ultimately prevail." *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969). Similarly, the Supreme Court has referred to the public school as "peculiarly the marketplace of ideas" in which students are afforded "wide exposure to that robust exchange of ideas which discovers truth . . . . " Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969) (citations omitted).

It is true that the Court's pedagogical theories are mere *dicta* and have never been applied to strike down a one-sided public school curriculum. The proposed standard as applied would do no more than give constitutional force to this *dicta*—that is, to impose a pedagogical fairness doctrine—when a school board or teacher chooses to incorporate

chooses to teach a very limited and well-defended subset of curricular material.

For all of the foregoing reasons, a constitutional standard proscribing the teaching of a theory of inherent racial superiority as fact is narrowly tailored to achieve a compelling governmental interest, and abridges no more speech than necessary. In particular, the standard would not implicate the traditional First Amendment concerns of vagueness and overbreadth, and thus should not chill classroom discussion and academic freedom generally. As such, the standard would strike the proper constitutional balance in an area fraught with constitutional conflict:[174] that is, the standard would remain consistent with speech-protective principles enshrined in the First Amendment while carrying out the equal protection principles that lie at the core of the Fourteenth Amendment.[175]

C. *The Constitution Prohibits the State From Establishing a Schoolwide Ethnocentric Curriculum That Promotes Racial Segregation*[176]

1. Sources of Authority

Several major cities have established schools specially designed to meet the academic and social needs of "at-risk" black students, especially black male students.[177] These schools are organized around curriculum

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theories of inherent racial superiority into the curriculum. In my view, the Equal Protection Clause requires no less than this. *See supra* notes 141-49 and accompanying text.

174. *See supra* notes 150-56 and accompanying text.

175. *See supra* notes 141-49 and accompanying text.

176. This section is derived in part from my earlier article, Steven Siegel, *Race, Education, and the Equal Protection Clause in the 1990s: The Meaning of* Brown v. Board of Education *Re-examined In Light of Milwaukee's Schools of African American Immersion*, 74 MARQ. L. REV. 501 (1991). The earlier article was a relatively brief and balanced treatment of arguments on both sides of the constitutional issue of separate Afrocentric public schools. In the years since the completion of my earlier article and after much thought, I have adopted the position articulated in this section. In contrast to my earlier article, this section presents a considerably more detailed discussion of the underlying values and the constitutional issues at stake in the Afrocentric public school controversy.

177. *See supra* note 40 and accompanying text (discussing the establishment of Afrocentric schools in Milwaukee, Seattle, and Detroit).

that emphasizes black history and culture.[178] Such schoolwide Afrocentric curriculum raises the question of whether these educational programs—however well-intentioned—represent a new form of unconstitutional state-sponsored segregation within the meaning of *Brown v. Board of Education*[179] and its progeny.[180]

In applying *Brown* to a contemporary Afrocentric public school, the threshold question is whether or not segregation of black students has actually taken place under state sponsorship.[181] While Afrocentric

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178. For example, the elementary school curriculum of Milwaukee's Schools of African American Immersion incorporates the traditional subjects of vocabulary, math, and music, "but Africa is always in the foreground as their point of reference." Dennis Kelly, *Afrocentric Studies: A Concept Rooted in Controversy*, USA TODAY, Jan. 28, 1992, at 1D, 2D. The Principal of one of the Milwaukee schools describes the school's educational mission as follows:

> [W]e have children out there who are confused about who they are, who think black is ugly. But you expect them to rise up out of an educational system run by white people. How can they do that? They have to feel good about themselves. . . . Our basic focus is on having children see themselves in the curriculum.

Id. (statement of Principal Josephine Mosley).

179. 347 U.S. 483 (1954).

180. In the five years since Milwaukee opened what was apparently the nation's first Afrocentric school, there has been no reported litigation on whether this type of public school represents unconstitutional state-sponsored racial segregation in public schools. However, Detroit's Afrocentric schools—officially characterized as schools aimed at meeting the special needs of at-risk black males—have been the subject of litigation solely concerned with the issue of gender discrimination. *See* Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) (enjoining school board from opening schools as all-male schools). The school board subsequently agreed to admit girls to the schools. *See Detroit Board Agrees to Let Girls Attend Male-Only Academies*, SCH. L. NEWS, Aug. 29, 1991, at 5. The issue of gender discrimination in the public schools is outside the scope of this article. Also excluded from discussion is the applicability of statutory remedies for racial and gender discrimination in the public schools pursuant to Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*

181. This question is rarely encountered in contemporary desegregation litigation. Most such litigation of the past 25 years has concerned school districts that were subject to *de jure* racial segregation prior to 1954 and, as a result of the *Brown* decisions, became subject to continuing federal judicial supervision necessary to oversee the desegregation remedy. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*) (holding unconstitutional state-sponsored segregation of public schools); Brown v. Board of Educ., 349 U.S. 294, 299-300 (1955) (*Brown II*) (authorizing the federal district courts to fashion and enforce desegregation remedies consistent with the principles of *Brown I* and *Brown II*). Thus in contemporary desegregation cases, a district court, as part of its continuing supervisory responsibility, typically is required to assess whether a school district has made progress toward the elimination of "vestiges" of the *de jure* dual school system. Freeman v. Pitts, 112 S. Ct. 1430, 1445-46 (1992). This

schools do not constitute *de jure* segregation of the type most clearly implicated in *Brown*, subsequent Supreme Court school desegregation decisions make it clear that the scope of the constitutional principle recognized in *Brown* is not limited to invalidating and remedying the effects of laws requiring dual public school systems. In *Keyes v. Denver*,[182] the Court considered racially "gerrymandered" school attendance zones and held that the practice was invalid for the same reason and to the same extent as statutorily mandated segregation.[183] In *Griffin v. County School Board*,[184] the Court held that the closing of all public schools in a county was unconstitutional because the Court found such closings were motivated by the state's intention of preventing white and black children from attending the same schools.[185] In other words, the Court has subsequently interpreted the *Brown* holding to mean that the state cannot do indirectly what it is prohibited from doing directly, assuming, of course, that one can show the requisite intent.

When the school officials of Milwaukee and Detroit established Afrocentric schools, these officials made clear that the schools were established to meet the special needs of black students, especially "at-risk" black male students. For example, a black member of the Milwaukee school board who voted in favor of establishing Afrocentric schools explained that the schools would "have an African-American perspective, rather than a European-American perspective . . . [because] [w]e want to give *our* kids a good sense of self, a chance to relate to *their* identity and culture."[186] Similarly, the principal of Detroit's Malcolm X Academy,

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determination may require the court to consider such factors as academic performance of students, school funding, teacher salaries, and extracurricular activities. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038, 2042-43 (1995). A court's consideration of these factors, it is to be stressed, follows from an earlier finding of *de jure* segregation. *See Brown II*, 349 U.S. at 299-300. As such, these factors—and much of contemporary desegregation litigation—are entirely irrelevant to the present question under consideration: that is, do separate Afrocentric schools constitute a new form of unconstitutional *de jure* segregation?

182. 413 U.S. 189 (1973).

183. *Id.* at 201-04. The Court noted that "the practice of building a school . . . to a certain size and in a certain location with conscious knowledge that it would be a segregated school" is evidence that would support a finding of a constitutional violation. *Id.* at 201-02 (citation omitted). In establishing Afrocentric schools, the school officials of Milwaukee and Detroit made clear that these schools were expressly designed to serve the needs of "at-risk" black males. *See infra* notes 187-88 and accompanying text.

184. 377 U.S. 218 (1964).

185. *Id.* at 231.

186. *See* Johnson, *supra* note 37, at 26 (statement of Joyce Mallory, member of Milwaukee Board of Education) (emphasis added).

an Afrocentric school, states, "[t]hese kids will (hear) that as an *African-American child, you* [sic] came from the beginning of civilization."[187] These statements indicate that the assignment of black students to the Afrocentric schools of Milwaukee and Detroit is integral to the educational purpose of the school officials and, as such, amount to a virtual admission by these school officials that these Afrocentric schools are premised on a policy of official racial segregation. In light of the teachings of *Keyes v. Denver*[188] and *Griffin v. County School Board*,[189] a court might well conclude that the Afrocentric schools of Milwaukee and Detroit are unconstitutional.

In defense of their Afrocentric schools, Milwaukee and Detroit school officials have argued that these schools are designed to meet the needs of their existing school populations, which are predominantly black,[190] and, in particular, the special needs of "at-risk" black males.[191] Moreover, these officials have argued that the establishment of Afrocentric schools has resulted in little net change in patterns of racial segregation in education in view of the existing patterns of *de facto* racial segregation in

187. Kelly, *supra* note 180, at 2D (quoting Clifford Watson, principal of Detroit's Malcolm X Academy) (emphasis added).

188. 413 U.S. 189 (1973); *see supra* notes 182-83 and accompanying text.

189. 377 U.S. 218 (1964); *see supra* notes 184-85 and accompanying text.

190. In Milwaukee, total minority enrollment is over 70% of the student population, and in Detroit total minority enrollment is over 90% of the student population. *See* Johnson, *supra* note 37, at 26; Walters, *supra* note 40, at 8.

191. In establishing Afrocentric schools, the Milwaukee school board in 1990 acknowledged that it was acting in response to the special needs of black males, and relied in part on statistics that showed the generally unsatisfactory academic performance of this part of the student population: 2% of black males had either an A or B grade point average, and only 17% had at least a C average. *See* Millicent Lawton, *2 Schools Aimed for Black Males Set in Milwaukee*, EDUC. WEEK, Oct. 10, 1990, at 1, 12. In Detroit, the school official who played a major role in the establishment of Afrocentric schools indicated that the schools are a response to an educational structure that "has not worked" for black males. *See* Walters, *supra* note 40, at 8 (statement of Clifford Watson, Detroit public school principal). Some black educators argue in favor of separate Afrocentric schools because black and white students have different "learning styles" and thus some traditional methods of teaching and testing are inappropriate for black students. *See* Johnson, *supra* note 37, at 26 (statement of Dr. Jawanza Kunjufu). *See also* Felix Boateny, *Combatting Deculturization of the African-American Child in the Public School System in* GOING TO SCHOOL, *supra* note 33, at 73. It is beyond the scope of this article to assess the validity of pedagogical or social science claims made in support of separate Afrocentric schools except to note that they appear to be flatly contradictory to the social science claims that formed a basis for the *Brown I* decision. *See* Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954); *see also infra* notes 216-25 and accompanying text.

housing and neighborhoods.[192] Therefore, it may be argued that Afrocentric schools, at least in these circumstances, are constitutional.

These arguments in favor of segregated schools, however, must fail in the face of the clear constitutional requirement not to engage in practices or policies that directly or indirectly promote racial segregation in education.[193] This is the unequivocal standard set forth in *Keyes*[194] and *Griffin*.[195] There is no recognized exception to this standard whereby a demonstrable attempt to segregate is permitted when it can be shown that the actual *immediate* effect of such segregative intent is likely to be little or no additional segregation. To recognize such an exception would be to invite discriminatory conduct by school districts with student populations that currently are predominantly or exclusively of one race.[196]

Alternatively, those who argue for the constitutionality of Afrocentric schools could conceivably adopt the view that the schools, while concededly established pursuant to a segregative intent, employ a form of segregation which must now be recognized as "benign" and therefore constitutionally permissible. In essence, this view would argue for the recognition of a benign form of racial segregation in education that would, in some sense, parallel the recognition of a benign form of racial discrimination in employment,[197] and admission to higher education[198] (for example, affirmative action). The difficulty with this analogy is that the remedy for racial segregation in education is, and has been since

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192. *See, e.g.*, Johnson, *supra* note 37, at 26 ("In the urban school districts, we're not educating large numbers of white children any more." (statement of Joyce Mallory, Milwaukee school board member)).

193. *See supra* notes 168-71 and accompanying text.

194. 413 U.S. 189, 201-04 (1973); *see supra* note 183 and accompanying text.

195. 377 U.S. 218, 231 (1964); *see supra* note 185 and accompanying text.

196. One could imagine, for example, the school board of a predominantly or exclusively white district in, for instance, Idaho prescribing a curriculum that included teaching a doctrine of white supremacy. Although this state action may offend the Constitution for other reasons, *see supra* notes 127-63 and accompanying text, it might also violate the equal-protection principles recognized in *Brown I* and its progeny if a court found that the school district instituted the curriculum so as to discourage present or prospective minority students from attending schools in the district.

197. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979) (construing Title VII of the Civil Rights Act of 1964 as permitting private, voluntary race-conscious affirmative action plans).

198. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (declaring that graduate school admissions programs which take into account the race of an applicant as one factor among many to effectuate a benign purpose is constitutionally permissible).

Brown, desegregation,[199] not remedial segregation. To recognize remedial segregation as permissible under the Constitution is to render incoherent forty years of school desegregation decisions. Unlike affirmative action in employment and housing, which can be reconciled with a remedial understanding of equal opportunity, remedial segregation cannot square with the fundamental principles underlying *Brown* and its progeny.[200]

Most strikingly, it is the principles articulated in *Brown* itself—that is, the principles that led the Supreme Court to conclude that state-sponsored racially segregated schools are inherently unequal and therefore unconstitutional—that seemingly stand in direct and intractable opposition to the very notion of separate Afrocentric public schools. These principles are first, that racially segregated schools cannot be made equal because of the existence of certain "intangible factors" which have the effect of placing the schools reserved for black students at an inherent disadvantage;[201] second, the critical role of public education in contemporary society,[202] and third, the psychological harm inflicted on black children as a direct result of state-sponsored racial segregation in the schools.[203] These principles, it must be conceded, arose from the Court's consideration of a quite different legal context: an entrenched statutory regime of educational apartheid that existed in seventeen states in which blacks were compelled to attend inferior schools.[204] Yet the *Brown* principles, on their face, do not easily admit to an exception for the contemporary circumstances giving rise to separate Afrocentric schools and, in fact, seem to apply with undiminished power and urgency to those circumstances.[205] Moreover, those who would read in an exception to

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199. *See Brown II*, 349 U.S. at 301 (holding that the remedy for the constitutional violation of state-sponsored racially segregated schools is desegregation, which must occur with "all deliberate speed").

200. *See infra* notes 201-24 and accompanying text. At least one prominent black legal scholar has endorsed a concept of remedial segregation and has termed the decision in *Brown I* "a mistake." Alex M. Johnson, Jr., *Bid Whist, Tonk and* U.S. v. Fordice: *Why Integration Fails African-Americans Again*, 81 CAL L. REV. 1401, 1409 (1993).

201. *Brown I*, 347 U.S. at 493-94.

202. *Id.* at 493.

203. *Id.* at 494-95.

204. *See generally* KLUGER, *supra* note 2.

205. At bottom, *Brown* seems premised on the fact that state-sponsored racially segregated schools set aside for a racial minority group (in particular a racial group consisting of less than 15% of the overall national population and suffering the effects of long-term and continuing oppression) cannot be made equal with the schools set aside for the majority racial group even if the resources available to the minority and majority group schools are equalized. It may be that, in a hypothetical biracial society, one in

the *Brown* principles at this late date would risk doing great violence—even partly overturning—a decision that is universally acknowledged to be of paramount legal, political, and historical importance.[206]

In finding state-sponsored racially segregated schools inherently unequal because of "intangible factors," the *Brown* Court expressly relied on prior decisions arising from racial segregation in higher education.[207] Examples of intangible factors in the context of a law school were set out in *Sweatt v. Painter* decided four years before *Brown*:

> What is more important, the University of Texas Law School possesses to a far greater degree [than the segregated black Texas law school] those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
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> Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner *excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses,*

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which two racial groups were nearly equal with respect to population and socio-economic status, that "separate but equal" public schools could be a workable legal and practical (although not necessarily moral) regime. But even assuming that "separate but equal" public schools were a worthwhile goal, few would argue today that United States society, forty years after *Brown*, approaches the characteristics of the above-described hypothetical society. Thus, *Brown's* central premise remains as vital today as it did in 1954. Viewed in this light, the rationale for establishing separate Afrocentric public schools, even if understood as arising from "benign" rather than "invidious" intent, does not overcome the central premise of *Brown*. Neither by its terms nor by implication, does *Brown's* central premise admit to an exception for "benign" or remedial state-sponsored racial segregation.

206. *See generally* KLUGER, *supra* note 2.

207. *Brown I*, 347 U.S. at 493 (citing Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)).

> *jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.* With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[208]

Put another way, blacks in a white-dominated society will learn better or learn more of what they need to learn in an integrated environment rather than a segregated environment. Such intangible considerations, the Court in *Brown* declared, "apply with added force to children in grade and high schools."[209]

Brown's "intangible consideration" doctrine can be viewed as diametrically opposed to Afrocentric schools in two ways. First, the doctrine appears to embrace the goal of integration, not merely the eradication of laws requiring segregation.[210] Second, the doctrine implicitly endorses a curriculum and an educational setting which prepares the student for full participation in a society dominated by whites.[211] It is difficult to argue that Afrocentric schools will perform the assimilative function implicit in *Brown's* "intangible factors" doctrine.

Moreover, the *Brown* Court goes beyond the "intangible factors" doctrine developed in earlier decisions arising from postsecondary schools[212] and considers the special role of elementary and secondary public education in contemporary American society:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the

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208. *Sweatt*, 339 U.S. at 634 (emphasis added).

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

210. Of course, as subsequent decisions make clear, the racial *integration* of public schools is not a constitutional right, but rather a remedy when it has been determined that public schools were subjected to state-sponsored racial segregation. *See generally Brown II*, 349 U.S. at 301 (holding that the remedy for constitutional violation of state-sponsored racially segregated schools is desegregation, which must occur with "all deliberate speed"). *See also* Deal v. Cincinnati, 369 F.2d 55, 62 (6th Cir. 1966) (stating that the "mere fact of [racial] imbalance alone [in the public schools] is not a deprivation of equality in the absence of discrimination"). As noted above, the Court's discussion of racial integration of public schools in *Brown I* is limited to providing support to the Court's legal conclusion that state-sponsored racially segregated public schools are inherently unequal.

211. *See Brown I*, 347 U.S. 483.

212. *See Sweatt*, 339 U.S. at 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

> performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[213]

This passage assumes great significance with respect to the question of the constitutionality of Afrocentric public schools because it reveals the *Brown* Court's view of the nature and proper function of public school *curriculum.*

Concepts such as "good citizenship," "cultural values" and "normal adjustment to the environment" are, of course, highly subjective, and could conceivably be appropriated by both supporters and opponents of Afrocentric public schools to defend their respective positions. It seems clear, however, that when considered in the narrow context of the Court's earlier discussion of "intangible factors" and in the larger context of *de jure* segregation giving rise to the *Brown* decision, that the Court by these words intended to reinforce its view that the public school curriculum is properly directed toward political, economic and social assimilation. If state-sponsored segregated black schools in 1954 were not well-suited to perform this function, then it may be difficult to make an argument consistent with *Brown* that the separate Afrocentric public schools of today are well-suited to perform this function.[214]

The remaining argument advanced by the *Brown* Court (as to why racially segregated public schools violate the Equal Protection Clause) is that segregated public schools confer a stigma on black children.[215] This argument was based at least in part on contemporary social science research,[216] the validity of which has been the subject of continuing

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213. *Brown I*, 347 U.S. at 493.

214. *Brown I*, read broadly, does not condemn a *multicultural* curriculum, since surely such a curriculum is consistent with overall educational objectives such as "good citizenship," "cultural values" and a child's "normal adjustment to the environment." *See generally* NAT'L HISTORY STANDARDS, *supra* note 14; ONE NATION, *supra* note 14. Rather, it is the establishment of separate public schools for teaching an "ethnocentric" curriculum directed at a particular racial or ethnic group that offends *Brown*.

215. "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494.

216. *Brown I*, 347 U.S. at 494 n.11 (citing K.B. Clark, *Effect Of Prejudice And Discrimination On Personality Development, in* PERSONALITY IN THE MAKING, at 135 (Helen Witmer & Rith Kotinsky eds., 1952); E. FRANKLIN FRAZIER, PH.D., THE NEGRO

controversy and dispute.[217] Today the pedagogical value of Afrocentric schools is also at the center of scholarly controversy.[218] However, it is important to point out that some of the social scientists and educators who *favor* Afrocentric schools base their support on precisely those assumptions and values that would appear to be inimicable to the *Brown* Court. Professor Kunjufu maintains that black children have different "learning styles" than white children.[219] Professor Peek argues that black students must receive a special political education, which is something white society, and presumably white teachers, cannot give them.[220] These views on their face appear to be irreconcilable with the Supreme Court's conclusion that separation of black students results not in educational or psychological advancement of those students but in "a feeling of inferiority as to their status in the community."[221] Not surprisingly, Dr. Kenneth Clark, upon whose social science research the

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IN THE UNITED STATES (1949); PERSONALITY IN THE MAKING (Helen Witmer & Ruth Kotinsky eds., 1952); Theodore Brameld, *Educational Costs*, *in* DISCRIMINATION AND NATIONAL WELFARE (R.M. MacIver ed., 1949); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT'L J. OPINION & ATTITUDE RES. 229 (1949); Max Deutscher and Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948)).

217. *See generally* Ernest Van Den Haag, *Social Science Testimony in the Desegregation Cases — A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978).

218. Spencer H. Holland, Director of the Center for Educating African-American Males at Morgan State University and Jomills H. Braddock, Director of the Center for Research on Effective Schooling for Disadvantaged Students at Johns Hopkins University expressed support for the concept of separate Afrocentric schools at the time when Milwaukee announced its Schools of African-American Immersion. *See* Millicent Lawton, *supra* note 191 at 12; William H. Watkins, *Black Curriculum Orientations: A Preliminary Inquiry*, 63 HARV. EDUC. REV., 321, 331-32 (1993). Other prominent scholars and educators, including Charles V. Willie, a professor of education at Harvard University and Dr. Shirley Thornton, California's Deputy Superintendent of Education, expressed strong opposition to Milwaukee's initiative. Johnson, *supra* note 37, at 26. *See generally* Jacqueline Berrien, *A Civil Liberties Imperative: Promoting Quality Education for* All *African-American Children*, 94 TCHRS. C. REC. 790 (1993) (discussing the effects of separating African-American boys and girls); Patricia A. Jones, *Educating Black Males—Several Solutions, But No Solution*, CRISIS, Oct. 1991, at 12; Joan Morgan, *All-Black Male Classrooms Run Into Resistance*, BLACK ISSUES IN HIGHER EDUC., Jan. 17, 1991, at 1.

219. Johnson, *supra* note 37, at 26 (statement of Dr. Jawanza Kunjufu).

220. Lomotey, *supra* note 38, at 14-15 (statement of Professor Booker Peek).

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

Brown Court expressly relied,[222] has stated his strong opposition to separate Afrocentric schools. In response to the establishment of Milwaukee's Schools of African-American Immersion, Dr. Clark declared, "I didn't expect that anybody would come up with anything like this. This is what I was fighting against. . . . It's a continuation of the whole segregation nonsense."[223] For Dr. Clark, then, separate Afrocentric schools, notwithstanding their arguably remedial and benign purposes, are as much of a constitutional violation as the state-sponsored racially segregated school of Topeka, Kansas in 1954.

In light of the foregoing considerations, the recognition of a principle of "remedial segregation" should be rejected. As noted above, to recognize "remedial segregation" as permissible under the Constitution is necessarily to render incoherent forty years of school desegregation decisions.[224] The fundamental principles underlying the *Brown* decision remain sound and do not warrant reconsideration at this late date. Instead, the *Brown* principles should be reaffirmed by the recognition of a clear constitutional standard prohibiting the states from establishing schoolwide ethnocentric curriculum that promotes racial segregation.

2. The Standard as Applied

The standard as applied does not unduly restrict the authority of a state or a school board to prescribe curriculum covering social, historical, cultural or civic issues. A school board remains free to establish a comprehensive social studies curriculum with a multicultural and multiethnic focus. Such a curriculum is to be encouraged,[225] and indeed is a statutory requirement in some states.[226] Moreover, the standard would not preclude a school board from establishing, as part of the general multicultural curriculum within a school, individual course offerings devoted to the study of particular racial or ethnic groups, languages, or cultures.

The standard is implicated only if a school board dedicates an *entire public school* to a curriculum or a curricular approach centering on the study of a particular racial or ethnic group. Such a school can be fairly characterized as ethnocentric rather than multicultural. The physical

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222. *Id.*

223. Samuel Francis, *At Segregation's Newest Frontier*, WASH. TIMES, Aug. 16, 1991, at F3 (statement of Dr. Kenneth Clark).

224. *See supra* text accompanying notes 200-01.

225. *See, e.g.*, NAT'L HISTORY STANDARDS, *supra* note 14; ONE NATION, *supra* note 14; *see also supra* notes 21-29 and accompanying text.

226. *See supra* note 21.

isolation of an ethnocentric school plainly promotes a form of segregation that is much more profound and far-reaching than a school which offers specialized ethnic studies courses as part of a more general curriculum, even if, in the latter case, the ethnic studies courses promote some *intra*school segregation as a result of student enrollment patterns in the ethnic studies courses.

The fact that the standard implicates interschool but not intraschool segregation arising from a particularized ethnic studies curriculum is not an inconsistency. As noted above, the first form of segregation is qualitatively different than the second. More fundamentally, the standard properly does not implicate specialized ethnic course offerings within a school because of the very nature of formal education itself: schools must organize their educational programs around discrete disciplines and subjects. Absent some actual evidence of an invidious intent to segregate, the foregoing considerations militate against presuming such an intent based solely on the subject matter of *some* course offerings within a school.[227] If anything, a multiplicity of course offerings within a school, including individual courses devoted to particular ethnic or cultural subjects, is evidence of a comprehensive social studies curriculum. State sponsorship of such curriculum promotes a healthy respect and understanding of different cultures and ethnic groups.[228] By contrast, state sponsorship of schoolwide ethnocentric curriculums conveys a very different message, a message of exclusion, isolation and stigma.[229] Such a message was condemned by the Supreme Court in 1954[230] and should be condemned in its present form.

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227. This interpretation of intraschool segregation comports with existing law. *Compare* NAACP v. State of Georgia, 775 F.2d 1403 (11th Cir. 1985) (placement of students in classes by academic ability, without proof of intent to engage in racial segregation, does not violate Equal Protection Clause, Title VI of the Civil Rights Act of 1964 or the Equal Education Opportunity Act) *with* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (invalidating state university regulation mandating physical segregation of black students from other students within classrooms and other school facilities of the University of Oklahoma).

228. *See* NAT'L HISTORY STANDARDS, *supra* note 14; ONE NATION, *supra* note 14; *see also supra* notes 21-29 and accompanying text.

229. *See supra* text accompanying notes 201-24.

230. *Brown I*, 347 U.S. at 494 ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

IV. CONCLUSION

> This country has been able to celebrate pluralism but keep some sense of the collective that holds us together. . . . Democracy has certain core ideas—freedom of speech, law, procedural rights, the way we deal with each other. If everything becomes hostile race and class warfare, we are going to lose this country. The issue is not multiculturalism. We agree with that. The question is, Are you also going to talk about the political and moral values that are essential for us to live together?[231]

These words were spoken by California's Superintendent of Public Instruction, a person in the center of a political maelstrom concerning curricular content in the public schools.[232] As the nation becomes ever more multiethnic and multicultural, this controversy can be expected to become even more difficult and contentious.

This article has *not* proposed comprehensive judicial oversight over public school curriculum. Such a proposal would be anti-democratic, unworkable and without legal foundation. Moreover, comprehensive judicial oversight would undermine the current debate which, for the most part, is the very model of a public dialogue that is "uninhibited, robust, and wide-open."[233]

Still, there is a legitimate and limited role for the judiciary in this controversy which would draw on the traditional strengths of the judiciary to enforce core constitutional values and to promote the stability and integrity of our political institutions.[234] This article has proposed judicial oversight of three well-defined and justiciable failures of educational policy-making, all of which are associated with ethnocentric curriculum. The policy failures have been identified as first, secular educational material that the state asserts is true but, in fact, is demonstrably false; second, the teaching of theories of inherent racial superiority as fact; and third, establishment of schoolwide ethnocentric curriculum that promotes racial segregation. These policy failures are deeply disturbing in that they suggest a breakdown of the political process and a threat to core constitutional values.

In 1954 the Supreme Court moved to correct a deep injustice embedded in our system of public education for which the political

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231. Reinhold, *supra* note 23, at 47 (statement of California Superintendent of Public Instruction Bill Honig).

232. *Id.* at 26-29.

233. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

234. *See supra* note 20 and accompanying text.

branches were unable or unwilling to correct.[235] Today the new constitutional challenges presented by radical ethnocentric curriculum demonstrate, somewhat ironically and painfully, how much progress has been made in forty years and, at the same time, how difficult and how central remain the underlying problems of race and ethnicity. The role proposed for the courts in the present controversy would not be nearly as significant as was the role played by the courts forty years ago; still, the courts can perform a vital function in the continuing national struggle to define and come to terms with our history, culture, and ethnicity.

235. *Brown I*, 347 U.S. 483.