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BROWN AND RACIAL DESEGREGATION OF U.S. PUBLIC EDUCATION

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Dedication

To the dearest people to my heart,

To my parents, Ali and Soumia,

To my grandmother Mahfouf Khadija,

To my sisters, Imen, Karima, and Meriem,

To my brother, Mohammed,

I say, I LOVE YOU SO MUCH.

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Abstract

The present research looks into the nature of racial desegregation of overwhelmingly black American public schools bringing to light the *Brown* decision (1954), being the spur to the school desegregation movement, and winding up with the recent ruling in *Grutter* (2003), reinforcing *Brown's* mandate by upholding affirmative action in higher education. This study is divided into four chapters. The first chapter reviews briefly the status of U.S. public education during the pre-*Brown* era, appraises *Brown's* impaired outcome on school discrimination a decade following its endorsement, and weighs up the federal government's commitment to the implementation of *Brown's* mandate from the mid 1960s up to the early 1970s. In spite of the significant school desegregation progression throughout that period, an alarming return to segregation in U.S. public schools characterized the 1990s. Chapter two delves into social, economic and political grounds behind this phenomenon. The third chapter explores the legal resegregation of U.S. public education spotlighting fundamentally a wide range of Supreme Court rulings held particularly throughout the 1970s and the 1990s. The last chapter considers two key federal educational measures adopted at the turn of the new century and assesses their effect on racial desegregation of American public education. The discussion reveals that the *Brown* decision is not principally held accountable for the hopelessness of racial integration of American public schools. The failure, instead, is attributable to a combination of diverse grounds.

Résumé

Cette recherche examine la nature de la déségrégation raciale des écoles publiques américaines en majorité noires mettant en évidence le verdict judiciaire *Brown* (1954), étant le déclenchant du mouvement de la déségrégation des écoles, et concluant par la décision la plus récente de *Grutter* (2003), affermissant le jugement de *Brown* en certifiant l'action affirmative dans l'éducation supérieure. Cette étude comprend quatre chapitres. Le premier chapitre passe en revue le statut de l'éducation américaine pendant la période qui précède *Brown*, examine l'effet infime de *Brown* sur la ségrégation des écoles durant la décennie qui a suivi son approbation, et analyse l'attitude du gouvernement fédéral dans l'exécution de l'ordre judiciaire pendant les années 60 jusqu'au début des années 70. Malgré la progression significative de la déségrégation des écoles tout au long de cette période, un retour alarmant de ségrégation dans les écoles américaines a caractérisé les années 90. Dans ce contexte, chapitre deux de cette étude analyse les raisons sociales, économiques, et politiques derrière ce phénomène. Le troisième chapitre quant à lui explore la réségrégation légale de l'éducation publique aux Etats Unis mettant en lumière fondamentalement un éventail d'actes émanant de Cour Suprême tout au long des années 70 et des années 90. Le dernier chapitre considère deux mesures éducatives fédérales adoptées principalement tout au début du 21^{ème} siècle et évalue leurs portées sur la déségrégation dans les écoles américaines. Il ressort de ce travail que la décision *Brown* n'est pas principalement à l'origine de l'inefficacité de l'intégration raciale des écoles publiques américaines. L'échec de *Brown* est plutôt causé par de nombreuses causes diverses.

ملخص

تعنى هذه الدراسة بطبيعة محاربة التمييز العنصري في المدارس العامة الأمريكية ذات الأغلبية السوداء بتسليط الضوء على قرار براون 1954، كونه المحرض الرئيسي لحركة محاربة العنصرية في المدارس، و تختتم بقرار *قراوتر* 2003، الذي يعزز حكم *براون* بتوطيد العمل الإيجابي في التعليم العالي. تنقسم هذه الدراسة الى أربعة فصول. يستعرض الفصل الأول بإيجاز حالة التعليم العام الأمريكي خلال فترة ما قبل *براون*، يحلل آثار *براون* الضعيفة على المدارس الأمريكية خلال العقد الأول من سنها، و يقيم مدى إلتزام الحكومة الفدرالية بتنفيذ القرار من منتصف الستينات إلى بداية السبعينات. بالرغم من التحسن الملحوظ في إزالة التمييز العنصري من المدارس خلال تلك الفترة، عودة مفزعة للعنصرية ميزت المدارس الأمريكية خلال التسعينات. الفصل الثاني يبحث في الأسباب الإجتماعية، الإقتصادية، و السياسية وراء هذه الظاهرة. الفصل الثالث يستكشف العودة الشرعية للعنصرية في التعليم العام الأمريكي بتسليط الضوء أساسا على مجموعة من الأحكام القضائية المقررة خصوصا خلال السبعينات و التسعينات. الفصل الأخير يأخذ بعين الإعتبار إجرائين تعليميين هامين مع بداية القرن الجديد و يقيم مدى تأثيرهما على محاربة العنصرية في التعليم العام الأمريكي. ينتهي هذا البحث إلى أن قرار *براون* غير مسؤول أساسا عن عدم فعالية الإنماج العنصري في المدارس العامة الأمريكية. الفشل في الواقع ينسب إلى مجموعة من الأسباب المتفرقة.

Table of Contents

INTRODUCTION	1
Chapter One: The Dilemma of School Desegregation	5
Introduction	5
1 Background	6
1.1 The Justification of Segregated Education	6
1.2 The Legalization of Racial Segregation	9
2 Brown v. Board of Education of Topeka, Kansas (1954)	13
2.1 All Deliberate Speed	15
2.2 Reliance on Social Science	20
2.3 Reaction to Cold War Efforts	23
3 The Federal Enforcement of School Desegregation	27
4 Bussing and the Continuing Dilemma of School Desegregation	33
Conclusion	39
Endnotes	40
Chapter Two: The Return to Segregation in U.S. Public Education	41
Introduction	41
1 The Alarming Trend Toward School Resegregation	42
1.1 Public Opinion and School Segregation	47
1.2 Demographic Forces and School Segregation	50
2 The Equalization of Separate Education	54
3 The Aftermath of School Desegregation Failure	58
3.1 Segregation and Poverty Concentration	58
4 The Educational Benefits of Desegregation	65
Conclusion	72
Endnotes	73
Chapter Three: The Legal Resegregation of U.S. Public Schools	74
Introduction	74
1 The Failure of School Desegregation	75
2 The Decisions of the 1970s: The Supreme Court Contributes to the Resegregation of American Public Education	77
2.1 White Flight to Suburban Areas	77
2.2 Proving Discrimination in Northern School System	80

2.3 Inequality in School Funding	82
3 The Decisions of the 1990s: The Supreme Court Ends Desegregation Orders	84
4 Why Have Courts Failed?	91
5 “The Deconstitutionalization of Education”	94
6 The Impact of the 1990s’ Court Decisions	98
6.2 The Return to Neighborhood Schools	99
6.2 Impact on Academic Performance	101
6.3 Within-School Integration	102
Conclusion	105
Endnotes	106
Chapter Four : New Dimensions of Segregation: The No Child Left Behind Act	108
Introduction	108
1 The No Child Left Behind Act	109
1.1 Background	109
1.2 Key Provisions	112
2 Criticizing the NCLBA	114
2.1 NCLBA’ s Effect on Black Americans	116
2.2 Holding the Administration Accountable for NCLBA’ s Implementation	118
3 Promoting Segregation and Exclusion	120
3.1 Incentives to Segregate	121
3.2 NCLBA’ s Choice Provisions	126
3.3 The Costs of Segregation	128
3.4 Student Exclusion	129
4 Deterring Good Teachers	131
4.1 Reinforcing the Unequal Distribution of Good Teachers	132
5 Affirmative Action in Higher Education: Mending Brown’s Broken Promise	135
Conclusion	141
Endnotes	142
CONCLUSION	144
BIBLIOGRAPHY	153

Introduction

Though the United States Supreme Court in *Brown v. Board of Education* (1954), commonly referred to as *Brown*, overrode racial segregation against blacks in U.S. public schools in particular, and by inference the logic of the decision was applicable to the entire America's Jim Crow system, American public schools surprisingly remain intensely segregated by race at the threshold of the 21st century. In no way, however, is the situation of today analogous to the pre-*Brown* epoch, according to data from the National Center for Education Statistics. The United States commemorated *Brown's* fiftieth anniversary three years ago (2004) recognizing the dismal failure of the integration of U.S. public education. On the instance, President George W. Bush acknowledged that "America has yet to reach the high calling of its own ideals," and added "Yet we're a nation that strives to do right. And we honor those who expose our failures, correct our course, and make us a better people" (17 May, 2004). Exposing America's failure with regard to racial educational integration is well our undertaking in this work. Yet, righting America's wrongs or remedying its injustices transcends our reach.

The present research probes into the nature of racial desegregation of overwhelmingly black American public schools laying particular emphasis on the landmark verdict in *Brown v. Board of Topeka* (1954), overturning the previously endorsed separate-but-equal dictum in the *Plessy* decision (1896), and winding up with the espousal of the current ruling in *Grutter v. Bollinger* (2003), buttressing *Brown's* school desegregation directive by sustaining affirmative action in higher education.

Being the goad to the school desegregation movement in 1954, *Brown* raises the issue of whether it is to be held accountable for the failure or triumph of all ensuing public education racial integration endeavors in

the post-*Brown* epoch. In actual point, the school desegregation efficiency to level out racial educational discrepancies in extremely isolated black American public schools is intimately coupled with the very Supreme Court pronouncement, with a number of extra forces that surpass *Brown*'s scope, and with the dedication of the federal government to the implementation of *Brown*'s lofty order.

This research delves into the subsequent probing questions: To what extent was *Brown* successful in eradicating racial inequities in U.S. public education? What were the dissimilar impediments that hindered the school desegregation progress? How far did the federal government live up to *Brown*'s mandate?

This study encompasses three divisions. The first part probes into the school desegregation progression from the *Brown* decision (1954) to the *Swann* ruling (1971), backing up busing as a school desegregation strategy. A succinct overview of the status of U.S. public education all through the pre-*Brown* era is initially presented. Plausible grounds engendering the stagnation and progression of school desegregation throughout the herein studied period are explored and a carefully considered appraisal of the federal government's commitment to the enforcement of *Brown*'s order is then reported.

Though racial school desegregation has come a long way since the mid 1960s up to the 1980s, American public education was leading a discernible backward slide toward renewed segregation as a startling proliferation of predominantly black American schools marked the 1990s and persisted at the threshold of the new century. The resegregation of U.S. public schools is at the very core of this study and is approached in two chapters. Chapter two investigates the socioeconomic as well as political dynamics that affected the school integration evolution. Chapter three, on the other hand, considers legal grounds engendering the desegregation

regression, highlighting chiefly a series of Supreme Court rulings decided, in the main, throughout the 1970s and 1990s.

The last chapter pores over two public education federal measures at the turn of the new century. The No Child Left Behind Act (2002), presumably aiming at boosting academic attainment for all students, is assessed with relevance to its pernicious effect on black Americans. The Supreme Court judgment in *Grutter v. Bollinger* (2003), in contrast, is considered as a promising underpinning of *Brown*'s mandate.

A descriptive analytical approach is adopted in this study to first depict the status of racially segregated public schools along with their aftermath on black Americans, and second account for several public education federal laws and rulings. Scrutiny of the evolution of the school desegregation movement, appraisal of major Supreme Court rulings, and assessment of the federal government's commitment to the enforcement of *Brown*'s desegregation order are crucial.

A wide array of Supreme Court rulings, a variety of federal statutes pertaining to the issue under examination, and several official reports analyzing the nature of racial integration in U.S. public education constitute fundamentally the central primary sources utilized in this research. Secondary sources, on the other hand, incorporate recent articles published principally in magazines, scholarly journals, and newspapers, whose data has critically been reviewed. Specialized recent books by authorities in the field have been consulted together with substantial conference papers with direct relevance to the issue. Civil Rights Projects of the Harvard University conducted regularly, chiefly by Professor of education and social policy Gary Orfield, have been of an enormous significance to this study.

In conclusion, this research reveals that the dismal failure of racial desegregation of U.S. public education, a disappointing actuality confirmed through the dogged persistence of racial segregation in most American public schools at the present time, is not in essence owing to the *Brown* ruling. It is somewhat the aftermath of a combination of several legal, social, political and economic grounds that undoubtedly exceeds *Brown's* scope.

CHAPTER ONE

The Dilemma of School Desegregation

The decision in *Brown v. Board of Education* did not end all segregation; did not even end school segregation for many years. The civil rights movement was still waiting on other heroes and cases and laws. Yet, all sides of the equation knew that on May 17th, 1954, a line had been crossed in American history. The system of racial oppression in our country had lost its claim to legitimacy, and the rising demand for justice would not be denied (U.S. Department of States, “President Bush,” 17 May 2004).

Introduction

Though the Supreme Court in *Brown* (1954) overruled the formerly legitimized black segregation under the rubric of ‘separate but equal,’ in the *Plessy* ruling (1896), school integration proved fruitless all through the first decade subsequent to *Brown*’s endorsement. From the mid 1960s and throughout the 1980s, however, desegregation of U.S. public education witnessed a noteworthy progress. A brief account of racially segregated public education in the pre-*Brown* era is first provided. This chapter then considers several grounds behind the stagnation and progression of school desegregation underlining chiefly *Brown*’s language, its judgment as well as its possibly-disguised intent. A careful appraisal of the federal government commitment to the enforcement of *Brown*’s mandate is evenly reported.

1 Background

1. 1 The Justification of Segregated Education

Well before the Supreme Court of the United States decided that segregation had no place in public education, in *Brown v. Board of Education of Topeka* Ruling of 1954, segregated education was strongly maintained by racist scientific studies that placed earlier obstacles in the way of *Brown's* efficiency to dismantle discriminatory practices in U.S. public schools. These biased studies might have pernicious effects upon public opinion with regard to desegregation and thus affect the formulation of public policy. While scientists are expected to avoid bias, racist scientists have exploited the opportunity, by seeking to use erroneous data to produce results favorable to their social agenda. It is this intentional adulteration of science that racists have used in the last few centuries to dissemble their studies of racial inferiority as fact. In the United States, a major target of scientific racism was the black population. Both esteemed and unscrupulous scientists alike wrote and believed in these racist theories that served to justify segregated education.

Some contemporary racist studies would certainly make it difficult for *Brown* to grapple with segregated education. The myth of intellectual inferiority is still not dispelled today. Recent 'scientific' studies such as The Bell Curve (1994) continue to assert that blacks do not have an equal capacity of intelligence as whites. Historical studies have substantiated these claims from several different angles.

Initially the most prevalent notion was that black people have smaller brains and thus are less intelligent. The correlation between brain size and intelligence in itself was a questionable assumption. Before the Civil War, scientific findings announced that blacks had less gray matter in their

brains (Thomas and Sillen, 2). Samuel Morton studied the sizes of skulls from different cultures and while measuring the capacity of skulls, he found Africans to have the smallest ones (Gould, 110). However upon reexamination, these results also were found suspect. He never considered the average stature of race, nor did he separate the genders. He was guilty of convenient omissions, inadvertent or otherwise, of larger skulls when the desired results were small and smaller skulls when the desired results were large. Regardless of these errors, "Morton was widely hailed as the objectivist of his age" (Gould, 111). A study by George O. Ferguson published first in 1916 indicated that intelligence increased with the degree of whiteness in a person (Ferguson, 125). Actually, it did not occur to American scientists to question such racist results because the concepts were so congruent with social and political life. Such racist studies might be responsible for hampering all significant attempts to put an end to segregation in education.

Additionally, such biased interpretations of intelligence testing scores that justified segregated education would doubtlessly strike a death blow to school desegregation efforts. Differences in scores on intelligence tests were conclusive to many people that blacks were intellectually inferior. The following excerpt describes well the implications of intelligence testing:

The Negro's intellectual deficiency is registered in the retardation percentages of the schools as well as in mental tests. And in view of all the evidence it does not seem possible to raise the scholastic attainment of the Negro to an equality with that of the white. It is probable that no expenditure of time or of money would accomplish this end, since education cannot create mental power, but can only develop that which is innate (Ferguson, 125).

Such obvious racial discrimination is to lay the foundation for the future justification of segregated facilities between blacks and whites in public education. Similar results echo in numerous published studies, like the words of Stanford psychologist, Lewis Terman in 1916 “dullness seems to be racial...uneducable beyond the merest rudiments of training. No amount of school instruction will ever make them intelligent voters or capable citizens” (Thomas and Sillen, 35). Words such as these became even more potent when the practice of school segregation came under fire.

In 1969 a notable supporter of genetic intellectual inferiority, Dr. Arthur Jensen published a paper on race and intelligence. He found a significant difference in IQ scores between blacks and whites and discounted environmental factors in favor of an “implicated” genetic factor. He infers that black children can make only a small amount of gain and implies that vocational training would be a better fit for their innate capabilities (Thomas and Sillen, 42). His theories supported both the inequality that existed in the education system, by implying better schools would not help and segregation because blacks should be learning different skills by different methods. Applying the results of intelligence tests in this way follows “the belief that intelligence was biologically innate and hence unchangeable” (Tucker, 110). Like many studies claiming racial inferiority, Jensen’s has been reviewed and critics found his conclusions overwhelmingly unjustified and based on faulty statistical analyses (Thomas and Sillen, 32). Most experts agree that “Any intelligence test favors individuals from the particular culture for which it was developed” (Thomas and Sillen, 39). In this arena, scientific racism still persists as the book The Bell Curve presents “essentially the same argument with more statistics” (Zack, 104).

A famous test that seemed to dispute the racial divisions of intelligence was an Army intelligence test taken by black and white recruits

of World War I. The results of the test gave northerners the advantage over southerners in intelligence. In most cases the black northerners did better than the white southerners on the tests (Montagu, 230). Racist literature did not broadcast this fact widely. Another interesting occurrence that has been pointed out is “that when two groups of Whites differ in their IQs, the explanation of the difference is immediately sought in schooling, environment, economic positions of parents, and so on, but that when Negroes and Whites differ in precisely the same way the difference is said to be genetic” (Washburn, 130). Clearly, racist scientific studies anticipated the placement of irremovable high hurdles on the school desegregation path by shaping public opinion and even affecting the formulation of public policy. Thus, there is no doubt that these biased studies were behind the legitimization of discrimination between blacks and whites by the end of the nineteenth century.

1.2 The Legalization of Racial Segregation

The *Brown* decision represents a landmark in the history of black education because it overturned the legal policies established by the *Plessy v. Ferguson* decision (1896) that legalized the practices of separate but equal. In the *Plessy* decision, the Fourteenth Amendment was interpreted in such a way that equality in the law could be met through segregated facilities. The case was based upon the refusal of Homer Plessy to use the segregated train car assigned to black Americans, and as a result, was imprisoned for the violation of a Louisiana statute. His case thereafter went to the Supreme Court and the judges considered the issue of separate but equal in relation to the Fourteenth Amendment. In the *Plessy* case, the Supreme Court ruled that separate facilities for blacks and whites were

constitutional as long as they were equal. *Plessy v. Ferguson* stood as the case by which separation of the races was legally sanctioned in the United States and denied black Americans access to many of the white facilities that had been racially integrated after the Civil War.¹

It is such federal legal sanction to racial segregation under the rubric of separate but equal that paradoxically constituted the significance of *Brown* and, at the same time, undermined its school desegregation mission. The significance of *Brown* lies in its ability to overturn the *Plessy* doctrine of separate facilities by law. The *Plessy* decision, on the other hand, would make it difficult for *Brown* to succeed in desegregating public education. Indeed, by the turn of the century, racially segregated public education had become deeply entrenched by law and custom throughout the United States and separate, in nearly every case, was decidedly unequal.

During the first decade of the twentieth century, segregation in public education was well established in the South. The growth of a racial gap in public expenditures on education, the reliance of blacks on their own resources to create their proper schools, and the decline in black school enrollment were all the aftermath of the separate but equal doctrine in southern communities. Most black schools were under-funded as funds were drained away from black education to support the movement to provide universal schooling for southern white children. At least twice as much was spent on the education of white students, as on black students, often the inequities were much greater. In Georgia, for example, less than ten percent of the total allocation for public school buildings, equipment, and library maintenance was spent on black schools. The same thing is for Mississippi where blacks made up 60 percent of the school-age population, but received only 19% of the state's school funds (Dittmer, 144-45). Similarly, in what was often referred to as a "second tax," black Americans drew on their own resources to create and sustain the rudiments of a common school system. In the countryside, where the great

majority of black southerners lived, this often meant supplying the building and furnishings, while the county provided a meager salary for the teacher, and possibly some old textbooks. In the Georgia Black Belt, for instance, three-fourths of the black schools met in private homes or churches and in South Carolina schools were housed in one-room structures, and most were run down and overcrowded. They were sparsely furnished, some with just a couple of benches and no desks. In one school, the students, known as “the broom brigade,” were responsible for sweeping out the room, and keeping the schoolhouse tidy (Litwack, 62). The decline in school enrollment of school age black children was an additional consequence of the separate but equal doctrine. Nearly two-thirds of black children between the ages of five and fourteen did not attend school. Multiple factors contributed to this situation, including location of schools, overcrowding, and limited availability of black teachers. Labor demands, which resulted in shorter school terms for black students, were also a major impediment to regular school attendance by black children (Anderson James, 150-53).

As segregation tightened in the South during the early decades of the twentieth century, Dunbar High School in Washington, DC defied the mandates of separated and unequal. Looking back on the illustrious history of the nation’s first black public high school, social psychologist Kenneth Clark commented: “Dunbar is the only example in our history of a separate black school that was able, somehow, to be equal.” For Clark, a leader in the fight against school segregation, Dunbar was the exception that proved the rule. It was the product of a unique set of historical circumstances that enabled a small and select group of black students to obtain a public education that was the equivalent of the country’s leading prep schools (Anderson, Jervis, 94-121). Actually, Dunbar was a real exception that was confined to a small segment of the South’s urban black population, and, even in the best cases, public funding for black schools did not approach parity with white schools. For the vast majority of southern blacks, a

high school education remained totally inaccessible. By the mid-1930s, while 54 percent of all southern white children attended public high school, less than 20 percent of school age black children did (Anderson, James, 235-37).

Racially segregated education, however, was not limited to the South. Black Americans in the urban North suffered similar inequalities. Until the great wave of migration northward began in the nineteen teens, the black American population in the North was minimal. Black enrollment was small and conditions in public schools were quite good. Indeed, longer school terms, better-equipped school buildings, and “the widening out and diversification of the modern high school” promised educational opportunities that were unavailable to blacks in the South. At a time when 85 percent of schools attended by blacks in Georgia were one-room structures without blackboards or desks, Moseley Elementary School, the oldest school in a black neighborhood in South Side Chicago, had cooking facilities, manual training equipment, and a gymnasium (Adero, 110). However, the rapid influx of southern blacks into northern urban areas generated a deliberate effort on the part of whites to tighten racial boundaries dividing blacks and whites. Legal and extra-legal residential restrictions squeezed blacks into racially segregated neighborhoods. In Chicago, whites protested black residential encroachment with violence; fifty-nine black homes were bombed during the late teens and early twenties. Historian Davison Douglas noted that “between 1910 and 1940, the number of segregated schools in the North dramatically increased, even in communities where school integration had been common since the antebellum era” (Haynes, 81-82). School officials in northern cities gerrymandered district lines, creating a dual school system for blacks and whites. In terms of resources and facilities, black schools were decidedly unequal. Racial segregation was also achieved by separating black and white students into separate buildings on the same plot of land, and separate classrooms within the same building. The rising popularity of intelligence testing during World War I,

and the connections made between ‘race’ and ‘intelligence’ also supported the segregation and tracking of black students (Mabee, 258).²

In short, the general attitude toward educating black Americans was in line with a statement made by A.A. Kincannon, Mississippi’s Superintendent of Education in 1899, who stated that “our public school system is designed primarily for the welfare of the white children of the state and incidentally for the Negro children” (Salvatore, 28). Clearly, such racial educational inequities would make *Brown*’s mission even harder as the discriminatory practices became part of the American way of life in both southern and northern communities. Consequently, it is not surprising that *Brown*’s mandate would fail to dismantle thorough ‘de facto’ segregation in public education.

2 Brown v. Board of Education of Topeka, Kansas (1954)

On May 17, 1954, the U.S. Supreme Court proclaimed that “in the field of public education ‘separate but equal’ has no place.” This historic ruling in *Brown v. Board of Education of Topeka* overturned the Court’s 1896 *Plessy v. Ferguson* decision that had sanctioned racial segregation. The landmark case marked the culmination of a decades-long legal battle waged by the National Association for the Advancement of Colored People (NAACP) and residents of several communities. Thurgood Marshall, the leading NAACP lawyer, explained how to conduct an all-out attack on segregated educational facilities proclaiming “We are going to insist on non-segregation in American public education from top to bottom_ from law school to kindergarten” (Salvatore, 70). In fact, the main legal tactic against segregated schools was based upon the fact that equalizing and maintaining two distinct school systems, one for whites and another for blacks, would prove too expensive for local governments to support. It was not long after the end of World War II that black Americans advocating for civil liberties made

noteworthy strides toward the equalization of educational facilities. Between 1933 and 1950 the focus of NAACP lawyers was the “desegregation of graduate and professional schools, the equalization of teacher salaries, and the equalization of physical facilities at black and white elementary and high schools” (Salvatore, 59). Progress was made, however, in their attacks at the professional and graduate school level with the cases of *Sweatt v. Painter* and *McLaurin v. Oklahoma State of Regents for Higher Education*.³

Although people often associate *Brown v. Board of Education of Topeka, Kansas* with Linda Brown, a young girl whose parents sued so that she could attend an all-white school, The case called *Brown* was actually a collection of five cases, from Delaware (*Gebhardt v. Belton*), Kansas(*Brown v. Board of Education*), South Carolina (*Briggs v. Elliott*), Virginia (*Davis v. County School Board of Prince Edward County*), and the District of Columbia (*Bolling v. Sharpe*). All these cases began as grassroots efforts to either enroll black students in all-white schools or obtain improved facilities for black students. The Court heard them together because each raised the issue of the constitutionality of racially segregated public schools, albeit with slightly different facts and circumstances. In fact, Thurgood Marshall, the main architect of NAACP’s legal strategy to overturn Jim Crow, actually represented the plaintiffs in the South Carolina case, *Briggs v. Elliott*. The District of Columbia case, *Bolling v. Sharpe*, was treated separately from the others because it raised distinct issues about the federal government’s duty to respect racial equality. It was handed down on the same day. Finally, the Supreme Court decided to delay the issue of the proper remedy for segregated schools for another year. It issued a second opinion in *Brown v. Board of Education* on May 31, 1955 to deal with remedial issues, concluding with the order to go forward “with all deliberate speed.” This opinion is usually referred to as *Brown II*, to distinguish it from the first opinion, called *Brown I*. Together, the three opinions of *Brown I*, *Brown II*,

and *Bolling* have come collectively to be known as ‘*Brown*’ or ‘the *Brown* opinion’ in the popular imagination, and in the present work we will refer to them in this way.

Clearly, the aim of the *Brown* decision was to remedy the exclusion of black students from white schools. Changes in the percentage of southern black students in majority white schools, however, reveal some striking trends. In fact, there was only the tiniest token of progress during the first ten years following *Brown*, as statistics demonstrate that about 98 percent of southern black students remained in all black schools a decade later (Sarratt, 362).

In actual fact, the stagnation of school desegregation during the first decade following *Brown*’s enactment is largely due to the decision’s language per se as well as to its judgment. *Brown*’s implied intention regarding racial equality might also be held accountable for the failure of school integration throughout that period.

2.1 All Deliberate Speed

Though the *Brown* decision occurred in 1954, the Supreme Court weakened its own decision a year later, by instructing lower federal courts to “enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis ‘with all deliberate speed’ the parties to these cases” (*Brown*, 1955). As a matter of fact, *Brown* was a compromised decision to begin with. To obtain a unanimous decision to announce such a break with history and tradition, Chief Justice Earl Warren was compelled, despite the decision’s lofty language, to be quite vague about its implementation. This vacuum subsequently led to *Brown II* (1955), which

was ostensibly to give guidance to beleaguered district judges, who were hearing all kinds of dodges to prevent integration. But *Brown II* contained the poisonous and infamous phrase ‘with all deliberate speed’. The vagueness of the Supreme Court statement and the inclusion of such a seemingly simple phrase ‘all deliberate speed’ kept the dream from becoming a reality. Law Professor Charles Ogletree states that:

[A]s Thurgood Marshall and other civil rights lawyers pondered the decision; they tried to ascertain what the Court meant in adding the crucial phrase 'all deliberate speed' to its opinion. It is reported that, after the lawyers read the decision, a staff member consulted a dictionary to confirm their worst fears—that 'all deliberate speed' language meant 'slow' and the apparent victory was compromised because resisters were allowed to end segregation on their own timetable (Ogletree, 10).

Brown's promise combined very broad goals with very narrow means. The 1954 decision sought to end imposed segregation, thereby halting what the Court found to be irreversible harm inflicted on students in segregated schools. The means of the 1955 *Brown* remedial decision, conversely, were far more limited: the Court instructed local federal district courts to begin some kind of change in ways the courts decided would be feasible in view of local conditions. Considering the two decisions together, one could say that the promise of *Brown* was contradictory—to change fundamentally the basic structure of southern society and race relations yet to do so in a way that would not seriously disturb white

racists. This compromise, which united the diverse elements on the Supreme Court, was based on the vain hope that a strategy of gradualism would ease the transition while displaying caution about the limits of judicial power.

But in fact, intense white political resistance rather than moderate compliance crystallized across the region. The black community read *Brown's* first part—its promise—and wondered why it was not being fulfilled, while white leaders read *Brown's* invitation to gradual, locally designed change and became confident that the color line could be maintained with only very minor modifications. Without any concrete requirements or guidance from the higher courts, and facing intense state and local resistance from virtually all white leaders, most southern federal district judges, themselves products and residents of a segregated society, decided that extremely limited change was all that would be necessary—policies permitting a handful of black students to transfer to white schools.

The courts had ultimately left the implementation of integration to the discretion of the local officials. The same local officials who were against integration from the beginning. In order to appease the black Americans quest for equal educational opportunity without forcing resisters to carry out the decision, the Courts basically gave resisters the choice to make the necessary changes at the time that they judged fit. Since the logic behind segregated schools systems stemmed from the unjustified fear that white children's education would be compromised if they were allowed to be taught in the same schools as black children as well as racist ideologies, the majority of state and local officials were in no rush to carry out this decision (Ogletree, 2). After 1954, the South's federal judges kept the pace of desegregation very slow. Virtually the entire elected leadership of the region mobilized under the banner of 'massive resistance,' enacting scores

of laws to try to block any significant desegregation, attacking the Supreme Court, opposing even the most modest voluntary desegregation, closing public schools, and stirring up deep racial polarization. White resistance was much more intense during the period in which leaders were exploiting fear of racial change that had not yet begun than when large-scale desegregation actually came. At the outset of the 1960s, it seemed as if the intensity of white southern resistance had grown so great that desegregation would remain a minor exception in an overwhelmingly segregated region, an area whose political unity made the *Brown* decision seem of little more than symbolic importance—and mostly an empty symbol at that (Bogar and Orfield, 5). Ogletree points out that “...the southern segregated school system remained almost completely segregated for a full decade after *Brown*. By 1964, only one-fiftieth of all southern black children attended integrated schools” (128). These figures were also reflected in the North where racism and segregation were thought to be nonexistent but instead are more subtle, “[i]n the North, many school districts refused to provide racial data that could be used to measure segregation; northern segregation remained unaffected until the mid-1970s” (Ogletree, 128). This provides insight that the education systems of the northern states were not unaffected by racist tendencies. Clearly, the ‘all deliberate speed’ clause undermined the *Brown* decision because the ambiguity of the phrase allowed blatant stalling on the part of resistors to remain in compliance.

Aside from placating white resistance, the Supreme Court did a disservice to the lower federal courts. First, “The only instruction the Court gave to the lower courts was to require that defendants make a prompt and reasonable start toward full compliance with *Brown*” (Bell, 19). *Brown I* was a largely philosophical opinion denouncing segregation and *Brown II* did nothing to clarify its mandate. Consequently, federal court judges had no way

to know what racial balance was required in schools to qualify them as desegregated, how desegregation should be accomplished, or how quickly and enthusiastically it should be done. In this respect, *Brown* created the chaos and social upheaval associated with desegregation without actually enforcing the mandate.

Ogletree vehemently opposed *Brown II* because it “left federal judges far too exposed” (127). Because neither *Brown I* nor *Brown II* gave any specific desegregation guidelines, any judge who ruled against segregationists could not claim to be following federal authority. Unable to claim he was simply doing his job, any federal judge who demanded noteworthy progress toward integration became an instant target for the violent terror imposed by anti-integration whites. Although lifetime appointments insulated federal judges from political repercussions in connection with enforcing *Brown’s* controversial ruling, they were still subject to intimidation and threats to the safety of themselves and their families. The threat of violence served to keep judges from ordering desegregation, and thus anti-*Brown* federal judges went virtually unopposed in the judicial system, allowing pro-segregationists to determine the practical definition of ‘all deliberate speed’. Considering that the same Court which ruled in *Brown* would virtually disable its impact just one year later by passing the burden of social change to lower court judges without any means to protect them, it is probable that the decision was intentionally symbolic, and that actual enforcement was never a priority.

2.2 Reliance on Social Science

Brown's reliance on social science research to come to its conclusion reflects an additional weakness, after the 'all deliberate speed' phrase, in the decision's desegregating order that attracted heavy criticism and was met with massive resistance. In reality, the actual trial in *Brown* featured extensive comparative testimony about measurable variables like physical plants and expert testimony about the psychological impact of school segregation on white and black school children. The use of psychological testing through Kenneth and Mamie Clark's doll test proved useful. Simply put, the test asked a group of black and white children a series of highly suggestive questions about the prettiness and desirability of both the white and black dolls. The responses illustrated not just aesthetic and personal choices, but according to the Clarks, the responses revealed a decided cultural and social preference for the white dolls. They correlated this preference with the greater esteem of whiteness and the lower esteem of blackness. Segregation, they extrapolated from this finding, mirrored and exacerbated this racist bias. The core of their argument was that the tests revealed that school segregation undermined the self-esteem of black school children because separate and unequal black schools stigmatized black school children as inferior (Scott, 119-36). The Warren Court seemed to have accepted this logic declaring:

To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone (*Brown*, 1954).

While critics within the NAACP and outside of it found the tests too soft, impressionistic, and open to doubt, others — including the lawyers who used the data — found them compelling even if imperfect. Interestingly enough, though, the Court did find the social scientific evidence cogent, even if not sufficient to rest a case for overruling school segregation upon. Drawing upon sociologist Louisa Holt's testimony, Finding VIII noted:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system (qtd. in Kluger, 424).

The NAACP Legal Defense Fund lawyers, Mamie and Kenneth Clark, and the host of like-minded social scientists, along with the gathering chorus of supporters for the evolving *Brown* cause, agreed. Indeed, they could not have put the social psychological and cultural arguments for school desegregation any better.

In the decade following 1954 the Supreme Court and its opinion in *Brown* were strongly vilified. Even many defenders of the result had little good to say about the opinion, arguing that its overruling of previous precedents was abrupt and unexplained and that its use of social science to demonstrate the harm that segregation imposed on black children was unconvincing. The day after the decision, May 18, 1954, the prominent American journalist James Reston wrote in the New York Times that the

Court had rejected “history, philosophy, and custom” in basing its decision in “the primacy of the general welfare. . . . Relying more on the social scientists than on legal precedents -- a procedure often in controversy in the past -- the Court insisted on equality of the mind and heart rather than on equal school facilities” (qtd. in Kluger, 711). The Court’s opinion read more like an expert paper on sociology than a Supreme Court opinion.

If the defenders of *Brown* were uneasy, its opponents were positively incensed by the decision. People who accuse the contemporary Supreme Court of abusing its office may forget how deeply *Brown* was resented, especially in the South. In March of 1956, southern Senators and Congressmen issued a “Southern Manifesto” denouncing *Brown* as a “clear abuse of judicial power,” that substituted the Justices’ “personal political and social ideas for the established law of the land.” This proved to be one of the more moderate reactions. Although Congressional leaders pledged to “use all lawful means to bring about the reversal of this decision which is contrary to the Constitution,” other opponents of the decision were less committed to peaceful legal methods (the Southern Manifesto, 1956). *Brown* gave rise to the era of ‘massive resistance’ in the South, leading President Eisenhower at one point to call in federal troops to enforce a desegregation order in Arkansas.⁴ Yet, lack of progress in racial desegregation of U.S. public education throughout the first ten years following *Brown*’s endorsement is not exclusively related to the decision’s language or its reliance on social science. *Brown*’s implied intention with reference to integration as well might be partially responsible for integration ineffectiveness.

2. 3 Reaction to Cold War Efforts

The failure to grapple with racial segregation in public education might be due to *Brown*'s implied intention which might have been other than racial equality. Actually, Today's American legal culture hails the 1954 Supreme Court ruling in *Brown v. Board of Education* as a landmark victory for the cause of racial equality. According to dominant civil rights discourse, *Brown* almost single-handedly changed the normative American vision of race relations by defining and supporting the possible cause of racial equality. This image, however, might be based upon misconceptions of the ruling's origins and its legacy. The common perception is that *Brown* was intended to help subjugated blacks and that segregation is an injustice of the past. In fact, *Brown* might have been a 'Cold War tactic' meant to improve America's international reputation. Segregation only vanished in popular consciousness; it is hugely prevalent at the turn of this century, though not with the same intensity that featured the pre-*Brown* era. Because of this inaccurate understanding of *Brown*, it remains "a magnificent mirage, the legal equivalent of that city on a hill to which all aspire without any serious thought that it will ever be attained" (Bell, 4).

An examination of the history of segregation sheds light on how naive it is to praise a single Supreme Court decision as defeating the entire institution. Slavery was the first, albeit more repressive and violent, form of segregation. In this light, segregation is older than the United States itself. When the thirteenth amendment finally abolished slavery, federal troops safeguarded the black population's newfound suffrage, citizenship, and due process rights. However, when troops left as part of the Compromise of 1877, they gave the Southern elite "meaningful if unspoken assurances that the federal government would not protect black civil rights" (Bogar and Orfield, 2). One of the first consequences of the Compromise was the

establishment of Jim Crow⁵ legislation. Southern elites pressured legislatures to legally mandate segregation to dismantle the populist movement, a multi-racial working-class coalition because its communist ideals threatened the aristocracy's dominance. The southern ruling elite capitalized on existing ideas of black inferiority that originated in the slavery era to divide the workers and thereby weaken resistance to their economic dominance and exploitation. The consequence of Jim Crow legislation was to shatter multi-racial alliances and to pit black workers against white workers in the struggle for economic survival. Blacks refused to strike for better working conditions and raises for fear of losing what scarce employment they had. Their poverty also made them eager to serve as scabs, strikebreakers who often work for less than the contested salary of the usual workers, which both undermined resistance of white workers and increased the animosity between the two groups. Modern segregation emerged as an ingenious "divide and conquer" strategy of the ruling class (Doty, 112). Therefore, to contend that the Supreme Court's disapproval of this system in *Brown v. Board of Education* (1954) could erase almost 100 years of history rooted in the interests of America's most powerful is naïve.

Brown represented a dramatic break from Supreme Court precedent in which the Court actually sided with black interests and rights. However, many scholars, both recently and in the *Brown* era, are justifiably hesitant to adopt this perception. As evidenced by years of slavery and oppression, the plight of the black people has rarely, if ever, been the government's primary concern. Professor of Constitutional Law at New York Law School Derrick Bell argues that rather than being a pure act of altruism toward the black community motivated by a profound sense of justice, the *Brown* decision was a reaction to the Cold War efforts abroad and the Red Scare at home. For example, the State Department filed a brief urging the Court to

invalidate segregation because it would benefit the nation's foreign policy (Bell, 71). At the time, both the Soviet Union and the United States were actively courting the newly independent nations to convert to their political systems. Because most of these formally colonized peoples were not white, most were disinclined to ally themselves with the United States, a government that endorsed segregation and discrimination and often refused to prosecute indiscriminate mob violence against minorities. Segregation and racism at home was a profound weakness in the ideological war against communism abroad. *Brown's* main objective might have been to rectify this weakness in foreign relations. In retrospect, *Brown* was only a symbolic victory for the petitioners. Even at the time of the decision, American civil rights activist William Edward Burghardt Du Bois observed that "no such decision would have been possible without the world pressure of communism" which made it "simply impossible for the United States to continue to lead a 'Free World' with race segregation kept legal over a third of its territory" (qtd. in Doty, 113). Ironically, the same threat that produced the Red Scare, which often manifested in ruthless attacks on black labor unions, compelled the United States government to move toward espousing racial equality in the *Brown* decision. It is more likely that the *Brown* decision was meant to thwart a communist critique of the American system than it was to ameliorate the plight of 'Black America'.

Although the Warren Court opinion centered on the psychological impacts of segregation and appealed to American ideals of justice, an analysis of the segregation cases following *Brown* fits the theory that foreign policy was *Brown's* origin more so than the popular understanding of the decision as a lofty declaration of equality based on ideals of American justice. The first legal blow to *Brown* came one year later in *Brown v. Board of Education* (1955), commonly referred to as *Brown II*, which was intended to resolve the issue of the enforcement of

Brown I. Unfortunately, the Court declined to state with any conviction how their landmark opinion in *Brown I* was to be enforced. Instead, it gave the ambiguous decree that the lower courts should move their districts into compliance with *Brown* “with all deliberate speed.”

In sum, *Brown* was a smashing disappointment in producing desegregated schools during its first decade, but it was nonetheless a huge force in terms of delegitimizing all aspects of the southern system of apartheid and spurring a social movement to produce changes that the courts were unwilling to order on their own. Southern blacks, drawing inspiration from *Brown*, began to confront entrenched racial practices not only in the courts but in the streets as well. *Brown* helped spur the civil rights movement and prod the Democratic Party into making a deep commitment to serious racial change. *Brown* produced a model for creation of new legal rights that would motivate other movements for legal changes that forbade discrimination based on language, gender, handicap, and other irrelevant personal circumstances. The model of the legal campaign for *Brown* also strongly influenced other educational campaigns, such as the battles for equalizing school funding and guaranteeing all students a minimally adequate education, that remain active in the courts a half century later. The decision's ultimate influence was vast. But its impact on its first target, segregated schools, remained small until the social and political forces outside the courts produced larger changes.

3 The Federal Enforcement of *Brown*

Because of the aforementioned shortcomings, school desegregation proved ineffective a decade after *Brown*'s order. From the mid 1960s up to the 1980s, however, remarkable progress featured the school integration movement (see chapter two, page 4) reflecting the federal government's enforcement of *Brown*'s desegregation mandate throughout that period. As a matter of fact, the years from 1964 through 1972 witnessed a substantial growth of federal support for educational opportunity. The Civil Rights Act of (1964), the Elementary and Secondary Education Act (1965) and the Supreme Court decision in *Green v. County School Board* (1968) are all crucial instances that account for the federal enforcement of the *Brown* decision.

The passage of the Civil Rights Act of 1964 laid the groundwork for greater federal enforcement of school desegregation via Title VI. This law forbade racial discrimination in any program receiving federal funds. It authorized the Department of Justice to go to court to enforce civil rights laws and required the schools to desegregate or face cutoff of school aid funds. With Title VI, the executive and congressional branches of the federal government, led by Presidents John F. Kennedy and Lyndon Johnson, signaled a more pro-active response to the imperatives of the growing black civil rights generally, and the school desegregation movement specifically. In effect, this key development helped to initiate a period of increasing and more effective federal oversight of the process of school desegregation nationally. In communities wishing to fight desegregation, leaders learned that they would be in court not only against a civil rights lawyer but also against the vastly more powerful U.S. Department of Justice which virtually never lost a civil rights case in that era. Desegregation soon began in earnest, and the dual system of black

and white segregated schools was radically restructured into systems of comprehensively desegregated schools. By the end of the 1960s, the South experienced a level of interracial schooling that had probably never been seen anywhere in American history on a large scale.

In point of fact, the first set of official guidelines detailing desegregation standards were written by the United States Office of Education of the Department of Health, Education, and Welfare (HEW) in April 1965. Refined over time, these guidelines demanded that those southern districts not under a court-ordered desegregation plan had to submit a voluntary desegregation plan. This voluntary plan had to satisfy conditions that went beyond the rhetorically race-neutral yet fundamentally race-based pupil assignment plans popular at the time throughout the South. In other words, the new plans had to be race neutral in impact as well as design. The emphasis in the voluntary compliance plan was to be on practical results as well as the plan's design. The actual numbers of black and white students and faculty in integrated schools, or norms of racial balance, became increasingly important (Pratt, 37-8). The 1966 Office of Education desegregation guidelines provided specific numerical ranges of students attending integrated schools as a way to measure progress and assess what further needed to be done to create a unitary or integrated school system. If, for instance, a school district had 9 percent black students attending desegregated schools in 1965-66, by the following school year, 1966-67, that district had to have twice that many, or 18 percent, in desegregated schools. Voluntary desegregation plans not meeting these kinds of goals had to be explained and revised quickly or the negligent district risked losing federal funding (U.S. Department of Interior, 86).

These goals proved very important, as legal historian Davison Douglas maintains, because these were the first federal government attempts to create quantifiable means of assessing school desegregation progress. These goals also further eroded the declining viability of freedom-of-choice plans. The

ineffectiveness of such plans had been plainly exposed for all to see. In addition, these guidelines offered courts relatively objective criteria to use as part of their evaluation of a district's progress. Consequently, that data could be factored into the court's ruling as to how a district might more effectively integrate its schools (Douglas, 125).

Another key factor in the federal government's move toward giving greater attention to school desegregation, as well as education generally, was the passage of the Elementary and Secondary Education Act of 1965 (ESEA). This law strengthened the federal commitment to an area of education previously principally under state control by providing moneys to promote educational equity. Providing aid for purposes such as improving the education of poor children as well as improving state boards of education were the basic aspects of the measure.

As a result, through control over the dispensation of these and other federal moneys for elementary and secondary school education, the federal government gained an upper hand in its battle to enforce school desegregation. The threat of withholding moneys to school districts which persisted in operating dual educational systems proved a powerful incentive to in fact integrate these systems. The gradual and steady initial growth in the percentages of black students attending integrated schools in this period can be attributed in part to this federal carrot and stick as well as the increasingly clear-cut Office of Education desegregation guidelines. Only 2.3 percent of black students attended integrated schools in 1964; that number grew to 7.5 in 1965, 12.5 in 1966 (Minter and Prettyman, 860-61). The 1966 guidelines, as mentioned earlier, prompted further improvement in the desegregation figures.

The threat of denial of funds under Title VI was not an unqualified success, however. This was especially the case in the North and elsewhere where entrenched patterns of 'de facto' segregation, white racism, and political factors sustained patterns of residential and school segregation even in the face of

threatened withholding of federal funds. In 1965 the Chicago schools were found to be in serious violation of *Brown* and for five days the Office of Education cut off funds to the school district (Orfield, Reconstruction of Southern Education, 151-207). “The Chicago incident was universally seen in the South” Orfield noted, “as a political test of strength and proof that civil rights enforcement could be beaten politically” (Reconstruction of Southern Education, 206).

The next key move in the growth of greater federal support for equal educational opportunity came in 1968 from the Supreme Court in its ruling *Green v. County Board of Regents of New Kent County*.⁶ On May 27, 1968 the Supreme Court handed down its most important decision regarding school desegregation since *Brown*. Rather than continue to work within the ambiguous enforcement paradigm of ‘all deliberate speed’ articulated in *Brown II*, here the court argued forcefully for school integration remedies that worked ‘now.’ Dual systems had to be replaced “root and branch” with unitary systems, or integrated ones, ‘now.’ Indeed, the Supreme Court finally put an end to the delay tactics of many Southern school districts in *Green v. New Kent County*. Justice William Brennan wrote for a unanimous Court that school districts were “clearly charged with the affirmative duty to take whatever steps may be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” The justices ordered New Kent County officials to “fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools...a unitary, non racial school system...” The obligation of the district courts, Brennan wrote, “is to assess the effectiveness of a proposed plan in achieving desegregation.” A school district must “establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation,” and judges “should retain jurisdiction until it is clear that state -imposed segregations has been

completely removed.” Brennan drove the final nail into the coffin of ‘deliberate speed’ as a delaying tactic. “The burden on a school board today,” he wrote, “is to come forward with a plan that promises realistically to work, and promises realistically to work *now*” (qtd. in Iron, 204).

The controlling issue became immediate integration meeting enforceable standards of racial balance. The new directive caused a key shift: to ensure racial balance, race conscious norm had to be devised and monitored. As desegregation scholar Jeffrey Raffel noted, the court’s unanimous decision was

...the major turning point or watershed in school desegregation plans, since the objective of the remedy changed from eliminating race-based pupil assignments to creating schools that were to the maximum feasible extent racially balanced, and the subject of public argument changed from debate over the principle of school desegregation to the means (113).

The results were startling. In 1968-69, 32 per cent of black students in the South attended integrated schools; in 1970-71, the number was 79 per cent (Minter and Prettyman, 861).

The fiction of freedom-of-choice came under particularly harsh court scrutiny as failing to meet the vastly strengthened norms of desegregation. Particularly unfair was the burden the freedom-of-choice formats placed on black students and, especially, their parents. For instance, black parents in particular were typically primarily responsible for initiating the school integration process through a formal application procedure and, if successful, seeing it through logistically by providing transportation, and the like. The black students, of course, then entered the minefield of unwelcoming, formerly all-white schools.

The ongoing school desegregation movement now driven by the imperatives of *Green* transformed the face of southern public school education.

The criteria for determining whether integration within a specific school site as well as the school system more broadly satisfied federal guidelines have come to be known as ‘*Green* factors,’ those elements which constitute an acceptable school desegregation plan. These include not just student body composition (the numbers and percentages of racial groups), but these factors also encompass “every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities” (Raffel, 113).

In response to black pressure and the pressure of federal directives, a measure of school desegregation finally came to the South. It must be reiterated that these changes demanded innumerable and extraordinary struggles on the part of black parents, students, white allies, and the various other advocates of desegregation. The litigation and advocacy work of the NAACP LDF in connection with the growing cadre of local black civil rights lawyers was essential.

Also critical were the efforts of lower courts, the Supreme Court, and eventually the congressional and the executive branches of the federal government. The role of the District Courts found in each state and the intermediate Court of Appeals, the next level of adjudication respectively before the Supreme Court, merits notice. Both played crucial roles in the implementation of *Brown*. Closer to the local desegregation struggles, the District Courts, and especially the judges who constituted them, crafted the specific plan or remedy to be implemented. Until adequate federal pressure forced them to do otherwise, too often these plans were evasive at best. The Courts of Appeals were likewise very active in school desegregation decisions, and their work varied in terms of its substantive support for desegregation. The Atlanta based Fifth Circuit Court, was after the Supreme Court itself, the most effective court in positively sustaining the mandate of *Brown*.⁷

In addition, the tidal wave of the rapidly expanding ‘black freedom insurgency,’ in concert with the social movements of communities of color, propelled integration generally, and school desegregation, specifically. Local schools desegregated, often compelled to do so by the courts and a federal government forced into action by the power and logic of these ongoing social movements. Yet, these efforts made little progress toward the integration ideal because they left “the more subtle forms of resistance, such as white flight, [and] denial of funding for equalization” virtually unaddressed (Ogletree, 17).

4 Busing and the Continuing Dilemma of School Desegregation

In order to counteract the effects of White Flight, a tendency of whites to reside away from areas of concentrated black enrollment if there are segregated white public schools available at a reasonable distance, and the segregated urban housing created during the ‘*Plessy* era,’ many school boards instituted busing policies to integrate their schools.⁸ At first, the Court supported busing plans. Actually, the unanimous Supreme Court ruling in *Swann v. Charlotte-Mecklenburg Board of Education*⁹ in April 1971 proved a milestone in the school desegregation movement. First and most important, the Supreme Court ruling in *Swann* established busing as an acceptable means of working toward school desegregation in a school system where a history of segregated and discriminatory public schools could be shown. Desegregation plans, the Court reasoned, “cannot be limited to the walk-in school.” Second, the Court validated the use of race-based numerical guidelines for what constitutes a racially integrated school

as well as school system. In Charlotte, that ratio was a 71-29 white to black figure. Third, the Court further elaborated specific elements of a viable and acceptable school desegregation plan, or ‘*Green* factors.’ Student assignment plans, existing policies and practices with regard to faculty staff, and transportation, extracurricular activities, and facilities (school construction and abandonment) were cited as important components of such plans; racial distinctions had to be eliminated in all of these areas (Raffel, 249).

The paradoxical crux of the proposed elimination of these racial distinctions, though, has been that race-conscious measures proved essential to the achievement of that goal. In other words, the racial integration of public schools demanded race-conscious actions. Race-neutral measures had previously proved ineffective. Thus in making school desegregation a primary aim of school districts nationwide, *Swann* supported the policy of taking race into account in making school assignments.

The geographic crux of the desegregation dilemma in Charlotte was the city’s extreme residential segregation. To resolve this knotty problem, in early 1970 federal district court judge James McMillan ordered and the NAACP and most of the black community supported, a sweeping metropolitan busing experiment which took students across city-county lines to achieve racial balance. The school desegregation movement had reached a strategic and political crossroads. White opposition was strong but not overwhelming. With strong civic, community, and business leadership, over time the plan worked (Raffel, 107-29).

As the Charlotte case wound its way to the Supreme Court, the pro-busing forces — led by the NAACP — and the anti-busing forces — notably the Concerned Parents Association — fought a spirited battle. The unanimous Supreme Court ruling in April 1971 proved a milestone in the school

desegregation movement. The judgment consisted of four parts. First, the court ruled that racial quotas to achieve racial balance in schools had to be flexible rather than strict. Second, if a school continued to be predominantly of one group, the burden of proof that such a population did not result from past or present discrimination rested on the school district. Third, the decision gave courts considerable latitude in creating school attendance zones. Fourth and finally, the decision balked at excessively long bus rides for schoolchildren (Douglas, 210).

However, growing public tension over court-ordered busing to achieve school integration in concert with a series of pivotal court rulings dominated the first several years of the 1970s, much like the late 1960s. The growing public debate over the aims and viability of court-ordered busing as a strategy to achieve school desegregation increasingly clouded the issue of equality of educational opportunity. In many instances, the controversy even clouded commitment to the very viability of school integration itself. Historically, students have ridden public buses to school, as well as school buses, outside the confines of desegregation. Indeed, throughout much of the twentieth century, especially throughout rural America and the segregated Jim Crow South, busing has been a common mode of transportation to and from school for many students.

The problem, then, was not with busing per se, but with court-ordered busing to achieve integration. Many parents were concerned with their children being taken to non-neighborhood schools, especially at the lower grades. Many parents were particularly concerned with their children attending schools in neighborhoods with a different racial and class profile. Regardless of the motivations and rationalizations behind the opposition to court-ordered busing to achieve school integration, that opposition only grew in this period. Correspondingly, that opposition increasingly undermined the viability of court-ordered busing as a tactic to achieve school desegregation.

The Supreme Court ruling in *Swann* actually approved busing, as a

desegregation strategy only where there was a history of ‘de jure’¹⁰ segregation. In fact, district courts have called for busing typically and only as a narrowly tailored tactic of last resort. Jeffrey Raffel marks that after *Swann*, District Courts could call for busing “only under restrictive conditions.” There had to be evidence of “a constitutional violation.” Busing had to be shown to be a “feasible, reasonable, and workable remedy that will not threaten the educational process or the health of students involved” (41-5).

Clearly a significant part of the white opposition to court-ordered busing to achieve school integration flowed from racism phrased in thinly coded language like opposition to ‘forced busing’ and ‘massive busing.’ But that opposition was not just racism. In addition, as historian Ronald Formisano has argued in Boston Against Bussing, “anti-busing action and opinion arose rather from the interplay of race and class, in admixture with ethnicity and place, or ‘turf.’ ” A large measure of the minority opposition to busing flowed from the undue burdens generally shouldered in the process by the less privileged. This problem only complicated the rank hostility and indifference their children too often endured at the hands of whites. Nevertheless during this period the public continued to profess strong support for integrated schools even while that same public more and more opposed busing as a remedy to achieve that aim (Formisano, 12).

In Richmond, for example, court-ordered busing became in the words of Professor of history Robert Pratt, “the eye of the storm.” The increasingly controversial use of court-ordered busing accelerated the transition of the Richmond Public Schools to an overwhelmingly black majority district, as whites continued to flee to the surrounding counties. In 1960, the Richmond schools were 45 percent white; in 1975, they were 79 percent black. Pratt ultimately sees the story of school desegregation in Richmond in this period as “a promise betrayed” (93).

In general, the busing solution was disliked by integrationists, who criticized the method for encouraging white families to flee to the suburbs to avoid its reach, resulting in urban schools that are even more racially isolated than before busing (Bell, 110). This criticism proved prophetic. In *Milliken v. Bradley* (1974), the Court struck down a busing plan for desegregation due to a lack of evidence that districts outside Detroit contributed to the desegregation. Rich white families, in effect, could buy noncompliance with the law, a result that had huge negative consequences both in the pursuit of true integration, and for the legitimacy of the rule of the law in general.

Similarly, the busing solution was vehemently opposed by segregationist critics, among them President Nixon, who courted the white vote by attacking busing policies, proclaiming that integration had gone “too far too fast” and pledging to work to reverse pro-integration Court rulings (Ogletree, 132). Tragically, a full fifteen years after the *Brown* decision, its minimal progress remained objectionable in mainstream American politics.

In spite of a hostile White House and an unenthusiastic Congress, the South continued to become more and more integrated into the late 1980s. Rural and small-town America, where resistance had seemed more intractable, became the most integrated segment of the population. White students in the South began to attend schools with far higher proportions of black classmates than did whites in any other region. Recognizing that desegregation had become inevitable, Congress and President Nixon agreed in 1972 on the creation of a large federal program to assist in the desegregation process, the Emergency School Aid Act. This Act gave no money for busing costs but funded programs to help the positive operation of desegregated schools by retraining teachers, providing appropriate curriculum and strategies, and working on interpersonal relations among

students. The programs were intended to assist desegregated schools in becoming genuinely integrated, with good race relations and funds, and research showed that those programs enjoyed considerable success (National Opinion Research, 1973).¹¹

Conclusion

All through the first decade following its endorsement, *Brown's* desegregation order proved unproductive to wrestle with segregation in U.S. public education. The Supreme Court's utilization of the 'all deliberate speed' turn of phrase, its utter reliance on social science research to draw its conclusion, and the decision's likely-hidden motive of improving the United States' image abroad, rather than fostering racial equality at home, diluted *Brown's* anti-segregation order. The failure of school integration might likewise be allied to the insidious impact of such 'scientific' prejudiced studies against school desegregation on public opinion and, therefore, public policy. The deeply entrenched 'separate and unequal' doctrine in the American mode of life might also be held liable for desegregation's ineptitude.

Yet, though some federal laws, such as the *Swann* decision (1971), aiming at enforcing *Brown's* order, were met with a scathing denigration, holding the federal government culpable for a lack of commitment to put into effect the school desegregation order would be distinctly inequitable, at least throughout the mid 1960s and the 1970s. The startling return to concentrated segregation that featured the 1990s, however, can be accounted for with relevance to dissimilar angles. The socioeconomic along with the political aspect is to be approached first in the next chapter.

Endnotes

¹ The separate but equal doctrine of *Plessy v. Ferguson* legally sanctioned the practice of placing children in schools according to race. In the early 1950s, the following 17 states required racial segregation in public schools: Alabama, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Four others— Arizona, Kansas, New Mexico, and Wyoming—permitted segregation in public schools if local communities wanted it.

² In the late 1920s, social researchers Horace Mann Bond and Clark Foreman conducted a study on the relationship between environmental factors and black educational achievement, using the new Stanford achievement test. Testing some 10,000 southern black students in a variety of situations, they documented a high correlation between the quality of school facilities and resources and student achievement.

³ In 1950 in *Sweatt v. Painter*, the Court ruled that a separate black law school, established for Sweatt after he sued for admission to the University of Texas Law School, was unequal not only in physical facilities and curriculum but in reputation and opportunity for stimulating professional contact. In *Laurin v. Oklahoma State Regents*, also in 1950, the Court ruled that the state violated the separate but equal doctrine when it required isolated cafeteria and classroom seating for black students because it produced unequal educational opportunity.

⁴ See the Little Rock Crisis (1957). Melba Beals, *Warriors Don't Cry: A Memoir of the Battle to Integrate Little Rock's Central High*. New York: Pocket Books, 1994 and Orval Eugene Faubus, *The Faubus Years: January 11, 1955 to January 10, 1967*. 1991 in the Dwight Eisenhower Presidential Library: Abilene, Kansas. <http://eisenhower.archives.gov>.

⁵ The Jim Crow Laws were state and local laws enacted in the South and border states of the United States and enforced between 1876 and 1965. They mandated "separate but equal" status for black Americans. In reality, this led to treatment and accommodations that were almost always inferior to those provided to white Americans. Although it was legally required that the facilities provided should be equal, they were not. The 'Jim Crow period' or the 'Jim Crow era' refers to the time during which this practice occurred. The most important laws required that public schools, public places and public transportation, like trains and buses, have separate facilities for whites and blacks.

⁶ This small, rural majority black county in eastern Virginia had only two schools: the all-black George W. Watkins and the all- white New Kent. While freedom-of-choice had worked out as well as might be expected in such a small and dispersed system, a dual system clearly continued to thrive. The NAACP LDF had pushed this and similar cases in an effort to get the Supreme Court to provide both a stronger remedy and more stringent guidelines for school integration throughout the South.

⁷ See Rowland C.K. and Robert A. Carp, *Politics and Judgment in Federal District Courts*. Lawrence: University Press of Kansas, 1996.

⁸ White flight as well as housing segregation will be discussed in detail in the next chapter.

⁹ When the Swanns tried to register their son James at the all-white Seversville Elementary rather than the all-black Biddleville Elementary, they were turned away. When the school board refused to budge and the Swanns refused to request a formal transfer under Pearsall Plan, a pupil assignment scheme they considered "evil," the die was cast. They filed suit in a case with a winding history. In fact, by the time the resurrected case of *Swann v. Charlotte –Mecklenburg Board of Education* reached the Supreme Court in 1970, the Swanns no longer lived in Charlotte. Nevertheless, the unanimous 1971 Supreme Court ruling in the case proved transformative.

¹⁰ Refers to segregation mandated by law as opposed to 'de facto' segregation which means segregation by practice; not spelled out by the law.

¹¹ This program was shut down in 1981 as part of President Ronald Reagan's first budget.

CHAPTER TWO

The Return to Segregation in U.S. Public Education

....By the end of the twentieth century many public schools in the United States remained largely segregated by race. The United States has been in period of resegregation for some time now.... Racial segregation today is the result of a complicated mix of social, political, legal and economic factors... yet whatever the causes, it remains overwhelmingly the case that...a majority of black...students around the country still attend predominantly minority schools (Orfield, Bachmeier, James, and Eitle, 11).

Introduction

Brown is almost unanimously distinguished as the greatest twentieth-century Supreme Court decision; in its wake, America changed deeply. Yet *Brown*'s legacy for American schools is still uncertain. In fact, in the early twenty-first century, the United States is leading a chillingly backward slide in the direction of renewed segregation in public schools after decades of progress toward integration. This chapter looks at resegregation throughout the 1990s and up to the turn of the new century, its social, economic as well as political grounds, and its pernicious repercussion on black Americans. It wraps up with a discussion of the educational benefits of desegregation on both blacks and whites.

1 The Alarming Trend Toward School Resegregation

As a matter of fact, by the close of the twentieth century, we might say that *Brown* had achieved a special place of honor in the United States. One reason for that special status is that *Brown* fits nicely into a widely held and often repeated story about America and its Constitution. This story has such deep resonance in American culture that we may justly regard it as the country's national narrative. Such narrative sees America as continually striving for democratic ideals from its founding and eventually realizing democracy through its historical development. According to this very narrative, the Constitution reflects America's deepest ideals, which are gradually realized through historical struggle and acts of great political courage. The basic ideal of America and the American people are good, even if America and Americans act unjustly, even if people acting in the name of the Constitution sometimes perpetuate terrible injustices. The basic ideas of Americans and their Constitution are promises for the future, promises that the United States will live up to, and, in so doing, confirming the country's deep commitment to liberty and equality.

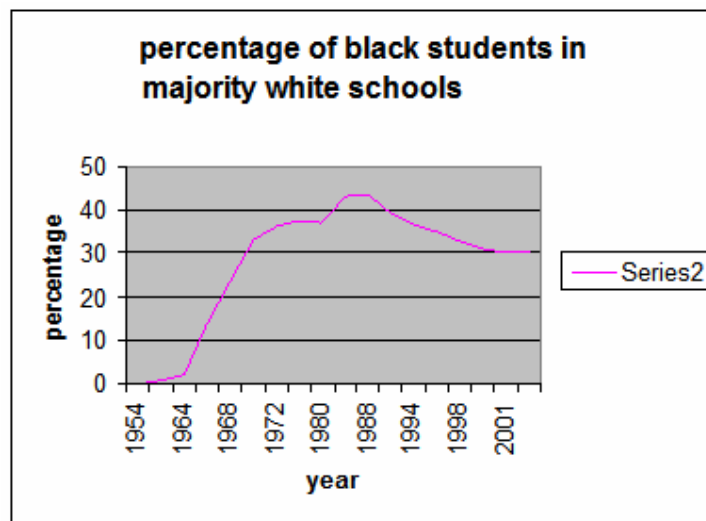
It is easy to see how *Brown* fits into this narrative and confirms its truth. Through years of struggle and a great Civil War, America gradually freed itself from an unjust regime of chattel slavery. The United States's failures were redeemed by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. To be sure, the Civil War was followed by retrenchment and the establishment of Jim Crow which was given official sanction in the 1896 decision in *Plessy v. Ferguson*. Nevertheless, eventually America redeemed itself once again by overturning that unjust precedent and firmly establishing the principle of racial equality. Seen in this way, *Brown* represents the Good Constitution – the Constitution whose deeper principles and truths were only fitfully and imperfectly realized,

rather than the Constitution that protected slavery and Jim Crow. By extension, *Brown* symbolizes the ‘good America,’ rather than the country that slaughtered Native Americans, subordinated women, and enslaved blacks.

In many respects, however, the honor *Brown* has received is ironic. A half century of efforts to end school segregation have largely failed. Gary Orfield’s powerful recent study, “Brown at Fifty: King’s Dream or Plessy’s Nightmare” (January 2004) carefully documents that, during the 1990s and up to the turn of the new century, America’s public schools have become substantially more segregated. In the South, for example, he shows that from 1988 to 1998, most of the progress of the previous two decades in increasing integration in the region was lost. According to Professor Gary Orfield, the South is still more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate (Orfield and Chungmei, 4). This fact can be clearly demonstrated through the percentage of black students’ attendance in majority white schools between 1954 and 2002.

**Percentage of black students in majority white schools in the south,
1954-2002**

year	Percentage of black students in white schools
1954	0.001
1960	1
1964	2.3
1967	13.9
1968	23.4
1970	33.1
1972	36.4
1976	37.6
1980	37.1
1986	42.9
1988	43.5
1991	39.2
1994	36.6
1996	34.7
1998	32.7
2000	31.0
2001	30.2
2002	30.1



Source: Southern Education Reporting Service, *The Ordeal of Desegregation*. New York: Harper & Row, 1966: 362; Orfield, Gary, and Chungmei Lee. "Brown at Fifty: King's Dream or Plessy's Nightmare?" *The Civil Rights Project, Harvard University*, , January 2004: 1, 19.

The statistics presented in Orfield's study are stark. For example, the percentage of black American students attending majority white schools has steadily decreased since 1986. In 1954, at the time of *Brown v. Board of Education*, only 0.001% of black American students in the South attended majority white schools. In 1964, a decade after *Brown*, this number increased to just 2.3%. From 1964 to 1988, there was significant progress: 13.9% in 1967; 23.4% in 1968; 37.6% in 1976; 42.9% in 1986; and 43.5% in 1988. But since 1988, the percentage of black American students attending majority white schools has declined. By 1991, the percentage of black American students attending majority white schools in the South had decreased to 39.2% and over the course of the 1990s this number dropped: 36.6% in 1994; 34.7% in 1996; and 32.7% in 1998. Similarly, at the threshold of the twenty first century, the number of black Americans attending majority white schools is in an alarming decrease.

In addition, Professor Orfield's study shows that, nationally, the percentage of black American students attending majority black American schools and schools where over 90% of the students are black American also has increased in the last twenty years. In 1986, 62.9% of black American students attended schools that were 50% to 100% comprised of minority students; by 1998-1999, this percentage had increased to 70.2% (Ebbs, 1A).

The simple and tragic reality is that American schools are separate and unequal. As Professor Orfield documents, to a very large degree, education in the United States is racially segregated.¹ By any measure, predominantly black American schools are not equal in their resources or their quality. Wealthy suburban school districts are almost exclusively white; poor inner city schools are often exclusively comprised of black American students. The year 2004 was the fiftieth

anniversary of *Brown v. Board of education*, and American schools marked that occasion with increasing racial segregation and gross inequality.

As clearly accounted for in chapter one of this research, no significant school desegregation rate characterized the first decade following the *Brown* decision. Conversely, the period of the civil rights revolution produced revolutionary changes in Southern schools from 1964 to 1972 as Congress and the Johnson Administration committed themselves to an unprecedented effort to enforce civil rights in the South. Change came with the passage and implementation of the 1964 Civil Rights Act, which forbade discrimination in any institution receiving federal aid and as the Supreme Court greatly tightened the constitutional requirements to be enforced by federal courts in the historic decisions of *Green v. New Kent County* (1968), and *Swann v. Charlotte-Mecklenburg* (1971), where the Supreme Court decided that desegregation must be thorough, comprehensive, immediate, and, that in segregated urban school systems, courts could transfer students to other neighborhoods to end school segregation.

However, during the Nixon Administration the executive branch stopped enforcing desegregation (until ordered to resume by a federal court), and the Supreme Court very seriously limited desegregation in the North with its Detroit decision, *Milliken v. Bradley* (1974). In spite of these limitations, desegregation of black students continued to increase in the South until the late 1980s, possibly reflecting the gradual decline in residential segregation levels. Then, beginning in the 1990s and up to the turn of the new century, segregation began to increase reflecting a deceiving failure of school integration endeavors.

In reality, the trends of increasing resegregation are often dismissed because people believe that nothing can be done. Many Americans believe that *Brown's* desegregation mandate is impossible to be adequately

enforced because of white flight, that led to a massive transfer to private schools, that public opinion has turned against desegregation, that blacks no longer support it, and that it is more beneficial for students to use desegregation funding for compensatory education. We argue in this chapter that none of these things is true. There have, of course, been unsuccessful and poorly implemented desegregation plans and black opinion has always been far from unanimous, but a large majority prefers integrated education.

1.1 Public Opinion and School Segregation

To begin with, the ineffectiveness of racial school integration was not the result of a shift in public opinion against desegregated schools. Instead, Contrary to conventional wisdom, the poll data shows an extremely high level of acceptance and approval of integrated education among both blacks and whites, with a strong majority saying desegregation improves education for blacks, and a growing proportion of the public believing that it improves education for whites as well.² The Gallup Poll's Social Audit of Black/White Relations in the U.S, asked in 1999 about school integration and found both blacks and whites increasingly positive about its educational benefits. Back in 1988, 55% of Americans believed that integration had "improved the quality of education" for blacks, and 35% believed it had made white education better. By 1999, 68% of the public saw an improvement for blacks, and 50% said that it made education better for whites. In 1988, 37% of Americans believed that much is needed to be done to integrate the schools, but the number climbed to 59% by 1999 (Gallup Poll: Race Relations, 1999). A 1999 survey of young adults (ages 18-29), showed that 60% felt that the federal government should make sure that the schools were integrated (Zogby International Poll, 1999). A 1999

Gallup Poll showed that across the U.S. parents believed their children needed to learn about race relations at school: 56% thought that there should be a required course, and 35% believed it should be an elective (Gallup Poll: Education, 1999).

These poll results do not mean that most Americans do not also prefer neighborhood schools --they clearly do. They would also like many other mutually incompatible things: both lower property taxes and much better school facilities, both less regulation and much tougher safety standards, etc. The basic point is that Americans say they believe, by large and growing majorities, that integrated schools are better. Poll data from the last three decades show that both white and black opposition was highest at the beginning of mandatory busing in the early and mid-1970s and declined significantly since that time. The studies also show considerable support from parents of all races whose children have actually been bused for desegregation purposes (Orfield, "Public Opinion," 654-70). The return to segregation was not the result of a shift in public opinion against desegregated schools.

The one recent national study that reported a lack of black support for desegregation, a widely publicized 1998 study conducted by the Public Agenda Foundation, Time to Move On, emphasized a finding that blacks preferred educational improvement to desegregation, reporting responses to a question posing this choice. Since research has long shown that blacks pursue desegregation primarily as a means to obtain better educational opportunities for their children and the forced choice suggested that one must choose between the two goals; of course parents said that their first concern was good education for their children. In fact the survey also found that 60% of blacks and 34% of whites said it was "absolutely essential" for schools to "have a diverse student body, with kids from different ethnic and racial backgrounds," and only 8% of blacks and 20%

of whites said that this was “not too important.” This finding was not featured in the release, giving readers of press accounts the inaccurate impression that blacks no longer cared and that it was “time to move on” (Farkas and Johnson 6-10).

Also contrary to popular belief, there has been no significant growth in the percent of U.S. students in private schools since the desegregation era began, in fact, the proportion is lower than a half century ago. If desegregation produced gains for private schools, a return to segregated neighborhood schools would logically produce a decline in private education. That has not happened even while desegregation has been reduced or eliminated in many areas, and America’s schools have become more segregated.

In 1960, before any significant desegregation, 19.2% of kindergarten students, 14.9% of elementary students and 10.1% of high school students were in private schools (U.S. Bureau of the Census, 107). In 1998, the share of kindergarten students in private schools had dropped by 4.4%, the share of elementary students in private schools was down by 5.8%, and the private share of high school students had dropped by 1.0% (NCES, The Condition of Education, 150). There were, of course, communities in the South where ‘segregation academies’ became very important, primarily at the beginning of serious desegregation, but that impact was not large on a national scale. Private school enrollment has actually increased more in the resegregation era than in the era of major increases in desegregation. Projections of existing trends suggest that the private share of students will continue to drop slowly. Clearly, there was no shift in public opinion against desegregation in public education and thus the failure to keep schools desegregated was a result of other factors.

1.2 Demographic Forces and School Segregation

Much of the change in the proportion of whites in the schools was caused by disparate birth rates, immigration, and the building of more and more white suburban communities, not by desegregation plans. The U.S. is in the midst of the largest wave of immigration in its history – the first that is overwhelmingly non-European and non-white. Latino families are much younger and much larger than white families, a factor that promises a continuing shift in population proportions, exclusive of future migration. If the number of white children being born falls, and the number of those coming to the U.S. from outside is a small minority in a society where population growth is very strongly linked to immigration, school enrollment can change dramatically without whites fleeing.

In point of fact, America's schools have undergone substantial demographic change. Due to high birth rates and increased immigration, the number of Latino students in the United States is increasing much faster than the number of white students and the total growth of black and Latino students is more than twice that of whites. Census Bureau population projections suggest that by the end of the 21st century little more than two-fifths of school age youth will be white (Orfield G., Rosemary, and Orfield A., 23-4). The following table demonstrates clearly the changes that took place in public school enrollment between 1968 and 2001.

Public School Enrollment Changes, 1968-2001

(In Millions)

	1968	1991	2001	Changes from 1968-2001 (% Change)	Changes in Past Decade (% Change)
Whites	34.7	25.4	28.6	-6.1(-18%)	+3.2(13%)
Blacks	6.3	6.0	8.1	1.8(29%)	+2.1(35%)
Latinos	2.0	4.7	8.1	6.1(305%)	+3.4(72%)

Source: Orfield, Gary, Rosemary George, and Amy Orfield. "Racial Change in U.S. School Enrollments, 1968-2001." Paper presented at National Conference on School Desegregation, University of Chicago, 2001: 23.

Because of the intensive high birth rate of Latino and black minorities between 1968 and 2001, Latino black public school enrollment increased from 2 million students in 1968, the number doubled in 1991 and multiplied a decade later. Similar demographic patterns, though not as intensive, featured the black school enrollment. While an increase of about two million black students was the difference between 1968 and 2001, white public school enrollment, in contrast, decreased alarmingly from 34.7 million in 1968 to 28.6 million in 2001 reflecting increasing high birth rates of black and Latino minorities.

In actual fact, there are a good many examples of communities where substantial desegregation has lasted a quarter century or longer, and that have actually gained white enrollment while highly desegregated.³ There are also a number of communities that never experienced significant desegregation which have had drastic loss of white enrollment—communities such as New York City, Chicago, and Atlanta. In fact, Atlanta avoided busing, partly in the hope of preventing further loss of white enrollment, to no avail. Los Angeles terminated all but a tiny voluntary transfer program in 1981, with the opponents charging that busing was causing white loss. Yet, in 1998-99, Los Angeles, free of mandatory busing

for almost two decades, had 10.5 percent whites; while Chicago, where no mandated busing had occurred, had 10.1 percent (Orfield and Eaton, 316-17).

These numbers point to an important fact that has been widely ignored in the debate over desegregation. Neighborhood schools were extremely unstable. Whatever integration occurred was usually on the boundaries of expanding black communities, and the 'integrated' schools usually became virtually all-black in a few years, as did the neighborhoods. City school districts have been losing white enrollment for decades, in spite of neighborhood schools, because the neighborhoods are highly unstable along the racial boundaries. Black families desiring to move out of poverty areas are directed to a very limited set of communities, and whites tend to leave or not to move into racially changing areas (Orfield and Eaton, 317).

These problems are typically intensified within neighborhood school systems because the black families who move out are often young with children and are seeking good public schools. The whites that live in the receiving communities are often older, with fewer children, and more likely to use parochial and private schools. This means that neighborhood schools go through racial change much faster than neighborhoods; even when there is a very high level of acceptance of school integration, attitudes are far more negative about schools with a nonwhite majority. Even when a neighborhood is well integrated residentially, its neighborhood school may well be resegregated, thus creating a barrier to future entry of white families. The idea that ending desegregation plans will produce stable white enrollments is not supported by the actual enrollment trends in districts without desegregation in the last several decades. The debate over desegregation policy often presupposes that doing nothing produces stability, but that is incorrect.

In a society with a rapidly growing minority population and little stable residential integration, unless there are successful strategies to stabilize either school or housing integration or both, there will be a great deal of resegregation and decline in white enrollment, whether or not there is any busing. There still is a tendency for whites to locate away from areas of concentrated black enrollment if there are segregated white public schools available at a reasonable distance⁴. For this reason, white enrollment is most stable when there are large school districts that both tend to equalize integration and to deny the possibility of finding nearby all-white schools, a finding that explains the success of county-wide desegregation in a number of metropolitan areas. (Clotfelter, "Are Whites Still Fleeing?" 28). Metropolitan Louisville, which has had city-suburban desegregation for a quarter century, has a high level of white enrollment, as do a number of other communities. In contrast, some of the largest districts that never had significant desegregation including New York, Atlanta, Baltimore, and Chicago experienced huge losses in white enrollment (Orfield and Monfort, 21-22). The underlying reality is the failure to significantly change the pattern of intense housing segregation for dramatically growing Latino populations.⁵

The fragmentation of many northern metropolitan areas into dozens of small districts and the Supreme Court's blocking of cross-district desegregation, however, have created the most difficult situation for stable desegregation.⁶

Many suburban communities are today facing the problems of unstable and rapidly changing racial enrollments and the emergence of segregated minority schools and communities. If the pattern of transition and resegregation extends out from the cities, as it obviously does in some large minority suburbs, many communities will face hard questions about the possibility of continuing to attract white homebuyers. Since the

average American moves every six years, attracting white buyers is essential if a neighborhood is to remain integrated for any length of time. There were no major initiatives in America in the 1990s, except the policies adopted by some individual suburban communities, to help suburbs resolve these challenges.

In summary, most of the assumptions about desegregation impacts are questionable or clearly incorrect. The public school systems have not been abandoned. The private school sector is smaller than a half century ago. There is a problem of declining white enrollments, but much of it comes from broader demographic forces and it is manifest in cities that never desegregated as well as those that abandoned desegregation efforts. Neighborhood schools with interracial student bodies are often not stable. Obviously, the failure to tackle the resegregation of U.S. public schools in the 1990s is not due to a shift in public opinion with respect to desegregation but rather to some inevitable demographic forces, such as birth rates, immigration, and the building of white suburban communities. Yet, further decline in white enrollment may best be limited by more widespread, not more restricted, desegregation plans.

2 The Equalization of Separate Education

Racial segregation in public schools prevailed during the 1990s since the separate but equal doctrine, though overruled under *Brown*, still has its proponents. The federal expenditures on desegregation programs are much less than for compensatory education. That is to say, the federal government is still operating under the 'separate but equal' doctrine.

Critics of desegregation often argue that it would be better to spend the money on improving schools where they are. The suggestion is that while a great deal of money is being spent on desegregation, Americans are

ignoring alternative solutions that have been shown to produce academic gains in segregated neighborhood schools. In reality, such solutions do not exist. Before the Supreme Court ordered desegregation in 1954, the United States had been operating under a constitutional mandate to equalize the segregated schools, which had been a massive failure. School boards consistently provided segregated and strikingly unequal schools, black communities' efforts were regularly defeated because they did not have enough political power to force changes in local politics, and neither the courts nor Congress nor any state government showed any interest in strongly enforcing the equality requirement (Weinberg, 122-23). Even after the Supreme Court acted, dramatic inequalities continued to exist between black and white schools in many districts and were often part of the proof presented to courts as a basis for desegregation orders. Civil rights groups engaged in decades of unsuccessful battles to equalize segregated schools before desegregation was ordered. This long history in thousands of communities produced great skepticism about the willingness of the majority to make black American schools equal.

Desegregation was seriously pursued by the elected branches of government for only a few years in the mid-1960s (1965-1968), the crucial period of breakthrough in making Southern school districts the nation's least segregated. The period of the most active Supreme Court intervention on more than token desegregation went from 1968 to 1973. Even in this period, the government always spent much more money on programs intended to equalize education in poor black schools than it did on desegregation. The only significant federal expenditures on desegregation occurred during the 1970s, when the Emergency School Aid Act provided funds for training teachers to deal with diverse classes, to develop curricula, and to work on improved race relations among students. The federal government did not fund school busing (Orfield, Congressional

Power, 53-5). This desegregation aid program, which was widely popular and had been shown to improve interracial schools, was summarily ended in President Reagan's first budget (Nathan et al., 50-51). Since then there has been only a small program of aid to magnet schools.

Those who say that the federal government has been spending much on this issue are simply wrong. Most of the added expenditures were for more transportation of students and for new magnet schools and programs, and were funded from local budgets, sometimes reimbursed by state governments. In most cases studied, the added costs were a few percent of the local school budget, a significant share of which could be attributed to new educational programs and choices. Since most American school children had long been transported to school, at its peak, busing for purposes of desegregation probably only added several percentage points to those numbers, less than busing for sports and activities (U.S. Senate).⁷ Ironically, the highest increases in transportation came under voluntary desegregation through educational choices, something many parents of all races strongly valued, as shown by the strong demand for enrollment in many magnet schools. Very few U.S. school districts had schools of choice before the desegregation era (Steel and Levine, 200-5).

Even at its peak, desegregation received much less money than compensatory education, and substantial parts of the desegregation money were spent on new educational offerings in choice and magnet programs and providing transportation to get the students to programs which parents often saw as superior to what had been offered in their neighborhood schools.

Compensatory education for high poverty schools has, in fact, been the central goal of federal educational policy for the past 40 years. The largest program, Title I, pumps dollars into high poverty schools. Many other programs, including bilingual education, Head Start, and charter

schools, are intended to improve education without addressing the issue of race or moving children away from their communities. Typically, when school districts dissolve their desegregation orders, they tend to offer more compensatory programs for at least some of the resegregated minority schools for at least a transition period (Orfield and Eaton, 318-19). These programs are often similar to Title I programs_ programs which typically have not proved effective _ nor is there any guarantee of their long-term funding or effectiveness.

Since the 1980s, the basic educational goal of both national parties has been to improve schools by imposing tough standards, and there has been no priority given by education officials of any administration in the past twenty years to desegregation. In 1989, President George H. Bush and the nation's governors, led by then Arkansas Governor Bill Clinton, embraced the goal of racial equity in education by 2000, which Congress embodied in the Goals 2000 legislation.⁸ Almost all the states adopted sweeping state reforms based on more course requirements and mandatory testing. Those reforms ignored the issue of race and class segregation (Campbell and Rockman, 83). The idea was to equalize outcomes within the existing structure of segregated schools. During this period there was a substantial increase in compensatory resources directed at improving impoverished schools and bringing strong pressure to bear on their teachers and administrators to raise achievement.

In fact, however, racial differences in achievement and graduation began to expand in the 1990s, after having closed substantially from the 1960s into the mid-1980s. There is no evidence that Americans have learnt how to make segregated high poverty schools equal, though there are a few policies and programs that have had a significant impact on raising achievement, particularly in the early grades, and there are a handful of remarkably successful high poverty segregated schools, usually elementary

schools, in most big cities.

The Prospects study Congress commissioned of the Title I program showed that low income students receiving Title I services in high poverty schools, which are usually segregated black schools, did less well than similar students receiving no services in less impoverished schools (U.S. Department of Education, Prospects). It suggested that the average benefits of the huge federal compensatory education program, administered by state and local educators, were extremely small or non-existent. A recent study of several cities shows that the typical achievement gap for low-income students is much wider for those living in concentrated poverty areas, areas that are overwhelmingly black (Schellenberg, 130-46). Thus, racial school desegregation ineffectiveness throughout the 1990s is largely due to the absence of positive federal leadership to desegregate public schools. Instead, the federal government has been fostering compensatory education during the past several decades, a strategy already experienced under the *Plessy* doctrine and was doomed to dismal failure.

3 The Aftermath of School Desegregation's Failure

3.1 Segregation and Poverty Concentration

In reality, the failure to deal with racial segregation in public education and thus to prevent the resegregation of U.S. public schools had pernicious effects on black students as well as their schools. With resegregation comes increasing concentration of poor children in segregated black schools and then comes the educational differences between segregated and integrated schools.

As school districts move back to neighborhood social policies, the next generation of white students will likely have less school contact than

their predecessors did. Particularly for young white children, interaction with black people is likely to be a virtual reality rather than an actual one, with media images (often negative ones) most clearly shaping their attitudes and perceived knowledge of black communities. For black students, it means the increased likelihood of attending a school with limited resources:

Most segregated African American...schools are dominated by poor children but that 96 percent of white schools have middle-class majorities. The extremely strong relationship between racial segregation and concentrated poverty in the nation's schools is a key reason for the educational differences between segregated and integrated schools....Schools with large numbers of impoverished students tend to have much lower test scores, higher dropout rates, fewer students in demanding classes, less well-prepared teachers, and a low percentage of students who will eventually finish college (Orfield and Eaton, 53).

Clearly, when the Supreme Court in *Brown* said that separate schools were “inherently unequal” (1954), it was discussing the impact of discrimination, not the talent of black students. Although there is a great deal of debate about the scale of the benefits produced by desegregation, there is no doubt that segregated schools are unequal in easily measurable ways. To a considerable degree this is because the segregated black schools are overwhelmingly likely to have to contend with the educational impacts of concentrated poverty (defined as having 50% or more of the student population eligible for free or reduced lunch), while segregated white schools are almost always middle class. Highly segregated black schools are many times more likely than segregated

white schools to experience concentration of poverty. This is the legacy of unequal education, income, and the continuing patterns of housing discrimination. The following table demonstrates the intimate relationship between segregation by race and poverty during the years 2001-2002.

Percent of black students in schools

% Poor in Schools	0-10%	10-20%	20-30%	30-40%	40-50%	50-60%	60-70%	70-80%	80-90%	90-100%
0-10%	24.7	20.2	9.5	5.1	5.5	4.2	4.9	4.2	3.8	4.3
10-25%	27.6	28.3	25.4	15.9	9.2	4.8	3.8	2.4	2.0	2.0
25-50%	32.9	35.4	4.3	42.9	38.2	30.4	19.9	12.0	8.8	6.1
50-100%	14.8	16.2	24.8	36.2	47.1	60.7	71.4	81.4	85.4	87.6
% of U.S. Schools	43.2	11.7	7.8	6.2	5.5	4.6	4.0	3.7	3.8	9.6

Source: National Core of Data of the National Center for Education Statistics, Common Core of Data, 2001-2002.

In the 2001-2002 school years, 43 percent of all U.S. schools were intensely segregated white schools or schools with less than a tenth black students. Only 15 percent of these intensely segregated white schools were schools of concentrated poverty, or schools with more than half of the students on free or reduced priced lunch. In contrast, 88 percent of the intensely segregated black schools (or schools with less than ten percent white) had concentrated poverty, with more than half of all students getting

free lunches. That means that students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty.

Concentrated poverty turns out to be powerfully related to both school opportunities and achievement levels. Children in these schools tend to be less healthy, to have weaker preschool experiences, to have only one parent, to move frequently and have unstable educational experiences, to attend classes taught by less experienced or unqualified teachers, to have friends and classmates with lower levels of achievement, to be in schools with fewer demanding pre-collegiate courses and more remedial courses, and to have higher teacher turnover (Young and Smith, 97). Many of these schools are also deteriorated and lack key resources.

Anyone who wants to explore the continuing inequalities need only examine the test scores, dropout rates, and other statistics for various schools in a metropolitan community and relate them to statistics for school poverty (free lunch) and race (percent black and/or Latino) to see a distressingly clear pattern. The state testing programs, which now publish school level test data in almost all states, identify schools as low performing, many of which are segregated minority schools with concentrated poverty. There is a very strong correlation between the percent poor in a school and its average test score. Therefore, black students in segregated schools, no matter how able they may be as individuals, usually face a much lower level of competition and average preparation by other students. Such schools tend to have teachers who are themselves much more likely to be teaching a subject they did not study and with which they have had little experience⁹ (Young and Smith, 99). This, in turn, often means that there are not enough students ready for advanced courses and that those opportunities are eliminated even for those who are ready. Many colleges give special consideration to students

who have taken advanced classes, ignoring the fact that such classes are far less available in segregated black American high schools.

School administrators, public officials, and the press in communities undergoing resegregation almost always publicize assurances that all neighborhood schools will be equal and that education might even be better because kids will be closer to home and transportation money can be used for other things. Although *Brown* declared that separate schools were inherently unequal based on generations of bitter experience under *Plessy*, current rhetoric strongly suggests that school officials have somehow learnt how to make separate schools equal (Bogar and Orfield, 17). In fact, however, the combined adverse impact of segregation by race, poverty, and inequality on major educational outcomes normally takes hold rapidly in most resegregating schools. Nine-tenths of highly segregated black neighborhood schools must deal with concentrated poverty and its educational impacts, a situation rarely found in highly segregated white schools, which still account for almost half of the America's educational institutions.

With resegregation comes increasing concentration of poor children in segregated minority schools. History researchers Russell W. Rumberger and Gregory J. Palardy show that a school's social class composition, which is very strongly related to its racial composition, is also strongly related to student achievement, particularly in southern schools. The authors conclude that if students are to have a fair chance, either they should attend less impoverished schools or the nature of the high-poverty schools that kids attend must be dramatically altered. Family characteristics are very powerful predictors of student success in the South, and large educational differences exist even among kindergarten children (Rumberger and Palardy, 18-19). This is an invaluable reminder of the fact

that the great leaders of the civil rights movement had no delusions that desegregating the schools alone would be sufficient. The movement sought full access to voting, jobs, housing, and equality in every sphere of life. The great march where Martin Luther King Jr. made his "I Have a Dream" speech was called the March on Washington for Jobs and Freedom. Increasing concentrations of children in isolated poor neighborhoods will produce growing gaps in achievement. Dealing with the poverty of black families would surely help school success.

If schools filled with poor children from families with low educational levels and few resources are systematically unequal, and if funds alone make relatively small differences, securing good teachers becomes a central need that becomes more urgent as isolation and poverty intensify. Increasingly powerful evidence confirms the importance to students' educational success of highly qualified teachers with significant experience.¹⁰ A classic complaint about segregated black schools has been that they cannot attract and retain excellent teachers. Research on schools that are unusually successful with disadvantaged students tends to identify a strongly committed and highly qualified faculty as a key element. In fact, good evidence shows that serious reforms take years of concerted effort by a faculty that buys into the reforms. As southern schools resegregate, one crucial question is what happens to the teachers. Historians Freeman, Scafidi, and Sjoquist report that the more heavily minority a school is, the more likely it is that white teachers have fewer advanced degrees and years of experience and the more likely that they will leave more rapidly. The supply of nonwhite teachers lags far behind the share of black children in the schools, so white teachers' decisions are very important and have serious implications for student achievement (19).

These problems are most serious when racial segregation is reinforced by class segregation, but they are also serious for the black middle class schools. A study examining the achievement gap for black middle class students found that students in middle class black schools perform at a much lower average level than would be predicted on the basis of their economic level (McCoy, 1-12). Part of this difference is due to the fact that black middle class families tend to live in communities with far more poor people than white middle class families and often live near and share schools with lower class black neighborhoods.

The basic message is that segregation, as normally seen in American schools almost a half-century after *Brown*, produces schools that are, on average, deeply unequal in ways that go far beyond unequal budgets. Integrated schools, on average, clearly have better opportunities. There are, of course, exceptions. Even if integrated schools have better opportunities, this does not assure that black children enrolled in those schools will receive fair access to those opportunities. That depends on the policies and practices under which the school operates. Desegregation at the school level is a necessary but far from sufficient condition for assuring equal opportunity in practice. A great deal is known about the conditions under which interracial schools operate more or less effectively and fairly. There are a variety of things that children learn in interracial schools about understanding and working together with people of other racial and ethnic backgrounds, things that are difficult or impossible to learn in segregated schools.

4 The Educational Benefits of Desegregation

Racial school integration attempts could have been more successful to redress racial inequities in public education and thus to prevent the resegregation of U.S. schools if the Supreme Court in *Brown* ordered desegregation as an educational treatment rather than an end to the deeply rooted patterns of illegal separation of students. In fact, aside from relying on the psychological harm on black school children that is brought about by segregation, *Brown* could have referred to the tremendous benefits of school desegregation for blacks in general and whites in particular while outlawing the separate but equal doctrine.

Indeed, there is evidence that desegregation both improves test scores and changes the lives of students (Crain and Mahard, 839-54). More importantly, there is also evidence that students from desegregated educational experiences benefit in terms of college going, employment, and living in integrated settings as adults (Wells and Crain, 531-55). There are also well documented and relatively simple instructional techniques that increase both the academic and human relations benefits of interracial schooling (Damico and Sparks, 113-23).

Over the last half-century, many researchers have studied and written about school desegregation and race in American schools. Most of the studies of the benefits and costs of school desegregation are from the 1960s and 1970s in response to the changes brought about by *Brown*, the 1964 Civil Rights Act, *Green* in 1968 and *Swann* in 1971— Supreme Court decisions that led to increased enforcement of *Brown* and the authorization of busing. These studies concentrated on the impact of desegregated schooling on the experiences of black American students, focusing specifically on the short-term achievement gains of blacks attending desegregated schools.

Demographic changes in the United States have led researchers to begin examining the impact of racially and ethnically diverse schools on students of all races. These more recent studies have documented that racially and ethnically diverse schools provide benefits to all students. Moreover, the impact of diversity on whites is gaining increasing scholarly and legal attention.

The many early studies of school desegregation recorded, tended to show modest gains in achievement outcomes for black American students who moved from segregated to desegregated settings with white students. These studies primarily focused on first year gains in test scores, paying little attention to differences in implementation of desegregation plans or in the types of desegregation experiences taking place in different school settings. The 1980s and 1990s brought several important reviews of the social science evidence on school desegregation, particularly on the broader effects for black American students (Wells and Crain, 550-52). In addition, as schools faced important demographic changes, greater attention has been paid to Latinos' experiences with school desegregation.

In the current desegregation literature there are three primary categories of student outcomes—higher achievement (as measured by test scores), greater educational or occupational aspirations and attainment, and increased social interaction among members of different racial and ethnic backgrounds—that may be enhanced in the desegregated schooling context. There is important evidence in the educational literature that minority students who attend more integrated schools have increased academic achievement, as most frequently measured by test scores (Hanushek and S. Rivkin, 481-502). The magnitude and persistence of these benefits, however, have been widely debated in education research, particularly those that came from the first year of mandatory desegregation plans of the type that was common in the 1960's and 1970's (Cook, 111-15).

A second set of outcomes addressed in the desegregation literature is the longer-term gains that desegregation offers. These studies focus on the role of school desegregation on individual life chances, rather than test score improvement or achievement levels. Segregated schools that are predominantly non-white often transmit lower expectations for students and offer a narrow range of occupational and educational options (Dawkins and Braddock, 394-405). The general hypothesis is that schools with a substantial white enrollment, which tend to have higher social and economic status, can offer black students a higher set of educational and career options due to the more developed social networks that represent white middle-class norms. As a result, minority students in desegregated settings are exposed to a higher set of educational expectations and career options, which are rarely present in segregated black schools (Anyon, 3-13). A recent study of educational attainment indicated that desegregated schooling has a positive effect on the number of years of school completed and on the probability of attending college (Boozer et al., 269-338). In another study examining the peer influence process, employing a large nationally representative sample, social researchers Hallinan and Williams found that both black and white students who had cross-race friendships had higher educational aspirations than those with same-race friendships (67-78).

Finally, since racial segregation tends to perpetuate through the life course, many sociologists and social psychologists have argued that only when students are exposed to sustained desegregated experiences will they lead more integrated lives as adults (Crain, 593-606). From a review of 21 studies applying perpetuation theory, researchers Wells and Crain concluded that desegregated experiences for black American students lead to increased interaction with members of other racial groups in later years. Results from these studies indicate that school desegregation had positive,

albeit modest, effects—both blacks and whites who attended desegregated schools were more likely to function in desegregated settings later in life (531-55). These later desegregated environments include workplaces, neighborhoods, and colleges and universities.

Far less has been done to examine the impact of racial diversity and desegregation on minority students' white peers, or on students from racial/ethnic minority groups other than black Americans. Given the broad mission of public schools to educate students to participate as citizens in an increasing multiracial society, it is critical to evaluate the role of school racial composition in promoting civic and democratic outcomes for all students.

One area that has been examined is the existence of interracial friendships across different schooling environments (Hallinan and Williams, 67-78). Whites' proximity to blacks in schools, workplaces, and neighborhoods leads to their likelihood of cross-racial interactions and friendships (Jackman and Crane, 459-486). Looking at adult cross-racial friendships, social historians Jackman and Crane also found that proximity (measured in the neighborhood context) and personal contact reinforced each other in influencing white's racial attitudes.

In addition to cross-racial friendships, there are other important attitudinal and behavioral outcomes that can occur as a result of attending a diverse school. Specifically, a more recent set of studies on attitudes of students toward their peers of other racial groups found that students_ of all racial/ethnic groups_ who attend more diverse schools have higher comfort levels with members of racial groups different than their own, an increased sense of civic engagement and a greater desire to live and work in multiracial settings relative to their more segregated peers (Kurlaender and Yun, 211-15). This finding corroborates with earlier findings that white students in integrated settings exhibit more racial

tolerance and less fear of their black peers over time than their peers in segregated environments (Schofield, 227-41). The educational and democratic benefits that arise for all students in more heterogeneous settings is a result of the complexity of interactions in diverse schools that lead to a greater ability to work with and understand people of backgrounds different than one's own, and to more fully participate in a rapidly changing democratic society.

Interestingly enough, the period of growing desegregation coincided with the period of the most dramatic narrowing of the test score gap ever recorded for blacks and whites. This cannot be attributed simply to desegregation but may well be a product of the broad reforms that were associated with the civil rights era according to a 1998 study by Dr. David Grissmer and an earlier study by Professor Daniel Koretz (Grissmer et al., 340-6). In the 1990s, on the other hand, racial gaps in achievement have been growing and the high school graduation rate of black students is decreasing (NCES, The Condition of Education, 150). The integration period was a time of major gains and gap closing for black students and the resegregation era is showing signs of retrogression.¹¹

Actually, at the time of *Brown*, very little was known about interracial schools, about how to create them or how to make them more effective. By the 1970s it had become clear that desegregation offered significant gains for minority students and that the most important of these gains were not measured by test score increases but by changes in students' life chances. It was also clear that the precise design of a desegregation decree mattered and that some approaches could increase student gains in all dimensions.

The black-white achievement gap closed substantially during the desegregation era (1964 through the late 1980s), particularly in the South, although the gaps have grown wider during the recent resegregation period. Some estimates suggest that the black-white achievement gap fell by half during the earlier period. Further, during the desegregation era, large increases occurred in both high school graduation levels and college-going rates among black students, although those gains have eroded seriously in the recent past. Only about one-quarter of blacks were graduating in the early 1950s, but the rate soared toward its high point—more than three-quarters, according to some federal statistics—in the period before resegregation and other policy changes such as high-stakes testing took hold (Bogar and Orfield, 7). Other changes obviously took place at the same time, making it impossible to know the precise impact of desegregation. The least we can say is that first desegregation occurred at the same time as substantial educational progress for blacks and improved racial attitudes among whites, and second the conservative agenda of the late 1980s and the 1990s was implemented at the same time that reversals of some of these gains took place. Direct research on desegregation impacts suggest that it had substantial influence and that resegregation has created new obstacles to equal educational opportunity and attainment.

Attitudes toward housing integration improved during the desegregation era. Since the issue has not been systematically researched, one can only speculate about the relationships between school desegregation and the rise of successful cross-racial political coalitions in many communities and states. Contemporary surveys show that students in desegregated schools feel that they understand people from other backgrounds better and are more confident of their ability to discuss issues across racial and ethnic lines. These skills and attitudes seem strongly

related to leadership and coalition building. The school desegregation movement can claim rare and extremely important accomplishments for black American students: breaking a deeply rooted social and political pattern of stratification, maintaining such change for decades, and producing real academic gains. Desegregation largely disappeared from southern politics after the 1970s: very few people listed it as a serious problem after that time, and desegregation levels remained very high for decades without additional judicial intervention despite the attacks of the Nixon and Reagan administrations. It looked in many ways like a successful social revolution, though many secondary problems of inequality within desegregated schools remained to be addressed.

Really, racial school integration attempts could have succeeded, to a much greater extent, to tackle both segregation and resegregation of public education if it opted for the explanation of the positive impact of racial diversity on both minority students as well as their white peers. Indeed, in a recent Supreme Court decision upholding affirmative action in higher education (2003), the Court renewed the enforcement of *Brown* by referring to the educational and social benefits of racial diversity.¹²

Conclusion

The failure of school desegregation efforts, an actuality visibly displayed through the resegregation of the U.S. public schools from the 1990s up to the threshold of the 21st century, might be ascribed to an assortment of demographic forces such as incongruent birth rates, extensive immigration, and severe housing discrimination. It can be also attributable to a federal educational policy based upon strategies for evening out separate education, rather than fostering *Brown's* mandate of desegregation, despite the fact that 'separate but equal' policy was experienced long-ago and was doomed to dismal failure.

The frightening return to segregation in U.S. public education, however, is distant from being an end outcome of shifting public opinion against desegregation. Owing to loads of current studies that proved the tremendous educational benefits of racial desegregation on blacks and whites, who knows; *Brown* could have fruitfully grappled with segregation and thus could have left no open doors to resegregation. Yet, the intimate linkage between segregation and poverty concentration accentuates the pernicious effects of the school integration failure. Aside from socioeconomic as well as political factors, legal grounds behind the resegregation of U.S. public schools during the 1990s and at the turn of the new century is a crucial point to be approached in the next chapter.

Endnotes

¹ Professor Orfield explains that segregation by race relates to segregation by poverty and to many forms of educational inequality for black American students (48).

² Gallup Poll 1999 sample questions:

Assuming that “free choice of public and private schools were allowed in this community” how important would “having your child exposed to a more diverse student body” be:

41% very important

38% fairly important

12% not too important

4% not at all important

³ Metropolitan Raleigh (Wake County, NC) and Charlotte (Mecklenburg Co., NC) were examples of this pattern in the mid-1990s.

⁴ The conservative Civil Rights Commission dominated by Reagan appointees sponsored a study of white flight in the 1980s which unexpectedly concluded that metropolitan desegregation produced larger and more stable desegregation levels. U.S. Commission on Civil Rights, New Evidence on School Desegregation, June 1987.

⁵ 2000 and 1990 segregation indices published on the Mumford Center, State University of New York at Albany, March, 2001.

⁶ See the list of most-segregated states dominated by states with large metropolitan areas that are split into many separate districts, which is the typical pattern for school systems in the Northeast and Midwest and some other regions in the United States. Gary Orfield. Schools More Separate: Consequences of a Decade of Resegregation. July, 2001. At <<http://www.law.harvard.edu/civilrights>>.

⁷ After considerable investigation the U.S. Committee on Civil Rights concluded in its final report that desegregation busing was far less than busing for extracurricular activities and was typically no more than 1 or 2 percent of the district’s budget.

⁸ Even earlier, in 1987, the state superintendents had unanimously adopted the goal of a zero dropout rate by 2000 together with guarantees of full educational opportunities for all students (Lynn Olson. “Chiefs Unanimously Endorse School Guarantees Policy.” Education Week. Nov. 25, 1987: 1, 16.)

⁹ This is to be discussed later in the final chapter of this work.

¹⁰ This evidence is clearly reflected in the No Child Left Behind Act’s requirement that all Title I classrooms have “highly qualified” teachers. This will be explained in chapter four.

¹¹ Desegregation was one of a related set of policies attacking discrimination and poverty in the earlier period and resegregation has been part of a much broader conservative agenda so these trends cannot, of course, be attributed to one single issue.

¹² *Gruttr v. Bollinger* (2003) will be discussed in the last chapter.

CHAPTER THREE

The Legal Resegregation of U.S. Public Schools

[We] deal here with the right of all children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together (Justice Thurgood Marshall dissenting in *Milliken* (1974), 738).¹

Introduction

Schools in the South and throughout America are resegregating. Why is this occurring, and why were racial desegregation efforts limited in their success? This chapter argues that the Supreme Court is largely to blame. In a series of decisions in the 1970s, the Court ensured separate and unequal schools by preventing inter-district remedies, refusing to find that inequities in school funding are unconstitutional, and making it difficult to prove a constitutional violation in northern 'de facto' segregated school systems. In a series of decisions in the 1990s, the Court ordered an end to effective desegregation orders. Lower federal courts have followed these rulings and, in many areas, have ended remedies despite the likelihood that resegregation would follow.

1 The Failure of School Desegregation

Almost a half century after the U.S. Supreme Court concluded that Southern school segregation was unconstitutional and “inherently unequal” in the *Brown* decision (1954), new statistics from the 1998-99 school year show that segregation continued to intensify throughout the 1990s, a period in which there were three major Supreme Court decisions authorizing a return to segregated neighborhood schools and limiting the reach and duration of desegregation orders. For black American students, this trend is particularly apparent in the South, where most blacks live and where the 2000 Census shows a continuing return from the North. From 1988 to 2002, most of the progress of the previous two decades in increasing integration in the region was lost (see chapter two, pages 4-5).

There are many causes for the failure of school desegregation. None of the following Presidents_ neither Reagan, nor either Bush, nor even Clinton_ have done anything to advance desegregation. None have used the powerful resources of the federal government, including the dependence of every school district on federal funds, to further desegregation. “Benign neglect” would be a charitable way of describing the attitude of these Presidents to the problem of segregated and unequal education; the issue has been neglected, but there has been nothing benign about this neglect. A serious social problem that affects millions of children has simply been ignored.

Nor has the federal government, or for that matter have state or local governments, acted to solve the problem of housing segregation. In a country deeply committed to the ideal of the neighborhood school, residential segregation often produces school segregation as already explained in the previous chapter. But decades have passed since the

enactment of the last law to deal with housing discrimination,² and efforts to enhance residential integration seem to have vanished.

There is not a simple explanation for the alarming trend toward resegregation. In this chapter, we argue that the courts must share the blame; courts could have done much more to bring about desegregation, and instead, the judiciary has created substantial obstacles to remedying the legacy of racial segregation in schools. We do not want to minimize the failure of political will, but every branch and level of government is responsible for the failure to desegregate American public education. We contend that Supreme Court decisions over the last thirty years have substantially contributed to the resegregation that Professor Orfield and others document.

Desegregation will not occur without judicial action; desegregation lacks sufficient national and local political support for elected officials to remedy the problem. Specifically, black Americans lack adequate political power to achieve desegregation through the political process. This relative political powerlessness was true when *Brown* was decided and remains true today. The courts are indispensable to effective desegregation, and over the last thirty years the courts, especially the Supreme Court, have failed. As discussed below, court orders have been successful in many areas of the United States to bring about desegregation. Courts could have done more, but even merely continuing rather than ending existing desegregation orders (as the Supreme Court has mandated) would have limited resegregation of southern schools.

2 The Decisions of the 1970s: The Supreme Court Contributes to the Resegregation of American Public Education

The failure to redress educational inequities in U.S. public schools in the 1990s, a fact clearly demonstrated by the increase of school segregation during that period, is largely due to a variety of Supreme Court decisions in the 1970s that contributed to the resegregation of American public education.

By the 1970s, as demonstrated in the precedent chapter, the American nation finally saw substantial progress towards desegregation. But three crucial problems emerged: white flight to suburbs threatened school integration efforts; northern school systems, which had not yet been enacted Jim Crow laws, required desegregation; and pervasive inequalities existed in funding, especially between city and suburban schools. The Court's handling of these issues was critical in achieving desegregation. In each instance, the Court, with four Nixon appointees in the majority, ruled against the civil rights plaintiffs and dramatically limited the effectiveness of school desegregation efforts and equal educational opportunities.

2.1 White Flight to Suburban Areas

By the 1970s, a crucial problem had emerged: white flight to suburban areas.³ White flight came about, in part, to avoid school desegregation and, in part, as a result of a larger demographic phenomenon, namely endangered successful desegregation (Asher, 1168). White families moved to suburban areas to avoid being part of desegregation orders affecting cities. In virtually every urban area, the inner city was increasingly comprised of black Americans. By contrast, the surrounding

suburbs were almost exclusively white and what little black population did reside in suburbs was concentrated in towns that were almost exclusively black American. School district lines parallel town borders, meaning that racial separation of cities and suburbs results in segregated school systems. For example, by 1980, whites constituted less than one-third of the students enrolled in the public schools in Baltimore, Dallas, Detroit, Houston, Los Angeles, Miami, Memphis, New York, and Philadelphia (Smedley, 405).

Thus, by the 1970s, effective school desegregation required inter-district remedies. The lack of white students in most major cities prevented desegregation. Likewise, intra-district remedies could not desegregate suburban school districts because of the scarcity of black students in the suburbs. As Professor Smedley explains:

Regardless of the cause, the result of this movement [of whites to suburban areas] is that the remaining city public school population becomes predominantly black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the schools, because there simply are not enough white students left in the city system (472).

In *Swann* (1971), the Supreme Court addressed the issue of the federal court's power to impose remedies in school desegregation cases. The Court upheld the broad power of the district courts to take "affirmative action in the form of remedial altering of attendance zones... to achieve truly nondiscriminatory assignments" (28). The Court also stated that courts could use busing as a remedy where needed, and that bus transportation is an important "tool of school desegregation" (30).

In 1974, the Supreme Court started to take a different turn in its jurisprudence of granting broad powers to federal courts in desegregating cases. In *Milliken v. Bradley*, the Court imposed a substantial limit on the court's remedial powers in desegregation cases. *Milliken* involved the Detroit area schools and the reality that, like so many areas of the United States, Detroit was a mostly black American city surrounded by predominantly white suburbs. A federal district court imposed a multi-district remedy to end 'de jure' segregation in one of the districts. The Supreme Court ruled that this desegregation technique is impermissible:

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district (744-45).

Thus, the Court concluded that "without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy" (*Milliken*, 745).

Milliken has a devastating effect on the ability to achieve desegregation in many areas. In a number of major cities, inner-city school systems are substantially black American and are surrounded by almost all-white suburbs; desegregation requires the ability to transfer students between the city and suburban schools. There simply are not enough white students in the city, or enough black American students in the suburbs, to achieve desegregation without an inter-district remedy. Yet, *Milliken* precludes an inter-district remedy unless plaintiffs offer proof of an inter-district violation. In other words, a multi-district remedy can only be

formulated for those districts whose own policies fostered discrimination or if a state law caused the inter-district segregation. Otherwise, the remedy can include only those districts found to violate the Constitution.

The segregated pattern in major metropolitan areas_ black Americans in the city and whites in the suburbs_ did not occur by accident, but rather was the product of myriad government policies. Moreover, *Milliken* has the effect of encouraging white flight. Whites who wish to avoid desegregation can do so by moving to the suburbs. If *Milliken* had been decided differently, one of the incentives for such moves would be eliminated. The reality is that in many areas the *Milliken* holding makes desegregation impossible.

In an important paper for the resegregation of Southern Schools Conference, Professor Charles Clotfelter quantifies the causes for segregation in public schools. Professor Clotfelter's study dramatically proves the impact of *Milliken* in perpetuating segregation and preventing effective remedies. According to Professor Clotfelter, private schools lead to only 17% of segregation in the United States. By far, the most important factor, accounting for segregation is racial disparities between public school districts ("Are Whites Still Fleeing?" 28). *Milliken* precludes courts, in most instances, from remedying this problem, and thus is significantly responsible for the failure of integration efforts to remedy the segregation of schools in the United States today.

2. 2 Proving Discrimination in Northern School System

Plaintiffs had no difficulty in proving discrimination in states that by law had required separation of the races in education. But in northern school systems, where segregated schools were not the product of state laws, the issue arose as to the requirements for proving an equal protection

violation and to justify a federal court remedy. Northern school systems were generally segregated; the issue was what plaintiffs had to prove for courts to provide a remedy.

The Supreme Court addressed this issue in *Keyes v. School District No. 1, Denver, Colorado* (1974). *Keyes* involved the public schools of Denver, where substantial segregation existed, even though state law had never mandated the separation of the races. The Court recognized that *Keyes* was not a case where schools were segregated by statute, but stated that,

[n]evertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system (201).

Once a plaintiff proves the existence of segregative actions affecting a significant number of students, an equal protection violation is demonstrated and justifies a system-wide federal court remedy because “common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions” (*Keyes*, 203).

Keyes held that absent laws requiring school segregation, plaintiffs must prove intentional segregative acts affecting a substantial part of the school system. The Court said that “a finding of intentionally segregative school board actions in a meaningful portion of a school system... creates a presumption that other segregated schooling within the system is not adventitious.” Such proof places “the burden of proving that other

segregated schools within the system are not also the result of intentionally segregative actions” on the defendant school systems (208).

The Court therefore drew a distinction between ‘de jure’ segregation that existed throughout the South, and ‘de facto’ segregation that existed in the North. The latter constitutes a constitutional violation only if there is proof of discriminatory purpose. This approach is consistent with the Supreme Court cases holding that when laws are facially neutral, proof of a discriminatory impact is not sufficient to show an equal protection violation; proof of a discriminatory purpose must also exist.⁴ But requiring proof of discriminatory purpose created a substantial obstacle to desegregation in northern school systems, where residential segregation_ which was a product of discriminatory policies_ caused school segregation. The reality is that *Keyes* created an almost insurmountable obstacle to judicial remedies for desegregation in northern cities and thus weakened integration effectiveness. The government was responsible for segregation in northern schools, but plaintiffs often found it impossible to prove the government’s responsibility.

2. 3 Inequality in School Funding

By the 1970s, substantial disparities existed in school funding. In 1972, education expert Christopher Jencks estimated that, on average, the government spent 15% to 20% more on each white student’s education than on each black American child’s schooling (28). This disparity existed throughout America. For example, the Chicago public schools spent \$5.265 for each student’s education; but the Niles school system, just north of the city, spent \$9.371 on each student’s schooling (Kozol, 236). The disparity also corresponded to race: in Chicago, 45.4% of the students were white

and 39.1% were black American; in Niles Township, the schools were 91.6% white and 0.4% black American (Steele, 591). Camden, New Jersey, spent \$3.538 on each pupil; but Princeton, New Jersey, spent \$7.725 (Kozol, 236).

There is a simple explanation for the disparities in school funding. In most states, education is substantially funded by local property taxes. Wealthier suburbs have significantly larger tax bases than poor inner cities. The result is that suburbs can tax at a lower rate and still have a great deal to spend on education. Cities must tax at a higher rate and nonetheless have less to spend on education (Coons et al., 45-51).

The Court had the opportunity to remedy this inequality in education in *San Antonio Independent School District v. Rodriguez* (1973). The Court, however, profoundly failed and concluded that the inequalities in funding did not deny equal protection (55). *Rodriguez* involved a challenge to the Texas system of funding public schools largely through local property taxes. Texas's financing system meant that poor areas had to tax at a high rate, but had little to spend on education; wealthier areas could tax at low rates, but still had much more to spend on education. One poorer district, for example, spent \$356 per pupil, while a wealthier district spent \$594 per student (*San Antonio*, 10-13).

The plaintiffs challenged this system on two grounds: it violated equal protection as impermissible wealth discrimination and it denied children in the poorer districts the fundamental right to education. The Court rejected the former argument by holding that poverty is not a suspect classification and thus discrimination against the poor need meet only rational basis review.⁵ The Court explained that where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. In thoroughly viewing the Texas system for funding school, the Court determined that the system met the rational basis test.⁶

The combined effect of *Milliken* and *Rodriguez* cannot be overstated. *Milliken* helped to ensure racially separate schools and *Rodriguez* ensured that the schools would be unequal.⁷ American public education is characterized by wealthy white suburban schools spending a great deal on education surrounding much poorer black American city schools that spend much less on education. Then, how can we expect a triumph to racial school integration efforts.

3 The Decisions of the 1990s: The Supreme Court Ends Desegregation Orders

In reality, Americans overwhelmingly subscribe to the belief that segregation in public schools ended decades ago. However, school segregation is not a problem of the past. On the contrary, it is still widely practiced in schools across the United States. Instead of holding schools accountable for willful separation of the races, America's courts have been systematically tearing down desegregation policies that were drafted to ensure equal educational opportunities for all Americans. The re-emergence of educational apartheid has trapped black Americans in substandard schools that are filled with impoverished students. This overwhelming poverty has led to blacks performing worse on standardized tests than do their white counterparts.

The U.S. Supreme Court issued several rulings during the 1990s which relieved school districts from federal supervision. Once districts are relieved of their responsibility to ensure desegregation, they are often very willing to turn a blind eye as schools within their jurisdictions revert to separation of the races. The result has been a reemergence of segregation in America's schools. In addition, it chillingly reflects the fact that the

diversity and equality on which the United States prides itself is simply a cheap and useless form of self-congratulation. Unfortunately America's reliance on words instead of actions has led to the present-day cycles of exclusion in which black Americans find themselves trapped.

The return to systematic separation of the races in the United States system has come about in large part via recent Supreme Court cases. Throughout the 1970s and 1980s, the United States and courts of law were focused on the integration of public schools through such means as busing, school choice, magnet schools, use of ratios, redrawn school district boundaries, mandatory and voluntary intra- and inter-district transfers, and consolidation of city districts with suburban districts. However, during the 1990s, Supreme Court justices appointed by Presidents Reagan and Bush began to issue rulings "that have authorized the piecemeal dismantling of desegregation plans" (Orfield, "The Resegregation of Our Nation," 2-3). Current rulings have released school districts from their responsibility to ensure that their schools are open to members of all races. The court's rulings have systematically stripped blacks of their rights granted to them under the 14th Amendment to the Constitution.

Professor Orfield, briefly but accurately, notes a cause for the resegregation of the 1990s and thus the ineffectiveness of school integration: Supreme Court decisions ending successful desegregation orders (Orfield and Edley, 16). In several cases, the Court concluded that school systems had achieved "unitary" status and thus that federal court desegregation efforts were to end. These decisions resulted in the cessation of remedies, which had been effective, and ultimately resegregation resulted. Many lower courts followed the lead of the Supreme Court and have likewise ended desegregation orders causing resegregation.

In several recent cases, the Supreme Court has considered when a federal court desegregation order should end. In *Board of Education v.*

Dowell (1991), the Court determined whether a desegregation order should continue when its termination would mean a resegregation of the public schools; Oklahoma schools had been segregated under a state law mandating separation of the races. It was not until 1972_ seventeen years after *Brown*_ that courts ordered desegregation. A federal court order was successful in desegregating the Oklahoma City public schools (*Dowel*, 240-41). Evidence indicated that ending the desegregation order would likely result in dramatic resegregation.⁸ Nonetheless, the Supreme Court held that once a “unitary” school system had been achieved, a federal court’s desegregation order should end even if the action could lead to resegregation of the schools (*Dowel*, 247-49).

The Court did not define “unitary system” with any specificity. The Court simply declared that the desegregation decree should end if the school board has “complied in good faith” and “the vestiges of past discrimination have been eliminated to the extent practicable” (249). In evaluating these two factors, the Court instructed the district court to look “not only at student assignments, but ‘to every facet of school operations_ faculty, staff, transportation, extracurricular activities and facilities.’ ”⁹

Simply put, in the case of *Board of Education v. Dowell*, the Court ruled that formerly segregated school districts could be released from court-ordered busing once they have taken all “practicable” steps to eliminate the legacy of segregation. The Court went on to say that school districts are not responsible for remedying local conditions, such as segregated housing patterns. This ruling was not only detrimental to desegregation efforts, but also was characterized by vagueness. The Court did not elaborate on what all “practicable” steps are, which gave local school districts the power to make up their own definition of what the

Court meant. The vague wording opened the door for districts all across the United States to do as little as possible to ensure desegregation in their schools.

The second consequence of this ruling was that it removed school districts from federal supervision. Federal supervision was the only procedure which held schools accountable for following desegregation procedures and commands: “However, local school districts have not historically placed desegregation on their list of priorities. Left to voluntarily implement desegregation plans, local school districts often opt to spend money on ‘separate but equal’ alternatives” (Orfield and Edley 2). This case represents only one of the recent decisions that have denied equal educational opportunities to blacks and thus limited integration’s success.

In *Freeman v. Pitts* (1992), the Supreme Court held that a federal court desegregation order should end when a district complies with the order, even if other desegregation orders for the same school system remain in place. A federal district court ordered desegregation of various aspects of a school system in Georgia that previously had been segregated by law. Part of the desegregation plan had been met; the school system had achieved desegregation in pupil assignment and in facilities (480-81). Another aspect of the desegregation order, concerning assignment of teachers, however, had not yet been fulfilled. The school system planned to construct a facility that likely would benefit whites more than black Americans. Nonetheless, the Supreme Court held that the federal court could not review the discriminatory effects of the new construction because the part of the desegregation order concerning facilities had already been met. The Court stated that once a portion of a desegregation order is met, the federal court should cease its efforts as to that part and remain involved only as to those aspects of the plan that have not been achieved (488-91).

In other words, the Court ruled that a school district does not need to achieve [equal] status in all six ‘*Green* factors’—student assignment, faculty, staff, transportation, extracurricular activities, and facilities—before being released from court supervision. The ‘*Green* factors’ were agreed to by the Supreme Court as typical components of a school system where desegregation is mandatory. In this ruling, the Supreme Court nullified the standards that they themselves had agreed to and once again weakened the validity of *Brown*’s desegregation mandate.

Finally, in *Missouri v. Jenkins* (1995), the Supreme Court mandated an end to a school desegregation order for the Kansas City school.¹⁰ Missouri law once required racial segregation of all public schools. It was not until 1977 that a federal district court ordered the desegregation of the Kansas City, Missouri, public schools. The federal court’s desegregation effort made a difference. In 1983, twenty-five schools in the district had a black American enrollment of greater than 90% or more. By 1993, no elementary-level student attended a school with an enrollment that was 90% or more black American. At the middle school and high school levels, the percentage of students attending schools with a black American enrollment of 90% or more declined from about 45% to 22% (*Jenkins*, 74-75).

The Court, in an opinion authored by Chief Justice Rehnquist, ruled in favor of the state on every issue. The Court’s holding consisted of three parts. First, the Court ruled that the district court’s order that attempted to attract non-minority students from outside district was impermissible because the plaintiffs had not proved an inter-district violation. The social reality is that many city school systems are now primarily comprised of minority students, while surrounding suburban school districts are almost all white. Effective desegregation requires an inter-district remedy. Chief Justice Rehnquist, however, applied *Milliken v. Bradley* to conclude that

the inter-district remedy_ incentives to attract students from outside the district into the Kansas City schools_ was impermissible because there only was proof of an intra-district violation (90-94).

Second, the Court ruled that the district court lacked authority to order an increase in teacher salaries. Although the district court believed that an across-the-board salary increase to attract teachers was essential for desegregation, the Supreme Court concluded that the increase was not necessary as a remedy (100).

Finally, the Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order. The Court concluded that the Constitution requires equal opportunity and not equal result and that, subsequently, disparities between black American and white students on standardized tests were not a sufficient basis for concluding that desegregation had not been achieved. Disparity in test scores is not a basis for continued federal court involvement. The Supreme Court held that once a district has complied with a desegregation order, the federal court effort should end (101-02).

Actually, this ruling ignored the possibility that black students were not being given as much time and attention in the classroom as were their counterparts; this decision, like the other two, gave school districts the reward of being unsupervised even though they had not done anything to deserve it.

The three cases_ *Dowell*, *Freeman*, and *Jenkins*_ together have given a clear signal to lower courts: the time has come to end *Brown's* desegregation order, even when the effect could be resegregation. Lower courts have followed this lead. Indeed, it is striking how many lower courts have ended desegregation orders in the last decade, even when provided with clear evidence that the result will be increased segregation of the public schools.

For example, in *People Who Care v. Rockford Board of Education* (2001), the United States Court of Appeals for the Seventh Circuit reversed a federal district court decision that refused to end desegregation efforts for the Rockford, Illinois, public schools. The court began its analysis by observing that the Supreme Court has called for “bend[ing] every effort to winding up school litigation and returning the operation of the schools to the local school authorities” (1074). The Seventh Circuit noted the substantial disparity in achievement between white and minority students, but stated that although the Board “may have a moral duty [to help its failing minority students,] it has no federal constitutional duty” (1076). This analysis is the same reasoning followed by other courts throughout America in ending school desegregation efforts.

Similarly, the United States Court of Appeals for the Fourth Circuit has ended the desegregation remedy for the Charlotte-Mecklenburg schools, a decision that was upheld by the Supreme Court in *Swann*. Although this was a historically segregated school system and desegregation had been successful, the court nonetheless ordered an end to desegregation efforts (Brown, A1).

In addition to these decisions by federal courts of appeals, many district courts have ordered an end to desegregation efforts, including several in 2002.¹¹ In none of these cases did the courts give weight to the consequences of ending the desegregation orders in causing resegregation of the public schools.

The trend across the United States of federal courts ending school desegregation efforts means that resegregation will increase, potentially dramatically, in the next decade. Professor Orfield documents the resegregation that occurred during the 1990s. Recent decisions indicate that this decade may see a much worse return to resegregation in the United States public schools.

4 Why Have Courts Failed?

The failure to tackle racial segregation in U.S. public schools throughout the 1990s resides primarily in the failure of the Supreme Court to make the right choices. Some commentators, such as Professor Gerald Rosenberg, argue that the failure to achieve desegregation reflects inherent limits on the power of the judiciary (75-76). This is not true. The judiciary's failure lies in its actions, not in inherent limits to its power. If the Supreme Court had decided key cases differently, the nature of public education today would be very different. Desegregation likely would have been more successful, and resegregation less likely to occur, if the Supreme Court had made different choices.

If the Court, from 1954 to 1971, had acted more aggressively in imposing timetables and outlining remedies, desegregation might have occurred more rapidly. If the Court had decided *Milliken* differently_ not a fanciful possibility considering the case was a 5-4 decision_ inter-district remedies could have produced much more desegregation of American public education. If the Court had decided *Keyes* differently, then courts could have fashioned desegregation remedies if there was proof of a discriminatory impact. Requiring a showing of discriminatory intent dramatically limited the ability of the federal courts to order desegregation of 'de facto' segregated northern city school systems. If the Court had decided *Rodriguez* differently, there would have been more equality in school funding and educational opportunity.

If the decisions of the 1990s had been decided differently, successful desegregation orders in many cities would have remained in place. Therefore, the dismal statistics about current segregation are less an

indication of the inherent limits of the judiciary and more a reflection of the Supreme Court's choices.

What, then, explains the Court's choices? The answer is obvious: its decisions result from the conservative ideology of the majority of Justices who sat on the Court when these cases were decided. *Milliken* and *Rodriguez* were both 5-4 decisions, and the majority included the four Nixon appointees who joined the Court in the few years before those rulings. Under President Lyndon Johnson, the federal government began vigorously enforcing desegregation laws and by 1970 the schools in the South were far more racially mixed than those in any other region of the United States. However, the election of President Richard Nixon in 1968 marked the end of such vigorous enforcement and the beginning of the ideological reconfiguration of the Supreme Court, with four Nixon appointees: Burger, Blackman, Powell, and Rehnquist (Orfield and Eaton, 316). In a tape recorded conversation with attorney general John Mitchell, President Nixon discussed his criteria for selecting a new Supreme Court justice saying:

I'd say that our first requirement is have a southerner. The second requirement, he must be a conservative southerner... I don't care if he's a Democrat or a Republican. Third, within the definition of conservative, he must be against busing, and against forced housing integration. Beyond that, he can do what he pleases (qtd. in Clotfelter, After Brown, 30-31).

If the Warren Court had decided the cases in 1968, six years before *Milliken* and five years before *Rodriguez*, the cases would have been resolved in favor of inter-district remedies. If Hubert Humphrey had won the 1968 presidential election and appointed the successors to Justices

Warren, Fortas, Black, and Harlan, the result might have been different in these cases.

Similarly, the decisions of the 1990s were the product of conservative, Republican Justices. In each of the cases, five Reagan and Bush appointees_ Chief Justice Rehnquist (who was nominated by President Reagan to be Chief Justice), and Justice O'Connor, Scalia, Kennedy, and Thomas_ constituted the majority in ordering an end to desegregation orders.

The cause for the judicial failure could not be clearer: conservative Justices have effectively sabotaged desegregation. In June 2002, Justice Clarence Thomas wrote a concurring opinion in *Zelman v. Simmons Harris*, in which the Supreme Court upheld the constitutionality of the use of vouchers in parochial schools.¹² Justice Thomas grieved for the poor quality of education for black Americans in inner cities and urged voucher systems as a solution. Indeed, Justice Thomas lamented the current condition of inner-city schools in very powerful language: Frederick Douglass once said that “[e]ducation ... means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.” Today many of America’s inner-city public schools deny emancipation to urban minority students. Despite this Court’s observation nearly 50 years ago in *Brown v. Board of Education*, that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education ,” urban children have been forced into a system that continually fails them (2480).

The irony, and indeed hypocrisy, of Justice Thomas’s opinion is enormous. The rulings of his conservative colleagues have contributed significantly to the educational problems of racial minorities. Justice Thomas has never suggested that the Court reconsider any of the decisions

discussed in this chapter; but it is the very willing to allow vouchers, which would take money from the public schools and transfer it to private, especially parochial, institutions.

5 The “Deconstitutionalization of Education”

Fifty years ago, in *Brown v. Board of Education* (1954), Chief Justice Earl Warren eloquently proclaimed the importance of education. He wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education ((1954), 493).

Brown offered the promise that the federal courts would recognize a fundamental right to education and use the Constitution to ensure equal educational opportunity for all children in the United States. In my opinion, the simple reality is that without judicial action equal educational opportunity will never exist. There is no powerful political

constituency for equalizing educational opportunities for children who are poor or are part of racial minority groups.¹³ For decades, no President has addressed the problem of school segregation (Ambrose, 74-75).¹⁴ Nor is it possible to think of many state or local politicians who have made an issue of separate and unequal schools. Any systematic attempt to deal with education would be highly unpopular; transferring money and students from wealthy areas to poorer areas is sure to engender enormous opposition. Those with the most influence in the political system can opt out of city public schools, by living in suburbs or sending their children to private schools.¹⁵

The result is that if the courts do not equalize educational opportunity, no one will. Yet, the reality is that for over thirty years, with the exception of largely disastrous and unsuccessful court-ordered busing, the Supreme Court, and the lower federal courts, have done nothing to advance desegregation of schools or to equalize expenditures for education.

In fact, the Supreme Court's overall approach has been to withdraw the courts from involvement in American schools. Law Professor Erwin Chemerinsky was thoroughly right when he termed this withdrawal the "deconstitutionalization of education" (112). In numerous decisions, involving many different kinds of claims, the Supreme Court has professed almost unlimited deference to school officials. The Court's abdication of responsibility for school desegregation and for equalizing educational opportunity might be understood as part of this larger pattern of the "deconstitutionalization of education."¹⁶ A recent article in the *National Law Journal* describes the end of desegregation orders throughout the United States and quotes education expert Gary Orfield: "We're going back to a kind of Plessy separate-but-equal world. I blame the courts. Because the Courts are responsible for

the resegregation of the South” (Baldas, 4)¹⁷. The federal courts are withdrawing from overseeing school desegregation; it might be an area of profound “deconstitutionalization.”

We believe that the three decisions in *Dowel*, *Freeman* and *Jenks* are undesirable in two senses. First, the federal courts are abdicating their proper role under the Constitution to enforce the fundamental rights of children in schools. Second, the rulings are undesirable in their social effects: increased segregation.

As to the former, the Supreme Court and the federal judiciary have an essential role to play in enforcing the Constitution’s protections, especially in contexts where the political branches are unlikely to do so. This philosophy—deference to the political branches of government in some areas, but the need for aggressive judicial review in others—was expressed in a very famous footnote in *United States v. Carolene Products Co* (1938).¹⁸ In footnote four, the Court declared:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment. . . . Nor need we [i]nquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes to be relied on to protect minorities, and which may call for a more searching judicial inquiry ((1938), 4).

In other words, courts generally should presume that laws are constitutional. As the Court has noted, a “more searching judicial inquiry” is appropriate when a law interferes with individual rights, restricts the ability of the political process to repeal undesirable legislation, or discriminates against a “discrete and insular minority” (4). It is a framework that provides general judicial deference to the legislature but requires more intensive judicial review in particular areas.

The enforcement of basic constitutional rights in schools fits exactly within the areas where the *Carolene Products* footnote justifies heightened review because the infringement of fundamental rights secured by the Bill of Rights, as well as a “discrete and insular minority exist.” The discrete and insular minority concept protects groups that are unlikely to rely on the political process for adequate protection. Aggressive judicial review, therefore, is justified because insular minority groups cannot trust the other branches of government (Scales, A18)¹⁹.

Black Americans are the classic insular minority. The reality is that the political process never has worked—and we fear never will—to desegregate schools. It is impossible to think of any politician in recent years who has made school segregation an issue. Nor is the political process going to achieve the equalization of funding for schools. Those with the greatest political power benefit from the inequality, or at the very least are unaffected by it as they can send their children to private schools. Families with children in inadequately funded public schools lack the political power to do anything about ensuring equal educational opportunity.

Nor do students have political power to protect their First or Fourth Amendment rights through the political process. For student rights, courts must take action or there will be no protections at all.

Our objection, of course, is not solely at the process level. What is particularly troubling is the result of the Supreme Court's "deconstitutionalization of education." American public education is separate and unequal, and as discussed above, becoming ever more so. The reality is that the average black American student receives a very different education than the average white student in the United States. The promise of *Brown's* equal educational opportunity has not been realized and will not be as long as the "deconstitutionalization of education" continues.

6 The Impact of the 1990s' Court Decisions

The Supreme Court decisions described above have proved to be devastating for blacks in America. Schools have become more and more segregated all across the United States. Statistics eerily portray a country moving in the wrong direction. Left to their own devices, school districts have slowly but surely sunk right back into a system of racial separation in the classroom. It is also clear that while minorities are being thrown into schools with children from different races, white children are attending schools where the vast majority of students are also white: "The average white student is in a school with 8.6% black students, 6.6% Latinos, 2.8% Asians and 1% American Indians" (Orfield, "The Resegregation of Our Nation," 5). Minorities, on the other hand, attend schools that are often between 90-100% minority.

Many educators, parents, community members, and politicians are relieved to see an end to the desegregation orders that for years heavily influenced decisions about educational and fiscal policies. Conversely, critics and civil rights advocates argue that the current trend toward dismantling court-ordered desegregation in many school districts is a step backwards toward segregated schooling (Orfield, Bachmeier, James, and Eitle, 23-4).

6. 1 The Return to Neighborhood Schools

When a school district is released from court supervision, it is often free to send students back to their neighborhood schools. Community members, parents, and educators often support a return to neighborhood schools because they believe that desegregation is costly, that it has not accomplished what it was intended to do many years ago, and that it has resulted in meager improvements. They also hope that whites and middle class residents who fled during desegregation will return to the schools closer to their homes (Orfield, "Turning Back to Segregation," 1-22). Other people claim that black American children would be better off staying in neighborhood schools rather than being transferred out of their communities to unfamiliar and often unwelcoming places.

Despite this belief in the value of neighborhood schools, the reality is that many urban students return to schools that are segregated and inferior. Often new funding for upgrading school facilities and educational programs is promised but not delivered. However, as is the case with many large urban schools, even an infusion of extra funds is often not enough to transform a school, as schools must struggle with the profound and increasing poverty and joblessness in their local communities. Often,

blacks left to survive in a poor school are not given the same resources and academic opportunities that white children in wealthier schools take for granted. The amount of money that a school receives depends upon the amount of property taxes paid by people who reside in the school district: “Therefore, there would seem to be a good case for regarding the general level of parental socioeconomic status in schools as a proxy for quality and quantity of instructional materials available” (Caladas 13). Black students most often come from very poor families who can only afford to pay very small property taxes. In essence, then, America is penalizing black children for the ‘crime’ of being poor. Unfortunately for black Americans, the recent Supreme Court decisions have provided school districts with legal precedent with which to argue that they should not be supervised by the federal government. Although America’s schools have not reverted back to complete educational segregation, schools all across the country have moved dangerously in that direction.

The worst consequence of ‘de facto’ school segregation by race is that black schools are often so overrun by poverty as already discussed in the precedent chapter. Poverty has a tremendous impact not only on the school itself but also on the success of its students: Segregated black or Latino schools are 11 times more likely to experience concentrated poverty. This is indeed alarming because it is widely known that a school’s cash flow or lack thereof determines whether or not a school can afford to purchase new books or repair buildings. In addition, it has a profound impact on the education that schools can offer their students: “Schools with high poverty concentrations have lower test score averages, few advanced courses, fewer teachers with credentials, inferior courses and levels of competition, and send fewer graduates to college” (Orfield and Edley 2). How can America honestly expect black students in sub-standards schools

to compete successfully with white students who have attended either private schools or public schools located in very wealthy school districts? College admission is becoming more selective every year, and American black children need more resources to compete, not less. Schools that are predominately white do not have the problem of concentrated poverty: 47% of U.S. schools still had between 0-10% black and Latino students and [only] one in fourteen (7.7%) of those schools had half or more children living in poverty. On the other extreme, 8% of schools were intensely segregated with between 90-100% black and Latino students. Of those schools, 87% of the children were impoverished (Orfield, "The Resegregation of Our Nation," 6). This shows that poor schools, and all of the consequences associated with them, are being disproportionately delegated to blacks in America.

6. 2 Impact on Academic Performance

It is clear that desegregation has little relevance for many of America's largest cities: a number of the biggest urban districts are one-sixth or less white, and thus lack a sufficient number of white students to meaningfully desegregate. Desegregation plans in many smaller cities are becoming increasingly ineffective with the tremendous growth of white suburbs and the expansion of inner-city neighborhoods without adjustments to racial balance mandates. Even within desegregated schools, claims persist that segregation still continues under the guise of school tracking and grouping practices. Because of these trends in the 1990s, desegregation planners across the United States are increasingly turning their attention from desegregation remedies such as student transfer and reassignment to achieve racial balance to a focus on access, equity, and the academic performance of black students (Willis, 15).

As more school districts have fulfilled their responsibilities insofar as the above-described ‘*Green* factors’ are concerned, plaintiffs in desegregation cases have shifted their focus to what are sometimes referred to as "educational vestiges." They argue that the educational achievement of racial and ethnic minority students continues to lag behind that of white students in the school district, and that this achievement gap, a vestige of legalized segregation, must be eliminated before a school district can be released from court orders (Lindseth, 1997). This argument is critical, and it will most likely be the subject of further Supreme Court decisions. The gap in performance on standardized test scores between white students and black American and Latino students, and differences in the choice of courses and curriculum available to different groups of students, is leading to serious examination of what happens to black students within individual schools and classrooms. It will most likely lead to an era of desegregation cases that focus on “within-school integration” (Willis, 10).

6.3 “Within-School Integration”

Currently, several school districts across the United States are engaged in desegregation planning and are focusing on provisions that address internal integration rather than the more conventional desegregation measures such as student assignment. Social researcher H. D. Willis uses the term “within-school integration” to mean "the elimination of all vestiges of segregation from all policies, practices, programs, and activities ‘within’ a district's school" (7). The focus of “within-school integration” is provision of the greatest possible integration and interaction among students and staff regardless of the student composition of the school. Although a school's racial/ethnic enrollment

may reflect integration, the school can often engage in segregative practices that negate the benefits of a well integrated school (Willis, 7-8).

Such a situation sparked a desegregation case in *Rockford, IL, People Who Care, et al. v. Rockford Board of Education* (1993). The school district was under District Court order to address within-school integration in its high schools, all of which are racially balanced. The district was also ordered to implement a student assignment plan utilizing controlled choice; to develop programs for significant improvement in instruction and achievement in a subset of elementary schools that for a short period of time will remain minority, racially identifiable; and to integrate all courses and other educational services offered in middle and high school. The court had found the level of internal segregation within racially integrated schools severe, as the district had maintained separation of white and minority students in most courses and in extracurricular activities.

For many school districts engaged in desegregation planning, the emphasis on “within-school integration” addresses both integrated schools and racially identifiable schools (segregated schools) since a school district often has a combination of both schools. For integrated or racially balanced schools, plans are developed to address equitable participation and performance of black students compared to white students attending the same schools. In racially identifiable schools, plans are developed to address the quality of education and performance of black students.

Monitoring equity within schools in the implementation of desegregation plans has often been difficult, in part because of the reliance on inadequate data from school districts. In the past, school districts were not required by the courts to provide discrete information on different groups of students. At best, statistical indicators such as achievement and

attendance data were provided for only two student categories: white and black. More recently, this limited categorization has been considered inadequate as the demographics in school districts change, and as school officials, plaintiffs, and court monitors ask for a more extensive breakdown of data. Going beyond simple separation by race, they seek data disaggregated by poverty status and fluency of English, and equity indicators such as information on enrollment levels in special education, extent of mainstreaming, courses and grades of students, grade retention rates, graduation rates, access to services, and participation of parents (see NCLBA in the next chapter).

The Supreme Court decisions have accelerated the federal courts' drive to end desegregation orders, which, in turn has accelerated the tendency toward resegregation in the 1990s. As desegregation cases come to a close, many educators are questioning the extent to which they should attempt to promote racial and ethnic integration without court orders to do so (Hendrie, 31). As the American nation becomes more multicultural, educators argue that public school diversity is more important than ever, since many school districts have retained or implemented school policies, such as the institution of selective admissions criteria to special schools or magnet programs, which sometimes adversely impact black students. It is, however, unclear how the judicial system will respond to desegregation efforts, as advocates argue that diversity policies are in the national interest and critics respond that they are unnecessary unless there are specific wrongs to be righted.

Conclusion

During the Viet Nam War, Senator George Aiken asserted that the United States should declare victory and withdraw from Viet Nam. The Supreme Court seems intent on declaring victory over the problem of school segregation and withdrawing the judiciary from solving the problem. But as Professor Orfield demonstrates, the problem has got worse, not better. The years ahead look even bleaker as courts end successful desegregation orders.

People can devise rationalizations to make this desegregation failure seem acceptable: that courts could not really succeed; that desegregation does not matter; that parents of black students do not really care about desegregation. But none of these rationalizations are true. *Brown* stated the truth: separate can never be equal. Tragically today, as *Brown* has just celebrated its fiftieth anniversary three years ago (2004), American public schools are still increasingly 'separate and unequal.' The institution that provided the impetus for desegregation and offered so much hope -the courts- is accountable for this failure. New dimensions of school segregation, however, have been brought up by the No Child Left Behind Act (2002) and a glimmer of hope for the reinforcement of *Brown's* promise, in contrast, was provided by the Supreme Court ruling in *Grutter* (2003).

Endnotes

¹ Thirty years ago, in a prophetic dissent in *Milliken v. Bradley* (1974), Justice Thurgood Marshall reminded the nation of what is at stake in the fight for desegregation.

² The last national housing law addressing discrimination, The Fair Housing Act, was enacted in 1968. Fair Housing Act of 1968, Pub.L.No.90-284, Title VIII, 82 Stat. 81.

³ A discussion of white flight including the context in which it occurred, how it occurred, the extent to which it occurred, and the reasons why it occurred have been discussed in the precedent chapter.

⁴ See, for example, *McCleskey v. Kemp*, 481 U.S.; 279, 297-99 (1987) (holding that proof of disparate impact is insufficient to establish a constitutional violation in administration of the death penalty); *Washington v. Davis*, 426 U.S. 229, 239-45 (1976) (holding that proof of discriminatory impact alone is not enough to prove a racial classification, there also must be proof of discriminatory purpose).

⁵ The Court determined that the system of alleged discrimination and the class it defines did not have the “traditional indicia of suspectness.” In the Court’s view, the class was not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process (*San Antonio*, 28-29).

⁶ After analyzing the various aspects of the Texas plan, the Court determined that it was “not the result of hurried, ill-conceived legislation... [or] the product of purposeful discrimination against any group or class.” To the extent that the plan of school financing resulted in unequal expenditures between children who resided in different districts, the Court found that such disparities were not the product of a system that is so irrational as to be invidiously discriminatory (*San Antonio*, 47-53).

⁷ This is not to minimize the adverse effects of the other decisions, but *Milliken* and *Rodriguez* are crucial because the former ensured the separateness of American public education and the latter ensured their inequality. In theory, there still could have been effective desegregation through actions of the federal or state governments; but such actions did not occur, and *Milliken* and *Rodriguez* meant that courts, the most likely agents for change, could not succeed in achieving desegregation.

⁸ After the School Board was released from the continuing constitutional supervision of the federal court, it adopted the Student Reassignment Plan (“SRP”). Under the plan, which relied on neighborhood assignments for students in grades k-4, a student could transfer from a school where he or she was in the majority to a school where he or she would be in the minority; in 1985, it appeared that the SRP was a return to segregation. If the SRP was to continue, 11 of 64 schools would be greater than 90% black American, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed. In light of this evidence, the district court refused to reopen the case (*Dowell*, 242).

⁹ Quoting *Green v. County School Board*, 391 U.S. 430, 435 (1968), 250.

¹⁰ Earlier in *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Supreme Court ruled that a federal district court could order a local taxing body to increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes (*Jenkins*, 103).

¹¹ See *Berry v. School District*, 195 F. Supp. 2d 971, 999,1001 (W.D. Mich. 2002) (ending desegregation efforts for the Benton Harbor public schools); *Lee v. Butler County Board of Education*, 183 F. Supp. 2d 1359, 1368-69 (M.D. Ala. 2002) (ending desegregation order for the Butler County, Alabama public schools)

¹² The Supreme Court upheld the constitutionality of an Ohio law that allowed parents to use vouchers in the Cleveland City Schools. Approximately 96% of parents used their vouchers in parochial schools. In a 5-4 decision, the Court upheld this use as constitutional. The Court’s division was identical to that in the 1990s decisions ordering an end to desegregation orders: the majority was comprised of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas.

¹³ See Top 20 Political Action Committee Contributor to Federal Candidates, 2003-2004, at <<http://usgovinfo.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=usgovinfo&zu=http%3A%2F%2Fwww.opensecrets.org%2Fpac%2Ftopacs.asp>> (last visited Nov. 5, 2004) (showing that industry lobbyists, trial lawyers, labor unions, and corporations are the heaviest political action committee contributors).

¹⁴ Perhaps the most significant presidential act in recent memory was President Dwight D. Eisenhower’s dispatch of the United States Army, including the 101st Airborne Division, to Little Rock, Arkansas, to enforce desegregation in the 1950s.

¹⁵ In the 2000 and 2004 presidential elections, much was made of the private prep-school backgrounds of Al Gore, George W. Bush, and John Kerry, all sons of wealthy public servants.

16 The focus of this chapter is exclusively on elementary and secondary schools; thus,, we are not considering the issue of affirmative action in colleges and universities.

17 Of course, the Midwest and North has by no means been a model for desegregation itself, given its own patterns of segregated schools and neighborhoods. See generally Douglass Massey and Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) (detailing how racial segregation is a persisting reality and is perpetuating urban poverty, which ultimately has led to a separate-but-equal environment).

18 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). For excellent discussion of this footnote and its significance, see generally J.M. Balkin, “The Footnote,” 83 *Columbia Law Review* 275 (1989); and, Bruce A. Ackerman, “Beyond Carolene Products,” 98 *Harvard Law Review*.

713 (1985).

19 See, e.g., Ann Scales, “Memo to Democrats: Black Vote Isn’t Secure,” *Boston Globe*, July 10, 1998 (noting black voter outrage at Jeremiah Nixon—then-Missouri Attorney General and 1998 Democratic candidate for the United States Senator—following Nixon’s proposal to end state aid for desegregation).

CHAPTER FOUR

New Dimensions of Segregation: The No Child Left Behind Act

The No Child Left Behind (NCLB) Act claims that it is intended to ensure that all children reach “challenging” standards... and to close the academic achievement gap that exists by race and class..... If the law were designed to make significant progress toward this goal, every supporter of equity and excellence in education would applaud it. However, for multiple reasons, the actual provisions of NCLB ...contradict its professed aims... (Neill, 225).¹

Introduction

This chapter examines the No Child Left Behind Act, which may be the most significant federal education law in the United States’ history. The Act is supposed to boost academic achievement in schools across the United States, rise the performance of underprivileged students to the level of their more affluent counterparts, and magnetize qualified professionals to teach in every classroom. These goals are obviously laudable. We argue, however, in this section that the Act creates incentives that actually work against their achievement. A flicker of hope, however, emerged with the issuance of the Supreme Court’s decision in *Grutter v. Bollinger* (2003) reaffirming *Brown*’s mandate and underlining the tremendous benefits of integrated educational environments.

1 The No Child left Behind Act

Probably the most recent hurdle that stands in the way of school desegregation progression is the adoption of a new federal measure, the No Child Left Behind Act (NCLBA) 2002, presumably aiming at fostering educational accountability by improving school performance as well as student performance. Before discussing the negative impact of the NCLBA on school desegregation, it is helpful to provide a brief history of the Act together with some of its key provisions.

1.1 Background

Actually, one of the most important fights of the civil rights movement was to define education as a fundamental right in the United States for all students, including minorities, women, and those with disabilities. Today, education is understood as the cornerstone of opportunity and a means to economic self-sufficiency, an understanding that transcends party lines. Even so, public education has frequently been the focus of reform, and the disagreement over methods for achieving educational equity has been divisive.

If any context invited an integration of civil, political, economic, and social rights, it would be education, where each student should not only be seen as a child like many other child, but also as a potential voter, juror, employer, taxpayer, and friend or neighbor (Minor, 449-50).

Supported by an overwhelming majority in Congress and signed into law by President George W. Bush in 2002, the No Child Left Behind Act (NCLBA) is remarkably ambitious and unusually intrusive. Indeed, it is probably the single largest expansion of federal power over America's education system. It is rather the largest federal intrusion into the educational affairs of the states in the history of the United States (Dillon, "Thousands of Schools," 33). The NCLBA revises the Elementary and Secondary Education Act, which was first enacted in 1965 and has been reauthorized periodically ever since.² The most important and well-known component of the Elementary and Secondary Education Act is Title I, which is the federal government's single largest educational aid program and ostensibly is designed to assist disadvantaged students. In exchange for federal funding, which all states receive, states and local school districts must comply with various federal directives.

From its passage until fairly recently, Title I received more criticism than praise. Empirical studies generally concluded that Title I fell far short of its goal of closing the achievement gap between poorer and more affluent students (Natriello and McDill, 33-34). One problem was the way federal money was used. Title I funding mostly supported the hiring of teachers' aides and the creation of remedial classes for disadvantaged students, who typically were pulled out of regular classrooms and exposed to a watered-down curriculum (Liebman and Sabel, 1721). Not surprisingly, this strategy did little to bridge the achievement gap.

By the time Title I was scheduled for reauthorization in 1994, many in and outside of the federal government agreed that the program needed alteration. Congress and President Clinton turned to standards-based reform for inspiration and direction (Elmore, 36). Standards-based reform centers on the simple idea that states should set ambitious academic

standards and periodically assess students to gauge their progress toward meeting those standards (Cohen, 99). The reform traces back to the 1983 publication of “A Nation At Risk,” a highly critical and widely publicized report on public schools, which argued in dramatic terms that America’s schools set their sights too low (U.S. Department of Education, 1983: 5). Standards-based reform promised to raise the academic bar by requiring all schools within a state to meet uniform, challenging standards. In addition to promoting excellence, standards-based reform also promised to promote equity by requiring all students, not just those in privileged suburban schools, to meet the same rigorous standards (Taylor, “Assessment to a Quality,” 312-13).

In reauthorizing Title I in 1994 through the passage of the Improving America’s Schools Act (IASA), Congress and President Clinton incorporated the core ideas of standards-based reform (Elmore, 36). In doing so, they fundamentally changed the nature of Title I. Instead of providing funds to support remedial instruction for disadvantaged students, Title I funds now had to be used to create standards for all students (Weckstein, 328-29). In order to receive Title I funds, states had to create “challenging” content and performance standards in at least reading and math, develop assessments that were aligned with those standards, and formulate plans to assist and ultimately sanction failing schools.

Importantly, standards and assessments for Title I schools had to be the same as those established for all other schools within a state.³ In this way, the federal government hoped to ensure that states would hold all students to the same high expectations and hold all schools, regardless of their student population, accountable for failure.

1.2 Key provisions

For a better understanding of how does the NCLBA work and how does it constitute an obstacle to the school integration progress, it is crucial to describe briefly some of the Act's key provisions.

In reality, the No Child Left Behind Act follows the same basic approach as the IASA, but it establishes more ambitious goals and places greater constraints on the states. States must still develop “challenging” content and performance standards, now not only in reading and math, but also in science. States must still use assessments that are aligned with those standards, and must hold schools and school districts accountable for failing to meet ambitious achievement goals (NCLBA §§1111 (b) (3), 1116).

President Bush, upon taking office, initiated the most sweeping public education changes in decades. The stated intent of the No Child Left Behind Act of 2001 (NCLBA) is to foster greater educational accountability at all levels by improving school performance and, thereby, student performance. The plan gained widespread bipartisan support, and on January 8, 2002, President Bush signed NCLBA into law. Its stated purpose, briefly, is to: increase accountability for student achievement; allow school choice for students attending failing schools; allow more flexibility for how federal education dollars are spent; and place a stronger emphasis on skilled teaching.

To promote accountability, NCLBA requires states to administer regular standardized testing and establish annual statewide progress goals. This is generally referred to as Adequate Yearly Progress (AYP). Furthermore, NCLBA expects that all students will achieve academic proficiency, or subject area competence, by 2014 (U.S. Department of Education, “NCLBA Non-Regulatory Draft,” 2003). To accomplish this,

states must test students in reading and math in grades 3–8 and at least once in high school. Every other year, states must administer the National Assessment of Education Progress exam to a sample of fourth- and eighth-grade students (U.S. Department of Education, “The NCLBA of 2001” 2002). Beginning in the 2007–08 school years, states must administer science tests at least once in elementary, middle, and high school. The Act requires that assessment results and state progress objectives be broken down and reported by income, race, ethnicity, gender, disability, and limited English proficiency.

Generally, the chief goals of the Act are to boost academic achievement across the board and to eliminate the achievement gap among students from different backgrounds. To accomplish these goals, the Act requires states to establish “challenging” academic standards for all schools and to test all students regularly to ensure that they are meeting those standards. The Act also requires states and school districts to employ teachers who are “highly qualified,” meaning that they have demonstrated some competence in the subjects they teach (NCLBA, § 1119).

Schools are expected to have all of their students scoring at the proficient level on state tests within twelve years of the Act’s passage. In the meantime, states must establish intermediate goals that require an ever-increasing percentage of students to demonstrate proficiency. The same intermediate achievement targets must be met both by schools as a whole and by various subgroups of students within each school, including racial minorities.

Schools that receive federal funding and fail to meet their targets face increasingly harsh sanctions for every year that they fail (NCLBA, § 1116). Districts and schools failing to make Adequate Yearly Progress must improve or face corrective action and restructuring measures, including staff reassignment and curriculum replacement. NCLBA allows

parents to transfer their children out of schools that fail for two consecutive years and into better schools within the district. Students who attend schools that fail to meet standards for three consecutive years become eligible for supplemental educational services, such as academic instruction, tutoring, and after-school programs. After five years of failure, a school can be taken under state control or closed and reopened as a charter school (Citizens' Commission on Civil Rights, "Analysis of Bush Plans," 5). These were briefly the main provisions that were adopted in the No Child Left Behind Act.

2 Criticizing the NCLBA

The No Child Left Behind Act has been praised by some and condemned by others in the popular press and in education journals, although it has received surprisingly little attention in the legal literature.⁴ Those who favor the Act emphasize its laudable goals and celebrate its tough accountability measures (Casserly, 48). Those who criticize the Act lament the heavy emphasis on testing and the inevitable "teaching to the test" that will follow. They also chastise the federal government for interfering with state and local control over education while failing to fund all of the costs associated with the Act (Hoff, 1).

In other words, some education and civil rights experts, while agreeing that NCLBA is an impressive pursuit, have expressed reservations about its implementation, specifically the school choice provisions and reliance on standardized tests, and the impact they will have on black students. Some fear that the sanctions outlined above, if not met with adequate resources, will punish black students who disproportionately attend consistently low-performing schools and are under the most pressure to improve. Moreover, because NCLBA only permits transfers within

school districts, those with many schools identified as needing improvement will be unable to offer alternative choices (Rudalevige, 23). Where limited choices are available, students left behind in failing schools will be worse off as resources are redistributed to cover transportation costs for transferring students. Proponents of NCLBA's school choice provision, however, assert that it provides opportunity to continue school desegregation efforts and empowers parents, giving them a more definitive benchmark by which to ascertain school quality (Taylor, "What Impacts of Accountability Movement?", 1751).

Others note that reliance on testing is both the greatest strength and greatest weakness of NCLBA (Nash, 240). Those who support testing as an accountability tool state that it will improve classroom instruction and illuminate problems that can otherwise go undetected. In addition, testing advocates claim that poor and black American students stand to benefit the most from testing because it will render it impossible to ignore achievement gaps (Kucurick, 481-484). Conversely, however, many educators are concerned that states will use tests not only as an accountability measure, but as a means to determine grade promotion or graduation, creating high-stakes for students and exacerbating the achievement gap. As a matter of fact, in the present chapter, we are not concerned with an absolute criticism of the No Child Left Behind Act, but rather with a critical review of some of its key provisions that affected black American students in particular.

2.1 NCLBA' s Effect on Black American Students

The Bush administration has correctly identified equal educational opportunity as a civil right and a necessity (Bush, George W. 28 July, 2003). The new law acknowledges the achievement gap between minority and non-minority students and states closing it as a main goal. However, because NCLBA does not establish guidelines for how tests should be used as an accountability measure or prohibit states from attaching individual high stakes to scores, there is concern that some states may use results to punish rather than support students and reform schools. Where this is the case, NCLBA will not resolve the core problem of unequal educational opportunities, but will instead mask disparities, or worse, limit opportunities for underachieving students, notably African Americans.

Emphasis on testing will only promote reform if the right safeguards are in place. NCLBA relies on the capacity of states to develop valid and reliable assessment tools and may force them to administer less rigorous tests to avoid penalties associated with being labeled “failing” (Nash, 241). In a briefing on educational accountability and NCLBA implementation, the U.S. Commission on Civil Rights heard numerous statements from education experts about the dangers of over-reliance on tests and the consequences of test results for students (U.S. Commission on Civil Rights, “A Briefing on Education,” 2003). For students who do not pass annual assessment tests, the stakes can be very high, resulting in grade retention, dropping out, and eventually failure to pursue higher education. Testing also presents high stakes for schools, as low passing rates can affect funding. This in turn carries implications for students who may be at risk of losing much- needed, and often insufficient, resources.

Because they lack exposure to supplemental and collateral educational opportunities, black American students rely more heavily on school for learning than children in high socioeconomic classifications. These students also more frequently attend poor schools that do not have the resources to provide necessary learning tools and, thus, are more likely to be punished (for example, through grade retention) for the school system's failure to prepare them. Consequently, high-stakes testing has a disparate impact on the most vulnerable students, and data show that as standards get more stringent, the disparities get larger (Heubert, 238-43). Moreover, retaining students in grade for failing tests does not necessarily help them gain proficiency or close the achievement gap. Thus, educators and civil rights advocates fear that the high stakes will most negatively affect children in poor, under funded, urban public schools that are largely populated by black American students.

Educators also find problems with using graduation rates to measure a school's success and pinpoint accountability. Dropout and graduation rate measurements are inconsistent across states, and there is evidence that some states disguise problems by falsifying completion rates, particularly as they relate to black students. For example, the New York City school system reportedly "pushed out" failing students and then categorized them as having transferred to other school settings, without tracking the students or identifying those settings (Lewin and Medina, A1). Disproportionately low black graduation rates expose a school's achievement gap, giving it incentive to hide or reclassify dropouts. According to the Urban Institute:

Policies that tempt schools to hide unpleasant truths for fear of being labeled a failure and losing federal support are sure to be counter-productive. And policies that inhibit innovation and transparency will only hinder real progress in determining what works (Hannaway and Swanson, A1).

2.2 Holding the Administration Accountable for NCLBA Implementation

In actual point, the failure to redress racial educational inequities in U.S. public schools today is intimately related to the ineffectiveness of the No Child Left Behind Act to materialize, which is in turn tightly linked to the dismal failure of the American Administration to bring about its promises.

President Bush and Members of Congress have made lofty promises for the success of this initiative, while generally underestimating the magnitude of change that must occur in American public education to bring about those promises (Center on Education Policy, 2).

Implementation of NCLBA falls on states, local school boards, and educators. However, the Bush administration has not pushed for funding to support its requirements, leaving state and local school boards, teachers, and administrators without the resources to comply with the law (U.S. Commission on Civil Rights, "Education Accountability," 2003). For the first year of NCLBA implementation, the administration supported a significant increase in appropriations for the Elementary and Secondary Education Act. Since passage, however, actual funding has fallen short of

levels authorized in the legislation. In 2003, funding fell \$8 billion short, and in 2004 the President's request was \$11 billion below target (Center on Education Policy, 2). The National Education Association estimates that because of funding shortages, only 40 percent of students eligible for Title I funds, which are earmarked for disadvantaged students, are being fully served. ("NCLB?," 2003).

The federal government may have trouble demanding 100 percent accountability from schools while only providing 7 percent of the total funding for public elementary and secondary education (Center on Education Policy, 2). A recent poll found that nearly nine in 10 school superintendents and principals view the law as an "unfunded mandate," i.e., requiring implementation without providing resources (Olson, "In ESEA Wake," 7). Other educators attribute the President's initial support to a political strategy to help the reform measure pass. Failure to fund what the administration has touted as one of the most pressing civil rights legislation demonstrates a lack of commitment on the part of the administration to follow through on its promise of improving education for all students.

The Department of Education and its leadership have likewise been criticized for failing to adopt timely regulations on how states can comply with NCLBA ("Rescuing Education Reform," 2004). As the League of United Latin American Citizens notes, the administration must be held to the standard of accountability to which it holds educators and school administrators (LULAC, 9). Moreover, accountability constructs that underlie NCLBA assume that the basic conditions for academic success already permeate schools and that students are ready to perform at optimal levels (De Velasco and Fix, 249). Both of these assumptions are false. Relying on tests and allowing transfers out of low-performing schools will not equalize the disparities in resources and outcomes for black American and disadvantaged students, particularly those left behind in failing schools.

NCLBA, in essence, tries to make separate but equal work. Determining how the performance of black and poor students, among other subgroups, can be fairly incorporated into accountability systems could go a long way to resolving the most pressing NCLBA problems.

Education Secretary Rod Paige has likened opponents of NCLBA to segregationists who resisted the *Brown* decision. In a speech before the American Enterprise Institute he accused NCLBA critics of being comfortable with substandard programs for black American children and using their opposition as a political special interest strategy (7 Jan., 2004: 4). Secretary Paige went on record as declaring that those who oppose NCLBA misunderstand it, and those who find its provisions problematic are resistant to change (Brookings Institution, 2003). By engaging in divisive rhetoric, the administration has not only demonstrated its resistance to criticism, but also its unwillingness to engage in constructive dialogue with the communities affected by its policies.

3 Promoting Segregation and Exclusion

Probably the major recent obstacle that contributed to the failure of the integration of U.S. public education are some of the key provisions that featured the NCLBA. Such provisions, though aiming at improving student performance, work at promoting segregation and exclusion of black Americans.

In fact, one of the most heralded aspects of the NCLBA is the requirement that schools meet performance goals for various groups of students, including racial minorities. By disaggregating the scores of these students and holding schools responsible for their achievement, the NCLBA promises to shine a needed spotlight on the performance of traditionally disadvantaged and under-performing students. No longer will

schools or school systems be able to obscure the academic performance of these groups within aggregate scores. Indeed, this aspect of the NCLBA, more than any other, implements the rhetorical commitment to ‘leave no child behind.’

Despite the thoroughly admirable purpose of this provision, it unintentionally promotes racial and socioeconomic segregation in at least two ways. The interesting question is whether these incentives to segregate will be dampened by the public school choice provisions in the NCLBA, which in theory could lead to more integration. We begin with the incentives to segregate and then turn to the question of choice. We end with a discussion of the incentives to push students out of school altogether.

3.1 Incentives to Segregate

In reality, the NCLBA struck a death blow to school desegregation efforts by fostering racial segregation, though unintentionally, in two different ways. The first way in which the NCLBA promotes segregation is by providing administrators of white, middle class schools a reason to exclude black American students. The mechanics are simple: these students traditionally do not perform as well as their white and more affluent peers on standardized tests. In a recent study, for example, Professors Kane and Staiger concluded that schools that contain a black American or economically disadvantaged subgroup are much more likely to fail to make Adequate Yearly Progress than those that do not (152, 58).

To improve the chances that a particular school or schools within a district make AYP, administrators have an incentive to minimize the number of black American students in a school or district (Bogar, 1448-49).⁵ Importantly, administrators need not exclude all such students. The NCLBA only requires the disaggregation of scores for a subgroup if it is

sufficiently large to yield “statistically reliable information.” Because there is no single formula for determining this figure, the NCLBA allows states to determine the minimum size of subgroups. That number will vary, but it uniformly will be more than one. Whatever the precise number is, in many places it will become the dividing line between schools that make AYP and those that do not.

In Texas, for example, schools must “count” the performance of racial or ethnic subgroups if at least 10% of the students fall within the subgroup. As Kane and Staiger report, among schools that had exactly 9% Latino students—and thus did not have to disaggregate their scores—42% were rated “exemplary,” while less than 20% of schools with exactly 10% Latino students achieved that status (162).

Non–Title I schools may have an extra incentive to avoid transfer students, at least those from poor families. Recall that the real sanctions of the NCLBA are reserved for schools that receive Title I funds. Although schools that do not receive Title I funds must in theory meet AYP and will have their test results reported, they do not face the public-choice, restructuring, or other accountability provisions that the NCLBA imposes on Title I schools. If a non–Title I school accepts Title I transfer students, however, this might convert it into a Title I school. It is unclear from the NCLBA whether this would happen automatically with even one transfer, or whether it only would happen if enough poor students transfer to bring the poverty level of the chosen school to the requisite level.⁶ Either way, however, accepting transfer students creates the risk that a school once free from the stern accountability provisions of Title I would become subject to them.

While the incentive to shun certain students seems obvious, it is less clear how administrators can achieve this goal if they should decide to pursue it. In some instances, the path is straightforward. A number of

existing integration plans is voluntary; they are a form of structured school choice, either within or across districts (Ryan and Heise, 2064-73). Schools that accept transfer students who are poor or black American simply might stop doing so.⁷

Consider, for example, the programs in various metropolitan areas through which urban students, predominantly blacks and poor, attend suburban schools.⁸ Now imagine that one of those suburban schools finds itself failing to achieve AYP in part or entirely because the transfer students do not meet their benchmark. To the extent suburban school participation was voluntary, there undoubtedly will be pressure within the district to bow out of the program.

Structured school choice plans within districts may face similar pressures. School districts in Cambridge, Massachusetts; Montclair, New Jersey; and Wake County, North Carolina, among others, sponsor choice plans that seek to create racial or socioeconomic balance within schools. Parents list their preferences among public schools and administrators assign students with an eye toward satisfying those preferences while creating racially or socioeconomically balanced schools (Kahlenberg, "All Together Now," 116-30). Surely there will be some pressure in these districts to disband the programs if it turns out that most of the schools are failing to make AYP. Under that scenario, district officials may well conclude that it is better to have at least some schools meeting AYP. One strategy to accomplish this would be to return to a neighborhood school policy, which would result in greater socioeconomic segregation and give those schools higher on the socioeconomic scale a greater chance of making AYP.

For the same reason that existing integration plans may be scaled back or eliminated, it will be that much harder to begin new programs. This may ultimately prove more detrimental to integration than the elimination

of the few existing programs. Rates of school segregation are already quite high, due to residential segregation and the ubiquitous policy of neighborhood school assignments. Given that court-ordered desegregation is fading from existence, the only real hope for integration in the near future is through the expansion of voluntary programs, which would generate political controversy even under the best of circumstances (Kahlenberg, “All Together Now,” 130-33). If increased diversity within a school raises the chances that the school will fail to make AYP, the already considerable political obstacles to racial and socioeconomic integration may become insurmountable. In this sense, then, the NCLBA may be even more significant in creating disincentives for schools and districts to integrate than in creating incentives to segregate.

Parents will face similar incentives, which is the second means by which the NCLBA will encourage segregation. Parents with options will be reluctant to choose schools that are failing to make AYP. In some places, this will lead those parents to shy away from more integrated schools, given that racially and socioeconomically integrated schools are more likely to fail to make AYP than predominantly or exclusively white and middle class schools.

Some parents will be able to act on these incentives either by choosing a particular neighborhood or choosing a particular school. In states that offer little or no public school choice, parents will have to move to the “right” neighborhood in order to place their children in middle class schools, which effectively means that exercising this form of choice will be restricted to those who can afford to live in the neighborhoods that host such schools. In states and districts that sponsor school choice, the option to select middle class schools may be more widely available, at least in theory. But if past experience is any guide, the parents who exercise this option will be disproportionately better educated and wealthier than those

who do not (Viteritti, 9). If the parents who do choose schools are motivated, as suggested, to avoid schools that fail to make AYP, unfettered public school choice may help promote racial and socioeconomic segregation.

This is not to suggest that a lot of white and middle class parents currently seek out diverse schools or districts. In the past, however, some obviously did. Perhaps in the future, even more would have chosen to do so. Presumably, parents who chose integrated schools looked to a number of factors to inform their judgment as to which schools were best for their children. If more parents equate school quality with test scores, however, they may be less willing to look beyond those scores to judge the quality of a school.

Indeed, there is already some evidence to this effect. Professors Wells and Holme have studied the effect of testing on the demographics of six integrated high schools in different regions of the United States. They illustrate how parents of children in these schools have become more skeptical of the value of integration in light of the schools' relatively poor performance on standardized tests. As a result, relatively good integrated schools, like those in Shaker Heights, Ohio; Englewood, New Jersey; and West Charlotte, North Carolina, have lost or are in the process of losing white students, as well as many middle class black American students (13). Through interviews with former students, teachers, community members, and local officials, Wells and Holme discovered that test scores have played an important role in prompting white and middle class flight. Whereas these integrated schools once were valued based on a number of criteria, they are now increasingly judged by their test scores alone. As one white graduate of Shaker Heights High School bluntly explained, "[i]f proficiency scores didn't

come down the Blacker the schools get, then white people wouldn't run away from [them]" (qtd. in Wells and Holme, 16).

Test scores alone do not explain why some integrated schools have lost or are losing white and middle class students, as Wells and Holme recognize. It may be that many parents who would have fled anyway point to test scores as a rationalization. At the same time, however, the current emphasis on standardized test scores has undeniably worked to narrow perceptions of what constitutes a "good" school. This narrowing will continue with the increasing importance of making AYP. To the extent integrated schools have relatively lower test scores and are less likely to make AYP, they are less likely to be judged favorably by parents. Parents with options are thus less likely to keep their children in them or to choose them in the first place. As Wells and Holme point out, reputations of integrated schools already tend to be somewhat fragile, and the emphasis on test scores will likely weaken them even further (18). Thus, the failure to tackle school segregation is further exacerbated by the No Child Left Behind Act's unintentional promotion of segregation in public education.

3. 2 NCLBA's Choice Provisions

Optimists may point to the choice provisions within the NCLBA. Recall that the NCLBA allows students in Title I schools that fail to make AYP for two consecutive years to attend another public school within the same district. Only schools that have made AYP are eligible to receive transfer students. If there are no such schools within the district, the NCLBA and its regulations encourage but do not require districts to arrange for students to attend school in another district. The NCLBA regulations also suggest that lack of space in a "good" school within the

same district is not a sufficient reason to deny students their right to choose another school (§ 200.44. (d)).

Some commentators and advocates suggest that the choice provisions could lead to greater racial and socioeconomic integration. The argument is simple. If black American and poor students disproportionately do worse on standardized tests, Title I schools with such students will be more likely to fail to make AYP. As a result, many black and poor students will have the option to transfer. The schools to which they transfer are more likely to be white and middle class if, again, past performance on standardized tests is any indication (Taylor, “What Impacts of Accountability?,” 1755-58). As a result, the operation of the public school choice provision in the NCLBA may promote greater racial and socioeconomic integration.

This is indeed a possibility, and for those who favor greater integration, it is a welcome one. There are reasons to be skeptical, however, that the choice provisions will play out in the way just described. To begin, it is important to recognize that inter-district choice is not required by the NCLBA. In many metropolitan areas, segregation occurs between rather than within districts (Ryan and Heise, 2093-96), and in these areas the NCLBA choice provision offers little hope of promoting integration. Second, where there is diversity within a given district, space constraints will surely limit the amount of movement (Dillon, “New Federal Law,” A 1). It is inconceivable that states and districts will abide by the regulation that suggests a lack of space is no excuse for failing to guarantee school choice. Saying that space is not a constraint does not make it so. To the extent districts are willing to ignore this regulation, they also may be willing to manipulate space constraints if doing so works to their advantage. That is to say, if the incentives to maintain segregation work in the way we have described, administrators of successful schools may claim that they lack much, if any, space for transfer students.

In addition, there does not yet seem to be a great demand for choice. Over 8500 schools were required to offer school choice in 2002–3, but only a “trickle” of parents exercised this option (Bogar, 1443-44). Part of the explanation may be a lack of information. The choice option is a new one, and it takes time for information to filter out to the public. But this simply points to the likelihood that school officials who are not excited about choice will have opportunities to limit the flow of information and informally discourage the exercise of choice.

Finally, there is a little-noticed provision in the NCLBA that makes the school choice provision contingent on state permission. The NCLBA requires schools to offer choice unless they are prohibited from doing so by state law. Although this might be an extreme move, it is possible that, if nothing else works, states will enact laws prohibiting school choice. Taken together, all of these obstacles make it unlikely that the NCLBA requirement of offering choice will be sufficient to overcome the strong incentives to maintain or increase racial and socioeconomic segregation.

3.3 The Costs of Segregation

A policy that promotes racial and socioeconomic segregation will be opposed by some, regardless of its effect on academic achievement. Others might argue that it should be preferable to be concerned only about segregation if it has a detrimental effect on academic achievement. Even if we agree, for argument’s sake, with the latter position, there is a strong argument that integration, at least along socioeconomic lines, ought to be pursued. That is, even if the only goals are to increase academic

performance and to close the achievement gap, socioeconomic integration can be an effective means to achieve those ends.

Numerous studies demonstrate that predominantly poor schools typically perform much worse than do middle class schools (Bogar, 1417-23). Moving poor students to middle class schools, moreover, has been shown to boost their achievement, and to do so without threatening the achievement of their more advantaged peers (Ryan and Heise, 2106-07). To be sure, studies on the asymmetrical benefits of socioeconomic integration are neither uniform nor free from methodological criticism, and the evidence does not suggest that poor students who transfer to middle class schools will immediately start scoring at the proficient level on state tests (Ladd, 13-14). But the evidence is sufficiently strong to indicate that promoting socioeconomic stratification is not a promising strategy for boosting aggregate achievement levels or closing the achievement gap. It is also abundantly clear that, regardless of the precise benefits of socioeconomic integration, students do not perform well in schools of concentrated poverty. To the extent the aim is to boost academic achievement or close the achievement gap, therefore, Americans should hesitate before promoting socioeconomic segregation. Yet this is precisely what the NCLBA does, further hampering school desegregation efforts.

3.4 Student Exclusion

An even more serious threat to black American students and thus to the racial desegregation of U.S. public education is the problem of student exclusion, which the NCLBA threatens to exacerbate. All types of schools, whether elementary, middle, or high school, must make AYP. Students who perform poorly on state tests obviously hurt schools looking to make AYP. This is why schools, to the extent they can, will work to

avoid enrolling those students who are at risk of failing the exams. The same pressure could lead schools to push low-performing students out, either to another school (if one can be found that will accept them) or out of the school system entirely. This temptation presumably will be strongest at the high school level, both because students most typically drop out at this stage and because low-performing high school students are most likely to be farthest behind. Given the connection between performance on tests, socioeconomic status, and race, the students most likely to be targeted for exclusion will be poor and/or racial minorities. Just as these students will suffer from any incentive to segregate created by the NCLBA, they will also suffer, even more dramatically, from any incentive to exclude them from school altogether.

The notion that high stakes testing increases school dropouts has been debated in the academic literature for some time, and empirical studies have reached different conclusions on the question (Raymond and Hanushek, 48). Nonetheless, the temptation to exclude low-performing students, enhanced by the NCLBA, can hardly be denied: One less student performing below the proficiency level increases the overall percentage of students who have hit that benchmark. A recent report on New York City schools, moreover, lends credence to the view that test-based accountability for schools does indeed provide an incentive to push out low-performing students (Office of the Public Advocate, 2002).

The No Child Left Behind Act provides weak protection against this temptation. It requires that graduation rates be included as part of a school's determination of AYP, but it does not say what the rate must be, nor does it demand that the rate increase over a certain period of time. Moreover, graduation rates can only be counted against a school when determining AYP. A school with poor test scores, in other words, cannot point to a relatively high graduation rate and thereby make AYP. On the

other hand, a school with good test scores but low graduation rates could be at risk of failing to make AYP if the state sets a high target for graduation rates. States thus have little incentive to establish a demanding graduation rate. The lower that rate is set, of course, the easier it is for schools to push out students (Lewin and Medina, A1).⁹

To be fair, the NCLBA does require that information about graduation rates be made public (§ 1111 (b)(2)(c)(vi)). Disseminating this information is far from useless, but it remains to be seen whether simply publishing graduation rates will provide sufficient protection for students at risk of being pushed out. If it does not, and if dropout rates increase, the NCLBA could end up further harming those students who obviously need the most help—leaving them, quite literally, behind. Thus, school integration failure is clearly enhanced by the No Child Left Behind Act’s provisions.

4 Deterring Good Teachers

Another major hurdle that blocked racial school desegregation progress is the prevention of good teachers from choosing black Americans-attended schools. Although social scientists continue to debate the relationship between various educational inputs and outputs, these researchers find common ground on one obvious point: Teachers matter (Rivkin, Hanushek and Kain, 3).¹⁰ The better the teacher, the better the student performance, regardless of the student’s background. Researchers disagree over which teacher characteristics matter the most—experience, education background, subject matter knowledge, or unquantifiable traits. But they generally agree that, whatever characteristic is chosen, better teachers tend to be found in middle class schools rather than in high-poverty schools (Olson, “The Great Divide,” 9).

The larger standards and testing movement, of which the NCLBA is a part, creates two separate problems regarding teachers. First, it makes teaching a less attractive profession to some talented individuals. Second, it bolsters the tendency of good teachers to choose relatively wealthy, white, and high-achieving schools. The second point is with immediate relevance to the present research and needs to be detailed further.

4.1 Reinforcing the Unequal Distribution of Good Teachers

At the very least, teaching will be less attractive in those schools where teachers must spend a great deal of time preparing for the tests. This points to the second effect of the NCLBA on teachers, which has to do with their distribution. Attaching consequences to test results creates obvious incentives for teachers to avoid schools that are likely to produce bad results. As already discussed, schools with poor and minority students are more likely to perform poorly on state tests than schools with relatively affluent, white students. Poor and predominantly black schools already struggle to attract and retain good teachers. Study after study documents that high-poverty and high-black schools have less qualified and less experienced teachers. Empirical studies also consistently indicate that, when given the chance to choose, teachers systematically move to schools with fewer poor, black, and low-achieving students (Hanushek, 20-37). Exactly why more qualified and experienced teachers shy away from high-poverty, high-black, and low-achieving schools is hard to pin down and most likely is related to a mix of factors, including working conditions, salary, student behavior, parental support, and administrative support (Park, 17). All of these factors, together and

singly, point teachers toward relatively high-performing, affluent, and white schools.

The NCLBA will likely reinforce the trend of good teachers exiting challenging schools. Everyone recognizes that a student's test results stem from a combination of in-school and external factors, including ability, socioeconomic status, and parental involvement (Hanushek and Raymond, 4-9). These external factors help explain why students from wealthier families tend to do better on tests than students from poorer families: The former come to school more prepared to learn and receive more assistance outside of school than do the latter. High or low test scores in a particular school, therefore, may have less to do with the quality of teaching than with factors beyond the control of schools and teachers (Elmore, 37).

Adequate Yearly Progress is pegged to uniform benchmarks of achievement. It follows that a teacher with a classroom of disadvantaged students will generally face a greater challenge than one with a classroom of relatively affluent students. At the same time, the teacher who makes remarkable gains with disadvantaged children but nonetheless fails to bring the students to the AYP benchmark (or within the safe harbor provision) will get little reward under the NCLBA (§ 1112(b)(2))

Consider two different scenarios. Under the first, imagine a school that is already well above the AYP benchmark in year one. Now imagine that performance holds steady in year two or drops only slightly, so that the students are still hitting the AYP benchmark. Neither that school nor its teachers will be considered failing under the NCLBA. Now change the facts and imagine a school that is well below the AYP benchmark in year one. Suppose that this school makes strong gains in year two, but not enough to meet AYP or to bring the school within the safe harbor provision of the NCLBA. Despite larger annual gains than the first

school, this school and its teachers essentially get no credit for the achievement gain.

The safest bet for a teacher, therefore, is to pick schools that are likely to succeed under the NCLBA's framework. These schools are most likely predominantly white, middle class, and located in the suburbs. Given that the most experienced and talented teachers will usually have the widest array of choices, these are the teachers who will have the opportunity and incentive to choose already successful schools (Traub, 46). The best and most experienced teachers will thus have an added incentive to teach in schools that are already performing well. Teaching in such schools will not only be less risky, given the stakes involved, but it may also be more enjoyable on a day-to-day basis. As already suggested, in schools whose students can easily pass state tests, teachers may not have to spend much time on test preparation. In schools with students at risk of failing the tests, by contrast, test preparation will occupy a large portion of classroom time. If it is reasonable to suppose that teachers—especially the more creative and innovative ones—would prefer to spend less rather than more time on test preparation, this is yet another reason for them to choose high-performing schools. Thus, the current resegregation of U.S. public schools can partly be attributed to such a new federal statute: the No Child Left Behind Act (2002).

5 Affirmative Action in Higher Education: Mending *Brown's* Broken Promise

As a matter of fact, the No Child Left Behind Act, a federal education law that aimed at increasing academic achievement for all American students, failed to achieve its lofty aim. Instead, it fostered racial segregation in U.S. public schools and thus created a further hurdle in the way of school desegregation efforts. The most hopeful sign of a new recognition of the enduring importance of *Brown's* principles, however, came in the sweeping language of the Supreme Court's most important civil rights decision in a generation, the June 2003 *Grutter v. Bollinger* decision upholding affirmative action in higher education.

Affirmative action has been a component of the college admissions process since the 1970s to remedy the entrenched discrimination policies that had prohibited racial and ethnic minorities and women from attending institutions of higher learning. Recognizing the low rate of minority participation in higher education and the correlation between education, employment, economic self-sufficiency, and political participation, the U.S. Commission on Civil Rights has long supported affirmative action programs. As early as 1977, the Commission released a statement in which it noted:

[C]olor consciousness is unavoidable while the effects persist of decades of governmentally-imposed racial wrongs. A society that, in the name of the ideal, foreclosed racially-conscious remedies would not truly be color blind but morally blind (“Statement on Affirmative Action”, 12).

Two and a half decades after its initial statement, the Commission re-examined affirmative action and again acted in support, noting that although minority enrollment has increased markedly over the past 30 years, students of color remain less likely to attend and graduate from college and are even less likely to attend the most prestigious institutions (“Beyond Percentage Plans,” 1). Despite evidence of its usefulness, opponents charge that affirmative action is “reverse discrimination,” which results in “preferential treatment,” or less qualified individuals being admitted to colleges solely on the basis of race or ethnicity. Others contend that the educational benefits of diversity, as a justification for affirmative action, do not outweigh the negative effects of the tactics used to achieve it (Crawford, 71).¹¹

Against this debate, in 2003, the Supreme Court re-examined the legality of affirmative action in higher-education admissions policies for the first time in 25 years. In *Grutter v. Bollinger* the Supreme Court discussed the issue of whether the use of race as a criterion for admitting students to an institution of higher education violates the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act of 1964.

In *Grutter*, the Supreme Court, by a narrow 5-4 majority, upheld a race-conscious admissions program employed by the University of Michigan Law School. The Court held that the law schools’ asserted goal of “attaining student body diversity” was a “compelling state interest” sufficient to justify its practice of giving favorable weight to an applicant’s self-identified status as a black American, Latino, or Native American. Further the Court found that the law school’s “holistic” method of considering each applicant’s race along with other academic and nonacademic variables satisfied the Equal Protection Clause’s requirement of “narrow tailoring” (333).

In other words, the Supreme Court issued its decision in *Grutter v. Bollinger*, holding that educational diversity is a compelling governmental interest and that, to that end, an applicant's race may be considered as one of a number of factors in making admissions decisions. That holding—although concerned with graduate and professional schools rather than elementary schools—reaffirmed the simple yet central message of *Brown* that students should learn in a racially integrated environment. Moreover, *Grutter* laudably went one step further than *Brown* by grounding its holding upon the rationale that 'everyone' in the student body and society generally, not just minorities, benefits from educational diversity (333-42). While this is by no means a novel concept—in fact, the widespread and enduring benefits of such diversity have been well documented—the Court's recognition of this essential truth was much needed.

In point of fact, as the fiftieth anniversary of *Brown* was just celebrated three years ago (2004), Americans could not help but feel disheartened at how little progress America, as a nation, has made in achieving the promise of integration. It was precisely against this backdrop that the Supreme Court uttered its decision in *Grutter v. Bollinger* case.

Timely issued just one year before the fiftieth anniversary of *Brown*, the Supreme Court's opinion in *Grutter*, among other things, served as a much needed reminder of a simple truth that the Court had recognized nearly fifty years earlier in *Brown*: that students of all racial and ethnic backgrounds should learn in an integrated educational environment, recognizing the countless and lasting benefits that diversity confers upon the entire student body and society as a whole (333-34).

Most striking is the clear, unambiguous voice with which the Supreme Court recognized and emphasized the importance of racial and ethnic diversity—among many other relevant and important measures of

diversity_ in academics. This recognition stands in stark contrast with the rationale supporting the Court's decision in *Brown* which was primarily concerned with ameliorating the negative effects that segregated schools had on black students:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system ((1954), 494).

In *Grutter*, by contrast, the Court recognized that all students_ minority and non-minority alike_ benefit from racial and ethnic diversity in academics because such diversity “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races.” With increased diversity, the Court noted, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” The Court emphasized that the benefits associated with academic diversity extend far beyond the classroom: “[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals” (330).

For example, the Court credited “major American businesses” with making it “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.” It also recognized that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security” (*Grutter*, 330). The Court’s focus upon the importance of diversity not only to minority students, but to ‘all students’_ and the resulting benefits that such diversity bestows upon American society_ is, laudably, the strongest endorsement for diversity in the history of the Court.¹²

Despite its approval of the University of Michigan Law School’s race-conscious admissions program, the *Grutter* Court held that “race-conscious admissions policies must be limited in time” (342). While the Court declined to fix a precise date on which the permissibility of such programs would expire, the Justices in the majority “expect that 25 years from now, the use of racial preferences will no longer be necessary” (qtd. in. Synder, 241). Given that the gap in standardized test scores between races is widening as a consequence of the resegregation that is occurring throughout the United States, Americans have a long way to go to achieve this goal.

To obviate the need for race-conscious admissions policies will require broad-based commitment, coupled with a serious change in societal attitudes and customs. For example, other schools must take advantage of the opportunity that the *Grutter* Court has provided by implementing race-conscious admissions programs that are narrowly tailored to achieve a diverse student body. The extent to which other colleges and universities follow suit remains to be seen, but is critical to the American’s ability to rise to the challenge that the Supreme Court has issued.¹³

Even more significantly, individuals must take advantage of these programs and motivate future generations to do the same. Observing the admission of other minorities into selective schools who then graduate into higher echelons of society can motivate otherwise unproductive, unresponsive, and resistant young people before they foreclose options that can prepare them for upward mobility (Greenberg, 1620). As Professor Elijah Anderson states that young people must be encouraged to adopt an outlook that allows them to invest their considerable personal resources in available opportunities. In such more positive circumstances, they can be expected to leave behind the attitudes, values, and behavior that work to block their advancement into the mainstream (289).

In the end, the legacy of *Grutter* will depend upon what America, as a society, makes of it. It is certainly hoped that *Grutter* would have the effect of increasing diversity not only in graduate and professional schools, but in all levels of education. Granted, much of *Grutter's* rationale is specific to the context of graduate or professional schools, but the basic underpinning of the Court's holding—that a diverse student body confers extraordinary and enduring benefits upon every student and, indeed, society in general—applies with equal force to any level of education. It is our hope, in this research, that the Supreme Court's affirmation of this essential truth will motivate schools of all educational levels to institute programs that achieve meaningful integration and diversity in the American nation's schools.

Conclusion

The No Child Left Behind Act (NCLBA) is hoping for a miracle. Yet it is simultaneously decreasing the odds that this miracle will happen. By using an unrealistic goal as a basis for accountability, the Act devises incentives that make it harder to achieve that goal, chiefly for black American students facing even lower odds of being taught by good teachers. If the incentives play out in the way we have described, however, the NCLBA would operate to ensure that ‘many students indeed are left behind,’ particularly those who are already disadvantaged. Besides, given the connection between test performance and socioeconomic status, the ultimate irony is that the NCLBA may reinforce the impression that underprivileged students cannot achieve at high levels and that the vast majority of schools that teach such students are failures.

Evenly significant, the Act shows why the federal government should get off the federalism fence. In an attempt to drive education policy without intruding too greatly upon state authority, the federal government has combined regulatory stringency vis-à-vis the Adequate Yearly Progress with regulatory laxity regarding the quality of standards and assessments.

The Supreme Court’s decision in *Grutter*, however, shines as a glimmer of hope for the renewal of *Brown*’s promise. *Grutter* reaffirms *Brown*’s commitment to meaningful educational integration and goes one step further by recognizing the enduring benefits that educational diversity confers upon all students and society as a whole. But *Grutter* alone can do nothing to improve educational integration and diversity; that is up to Americans. We can only hope that America, as a society, takes advantage of the opportunity *Grutter* has provided.

Endnotes

¹ In his article “Leaving Children Behind: How No Child Left Behind Will Fail our Children” (Nov. 2003), Monty Neill, the executive director of the National Center for Fair & Open Testing, presented a litany of fatal flaws in the No Child Left Behind Act. The law as passed, he argued, will have precisely the opposite effect of its name, with the most damage being done to low-income and minority students.

² Prior to the NCLBA, the most recent reauthorization of the Elementary and Secondary Education Act occurred in 1994. See Improving America’s Schools Act (IASA) of 1994, Pub. L. No. 103-382, 108 Stat. 3518.

³ In the same year that it passed the IASA, the federal government enacted Goals 2000, which provided money to states to assist them in developing academic standards for all students. See Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 130.

⁴ Important exceptions include James S. Liebman & Charles F. Sabel, “the Federal No Child Left Behind Act and the Post-Desegregation Civil rights Agenda,” 81 North Carolina Law Review 1703 (2003), and John Charles Boger, “Education’s “Perfect Storm”? Racial Resegregation, High Stakes Testing, and School Resource Inequities: the Case of North Carolina,” 81 North Carolina Law Review 1375, 1434-45 (2003).

⁵ Another strategy would be to exclude these students only from testing rather than barring them from particular school entirely. Earlier studies of state accountability systems documented that schools pursued this strategy by classifying low-income and low-performing students as disabled, which usually exempted them from testing. See Julie Berry Cullen and Randall Reback, “Tinkering Toward Accolades: School Gaming Under a Performance Accountability System,” New York University Law Review, Mar. 2002.

⁶ Even if schools are not automatically converted to Title I schools by accepting a transfer student, in some districts it would not take many transfers to render a school eligible for Title I funding. For example, in a district in which a ten percent poverty rate are eligible for Title I funding, a school with 135 students, none of whom live in poverty, would only need fifteen poor transfer students to become eligible for Title I funding (and the accompanying accountability provisions).

⁷ A school’s ability to refuse to accept transfer students will depend in part on the choice provisions of the NCLBA, discussed later.

⁸ For a description of these programs, see Richard D. Kahlenberg, All Together Now: Creating Middle-Class Schools Throughout Public School Choice. 2000: 130-33, 251-54.

⁹ Even if graduation rates are set at a demanding level, school districts possess administrative tricks to manipulate the rate. In New York City, for example, students who leave a school are given one of a bewildering array of classifications, which are supposed to indicate whether the student dropped out, transferred to another school, moved out of the city, et cetera. These classifications can be used to mask dropouts; students who are pushed out, for example, are often counted as transfers rather than dropouts.

¹⁰ Eric Hanushek, for example, who has argued strongly and consistently that there is no systematic relationship between resources and outcomes, has currently acknowledged that “the effects of teacher quality [are] substantial.” He concludes that “having a high quality teacher throughout elementary school can substantially offset or even eliminate the disadvantage of low socio-economic background.” Hanushek and his colleagues nonetheless argue that the differences among teachers are not readily measured by looking to simple, observable characteristics. For Hanushek’s views on the general relationship between money and outcomes, see, for example, Eric A. Hanushek, “School Resources and Student Performance”, in Does Money Matter?: The Effect of School Resources on Student Achievement and Adult Success. Ed. Gary Burtless, 1996.

¹¹ See, Brief of Amici Curiae for the Center for Equal Opportunity, the Independent Women’s Forum, and the American Civil Rights Institute Supporting Petitioner, *Grutter v. Bollinger*, et al., 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, et al., 539 U.S. 244 (2003) (No. 02-516).

¹² Actually, the majority opinion in *Grutter* relied heavily upon Justice Powell’s opinion in the *Regents of University of California v. Bakke* (438 U.S. 265 (1978) as binding precedent for the proposition that academic diversity was a compelling interest. In *Bakke*, Justice Powell did state that “the ‘nation’s’ future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978). It has been argued, however, that Justice Powell’s statement “does not necessarily contemplate the presence of both blacks and whites among the nation’s leaders, only that the leaders, who might all be white, should be attuned to a diversity of ideas and mores.” (Jack Greenberg, “Diversity, the University, and the World Outside.” 103 Columbia Law Review. 1610, 1618 (2003).

¹³ A “Joint Statement of Constitutional Law Scholars” responding to the Court’s decisions in *Grutter* and *Gratz* provides useful guidance to institutions of higher education in formulating race-conscious admissions policies that pass constitutional muster. Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases, Cambridge, MA: The Civil Rights Project at Harvard University, at 19–22 (2003). It also discusses the impact of *Grutter* and *Gratz* upon the issue of race-conscious policies in the related areas of K–12 public education, government and employment.

Conclusion

The legacy of *Brown* has been mixed at best, a failure at worst. The legal and constitutional triumph of *Brown* not only overturned the *Plessy* dictum, but it also maintained persuasively that separate schools harmed white as well as black children, indeed all Americans. Integrated public schools were envisioned, therefore, as a compulsory stride in the direction of a more egalitarian, more democratic, and, in turn, integrated society. In contrast, *Brown* did not tackle the fundamental issue of the way race is so profoundly entrenched in the narrative of the American society. The decision was an instance of very creative lawyering, but also an example of the dilemma of relying on litigation to grapple with problems relating to social and economic structures, not just the law.

Statistics eerily portray a merely token progress in the desegregation of overwhelmingly black public schools during the first decade subsequent to *Brown*'s endorsement. Noteworthy progression, however, marked the era extending from 1965 to the 1980s. Such xenophobic and bigoted 'scientific' studies against school integration, aspiring primarily to shape public opinion and hereby affect the formulation of public policy, in common with the deep-rooted 'separate but unequal' facilities, sanctioned by the *Plessy* decision (1896), might be positioned at the origin of the failure of school desegregation. Outstandingly, the failure to even out racial segregation is ascribed to *Brown*'s language per se, to its own judgment, and to the possibly-veiled intent behind the decision's issuance.

Though *Brown* was decided in 1954, the Supreme Court, led by Chief Justice Earl Warren, undermined its genuine ruling a year later, in a remedial *Brown II* verdict, by instructing lower federal courts to abide by the desegregation order "with all deliberate speed," entailing gradualism in accomplishment, and hereby placating enormously massive state and local

white resistance. Evenly vital, extrapolation from the use of psychological testing through Kenneth and Mamie Clark's doll test to weigh up the upshot of school segregation on black kids and the Supreme Court's utter dependence on social scientific evidence, rather than on legal precedents, to draw its conclusion in *Brown* was away from being potently cogent. Additionally, decided at a time when the Soviet Union alongside the United States were keenly courting the newly independent nations to convert to their political systems, and when segregation in America was a highly detrimental 'Achilles' heel' in the ideological war against communism, *Brown's* intention might have been a time-adequate retort to the Cold War efforts abroad, and the Red Scare at home more willingly than a pure act of altruism toward black Americans neither a haughty assertion of racial equality and justice.

The remarkable evolution of school integration all through the mid 1960s and the early 1970s, nonetheless, is basically owing to the enactment of such federal regulations as the Civil Rights Act (1964), outlawing racial bigotry in whichever program receiving federal funds; the Elementary and Secondary Education Act (1965), supplying moneys to prop up educational equity; the Supreme Court ruling in *Green* (1968), arguing for instant school integration and the *Swann* decision (1971), backing up busing as a desegregation policy. Yet, mounting white antagonism over and above scathing criticism diluted the viability of the busing way out as a ploy to achieve school integration.

Racial integration of U.S. public education, however, did not last for long as a startling return to intense segregation marked the 1990s and extended to the turn of the new century. Assessment of public opinion with reference to school desegregation, by means of a 1999 Gallup Poll, exposed a high level of appreciation and approval of integrated education amongst both blacks along with whites, and counter to popular conviction private

school white enrollment has remarkably dropped all through the desegregation era. A great deal of the alteration in the proportion of white students in mostly black American schools, as an alternative, is largely a result of a number of inevitable demographic forces such as disparate birth rates, large-scale minority immigration to the United States, and severe discriminatory housing patterns.

Appraisal of the federal educational course of action vis-à-vis school desegregation programs' funding for the past forty years displays strikingly that the federal government was still operating under *Plessy's* 'separate but equal' rubric prioritizing compensatory education over putting into effect *Brown's* school desegregation mandate. Exacerbating the abortive endeavors to remedy educational inequities in U.S. public education, poverty concentration, being in intimate correlation with racial school segregation, is deemed as an inescapable repercussion of resegregation. Research findings illustrated that exceedingly segregated black schools are more liable to contend with the educational impacts of intense poverty, notably on black Americans' school opportunities and attainment levels, while segregated white schools are more or less constantly middle class.

As regards the well-acknowledged studies and potently proved evidence of the tremendous benefits of racial diversity on life chances on top of the educational achievement gains on both black and white students attending desegregated schooling, it is anybody's guess that *Brown* could have had a much greater upshot on the integration of U.S. public education if it opted for desegregation as an educational treatment rather than a closing stage to the awfully embedded patterns of illegal separation of the races.

The widespread return to segregated schooling, furthermore, is an end result of several Supreme Court rulings decided conspicuously

throughout the 1970s and the 1990s. The Supreme Court's handling of such knotty issues as white flight to the suburbs, northern 'de facto' segregated school systems and pervasive inequalities in funding largely between city and suburban schools proved unfavorable in accomplishing desegregation.

Though a lack of white students in major cities banned desegregation and intra-district remedies could not desegregate suburban school districts on account of the scarcity of black students in the suburbs, the Supreme Court in *Milliken* (1974) precluded an inter-district remedy, stoutly needed for effectual school desegregation, unless plaintiffs present proof of an inter-district infringement. The very same year in *Keyes*, the Court tackled the issue of northern school discrimination, where segregated schools were not the product of state laws, asserting that plaintiffs ought to prove deliberate segregative acts affecting a substantial part of the school system. As for incongruities in funding between city and suburban schools, the Supreme Court systematically concluded in *Rodriguez* (1973) that the Equal Protection Clause does not necessitate absolute equality or accurately equal compensation.

Instead of holding schools accountable for intractable separation of the races, America's courts have been steadily tearing down desegregation policies drafted to ensure equal educational opportunities for all Americans. The U.S. Supreme Court issued several rulings, throughout the 1990s, relieving school districts from federal supervision despite the likelihood that resegregation would pursue.

In *Dowell* (1991), the Court ruled that formerly segregated school districts could be released from court-ordered busing once the legacy of segregation has been moderately wiped out. A year later in *Freeman*, the Court held that once a part of a desegregation order is met, the federal court is supposed to cease its desegregation efforts even though other desegregation orders for the very same school system remain in place. The

Supreme Court in *Missouri* (1995) mandated an end to school desegregation order for the Kansas city school proclaiming that the district court's order attempting to magnetize non-minority students from outside district was impermissible since the plaintiffs had not proved an inter-district violation, that the district court is in short of authority to order an increase in teacher salaries and that the sustained disproportion in student test scores did not rationalize prolongation of the federal court desegregation order.

In none of the aforementioned cases did the Supreme Court give weight to the consequences of ending the desegregation order in engendering resegregation. Though some observers argue that the failure to achieve desegregation chillingly replicates intrinsic confines on the power of the judiciary, it is more apt to say that the judiciary's failure lies in the Supreme Court's own options; its decisions stemmed from the conservative ideology of the majority of justices who sat on the Court when those cases were decided.

Brown's broken promise is likewise caused by a lack of political determination. No president since Lyndon Johnson has put forward steps to cope with segregation in housing or schools. No Congress has attempted to handle the problem. There just is not the political will to sort out segregated unequal schools through the legislative process. Equal educational opportunity can be achieved. But living up to the legacy and promise of *Brown* would necessitate considerable effort and audacity by politicians and the courts that has yet to be shown.

Though the federal government attempted to even out educational inequities in U.S. public schools at the threshold of the new century through the endorsement of the No Child Left Behind Act (NCLBA) (2002), presumably aiming at fostering educational accountability by

improving school performance, and hereby, student performance, newly-established dimensions of segregation have instead been generated.

In spite of the perceptibly praiseworthy aspirations of the NCLBA, the new federal measure devises, though inadvertently, inducements that work against their realization. Not only does it uphold segregation by endowing administrators of white and middle class schools with a motive to exclude black American students, the Act also heartens parents to shy away from more integrated schools, given that racially and socio-economically integrated schools are more liable to fall short of making Adequate Yearly Progress than predominantly or exclusively white and middle class ones. The choice provision required by the NCLBA, on the other hand, offers slight hope of promoting integration as it is more likely to be maneuvered by school officials. The temptation to keep out low-performing students, notably black Americans, is evenly enhanced by the Act and can barely be denied. Above and beyond, over-relying on testing and students' attainment, the NCLBA bolsters the tendency of good teachers to choose relatively wealthy, white and high achieving schools, and hereby buttresses the discriminatory and unequal distribution of good teachers.

Considered as an "unfunded mandate," the NCLBA displays a lack of dedication on the part of the Bush Administration to follow through its promise of improving education for all students, by requiring completion without providing resources. Yet, the Act proffers a prospect to reflect on an issue that has obtained relatively little scholarly attention, namely, the proper role of the federal government in education law and policy. Historically, that role has been fairly constrained and primarily directed toward special programs, typically targeted at particular populations such as the poor or the disabled. With the NCLBA, the federal government has moved to center stage in education.

Standing in stark contrast with the NCLBA's developed new dimensions of segregation, a newly-granted recognition of the enduring significance of *Brown's* principles was laudably proclaimed by the Supreme Court in *Grutter* (2003) holding that educational diversity is a compelling governmental interest and that, to that end, an applicant's race may be deemed as one of innumerable factors in making admission decisions. *Grutter* went one step further than *Brown* by recognizing the countless and lasting benefits that a diverse student body bestows not only upon minority students, but also upon the entire student body and society as a whole. Hopefully, *Grutter* materialized to mend *Brown's* broken promise five decades after its enactment, it is left to the American society, however, to live up to *Brown's* rehabilitated legacy at the turn of the new century.

In point of fact, Courts can rule on the legality and constitutionality of positions, and can even mandate steps to be taken to implement those rulings. But the absence of national will and leadership to realize those rulings will languish the hoped-for progress. The Justices had no magic wand to do away with racial segregation, of course, but in *Brown* they had affirmed, in effect, that racial inferiority was an idea whose time was up. Thus, the tendency to equate the *Brown* decision with the whole of school integration history is flawed and misleading. In and of itself, that decision is neither responsible for the too-few subsequent moments of integration's success, nor the too-many subsequent moments of integration's failure. In effect, the hope and promise of *Brown* has foundered on the shoals of American's foundering commitment to equality and justice, not to mention freedom. In other words, the failure of integration is America's failure, not the failure of *Brown*. Put another way, to the extent that it has been a failure, the decision has failed society because society has failed the decision.

The hope and promise of *Brown*, in this view, has to date been subverted and squandered by a leadership and a citizenry whose responsibility has been to make integration happen. The failure, therefore, is neither with the decision's powerful egalitarian and democratic vision, nor the committed and visionary lawyers who bequeathed it to Americans. Rather, the failure rests with the decision makers and the rest of Americans. The problem rests with those who were entrusted with the power to make integration happen but have instead lacked commitment to, even opposed, the vision of integration, not to mention having worked against it, and thus undermined its realization. Making integration work is a vital national goal. Absolute centrality of and a firm commitment to bringing about integration at every level, including economic, social, political, and even cultural, is thus strongly needed.

It is highly debatable that America as a nation has ever actually agreed upon first principles in the matter of integration. The concept emerged in the second half of the twentieth century as part of the postwar American national ethos critically spurred on by a variety of movements for social change, most importantly the Modern Civil Rights Movement. All of this transpired, however, without the kind of coherent national discussion that might have led to a national consensus regarding a set of guiding first principles. What is integration? Does America as a nation really want integration? If it truly does, how does it go about making it a reality? Given the lack of clarity on these fundamental issues, it is no wonder that in terms of theory and practice, America has often drifted, been sidetracked, and stumbled badly. This very lack of clarity has only aided and abetted the maintenance of an unequal and unfair status quo, leading to a history of integration replete with ambiguity, ambivalence, half-backed schemes, missed opportunities, and outright opposition.

The legacy of *Brown* has indeed been mixed at best, a failure at worst. In the end, however, that very legacy, whether seen failed or mixed, illuminates and signifies an even larger question: what kind of society do Americans really want? Do they really want a truly egalitarian and democratic society? Until Americans as a nation can commit themselves to a concerted national effort to a more egalitarian and a more democratic society, America's schools will continue to replicate, even exacerbate, inequality and injustice.

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