

Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations

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ABSTRACT

American racism and discrimination continue to plague our institutions of higher education. Predominantly white law school environments are especially notable for being inhospitable and unfriendly, especially for students of color. Many law students of color create and join race/ethnic-specific organizations in order to receive support on otherwise unwelcoming campuses. This Article analyzes data from a mixed-method empirical research study investigating student perceptions of race/ethnic-specific campus organizations. While many students view these groups as a safe space that provides a buffer from the rest of law school life, others worry that these organizations may increase segregation. Which perception is correct? When considered through a lens of racial privilege and utilizing a Critical Race Theory framework, we see that “exclusion” may have different meanings and outcomes based on the positionality of the groups involved. What some consider “self-segregation” may be necessary for creating safe space for otherwise marginalized students.

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I. INTRODUCTION

We are approaching the sixtieth anniversary of *Brown v. Board of Education*, when separate was determined to be inherently unequal.¹ Yet, American schools remain largely segregated—in some cases more so than in the time of *Brown*.² Many institutions of higher education and law schools specifically manage to enroll only token numbers of students of color. The paltry numbers are compounded by

1. 347 U.S. 483, 495 (1954) (holding separate educational facilities are inherently unequal).

2. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, in THE CIVIL RIGHTS PROJECT 3 (2009) (“Fifty-five years after the *Brown* decision, blacks and Latinos in American schools are more segregated than they have been in more than four decades.”).

the marginalization of these students based on their relative lack of privilege on the law school campus.³

Data from a mixed-method empirical research project show that many members of student organizations, and even some non-members, recognize the importance of identity-based groups allowing otherwise-marginalized individuals a safe space to “speak their own language, eat their own food, . . . and share common experiences”⁴ However, other students question whether having separate or exclusive groups of different races/ethnicities may lead to greater segregation in a modern America that welcomes, tolerates, and even celebrates diversity.⁵ This Article examines the phenomenon of the race/ethnic-specific organization in the law school context, specifically analyzing law student perceptions of these groups and then interpreting them through a framework of privilege,⁶ as outlined by Stephanie Wildman and others, and broader Critical Race Theory.⁷

3. See Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 18 (2012) [hereinafter, Deo, *Separate, Unequal*] (suggesting many students of color see higher education as beyond their reach because it is outside the scope of their habitus, or collective identity).

4. Min Zhou, *Social Capital in Chinatown: The Role of Community-Based Organizations and Families in the Adaptation of the Younger Generation*, in BEYOND BLACK AND WHITE: NEW FACES AND VOICES IN U.S. SCHOOLS 9 (Maxine Seller & Lois Weis eds., 1997).

5. For example, when the Arizona legislature passed a law restricting ethnic studies, some said they did so to avoid promoting segregation or “apartheid.” See Julian Kunnie, *Apartheid in Arizona? HB 2281 and Arizona’s Denial of Human Rights of Peoples of Color*, 40(4) BLACK SCHOLAR 16 (2010).

6. It is important to recognize at the outset that student organizations do not enjoy complete freedom or autonomy. Although “students do not ‘shed their constitutional rights to freedom of expression at the schoolhouse gate,’ . . . the First Amendment permits ‘reasonable regulation of speech-connected activities in carefully restricted circumstances.’” David Brown, Comment, *Hey! Universities! Leave Them Kids Alone!* *Christian Legal Society v. Martinez and Conditioning Equal Access to a University’s Student-Organization Forum*, 116 PENN. ST. L. REV. 163, 165–66 (2011) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). For instance, *Christian Legal Society v. Martinez* clarifies that student organizations receiving recognition or funding from public institutions of higher education are required to comply with institutional anti-discrimination policies. 130 S. Ct. 2971 (2010).

7. STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 61 (1996); Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003); Maurice R. Dyson, *When Government is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in PICS v. Seattle School District*, 40 U. TOL. L. REV. 145, 148 (2008)

Through the literature on privilege and associated work by scholars working within the framework of Critical Race Theory, we see how segregation in the sense of keeping Black students out of white schools may be different from students of color on predominantly white campuses maintaining a separate safe space for themselves. An understanding of white privilege clarifies that segregation mandated by those in power seeks to maintain the racial order, whereas when those from marginalized groups choose segregation (or separation or sovereignty), they may do so to protect group members within a safe space.⁸

Numerous scholars have written on the continuing significance of race and the resilience of racism and discrimination in America.⁹ One result of ongoing racism and racial discrimination is persistent segregation in housing, education, and many other facets of American life.¹⁰ Generally speaking, segregation is seen as a social ill—something to be avoided and diminished whenever possible. Since 1954, when the U.S. Supreme Court decided *Brown v. Board of Education*, Americans have come to accept that separate cannot be equal.¹¹ Integration has become a legal mandate for primary and

(discussing education discrimination due to unequal funding); Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, CREATION SPIRITUALITY, Jan./Feb. 1992.

8. WILDMAN, *supra* note 7, at 61.

9. See, e.g., EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA (2001); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994); DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA (1972); JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM (1994); YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES (1992); REYNOLDS FARLEY & WALTER R. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA (1987).

10. See, e.g., JEANNIE OAKES ET AL., REMOVING THE ROADBLOCKS: FAIR COLLEGE OPPORTUNITIES FOR ALL CALIFORNIA STUDENTS (Christine O'Keefe et al. eds., 2006); RICARDO D. STANTON-SALAZAR, MANUFACTURING HOPE AND DESPAIR: THE SCHOOL AND KIN SUPPORT NETWORKS OF U.S.-MEXICAN YOUTH (2001); JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1992); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003).

11. 347 U.S. 483, 495 (1954).

secondary education. Administrators in higher education seek diversity, a potential corollary of integration, as a goal as well.¹²

Yet, when we consider segregation through the lens of privilege, segregation by marginalized groups may have more to do with sovereignty and safe space than oppression.¹³ In segregated environments, those excluded from the mainstream or upper-status environments often join together to create a safe space for themselves; these “counter spaces” serve as buffers from the broader community.¹⁴ This phenomenon occurs regularly in secondary school and in institutions of higher education.¹⁵ Even in law school, many students of color create and join race/ethnic-specific student organizations in order to be around others from similar backgrounds and draw on the supportive environment that these groups provide.¹⁶ This may be especially important given the ongoing isolation and alienation reported by many students of color on predominantly white campuses.¹⁷

Research shows us that students of color are often alienated on predominantly white law school campuses.¹⁸ Many join race/ethnic-

12. Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, a Deeper Commitment*, 52 J. LEGAL EDUC. 491, 492 (2002).

13. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (Richard Delgado & Jean Stefancic eds., 2001); WILDMAN, *supra* note 7 (examining white privilege in various societal contexts).

14. See Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 44–48 (2002); Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237 (2001).

15. BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE (rev. ed. 2003).

16. Deo, *Separate, Unequal*, *supra* note 3, at 21; Meera E. Deo, *Bolstering Bonds and Building Bridges: Social Capital in Law Student Organizations* (May 8, 2009) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with author) [hereinafter Deo, *Bolstering Bonds*]; Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 463 (1983).

17. Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2268–69 (2000) (reporting that when people of color attended colleges and universities in very small numbers, their achievement was depressed and they often became alienated and isolated from the rest of the student body); Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 75–76 (2011) [hereinafter Deo, *The Promise of Grutter*] (discussing alienation of students of color on predominantly white campuses).

18. See Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal*

specific student organizations seeking support and guidance through the challenging law school environment.¹⁹ Recent studies have documented the many benefits of these groups for students who are otherwise marginalized on campus.²⁰ Some individuals, however, worry that in spite of these benefits, race/ethnic-specific organizations may perpetuate segregation on campus; for instance, some may be concerned that race/ethnic-specific groups may purposefully or unwittingly exclude white students who feel unwelcome or are uncomfortable attending events. In fact, this concern has led in at least one instance to an attempt at outright prohibition of these organizations. As recently as 2008, Arizona attempted to pass legislation banning not only ethnic studies (which received considerable press), but also student organizations that were “based in whole or in part on race-based criteria.”²¹ Though ultimately Arizona Senate Bill 1108 was defeated, it targeted both “ethnic studies programs and ethnic-based organizations [by characterizing them] as ‘un-American.’”²² Thus, the threat against these groups is not simply theoretical but grounded in contemporary struggles to maintain their existence.

This Article argues that this “segregation” or separation from the mainstream campus is not only an accurate portrayal but an important characteristic of race/ethnic-specific groups that serve as safe space “buffers” for students of color. Without some sense of sovereignty from the larger student body, the groups would likely fail to provide

Education, 15 U. FLA. J.L. & PUB. POL’Y 11, 23 (2003) (reporting that non-white students participate less in classroom discussions whereas white male students react positively to these classroom settings); see also *supra* note 17.

19. See Daniel Solórzano et al., *supra* note 14; Meera E. Deo et al., *Struggles and Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L.J. 71, 91 (2010) [hereinafter Deo et al., *Struggles and Support*]; Deo, *Separate, Unequal*, *supra* note 3, at 36.

20. See Deo, *Separate, Unequal*, *supra* note 3, at 36 (discussing the different types of benefits beyond academic support that come from being a member of an ethnic-specific organization).

21. Howard Fischer, *Measure Backs ‘American Values’ in State Schools*, EAST VALLEY TRIB. (Apr. 16, 2008, 9:51 PM), http://eastvalleytribune.com/news/article_4b993c3e-2cbf-5a70-a4cd-6420f6079109.html.

22. Anna Ochoa O’Leary & Andrea J. Romero, *Chicana/o Students Respond to “AntiEthnic Studies” Bill 1108: Civic Engagement, Ethnic Identity and Well-being*, 36(1) AZTLAN: A JOURNAL OF CHICANO STUD. 9, 9–36 (2011).

many of the benefits that members appreciate most.²³ Thus, “safe space” and “segregation” are actually two sides to the same coin, both accurate characteristics of the race/ethnic-specific student organization, one necessary to the other and both required for the groups and individual members to succeed.

Part II of this Article introduces the data, research questions, and methods used in data collection and analysis of perceptions of race/ethnic-specific law student organizations. Part III then presents findings of empirical data showing that students see race/ethnic-specific organizations as both causing segregation and as safe space havens. (How) Can we reconcile these two competing views of race/ethnic-specific organizations? In part, we do so by better understanding segregation but also by viewing the problem through the lens of racial privilege. In Part IV, the Article presents a brief overview of educational segregation, including historical and contemporary concerns. While much of the scholarship has centered on primary and secondary education, the application of segregation in the contemporary law school context is included as well. Part V then introduces a theoretical framework for interpreting the data, which considers how privilege and structural discrimination function in the law school setting. This section begins with Stephanie Wildman’s discussion of societal privilege and continues with other leading voices in Sociology and Critical Race Theory who discuss racial privilege more specifically. The application of this framework to the empirical research findings is discussed in the final section of the Article, which also presents implications, policy suggestions, and possibilities for future study.

II. EMPIRICALLY INVESTIGATING PERCEPTIONS

A. *An Introduction to the Data*

The data for this paper come from the Perspectives on Diversity study, a survey and focus group study involving over five hundred

23. For more on sovereignty specifically, see Rebecca Tsosie, *Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005).

research subjects who were enrolled as JD and LLM students at the University of Michigan Law School during the 2009–10 academic year.

All enrolled law students were invited to participate in the study through an invitation sent to each student's unique email address via the online data collection tool SurveyMonkey. In addition, students were sent a web link whereby they could input their email address and complete the survey online instead of clicking on the email link. All responses were confidential and anonymous. Students also had the option of providing their email address to be entered in a drawing for an iPod Shuffle or iTunes gift cards. The survey was live online during the month of March 2010.

The survey study focused on five particular domains:

1. Basic demographics (i.e., race, sex, date of birth, year in school);
2. Personal background (i.e., whether a parent had been born outside of the United States, whether a language other than English had been spoken in the home);
3. Levels of interaction with diverse groups/individuals (i.e., levels of interaction with students from various backgrounds);
4. Law school information/experiences (i.e., sources of support, membership in organizations, law school debt, law school GPA); and
5. Attitudes about law school (i.e., level of agreement/disagreement with statements regarding diversity of the curriculum, levels of diversity at the law school, etc.)

A total of 505 students completed the survey portion of the study. This represents 48 percent of the University of Michigan Law School student body.²⁴ Approximately 53 percent of the survey includes female participants, which parallels the enrollment at the University

24. The 48 percent response rate is one potential limitation of this study, though most empirical studies of law schools have even lower response rates. As an example, one recently published study received a response rate of only 20 percent. Dowd et al., *supra* note 18, at 17. Additionally, recruitment of student research subjects focused on diversity generally with carefully worded invitations to students with divergent views on the subject, which minimized sampling bias in eligibility or the selection process.

of Michigan Law School (see Table 1). The racial/ethnic background of survey participants includes 70 percent white students, 7 percent Black students, 4 percent Latinos, 16 percent Asian Pacific Islanders (APIs), 2 percent Native Americans, and 3 percent who identified as some other racial/ethnic group (see Table 2). Participants include first-, second-, and third-year students, as well as joint degree students and others spending more than three years in school, with 37 percent beginning law school in 2009, 37 percent beginning in 2008, and 22 percent beginning in 2007 (see Table 3).

TABLE 1. SURVEY RESPONDENTS BY SEX. PERSPECTIVES ON DIVERSITY STUDY, 2010 (N=502).

	Male	Female	Total
N	237	264	501
%	47.31%	52.69%	100.00%

TABLE 2. SURVEY RESPONDENTS BY RACE. PERSPECTIVES ON DIVERSITY STUDY, 2010 (N=502).

Race	Total
Black %	33 6.57%
API %	79 15.94%
Latino %	19 3.78%
Native American %	8 1.59%
White %	349 69.52%
Other %	14 2.79%
Total %	502 100.00%

TABLE 3. SURVEY RESPONDENTS BY YEAR THEY BEGAN LAW SCHOOL. PERSPECTIVES ON DIVERSITY STUDY, 2010 (N=502).

	<2006	2006	2007	2008	2009	Total
N	6	12	112	184	188	502
%	1.20%	2.39%	22.31%	36.65%	37.45%	100.00%

The Perspectives on Diversity study also includes a qualitative component. While quantitative data can provide broad commentary on trends and preferences, qualitative data analysis can be more informative for understanding nuanced details, perceptions, and otherwise giving voice to research subjects.²⁵ Thus, all students who participated in the survey portion of the study were invited to join one of the many focus groups held over two days at the University of Michigan Law School campus in Ann Arbor, Michigan.²⁶

All focus group sessions were held in small University of Michigan Law School classrooms or seminar rooms. One to five students participated in each group. Most focus groups were completed in about forty minutes. To encourage a more comfortable environment while discussing sensitive topics involving race, students of color were placed into focus groups with other students of color, while white students participated in groups with other white students. The racial background of the facilitator also matched the racial composition of the group, with a white researcher leading focus groups with white students and a facilitator of color leading focus groups with students of color. Whenever possible, students of color were matched into groups with other students and a facilitator who shared their racial/ethnic identity (i.e., focus groups consisting of API students were led by an API facilitator). Students chose or were

25. See, e.g., JOHN W. CRESWELL & VICKI L. PLANO CLARK, *DESIGNING AND CONDUCTING MIXED METHODS RESEARCH* (Claudia AA. Hoffman et al. eds., 2d ed. 2011); ABBAS TASHAKKORI & CHARLES TEDDLIE, *MIXED METHODOLOGY: COMBINING QUALITATIVE AND QUANTITATIVE APPROACHES* 5 (1998).

26. This study design was modified from that used in the Educational Diversity Project, a mixed-method study of diversity in legal education spearheaded by Walter Allen, Abigail Panter, Charles Daye, and Linda Wightman. For more about the methods and findings of that study, see THE EDUCATIONAL DIVERSITY PROJECT, <http://www.unc.edu/edp/> (last visited Dec. 20, 2012).

assigned pseudonyms to ensure confidentiality in reporting. The data presented below as quotes include only these pseudonyms, not the actual names of student participants. Research subjects were provided with light refreshments and \$5.00 coffee gift cards as a small token of appreciation for their participation. The focus group protocol focused on the first-year curriculum, interactions with peers and professors, involvement in student organizations, and law school diversity.

The qualitative portion of the study includes 97 focus group participants. Approximately 64 percent of the focus group participants are female (see Table 4). The participants include 56 percent white students, 12 percent Black students, 6 percent Latinos, 25 percent Asian Pacific Islanders (API), and 1 percent Native American (see Table 5). The students are 39 percent first-year students, 35 percent second years, and 26 percent third years (see Table 6).

TABLE 4. FOCUS GROUP PARTICIPANTS BY SEX.
PERSPECTIVES ON DIVERSITY STUDY, 2010 (N = 97).

	Male	Female	Total
N	33	64	97
%	34.02%	65.98%	100.00%

TABLE 5. FOCUS GROUP PARTICIPANTS BY RACE.
PERSPECTIVES ON DIVERSITY STUDY, 2010 (N = 97).

Race	Total
Black	12
%	12.37%
API	24
%	24.74%
Latino	6
%	6.19%
Native American	1
%	1.03%
White	54
%	55.67%
Total	97
%	100.00%

TABLE 6. FOCUS GROUP PARTICIPANTS BY YEAR THEY BEGAN LAW SCHOOL.
PERSPECTIVES ON DIVERSITY STUDY, 2010 (N = 97).

	<2006	2006	2007	2008	2009	Total
N	0	0	25	34	38	97
%	0%	0%	25.77%	35.05%	39.18%	100.00%

B. A Focus on Methodology

Qualitative data serve as the primary data for this research, though they are framed with quantitative data analysis using Stata software. Qualitative data were analyzed using ATLAS.ti software through coding and using emerging theme analysis.²⁷ For the purposes of this Article, race/ethnic-specific groups are those groups whose missions reflect a focus on a particular race/ethnic community; the name of the group refers directly to the community and membership it serves.²⁸ Many of these groups are campus chapters of national organizations that work to meet the educational and professional needs of members, create connections between law students and practicing attorneys, and serve the particular race/ethnic community or society generally.²⁹

27. See generally ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES* (1995).

28. Mainstream organizations, including those that may include some focus on a particular racial/ethnic group or region of the world (i.e., the Asian Law Society) are not included in the analysis presented in this Article. Research indicates that mainstream groups also provide a wide variety of benefits to members, though they are focused on networking and professional benefits. See Deo, *Separate, Unequal*, *supra* note 3, at 43–44; see also Deo, *Bolstering Bonds*, *supra* note 16.

29. For example, the National Black Law Students Association (NBLSA) website states that the mission of the organization is to:

articulate and promote the educational, professional, political, and social needs and goals of Black law students; foster and encourage professional competence; improve the relationship between Black law students, Black attorneys, and the American legal structure; instill in the Black attorney and law student a greater awareness and commitment to the needs of the Black community; influence the legal community by bringing about meaningful legal and political change that addresses the needs and concerns of the Black community; adopt and implement policies of economic independence; encourage Black law students to pursue careers in the judiciary; and do all things necessary and appropriate to accomplish these purposes.

These groups include: Black Law Student Association (BLSA), Latino Law Student Association (LLSA), and the Asian/Pacific American Law Student Association (APALSA).³⁰

The central research question addressed in this Article is: how do students perceive race/ethnic-specific student organizations? This study, examining various perspectives of student organizations, is especially well-suited to a mixed-method design. Utilizing both quantitative and qualitative methods provides an opportunity to draw from the strengths of data collection through both surveys and focus groups; it also provides for a more robust assessment through triangulation of the data.³¹

Quantitative modes of analysis were conducted on survey data through use of Stata statistical software. Specifically, basic descriptive analyses were conducted on student responses to the question asking students to indicate participation in various student organizations. These were cross-tabulated with student responses to questions regarding their racial/ethnic identification.

The qualitative component of this study draws on broad patterns revealed by the survey data, improving our understanding of student perceptions of law student organizations. Focus group sessions were digitally audio-taped and later transcribed and reviewed for error. Coding of the data followed a soft version of grounded theory, whereby particular themes in the data were analyzed in more detail once they were revealed.³²

Coding followed a comprehensive codebook developed specifically for the Perspectives on Diversity project. The first step was development of a preliminary list of codes based on the specific questions included in the survey instrument and the focus group protocol. The codebook was continuously updated based on ongoing

See Mission, NBSA, <http://www.nbsa.org/index.php?pid=1> (last visited Dec. 19, 2012 and on file with the author).

30. While these three groups are the most common race/ethnic-specific law student organizations nationwide, others are also active and included in this research as well. Other groups include the Middle Eastern Law Student Association (MELSA), the South Asian Law Student Association (SALSA), and the Native American Law Student Association (NALSA).

31. *See generally* CRESWELL & CLARK, *supra* note 25; TASHAKKORI & TEDDLIE, *supra* note 25.

32. *See* JOHN CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHOD APPROACHES* 203–25 (2008).

review and coding of the data so that emerging themes could be included in future coding and analysis.³³ Transcripts were then analyzed using ATLAS.ti software.

A subsection of the codebook and coded data dealing with race/ethnic-specific organizations were re-analyzed in detail for this Article. The focus during this re-analysis was on distinguishing between race/ethnic-specific and mainstream groups and identifying student perceptions of race/ethnic-specific groups. Based on this Article's focus on perceptions of race/ethnic-specific groups, the list of codes was amended to capture the particular views of students with regard to these groups. Respondents fit within two established codes. Some students saw the groups as a source of support (Supportive) and some saw the groups as promoting segregation or exclusion (Exclusive). Data were then analyzed again using these new codes. While privilege and Critical Race Theory are the guiding frameworks for this Article, codes were not developed based on this literature. Rather, the literature informed the ways in which student perceptions of race/ethnic-specific organizations were interpreted, laying the foundation for the discussion that follows the findings.

III. FINDINGS: THE CONVERGENCE OF SAFE SPACE AND SEGREGATION

Analyzing the data presented above, we can begin to understand how different students perceive race/ethnic-specific organizations. This Article looks specifically at perceptions of these groups as supportive or exclusive. In order to meaningfully investigate the perceptions, we must first understand the groups themselves. Thus, this Part begins with an introduction to the race/ethnic-specific law student organization; the survey data quantifies student involvement in various organizations. Next, findings from the qualitative data explore perceptions of these groups as providing a safe space for particular students. Finally, this Part considers qualitative findings relating to these groups as perpetuating segregation.

33. *See generally* ROBERT M. EMERSON, CONTEMPORARY FIELD RESEARCH (1983); BARNEY G. GLASER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH 291-95 (1967).

A. Membership in Race/Ethnic-Specific Law Student Organizations

Perspectives on Diversity (POD) data reveal that the vast majority of students of color at the University of Michigan Law School participate in race/ethnic-specific groups. Specifically, 97 percent of Black students, 86 percent of API students, 89 percent of Latinos, and 75 percent of Native American students join the race/ethnic-specific organization that matches their own race/ethnic background (see Table 7). Interestingly, a full 20 percent of white students at the University of Michigan Law School also join race/ethnic-specific organizations.³⁴ This is notable because these students are joining groups geared toward students from a particular racial/ethnic background even though they themselves do not self-identify as sharing that background.³⁵ Implications of white membership in race/ethnic-specific groups, which rely in part on discussions of privilege to follow, are presented later in this Article.³⁶

34. Note that research subjects could indicate the full range of their racial identity, “checking” multiple boxes on the survey to indicate their biracial or multiracial identity. For purposes of this Article, students who self-identified as belonging to multiple racial groups were categorized into the racial group with the smallest numbers. For example, a student who self-identified as white and API would be categorized as API. Thus, a student identified in this Article as “white” is one who self-identified as only white (i.e., checked only one box).

35. While some law schools have an Italian Law Student Organization or an Irish Law Student Organization that may correspond to the racial/ethnic identity of white students, these groups did not exist on the University of Michigan Law School campus at the time of this study. Thus, the sixty-seven white students from this study who indicate membership in a race/ethnic-specific organization are involved in a group geared toward students of color. Additionally, since all students identified in this Article as white are those who self-identified as coming from only one racial/ethnic background, we know that none of the sixty-seven white student members of race/ethnic-specific organizations are biracial or multiracial. In other words, they are involved in a student organization that does not correspond to their own racial identity.

36. OMI & WINANT, *supra* note 9.

TABLE 7. STUDENT INVOLVEMENT IN RACE/ETHNIC-SPECIFIC
STUDENT ORGANIZATIONS, BY RACE.
PERSPECTIVES ON DIVERSITY STUDY, 2010 (N = 97).

Black %	31 96.88%
API %	59 85.51%
Latino %	16 88.89%
Native American %	6 75.00%
White %	67 19.94%
Other %	8 57.14%

In addition to their membership in race/ethnic-specific organizations, a high percentage of students are involved in mainstream law student groups.³⁷ In fact, although much of the literature suggests that students of color may be alienated from mainstream campus life, including participation in mainstream organizations, the data confirm that they join in substantial numbers.³⁸ For instance, over 80 percent of students of color in the POD sample join mainstream groups, as compared to 85 percent of white students (see Table 8). When considered by race and compared to their participation rates in race/ethnic-specific organizations, students of color from all racial backgrounds (except for Native Americans³⁹) do join race/ethnic-specific groups at higher rates than

37. For purposes of this Article, “mainstream groups” refer to any and all law student groups or school-sponsored programs other than race/ethnic-specific organizations.

38. This finding of high participation rates by students of color at the University of Michigan Law School in mainstream groups as well as race/ethnic-specific groups parallels research from a national study of law student diversity. See, e.g., Deo et al., *Struggles and Support*, *supra* note 19.

39. This outlying statistic may be due to the limited sample size of the population of this group, as only eight Native American students were included in the study.

mainstream groups. For instance, 81 percent of Black students join mainstream groups as compared to 97 percent participating in race/ethnic-specific organizations. Similarly, 81 percent of API students and 83 percent of Latinos join mainstream groups, as compared to 86 percent and 89 percent respectively in mainstream organizations. In other words, while most students seem to join both race/ethnic-specific organizations and mainstream groups, those who choose only one type of group gravitate toward the group consisting of members from their shared racial/ethnic background. Thus, while students of color seem invested in law school generally, as evidenced by their participation rates in mainstream groups, they may be even more focused on the benefits they receive through participation in race/ethnic-specific organizations.⁴⁰

TABLE 8. STUDENT INVOLVEMENT IN MAINSTREAM STUDENT ORGANIZATIONS, BY RACE. PERSPECTIVES ON DIVERSITY STUDY, 2010 (N = 97).

Black	N	6	25	31
	%	19.35%	80.65%	100.00%
API	N	13	56	69
	%	18.84%	81.16%	100.00%
Latino	N	3	15	18
	%	16.67%	83.33%	100.00%
Native American	N	1	7	8
	%	12.50%	87.50%	100.00%
White	N	49	284	333
	%	14.71%	85.29%	100.00%
Other	N	4	10	14
	%	28.57%	71.43%	100.00%

Additional data confirm that these student organizations provide a great deal of support to members. When indicating their levels of support from law school organizations, students overwhelmingly

40. For a more detailed discussion of membership in race/ethnic-specific groups as compared to mainstream groups, see Deo, *Separate, Unequal*, *supra* note 3, at 27–45; Deo, *Bolstering Bonds*, *supra* note 16.

report that they rely on groups for support.⁴¹ In fact, the majority of students from all racial/ethnic backgrounds report that they draw support from participation in student groups (see Table 9). When we consider the effect of race on levels of support, we do see a division between students of color and whites. Roughly 26 percent of whites state that they do not receive any support from student groups, as compared to only 10 percent of Black students, 22 percent of APIs, and 12 percent of Latinos who report no organizational support.⁴²

TABLE 9. LEVELS OF SUPPORT FROM LAW STUDENT ORGANIZATIONS, BY RACE. PERSPECTIVES ON DIVERSITY STUDY, 2010 (N = 97).

		Strong	Some	None	Total
Black	N	16	12	3	31
	%	51.61%	38.71%	9.68%	100.00%
API	N	20	34	15	69
	%	28.99%	49.28%	21.74%	100.00%
Latino	N	8	7	2	17
	%	47.06%	41.18%	11.76%	100.00%
Native American	N	1	7	0	8
	%	12.50%	87.50%	0.00%	100.00%
White	N	49	198	87	334
	%	14.67%	59.28%	26.05%	100.00%
Other	N	0	11	3	14
	%	0.00%	78.57%	21.43%	100.00%
Total	N	94	269	110	473
	%	19.87%	56.87%	23.26%	100.00%

To summarize, we see that the vast majority of students of color join race/ethnic-specific groups. A significant percentage of white

41. This finding of student groups providing high levels of support at the University of Michigan Law School parallels research from a national study of law student diversity. See, e.g., Deo et al., *Struggles and Support*, *supra* note 19, at 77.

42. An interesting future study could consider whether and how levels of support from race/ethnic-specific and mainstream organizations relate to the marginalization of the particular group involved. For instance, perhaps Black and Latino students—those who the literature identifies as the most marginalized on law school campuses—draw more support from groups than API students specifically because they are marginalized and rely on the groups to support them. For a further discussion of how different types of groups provide various benefits to members, see Deo, *Separate, Unequal*, *supra* note 3, at 36.

students (20 percent) do as well. In addition, students from all racial/ethnic backgrounds join mainstream organizations. Students are very appreciative of the benefits that groups provide, reporting that they are supportive centers on the law school campus. Higher percentages of Black and Latino students report receiving “strong support” from group membership. Now that we have quantified the high levels of student participation in student groups as well as the support that these groups provide, we can examine through qualitative analysis how students perceive these organizations.

B. Groups as Safe Space Havens

Many Black students are like Melissa, who joined BLSA seeking a sense of belonging. Melissa says,

There are benefits [to BLSA membership] in terms of being able to share with people who know your experience. Like if something semi-offensive happens in class, you don't have to explain why it's offensive. So I definitely think there is a benefit to being around people who look like you and may have the same experiences that you do.

Clearly, Melissa seeks an experience different from the one she encounters in class, where the majority of her classmates do not share her racial/ethnic background. Jim, an API student, connects this unease at being part of the larger campus community with the very limited numbers of students of color on campus. Joining with others from a shared identity helps him feel more secure on the campus and gives him a sense of identity within the school. Jim says:

What I think APALSA has given me is just a chance in the law school to be around people who are not mostly White. Going to APALSA meetings and seeing a lot of Asian faces is just nice. It makes me feel . . . palpably blessed, when I don't typically in the law school. And I think also in general, [it gives] me a sense of identity and a sense of location within the law school.

Jim's sense of belonging comes specifically from being with others who look like him, and share his sense of identity, especially as he

has few opportunities for this in other aspects of his law school life. Eva, a Latina law student, joined LLSA for that same sense of community that she felt was lacking among the law school generally. Eva says, “[I]t was kind of important at the beginning when the Fall started and all the student groups were forming. It was nice to feel like I had a sense of community with people with a background similar to me.” For some, the rewards of group membership are even greater. Sherie credits BLSA for her retention in law school, saying, “Being in BLSA is huge. It’s probably the reason why I’m still in law school. As a 1L we got big sisters or brothers and tons of support and help with everything from outlines and notes to mock interviews. [BLSA was] a really good support group.”

While many students of color appreciate the safe space that race/ethnic-specific organizations provide to members, their space is not purely exclusive. As we saw from the quantitative findings, 20 percent of white students join race/ethnic-specific organizations though they do not self-identify as members of the racial/ethnic group those organizations are meant to serve.⁴³ While some may do so out of a sense of solidarity, others do so specifically because they are hoping to receive particular academic or professional benefits that are available to members.⁴⁴ In this sense, the groups can never be truly exclusive, as whites and others are not formally excluded from membership or participation.⁴⁵ In fact, many events are open even to non-members—so even more than the 20 percent of whites who identified themselves as members of race/ethnic-specific groups may be attending events sponsored by race/ethnic-specific organizations. For instance, a white male student named Alex enthusiastically recounts how he (in his words) “infiltrated” a South Asian Law Student Association (SALSA) networking event for professional advantage. In fact, it may have been an additional advantage being the only (as he puts it) “white kid” there. He says:

43. *See supra* Table 7.

44. Deo, *Bolstering Bonds*, *supra* note 16.

45. *Christian Legal Society v. Martinez* confirms that public institutions of higher learning can set non-discrimination policies that student organizations must follow. 130 S. Ct. 2971 (2010). Though that case was about discrimination against prospective LGBTQ members, an argument could be made that it could extend to race-based exclusion from organizational membership as well.

I'm not a member but I spent most of Saturday with all of SALSA and I was the only white kid there. So that was really unique and definitely the benefit that I could tell that that group was gaining was that both that they had this cultural group of people who come from similar backgrounds and experiences but we went to a South Asian Business Association or Bar Association meeting and they had this giant network of people for professional reasons that had the same identity background and same professional goals. It was an awesome networking experience so I could see that benefit for them and I was just infiltrating for the day.

Thus, a number of students of color report the ways in which membership in race/ethnic-specific student organizations provides them with a sense of support on an otherwise unwelcoming law school campus. However, even these safe spaces are not truly sovereign, as they are open to "infiltration" from white students seeking professional benefits for themselves.

C. Groups as Perpetuating Segregation

In spite of the accessibility of these groups even to white non-members, some students have concerns about the ways in which race/ethnic-specific organizations may perpetuate or exacerbate segregation or exclusivity on campus. A white student named Erin draws a particular distinction between the Latin American Law Society and the Latino Law Students Association (LLSA). The first group she says is for people interested in learning about "that part of the world," whereas she thinks to join LLSA, "you've got to be Latino; this is a much more of a kind of exclusive kind of thing." Don is a white male student who appreciates diversity generally but is concerned that it sometimes leads students of color to self-segregate into their own groups; while it may be natural to "make friends or get along with the people with whom you most identify," he believes that "it certainly sort of Balkanizes the law school for better or worse, probably worse." A South Asian American student named Meena is also a little frustrated because her "one" Black friend is always busy with BLSA activities. Meena concludes, "I think it's good to have

different ethnic groups, but you should also still be open to hanging out outside of that.”

A second-year South Asian American student named Kavita discusses the division that occurs within her own social network in law school, noting that there are “two different parts to my life in law school.” One group of friends are those she made immediately upon arrival in Ann Arbor, who “all happen to be white female.” After her first year, she says, she has “been spending more time with people in APALSA and SALSA,” students who identify as API and are members of the racial/ethnic-student organizations she herself has joined. Kavita goes on to emphasize how the two groups “usually don’t mix.” She says:

There may be one or two people from the groups that mix but for the most part, they stay separate. It’s the white females that I predominantly study with and socialize with, and the [APIs] are the ones I find myself [politically] organizing with in school and sometimes socializing with, . . . usually [for an organization-sponsored] function.

Perhaps a white student named Earl explains the dichotomy best. He makes clear that the segregation may be necessary to create the sovereignty that students of color feel is important to the sense of support their race/ethnic-specific groups provide. Earl says:

It is a practical social thing that when there aren’t so many members of a given racial group, there is a tendency to stick together and that becomes self-enforcing. Obviously you want your class mixed up together but I can imagine if I was the only African-American person in the class or [one of] two African-American people, I might feel more comfortable hanging out with the other African-American in the class but then that becomes a self-ruling prophecy. I always heard about that and I never saw it in college or high school to the extent that I see it here.

Earl’s observation highlights how the tendency to stick together may relate directly to the small numbers of students of color on campus. When there are just a few African Americans in the class, many students can understand why they may have a natural affinity for one

another. A critical mass of students of color might yield a different result.⁴⁶ Erin, a white student, recognizes this as well, stating: “[LLSA is] more about solidarity and supporting each other in a way that perhaps people who are not Latino can’t through the law school experience.” A South Asian American student named Hari reinforces this idea with the converse—imagining a school with more diversity. He says that while he is concerned about Balkanization, “I don’t know how the numbers situation plays into that. I don’t know if you have so many folks that identify with all sorts of different identities that starts to become less of a problem.”

Thus, white students and students of color alike struggle with the problem of characterizing race/ethnic-specific student groups as pockets of safe space vs. areas of self-segregation. While the tone of the white students’ narratives indicates that many have an understanding of why race/ethnic-specific student organizations may be important for students of color, some see the existence of these groups as potentially problematic, exclusive, and/or promoting segregation.

IV. PAST AND PRESENT EDUCATIONAL SEGREGATION

How can we make sense of these empirical findings? The data show that students see race/ethnic-specific organizations as both perpetuating segregation and providing a safe space haven for marginalized students. Some of those who worry about segregation nevertheless appreciate the benefits that they themselves enjoy as members of race/ethnic-specific groups. Which perception is correct? Which one would we prefer? Generally, society seeks to stamp out

46. Mitchell J. Chang, Alexander W. Astin & Dongbin Kim, *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529, 530 (2004); Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J.C. STUDENT DEV. 377 (1999). However, we must also keep in mind that “the singular act of increasing the number of people of color on a campus will not create a more positive racial climate” (Sylvia Hurtado, Kimberly A. Griffin, Lucy Arellano & Marcela Cuellar, *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY HIGHER EDUC. 204, 207 (2008)); “while the admission of a critical mass of students is a necessary element to achieving the benefits of diversity, it is by no means sufficient” (Deo, *The Promise of Grutter*, *supra* note 17, at 65).

segregation; but, should we do so at the expense of these beneficial race/ethnic-specific groups?⁴⁷ In order to answer these questions, we must begin with a clear conception of segregation—both its evolution through various facets of American life and its application on the law school campus. Thus, a brief introduction to segregation is presented below.

A. Educational Segregation

The historical segregation of this country is well-documented and undisputed.⁴⁸ Some say that “racism was built into the constitutional architecture of American democracy.”⁴⁹ Regardless of the exact origins, through the mid-1950s many states in the union either tolerated or required formal separation by race in various aspects of society.⁵⁰ Segregation in interstate travel was brought to the forefront through *Plessy v. Ferguson*, the 1896 case that upheld the constitutionality of separate but equal.⁵¹ At least as common and even more controversial was educational segregation.

Again, the *de jure* segregation that characterized the pre-*Brown* South is well-known.⁵² In many states, statutes specifically forbade

47. Again note how the Arizona attempt at restricting ethnic studies may have been due to legislators trying to curb segregation. See Kunnie, *supra* note 5, at 16.

48. See, e.g., SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 21–23 (2007); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR EQUALITY (2004); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 425–34 (2010); Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001); Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. CIR. RTS. & ECON. DEV. 697, 720 (2011).

49. Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1613 (2011).

50. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (rev. and expanded ed. 2004); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1695 (2005) (changing definitions of what constitutes equality considering education as well as participation in the political and social aspects of society).

51. 163 U.S. 537, 548 (1896) (“[E]nforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws . . .”).

52. See Boddie, *supra* note 48, at 427–34; see also KLUGER, *supra* note 50; Jonathan Fischbach et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy de Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491 (2008).

African Americans and whites from attending the same schools; a number of other school districts across the country found their own ways to effectively segregate students based on race, even if there were no formal laws requiring it.⁵³ While African Americans were clearly singled out as a group unworthy of affiliating with white students, whites were also separated from Chinese-Americans, Latinos, Native Americans, and others.⁵⁴

The U.S. Supreme Court decision in *Brown v. Board of Education* followed more than a decade of litigation focused on educational integration.⁵⁵ Through a number of landmark cases, the NAACP and others fought for educational equality, equal resources for African American students, and the right to attend the schools of their choice without regard to race.⁵⁶ While *Brown* formally outlawed educational segregation based on race, nothing changed overnight. In fact, the opinion was met with outright resistance in many quarters.⁵⁷ Even when society had generally come to accept the formal requirement of integration, change continued at a glacial pace. The Court itself asked the nation to move “with all deliberate speed,” perhaps anticipating

53. See MARK G. YUDOF, BETSY LEVIN, RACHEL F. MORAN, JAMES E. RYAN & KRISTI L. BOWMAN, *EDUCATIONAL POLICY AND THE LAW*, Chapter Four (5th ed. 2011); Boddie, *supra* note 48, at 427–34 (discussing how certain laws prevented Blacks from moving uninhibited from place to place).

54. See *Gong Lum v. Rice*, 272 U.S. 78, 87 (1927) (upholding the constitutionality of segregating Chinese-American students from whites); Boddie, *supra* note 48, at 411 n.43; Bowman, *supra* note 48, at 1752–55 (discussing Latinos and school segregation); see also ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* 5 (2d ed. 2006) (“Asian Americans for decades endured many of the same disabilities of racial subordination as African Americans—racial violence, segregation, unequal access to public institutions and discrimination in housing, employment, and education.”); IFILL, *supra* note 48; MASSEY & DENTON, *supra* note 10 (examining the extraordinarily high degree of hypersegregation that prevails in and around major U.S. cities).

55. 347 U.S. 483 (1954); YUDOF ET AL., *supra* note 53.

56. YUDOF ET AL., *supra* note 53, at Chapter Four; see also Derrick Bell, *Brown v. Board of Education: Forty-Five Years After the Fact*, 26 OHIO N.U. L. REV. 171, 174–80 (2000).

57. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); see also Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 223 (2010) (identifying the resistance to school desegregation and other responses to the *Brown* ruling); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 800 (2010) (“[M]ost of the South waged a campaign of ‘massive resistance’ to the decision that included almost all of the congressmen and senators from the South signing a pledge that denounced and pledged to overturn *Brown*.”).

that moving deliberately is not especially conducive to moving quickly.⁵⁸

In fact, particular regions of the United States face more educational segregation today than they did before *Brown*.⁵⁹ Interestingly, the elementary and secondary schools that have become more segregated over time tend to be those in the West and Midwest—areas of the country that were not forced to integrate through consent decrees.⁶⁰ An increasing number of elementary and secondary schools are considered to be “hypersegregated,” meaning that over 90 percent of students at the school come from the same race/ethnic background.⁶¹ In addition, after the Supreme Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle*, elementary and secondary schools that are not currently operating under consent decrees—even if they did so in the recent past—face steep limitations on attempts to maintain integration or strive for diversity.⁶² In addition to losing the well-documented benefits associated with diversity,⁶³ segregated and hypersegregated schools,

58. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*) (“[A]dmit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”); CHARLES J. OGLETTREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004).

59. See Orfield, *supra* note 2, at 12–13 (recent reports on intensifying segregation in particular regions of the United States); see also Bell, Jr., *supra* note 57, at 524; Deo, *Separate, Unequal*, *supra* note 3, at 22 (“We see today that American children are enrolled in increasingly segregated schools.”); Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1017 (2008).

60. See Gary Orfield, *Why Segregation is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessy*, 49 N.Y.L. SCH. L. REV. 1041, 1047 (2005) (reporting on how the courts waited too long to implement a remedy which did not work in metropolitan America); see also Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. L. & SOC. CHANGE 47, 50 (2009) (“Over the past eight years, these doctrinal developments have dovetailed with a Bush Administration policy of reducing the number of open school desegregation cases.”).

61. Gary Orfield & Erica Frankenberg, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation*, in THE CIVIL RIGHTS PROJECT (PROYECTO DERECHOS CIVILES) (2008).

62. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 753–54 (2007) (reporting that once the decree in Louisville was dissolved, the race-based student assignment was not even arguably required by the Constitution).

63. See Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 370–72 (1999); see also Deo, *The Promise of Grutter*, *supra* note 17, at 82–84 (discussing the sociological literature on diversity and the importance of diverse interactions).

which are almost universally populated by students of color, face even greater disadvantage due to the unequal funding their schools receive as compared to predominantly white and also more diverse schools.⁶⁴

B. Segregation in Higher Education

Educational segregation has been a facet of higher education since the founding of most educational institutions, just as it has historically characterized elementary and secondary schooling in America. For instance, law school traditionally has been a white male endeavor.⁶⁵ On the road to *Brown*, other path-breaking cases chipped away at the policy of “separate but equal,” pushing towards integration.⁶⁶ For example, the case of *Sweatt v. Painter* was filed by Heman Sweatt, an African American applicant who was barred entry to the University of Texas Law School in Austin.⁶⁷ The state of Texas hastily set up an alternative law school in Houston to prevent Mr. Sweatt from enrolling on their flagship campus, arguing that he could instead attend this “separate but equal” Black school to earn a law degree.⁶⁸ The U.S. Supreme Court disagreed, finding that the new law school was not “equal” to the original school in terms of either quantitative or qualitative factors—ranging from the new school’s limited library holdings to its lack of access to alumni and practicing attorneys.⁶⁹ Thus, the Court found that the *Plessy* threshold of “separate but equal” had not been satisfied,⁷⁰ and the University was

64. Dyson, *supra* note 7, at 148 (discussing education discrimination due to unequal funding).

65. See Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51 (2002); see also Brando Simeo Starkey, *Drastic Action: The 1983 Course Boycott at Harvard Law School*, 21 ST. THOMAS L. REV. 56 (2008).

66. See YUDOF ET AL., *supra* note 53, at Chapter Four.

67. 339 U.S. 629, 631 (1950).

68. *Id.* at 633.

69. *Id.* at 635–36; see also Bell, Jr., *supra* note 57, at 524; MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 19 (2010) (“Separate but equal is a legal fiction. There never was and never will be any separate equality.”).

70. Strangely, since *Plessy* had been overruled almost a half century earlier, the University made similar arguments and the Court followed similar reasoning in the more recent case of *United States v. Virginia*, finding that Virginia did not show substantial equality in the

ordered to admit Mr. Sweatt to the original (white) Austin campus.⁷¹ The networking and career-related intangibles that the Supreme Court relied on in 1950 to order Mr. Sweatt admitted to the University of Texas are just as important in contemporary law schools, especially given the historical context of legal education.

Just as post-*Brown* schools were not immediately integrated, higher education also remained predominantly white and male until relatively recently.⁷² The first female students enrolled in American law schools in the 1860s, though it took a full century for women to enter the profession in meaningful numbers.⁷³ People of color began increasing enrollment at predominantly white law schools soon after.⁷⁴ Non-traditional students—women, people of color, those in the lesbian/gay/bisexual/transgender/queer (LGBTQ) community, and older students—are now increasingly common on law school campuses.⁷⁵ Yet, many of these students are marginalized and alienated in law school, perhaps sensing that the school was not

separate educational opportunities the state supports at the different schools. *United States v. Virginia*, 518 U.S. 515, 517 (1996) (quoting *Sweatt v. Painter*, 339 U.S. at 629).

71. *Sweatt*, 339 U.S. at 636.

72. See Dowd et al., *supra* note 18, at 18 (“Historically, legal education was limited to white males; the profession and legal services were limited to white male lawyers and predominantly white male clients.”) (footnote omitted); see also Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity”—Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. REV. 877, 885 (2004).

73. See, e.g., Herma Hill Kay (forthcoming book on first female law professors); M.J. MOSSMAN, *THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS* (2006); Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America*, 28 IND. L. REV. 227 (1995); Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, ANNUAL REVIEWS: A NONPROFIT SCIENTIFIC PUBLISHER (2008), <http://www.annualreviews.org/doi/pdf/10.1146/annurev.lawsocsci.4.110707.172309>.

74. Buckner, *supra* note 72, at 885 (reporting statistics of the increase of culturally diverse students and women in law school); BLACKS AND LAW SCHOOL: LIFE’S MOCKERY, <http://lifessmockery.wordpress.com/category/law-school-2/blacks-and-law-school/> (last visited Jan. 30, 2013). In addition, historically Black law schools traditionally matriculated a significant percentage of the lawyers of color in practice in the United States. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007).

75. *First Year J.D. and Total J.D. Enrollment for 1971–2007*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_t_o_the_bar/statistics/jd_enrollment_1yr_total_minority.authcheckdam.pdf (last visited Jan. 31, 2013).

created with them in mind, and little has changed, structurally.⁷⁶ Recent challenges and reforms in legal education may put even these small advances in jeopardy.⁷⁷ In recent history, segregation has been seen as a social problem, but perhaps in some contexts “the need for sovereignty, or a separate safe space, may be just as important.”⁷⁸

C. Law School Today

Both scholarly and popular literature regarding the law school environment has documented the challenges associated with learning about the law. Academics have published articles, books, and anthologies discussing many facets of legal education, covering everything from pedagogy⁷⁹ to peer mentorship.⁸⁰ These studies reveal that law school is “frustrating and even debilitating” for many students.⁸¹ It is no secret that law school can be a stressful and sometimes depressing environment for students from all backgrounds and walks of life.⁸²

While the experience may be challenging for almost all students, it can be especially difficult for those who are traditionally underrepresented on the law school campus. White men are reported to be the focus of legal education even today, receiving more classroom attention than their female and student of color

76. See Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1244 (2005); see also Dowd et al., *supra* note 18, at 34.

77. See generally Luz Herrera, *Affirming the Relevance of the Main Street Lawyer*, 62 J. LEGAL EDUC. (forthcoming 2013); see also BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); but see Philip G. Shrag, *Failing Law Schools—Tamanaha’s Misguided Missile*, GEO. J. LEGAL ETHICS (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179625.

78. Deo, *Separate, Unequal*, *supra* note 3, at 13.

79. See, e.g., Cassman & Pruitt, *supra* note 76, at 1245–47 (discussing how the Socratic method causes greater discomfort to female rather than to male students. Additionally, the negative reactions increase with “the duration of a student’s legal education.”); Dowd et al., *supra* note 18, at 39–42.

80. See, e.g., Meera E. Deo & Kimberly A. Griffin, *The Social Capital Benefits of Peer-Mentoring Relationships in Law School*, 38 OHIO N.U. L. REV. 305 (2010); SCOTT TUROW, *ONE L* (1977) (fictionalized accounts of law school have been popular as well).

81. Deo & Griffin, *supra* note 80, at 306 (citation omitted).

82. Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 CONN. L. REV. 353 (2003).

classmates.⁸³ The continuing white male normative environment on predominantly white law school campuses may be one cause of the ongoing achievement gap,⁸⁴ especially as some students of color disengage from learning rather than participate in the classroom.⁸⁵ An alternative to disengagement is to create and join race/ethnic-specific organizations that provide supportive “counter spaces” on the otherwise unwelcoming campus.⁸⁶ This Article analyzes the empirical data already presented, especially regarding student perceptions of these “counter spaces,” within a framework of privilege, sovereignty, and segregation.

In fact, law school could be considered largely segregated already, with many whites preferring those from their own racial background for social and academic pursuits.⁸⁷ Law students of color facing microaggressions⁸⁸ that may cause Mundane Extreme Environmental Stress (MEES) sometimes create and join “counter spaces” as “a positive coping strategy.”⁸⁹ This may be especially true on campuses with little structural diversity—i.e., few students of color on campus.⁹⁰ Although there has been more integration of law school in recent decades,⁹¹ it is unclear whether levels of interaction and classroom diversity have improved.⁹² Recent challenges in legal education may be reversing recent gains in enrollment and graduation of diverse students. Thus, the safe space buffer provided by “counter spaces” may be essential for the retention of law students of color.⁹³

A few recent studies have pointed toward the ways in which students of color, especially those who are members of race/ethnic-

83. Dowd et al., *supra* note 18, at 27.

84. See Buckner, *supra* note 72, at 886; see also Hamlar, *supra* note 16, at 535.

85. Buckner, *supra* note 72, at 888.

86. Solórzano et al., *supra* note 14, at 42.

87. See generally COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Mitchell J. Chang et al. eds., 2003).

88. See *id.* at 17 (“Microaggressions are subtle verbal and non-verbal insults directed toward non-Whites, often done automatically or unconsciously.”).

89. TATUM, *supra* note 15, at 62.

90. See, e.g., Deo, *The Promise of Grutter*, *supra* note 17, at 82–83.

91. See *First Year J.D. and Total J.D. Enrollment for 1971–2007*, *supra* note 75; see also David L. Chambers et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000).

92. Deo, *The Promise of Grutter*, *supra* note 17, at 65.

93. *Id.* at 85 n.143; see also Solórzano et al., *supra* note 14, at 66–70.

specific organizations, are appreciative of the safe space that their groups provide.⁹⁴ They tend to join these groups for various forms of support and benefit from the buffer that these groups provide from the larger campus environment.⁹⁵ This may be especially true for the few law students of color on each predominantly white campus, many of whom feel marginalized, tokenized, and singled out as different from their peers.⁹⁶

Many of the benefits that accrue to students of color who join race/ethnic-specific organizations may be due specifically to the safe space inherent within them. This safe space would be impossible to preserve if the broader campus community participated in the groups in significant numbers. In other words, if the racial composition of group membership mirrored that of the law school as a whole, it would obviously not be a group consisting mainly of students of color but rather would be predominantly white, since that is the racial composition of most law schools.⁹⁷ The culture, tone, and nature of the group would likely change as well, depending on how the privileged status of those not sharing the racial/ethnic identity of the group's focus affected the others.⁹⁸

Again, one main cause behind the isolation facing students of color at predominantly white institutions is the expectation that they will conform to an inflexible and white-focused environment.⁹⁹ As historically elite white settings, universities treat students of color as "outsiders" who do not belong.¹⁰⁰ This continues into law school, where a "cultural paradigm [that is] decidedly 'white' . . . generally exerts upon non-whites more pressures to conform"¹⁰¹

94. See, e.g., Deo et al., *Struggles and Support*, *supra* note 19, at 91.

95. Deo, *Separate, Unequal*, *supra* note 3, at 27.

96. Buckner, *supra* note 72, at 892; Dowd et al., *supra* note 18, at 45; Hamlar, *supra* note 16, at 576.

97. For the time period corresponding to the Perspectives on Diversity study, the University of Michigan Law School reported that approximately 61 percent of its student body consisted of white students. See Deo, *The Promise of Grutter*, *supra* note 17, at 113.

98. See generally WILDMAN, *supra* note 7.

99. JOE R. FEAGIN ET AL., *THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE COLLEGES AND UNIVERSITIES* (1996) (identifying Black demands for separate dorms and support facilities at major universities as being comparable to earlier patterns of legal segregation).

100. BROWN ET AL., *supra* note 10, at 118.

101. Cassman & Pruitt, *supra* note 76, at 1269.

This background leads to a profound question, one that community members asked when the litigators of *Brown* pushed for an integration strategy: is integration truly the goal?¹⁰² To fully answer this question, we must first understand how privilege plays into both segregation and integration. The interplay between privilege and segregation/integration specifically in the law school environment is explored below.

V. UNDERSTANDING THE EFFECTS OF PRIVILEGE ON SEGREGATION

A. *Recognizing Privilege*

While “victory in *Brown* failed to produce the full integration envisioned by the attorneys,” it may instead have “set the stage for the current marginalization of many African American students ‘integrated’ into predominantly white campuses.”¹⁰³ American history reveals the deep structural roots of privilege in the educational context.¹⁰⁴ Stephanie Wildman’s path-breaking book, *Privilege Revealed*, sets the stage for considering law school through the lens of privilege.¹⁰⁵ Wildman defines privilege as a “systemic conferral of benefit and advantage [based on] affiliation, conscious or not and chosen or not, to the dominant side of a power system.”¹⁰⁶ Privilege is largely invisible to those who reap its benefits, in part because many aspects of privilege are seen as a “normal” part of everyday life.¹⁰⁷

102. For a discussion of the tension between community interests and lawyers’ goals see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 490 (1976) (“[C]ivil rights attorneys often do not represent their clients’ best interests in desegregation litigation because ‘they answer to a miniscule constituency while serving a massive clientele.’”) (quoting Ron Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176 (1974)); Bell, Jr., *supra* note 57 (identifying civil rights lawyers’ priorities); Deo, *Separate, Unequal*, *supra* note 3, at 21.

103. Deo, *Separate, Unequal*, *supra* note 3, at 22.

104. BROWN ET AL., *supra* note 10, at 149 (“Structural variables are elements of social and economic organization that lie beyond individual control, that are built into the way society is organized.”); MASSEY & DENTON, *supra* note 10.

105. WILDMAN, *supra* note 7.

106. *Id.* at 29.

107. Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA, *supra* note 7, at 7–24.

Those who do not enjoy positions of privilege must adapt to the norms established by the privileged, which often creates further disadvantage.¹⁰⁸

Wildman makes clear that law schools reflect the broader structural inequality of society as a whole. She notes that “[t]he reality of American democracy and the institutions within it is that social privileges are accorded based on race, sex, class, and sexual preference.” Thus, it should be no surprise that law schools perpetuate these very forms of privilege within their walls.¹⁰⁹ Wildman notes that the legal profession maintains many of these systems of privilege, largely on exclusion since “[t]he [legal] academy and the profession remain primarily white and male.”¹¹⁰

Many recognize that diversity is increasingly important in our globalizing society. In fact, the U.S. Supreme Court in *Grutter v. Bollinger* upheld affirmative action at the University of Michigan Law School in part because of the role of diversity in fostering an inclusive environment that improved the education of all students.¹¹¹ Yet, Wildman cautions institutions of higher education against simply giving lip service to diversity if they truly seek the anticipated benefits. Citing the work of feminist scholar and former Berkeley Dean Herma Hill Kay, Wildman notes, “A commitment to diversity cannot succeed without the willingness to hear, understand, and accept [] different voices.”¹¹² In fact, recent research has shown that positive interactions in the classroom between students of different racial/ethnic backgrounds may be key to realizing the actual benefits of diversity expected by the *Grutter* Court.¹¹³ Without these, our institutions of higher learning may have students of color silently

108. *Id.*

109. WILDMAN, *supra* note 7, at 106.

110. *Id.* at 104.

111. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”).

112. WILDMAN, *supra* note 7, at 105. (“Kay reminded faculty that diversity will bring ‘intellectual richness’ to legal education.”).

113. Deo, *The Promise of Grutter*, *supra* note 17, at 83–86.

sitting next to white students in the classroom, with many missed opportunities for few educational or professional benefits.¹¹⁴

B. The Flip Side of Privilege

White privilege may be “the opposite side of the coin of discrimination and exploitation.”¹¹⁵ A number of scholars have examined the structural nature of privilege with a focus on racial oppression and from the viewpoint of the oppressed. For instance, racial privilege is the focus of Michael Omi and Howard Winant’s foundational book *Racial Formation in the U.S.*¹¹⁶ Because race is “a socially constructed way of differentiating human beings,” rather than biologically determined, the very definitions of race can change over time and continue to change today.¹¹⁷ Omi and Winant discuss the socio-historical transformations of race as political projects push and pull race and racism into various contortions.¹¹⁸ These are not private political concerns that operate wholly separately from the public sphere; instead, “the State maintains ‘a tendency to reproduce those patterns of inequality’” in the form and manner most appropriate for the day and age.¹¹⁹ Thus, “the major institutions and social relationships of U.S. society—law, political organization, economic relationships, religion, cultural life, residential patterns, etc.—have been structured from the beginning by the racial order” and continue to reflect racial privilege today.¹²⁰

Sociologist Eduardo Bonilla-Silva has also made a significant contribution to this conversation with his impressive body of work

114. See *id.* at 103 (discussing how exclusion of diversity discussions causes problems for students who value these characteristics, and can result in students feeling alienated from law school learning); *id.* at 107.

115. Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1286 (2011) (citing Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 96–97 (1992)).

116. OMI & WINANT, *supra* note 9.

117. *Id.* at 65; William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 10 (2011–12).

118. OMI & WINANT, *supra* note 9, at 55.

119. *Id.* at 58.

120. *Id.* at 79.

over the past two decades.¹²¹ Among his early pieces he introduces the “racialized social system,” a theoretical framework for understanding the structural nature of American racism.¹²² According to this framework, the American racial hierarchy consists of groups that are either “beneficiaries (members of the dominant race)” or “subordinates (members of the dominated race or races).”¹²³ Members of different groups look to promote their own group’s interest, such that some work to perpetuate the racial order and others rebel against it.¹²⁴ Rather than looking at racism as an individual legacy from the past, once situated within this structural framework, “[r]acial phenomena are regarded as the ‘normal’ outcome of [society’s] racial structure” and “[r]acially motivated behavior, whether or not the actors are conscious of it, is regarded as ‘rational’—that is, as based on the races’ different interests.”¹²⁵ In other words, the overall structure sustains racism, as opposed to its existence being based solely on the actions of a few aberrant individuals.¹²⁶ Thus, it may be true that the past fifty years have seen less of the overt, *de jure* discrimination that had been rampant in the early history of the United States; however, racism in its current evolution may be equally oppressive.¹²⁷

While “[s]ociologists have extensively documented both the structural forces that perpetuate racial disparities and how the illusion of neutrality contributes to the persistence of those structural forces,” legal academics also have contributed to academic understandings of structural racism.¹²⁸ Critical Race Theory (CRT) scholars are especially clear voices in this conversation. For instance, much of Derrick Bell’s work elaborates on the “racial projects” that Omi and

121. Eduardo Bonilla-Silva, *The Invisible Weight of Whiteness: The Racial Grammar of Everyday Life in Contemporary America*, 35 *ETHNIC & RACIAL STUD.* 2, 173–94 (2012); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* (2d ed. 2006).

122. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 *AM. SOC. REV.* 465, 469 (1997).

123. BONILLA-SILVA, *supra* note 9, at 11.

124. *Id.*

125. *Id.* at 45–46.

126. Wiecek, *supra* note 117, at 3–12.

127. See generally BONILLA-SILVA, *supra* note 9; see also Wenger, *supra* note 48, at 722 (citing CRT scholars for the assertion that “colorblind legal arguments can perpetuate racial subordination”).

128. Wiecek, *supra* note 117, at 13.

Winant popularized.¹²⁹ Bell considers how the fluidity, flexibility, and adaptation of racial discrimination—the “myriad of guises” that racism dons to stay a step ahead of the law—are perhaps its greatest asset.¹³⁰ While some may believe racism to be a relic of the past, Bell emphasizes that while it may be disguised in various forms it is still with us today.¹³¹

What social scientists call “structural racism,” legal academics sometimes refer to as “institutional racism,” a term popularized in the CRT literature by Ian Haney-López over a decade ago.¹³² Though there are varying definitions associated with structural/institutional racism, most see it as “a complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color.”¹³³

Following along Wildman’s discussion of privilege, CRT scholars have presented a number of different characteristics often associated with racial privilege. Two important facets of structural/institutional racism include its infiltration of “multiple social domains” and its “dynamic and cumulative” nature; taken together, these allow for virtually invisible but pernicious racism to “adapt seamlessly to changing social conditions” throughout most aspects of social life.¹³⁴ Belief that inequality in the system is “normal” results in a great benefit to those who maintain structural power, as it “reinforce[s] a racial hierarchy of status resulting in ‘social domination’ by a

129. For more on Bell’s discussions on the adaptive nature of racism, the use of code words, the myth of reverse racism, and the new focus on a colorblind ideology, see Deo, *Separate, Unequal*, *supra* note 3, at 15.

130. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 101 (1992).

131. *Id.* at 97.

132. Ian F. Haney-López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717 (2000).

133. Wiecek, *supra* note 117, at 5.

134. *Id.* at 7 (Presenting eight facets of structural racism, including the following two: “The effects of structural racism are interconnected across multiple social domains (housing, education, medical care, nutrition, etc.)” and “Structural racism is dynamic and cumulative. It replicates itself over time and adapts seamlessly to changing social conditions.”).

superordinate group (Anglos) over a subordinated group [(people of color)].”¹³⁵

Structural racism is all-pervasive, infecting the very institutions that support communities, civic bodies, and society broadly. “The effects of structural racism do not occur in isolation from each other. Rather, they are connected spatially, across all social domains. This is often described as a ‘matrix of domination’ or a ‘web of oppression.’”¹³⁶

One of the earliest explorations of white privilege among Critical Race Theorists is Cheryl Harris’s powerful piece, *Whiteness as Property*. In the article, Harris provides strong evidence for considering a property interest in whiteness, in part based on the privileged social status that automatically flows from whiteness.¹³⁷ She argues that “whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation.”¹³⁸ Harris focuses much of her article on ways in which the law maintains white privilege, stating that “[t]he law’s construction of whiteness defined and affirmed critical aspects of . . . privilege.”¹³⁹ While many think of the law as working against discrimination, some perceive “law itself [to be] often at the root of the problem.”¹⁴⁰ Once white privilege was enshrined as a “normal” characteristic of society, it became “relatively invisible—at least to those who do not experience” its negative effects.¹⁴¹ To the extent that whites recognized it at all, since

135. *Id.* at 6 (examining “racial institutions,” those “understanding of race . . . within a community” that enable individuals to understand and explain reality) (summarizing Haney-López, *supra* note 132).

136. Wiecek, *supra* note 117, at 16 (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 227–28 (2000)); *see also* BOB MULLALY, *CHALLENGING OPPRESSION AND CONFRONTING PRIVILEGE: A CRITICAL SOCIAL WORK APPROACH* 197 (2010).

137. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1720–21 (1993) (“White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.”).

138. *Id.* at 1737.

139. *Id.* at 1725 (“Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.”).

140. ANCHETA, *supra* note 54, at 172.

141. BROWN ET AL., *supra* note 10, at 225.

all of society was “structured on racial subordination, white privilege became an expectation.”¹⁴²

Continuing in that vein, CRT scholar Peggy McIntosh discusses the “invisible knapsack” of benefits that whites carry with them throughout their day.¹⁴³ This vivid image presents all whites as carrying with them “an invisible package of unearned assets which [whites] can count on cashing in each day, but about which [whites were] ‘meant’ to remain oblivious.”¹⁴⁴ Obviously, non-whites have limited access to the resources contained in the knapsack, instead facing additional burdens and challenges.¹⁴⁵

C. *Privilege, Power, Segregation*

This focus on the relative hierarchies of different groups can help provide a more nuanced understanding of segregation itself.¹⁴⁶ Understanding the relationship between privilege and power helps explain how segregation may have different meanings in different contexts.¹⁴⁷ Without including the all-important context, a clear understanding of segregation within a framework of scholarship on privilege and Critical Race Theory, we could misunderstand

142. Harris, *supra* note 137, at 1730.

143. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women’s Studies* (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988).

144. McIntosh, *supra* note 7, at 33.

145. In fact, microaggressions, stereotypes, and other weighty burdens could be considered the heavy invisible knapsacks carried by people of color in America. See Meera E. Deo, *A Heavier Knapsack: Invisible Burdens on People of Color* (in progress).

146. For more on CRT scholarship on this topic, see Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1253 (2011) (“the early work of Derrick Bell, Charles Lawrence, Mari Matsuda, and Kimberlé Crenshaw developed a vocabulary and framework to address these types of structural or institutional racism”).

147. For more on CRT and intersectionality specifically, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR*, (2002); PATRICIA HILL COLLINS, *BLACK FEMINIST THEORY: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2000).

race/ethnic-specific organizations or mistake them for falling in line with the very social ills we seek to avoid. What is this context, then?

We learn from Cheryl Harris that the “right to exclude” is a “central principle” of whiteness, as the “exclusion of others deemed to be ‘non white’” defined whiteness more than any “inherent unifying characteristic.”¹⁴⁸ Early on, the law worked to cement white privilege, formalizing and normalizing this exclusion.¹⁴⁹ Thus, “whiteness became an exclusive club whose membership was closely and grudgingly guarded.”¹⁵⁰ When we connect white exclusivity and privilege to the law school intangibles that the Supreme Court emphasized in *Sweatt v. Painter* over sixty years ago, we see how student organizations may be even more important today. As groups that bond students to one another, increase their sense of belonging at the school, and may even improve retention rates and grades, race/ethnic-specific student organizations provide many of the intangible features that the *Sweatt* Court recognized as critical to a future attorney’s success.¹⁵¹ Ideally, students of color and white students will have meaningful diverse interactions throughout law school that will better prepare them to navigate our globalized society.¹⁵² Meanwhile, as students of color face ongoing exclusion from many facets of law school life, the race/ethnic-specific student organizations focus their time and attention on students with a shared identity. How then is this different from the race/ethnic-specific organizations accused in the data of being similarly exclusive?

For one, whiteness “was premised on white supremacy rather than mere difference.”¹⁵³ Race/ethnic-specific organizations, on the other hand, are simply serving a mission of working toward the educational and professional improvement of their members. In addition, when we think of the relative privilege of whites in society vis-à-vis marginalized students of color on predominantly white campuses,

148. Harris, *supra* note 137, at 1736.

149. *Id.*

150. *Id.*

151. See generally Deo, *Separate, Unequal*, *supra* note 3 (discussing the benefits of membership in race/ethnic-specific law student organizations).

152. See generally Deo, *The Promise of Grutter*, *supra* note 17 (exploring diverse interactions and how they can benefit students in the future as attorneys).

153. *Id.* at 1737.

perhaps members of both groups should not be treated the same. CRT scholars have pondered whether people who are different should be treated the same by law. For instance, Darren Hutchinson accuses the Supreme Court of “effectively invert[ing] the concepts of privilege and subordination” by insisting that members of privileged groups can rely on the laws put in place to protect the disadvantaged.¹⁵⁴

Critical Race Theory recognizes, in essence, that all segregation is not created equal. Using pre-*Brown* segregated schools in the South as an example, white schools had significantly more resources than similarly situated Black schools.¹⁵⁵ There is little to show concern for white students who may have felt or actually were excluded from Black schools—although of course segregation mandated the full educational separation of the races. This again relates to the structural basis of privilege.

Consider the context of the law school campus as a particular setting and specifically the race/ethnic-specific organizations on that campus. Whites excluding people of color from a particular environment may have different meaning than people of color creating a group seen as exclusive with the express mission of banding together marginalized individuals who may be largely excluded themselves from the broader white environment of the campus as a whole.

VI. CONCLUSIONS & IMPLICATIONS

Segregation is a part of the lives of most students of color. Many begin education at elementary and high schools that are ever-more

154. Carbado, *supra* note 49, at 1613 (“Still other CRT scholars, such as Darren Hutchinson, have demonstrated how the Supreme Court’s commitment to treating people formally the same ‘has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude.’”) (quoting Darren Lenard Hutchinson, “*Unexplainable on Grounds Other Than Race*”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 618 (2003)).

155. “In Mississippi, for example, as late as 1950, black schools received \$32.55 in education funding whereas white schools received \$122.93.” Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, 6 J. BLACKS IN HIGHER EDUC. 104, 106 (1994–95).

segregated,¹⁵⁶ in large part because of the inability to curb ongoing residential segregation.¹⁵⁷ This often leads to alienation and isolation for the few students of color who attend predominantly white schools, whether in high school, college, or beyond.¹⁵⁸ This marginalization, based in part on the enrollment of only token numbers of students of color, may be one unintended consequence of the decision to push for integration at the expense of full equality of resources in separate schools.¹⁵⁹

Once enrolled in predominantly white institutions of higher education, many of these tokenized students of color create a safe space distinct from the mainstream campus; these counter spaces serve as buffers between themselves and the hostile environment.¹⁶⁰ The empirical data show that some students worry that these groups perpetuate segregation or purposefully separate students based on race. However, others note that these groups provide a safe haven from the otherwise unwelcoming campus climate. Which perception should we validate?

It seems clear that race/ethnic-specific law student organizations do a great deal to foster community and create a “safe space” buffer between otherwise marginalized students of color and the larger campus environment. Many members appreciate the sense of family these groups provide.¹⁶¹ Research has shown that race/ethnic-specific organizations allow for strong connections that bond a small and

156. GARY ORFIELD, *Desegregation After Two Generations: Race, Schools and Opportunity in Urban Society*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY (Herbert Hill & James E. Jones, Jr. eds., 1993).

157. See generally MASSEY & DENTON, *supra* note 10; see also BROWN ET AL., *supra* note 10; FARLEY & ALLEN, *supra* note 9.

158. See generally LAURIE OLSEN, MADE IN AMERICA: IMMIGRANT STUDENTS IN OUR PUBLIC SCHOOLS (1997); see also FELIX M. PADILLA, THE STRUGGLE OF LATINO/A UNIVERSITY STUDENTS: IN SEARCH OF A LIBERATING EDUCATION (1997); Allen & Solórzano, *supra* note 14.

159. Deo, *Separate, Unequal*, *supra* note 3, at 12; Bell, Jr., *Serving Two Masters*, *supra* note 102, at 480.

160. Bell Jr., *Serving Two Masters*, *supra* note 102, at 489–92.

161. See Deo & Griffin, *supra* note 80, at 325 (“For example, as a Black student at a predominantly white institution, Bobby relies on the bonds he has formed with what he calls his ‘law school family’ to sustain him. This family is largely composed of peer mentors and other individuals he met through his participation in BLSA.”).

marginalized group of students of color to one another.¹⁶² This may be especially true when there are limited numbers of marginalized students from particular racial/ethnic backgrounds on campus. When considering their privilege relative to whites¹⁶³ and their (low) racial group hierarchy or status,¹⁶⁴ it may not be surprising that these students turn to race/ethnic-specific organizations for support, that they rely on peers who share some salient identity characteristics. On the other hand, some students complain that race/ethnic-specific groups lead to increased segregation on campus. If some students do not feel welcome participating as members of race/ethnic-specific organizations, the groups may not be fully inclusive.

Generally, in order to have a safe space within an otherwise unwelcoming larger space, the larger community cannot all be invited to participate. There must be some sovereignty, or that small space would become identical to the larger community.¹⁶⁵ In other words, keeping the space safe depends on keeping it somewhat exclusive—not in an elitist way, but in a *protective* way. This may be based largely on positionality, privilege, and power.¹⁶⁶ White students are used to being in the majority, at the top of status hierarchy, those that do the excluding. Some race/ethnic-specific organizations offer great resources to members but label whites as the “other,” making membership in these groups less comfortable for whites. Note that whites can—and do—still join these groups; they are not completely excluded. Some feel no qualms about “infiltrating” student of color events and benefiting from the resources extended to members. However, others feel as if they are not particularly welcome, which is a relatively unique experience for many in this privileged position.

Following in the vein of CRT scholarship and that of academics studying privilege, this Article emphasizes that many of these students of color feel unwelcome on the law school campus the

162. See generally TATUM, *supra* note 15; Deo, *Bolstering Bonds* *supra* note 16; Hamlar, *supra* note 16, at 545.

163. See generally WILDMAN, *supra* note 7.

164. See generally BONILLA-SILVA, *supra* note 9.

165. Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine*, 12 STAN. L. & POL’Y REV. 191 (2001).

166. For more on positionality see FREDRIK BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION* (1969) (discussing the distinction between “us” and “them”).

majority of the time. The low numbers of students of color can be blamed for some of the alienation; yet, women—who are increasingly in the numerical majority on law school campuses—report similar feelings of marginalization on campus.¹⁶⁷ When we consider the interplay of privilege—how the white male focus of law school penalizes those who may be different from the “norm”—the dynamic becomes clearer. We see how women and people of color, as well as other non-traditional achievers including older law students and those in the LGBTQ community, lack the privilege that their classmates enjoy. The literature tells us that this privilege is largely invisible, that those who benefit are likely unaware of the knapsack of benefits they carry with them.¹⁶⁸ Yet, the effects are clearly visible and carry forward in the data itself in terms of how students identify the various groups.

Thus, if we return to the pre-*Brown* South, where *de jure* segregation ruled the land, Blacks and whites in their separate schools could not be equal. This is what the U.S. Supreme Court proclaimed in *Brown*: Blacks are relegated to separate schools because they are considered inferior, while whites are protected in separate schools because they are exceptional.¹⁶⁹ The power relationship between the groups—with whites protecting their hierarchical position at the top of the ladder in part by preventing African Americans from ascending to join them—was the main problem with segregation in that setting. Today, “we may have failed at true integration, while also providing an unequal education to students of color on predominantly white campuses.”¹⁷⁰ Our situation exactly mirrors conceptions from Bonilla-Silva, Harris, and other CRT scholars regarding relative privilege and the effects on dominant and oppressed groups.¹⁷¹

This Article shows how we draw false dichotomies when we think of whether these organizations or other spheres of society safeguard one culture or exclude mainstream America. Often, in order to do one

167. Cassman & Pruitt, *supra* note 76, at 1247–55; Dowd et al., *supra* note 18, at 23; Moran, *supra* note 17, at 2292.

168. McIntosh, *supra* note 143.

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

170. Deo, *Separate, Unequal*, *supra* note 3, at 12.

171. Harris, *supra* note 137; BONILLA-SILVA, *supra* note 9.

(support), there must be some element of the other (exclude). This is definitely true in law school where the safe space of the race/ethnic-specific group means the focus is on those with a shared background.

In fact, this complex issue of safe space vs. self-segregation may be inherent in the existence and maintenance of race/ethnic-specific organizations on predominantly white campuses. Many white students and students of color recognize the need for a safe space for students who tend to be marginalized both in the classroom and during social interactions, though they also worry that these groups may be seen as exclusive. Therein lies the tension: a safe space is one where students of color feel comfortable; if they are not comfortable in the larger campus environment, the group cannot be one that welcomes every student, but rather one that caters to the needs of its members.

While the focus of this particular Article is on race/ethnic-specific organizations and the same-race members of those groups, it must be noted that other groups are also marginalized on the law school campus. Also vulnerable on the law school campus are female law students and members of the LGBTQ community.¹⁷²

This Article is clearly not the first to consider how group status affects segregated environments. To point out two examples, scholars have studied Historically Black Colleges and Universities (HBCUs) as well as female-only institutions.¹⁷³ Some of these studies challenge the myth that HBCUs are segregated institutions, pointing out the

172. See Lani Guinier, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994). Data from women and LGBTQ students confirm the ways in which these individuals may also seek nurturing within supportive organizations in law school. For instance, a white woman named Carrie mentions, "As a woman, I feel uncomfortable here. That's something I would like changed. I never felt my identity as a woman as much as when I came here. Sometimes [my male classmates] feel comfortable making jokes that I find offensive and insensitive." Similarly, a white lesbian student named Shawn worries that issues of sexual orientation are usually "framed in the context of, 'Should these people have rights at all?'" Shawn feels these attacks personally though she believes they are purely academic conversations for many of her classmates, who may not even realize that what are saying "may be hurtful to people in the room." Thus, privilege does not stop at white privilege but extends to other groups such that women and those in the LGBTQ community may also feel marginalized and in need of support from a safe space buffer.

173. MARYBETH GASMAN, VALERIE LUNDY-WAGNER, TAFAYA RANSOM & NELSON BOWMAN III, *UNEARTHING PROMISE AND POTENTIAL: OUR NATION'S HISTORICALLY BLACK COLLEGES AND UNIVERSITIES* (2010); Mildred H. McAfee, *Segregation and the Women's Colleges*, 43(1) AM. J. SOC. 16 (1937).

great diversity that exists on most campuses.¹⁷⁴ Many make clear that the institutions come from a tradition of educating those who were excluded from mainstream (i.e., white male) institutions of higher learning.¹⁷⁵ Some make clear that these institutions continue to play an important role in American society, educating individuals in a safe and nurturing environment that may be difficult to replicate on a mainstream campus even today.¹⁷⁶

In fact, communities have disagreed about prioritizing integration vs. improving segregated schools for decades. Even before the U.S. Supreme Court decided *Brown v. Board of Education*,¹⁷⁷ those challenging “separate but equal” were not united in the fight against segregation.¹⁷⁸ Some community members would have preferred to focus on improving African American schools, even if that meant maintaining segregation, rather than integrating with whites and running the risk of second-class citizenship.¹⁷⁹

How do we move forward from here? First, the issue may not be whether these groups create community *or* increase segregation; many do both simultaneously. That itself is the tension. What can be done about this conflict? One implication is that administrators, students, faculty, and policy-makers should recognize the tension and do more to address it. If students of color crave a safe space because the rest of the campus is hostile, it seems logical that a welcoming campus would result in less of a need for these groups to have a separate space. In other words, if students of color did not need a buffer from law school, these groups would not be “counter spaces.” Perhaps then these groups would simply be seen as positive elements on campus, rather than being accused of dividing or segregating the student body. In fact, especially when considering the literature on privilege, we see that these groups may be important even on

174. HOW BLACK COLLEGES EMPOWER BLACK STUDENTS: LESSONS FOR HIGHER EDUCATION (Frank W. Hale, Jr., ed., 2006).

175. *Id.*; see also McAfee, *supra* note 173.

176. See U.S. COMMISSION ON CIVIL RIGHTS, THE EDUCATIONAL EFFECTIVENESS OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (2010), available at http://www.usccr.gov/pubs/HBCU_webversion2.pdf.

177. 347 U.S. 483 (1954).

178. Deo, *Separate, Unequal*, *supra* note 3, at 21.

179. For a discussion on the distinction between clients and constituents, see Bell, Jr., *Serving Two Masters*, *supra* note 102, at 489–92.

campuses that have achieved a semblance of critical mass for students of color—because in spite of increasing numbers of students of color, they nevertheless lack power as compared to their more privileged white peers.

In fact, the focus of these groups is to provide a space that encourages bonding between students from the same race or ethnic background, regardless of the exclusion of their white peers. Thus, perhaps diversity on the law school campus—or lack thereof—is another critical factor that deserves additional study in this complicated arena of whether race/ethnic-specific student organizations create safe spaces and/or increase segregation.

Until that time, we must protect race/ethnic-specific organizations from attacks both internal and external. As stated earlier, Arizona recently attempted to ban race/ethnic-specific student organizations by arguing that they were “un-American” and worked against the goals of public education.¹⁸⁰ Ironically, these very students of color are often excluded from many other facets of campus life. Students of color and other marginalized students will therefore seek out some way to congregate with others who share their identity and experience. Without a formal group and the sense of belonging that accompanies group membership, these alienated students may face even greater challenges. In fact, the groups further the goals of education by providing academic and career benefits to members in addition to social, cultural, and emotional support.¹⁸¹

Ultimately, the data from this Article indicate that at a predominantly white institution, where students of color are in the minority, many of those students join race/ethnic-specific organizations in search of a buffer from the larger campus. White students are not formally excluded from these groups, and in fact they do join in relatively large numbers. However, for race/ethnic-specific organizations to continue to provide a safe haven for students who are otherwise somewhat marginalized on campus, it is imperative that they do project some sort of exclusivity. Maintaining a racial

180. *See supra* notes 21 and 22.

181. *See Deo, Separate, Unequal, supra* note 3, at 41–44 (detailing the social, cultural, emotional, academic, and professional support that student members of race/ethnic-specific organizations enjoy); *see also* Deo, Bolstering Bonds, *supra* note 16.

composition that reflects the focus of the group (i.e., mostly Black students in the Black Law Student Association) may be critical for ensuring that members get the safe space they need to sustain them through law school.