Remark: Brown v. Board: Revisited

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[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and Truth, outweigh all that the mixed school can offer.¹

As an African-American lawyer involved in the legal struggle to equalize opportunity for all Americans during my entire professional life, I have been troubled by the dilemma that presents itself when the ideal of integration conflicts with the goal of enhancing educational opportunity. What is the appropriate solution, in the context of implementing a desegregation program, when the interest in achieving or maintaining racial balance results in a denial of opportunity to African-American schoolchildren?² This dilemma presents itself in three broadly defined circumstances: 1) where a desirable and effective educational program of limited capacity is made available on an integrated basis; 2) where limited resources require a choice between maximizing integration and maximizing the quality of education for African-Americans; and 3) where honest efforts to meet the educational needs of African-American children through race-specific programs are met with resistance as resegregative. In each of these situations, administrators and policymakers are

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² I recognize that there are many who would argue that an equally perplexing dilemma arises when the goal of integration conflicts with the goal of enhancing educational opportunity for White children. This paper will not attempt to address that question since it assumes that the goal of eliminating unlawful segregation and, to the extent practicable, its lingering vestiges, supersedes as a matter of law virtually all other interests inconsistent with that goal, including the interest of majority group children in maintaining a privileged status. Enhancing educational opportunity for minority children, however, has always been the essence of desegregation remedies.
faced with a difficult choice between meeting the educational needs of African-American children and complying with the integration mandate that is implicit in current desegregation discourse.

For example, where a highly attractive program, such as a particular magnet school, does not attract a sufficient number of White applicants to provide an appropriate balance for the number of Black applicants, the conflict between integration and quality education opportunities poses difficult problems. The interest in maintaining racial balance would compel administrators to admit only enough Blacks to “balance” the Whites admitted even if such a practice resulted in a substantial number of seats remaining unfilled. An interest in maximizing quality education opportunities for African-American children would compel administrators to admit African-American applicants until all seats were filled, even if the admission of large numbers of African-American children resulted, through “tipping,”3 in the eventual development of an all Black program.4

A similar dilemma is posed where limited resources force allocation decisions. Most desegregation efforts include some transportation component. The administrators of a program may propose to purchase a limited number of large capacity buses to transport children for desegregation purposes. With a smaller number of buses, longer routes will be necessary and the average ride time for the children involved will necessarily be longer. An alternative proposal would be to purchase a larger number of smaller buses, thereby shortening the average ride time. The costs involved in the smaller bus alternative would of course be higher both in terms of the initial purchase price and long term operating costs. A focus on integration as the primary goal of the desegregation program could lead one to the conclusion that since both options effectively move children from a segregated setting to an integrated setting, the less costly method should be preferred, freeing resources for other integration promoting initiatives. A focus on the quality of education received might compel the conclusion that the longer ride time impedes the education process.

3. The “tipping point” is generally seen as that point where minority enrollment reaches a level that results in a massive departure of Whites. Researchers set the tipping point in the general range of 30% to 40% Black. Christine H. Rossell & Willis D. Hawley, Understanding White Flight and Doing Something About It, in EFFECTIVE SCHOOL DESEGREGATION 157, 165–71 (Willis D. Hawley ed., 1981). See also Christine H. Rosell, Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?, 12 J. LEGAL STUD. 69, 80–94 (1983) (summarizing research on the effects of White flight).

to an extent that the additional expense of the smaller bus option would be justified.

Another situation in which the dilemma presents itself is where sincere efforts are made to create educationally innovative programs targeting particular groups of "at risk" students.\(^5\) The integration ideal would compel a decision against the creation of an all African-American classroom or school. The interest in providing quality education for African-American children might justify such targeting for legitimate sociological and pedagogical reasons.

My concern is that policymakers, lawyers, and judges, because of the Supreme Court's unanimous decision in \textit{Brown v. Board of Education}\(^6\) and the confirming interpretations of that decision over the past several decades, have a fixation on integration as the primary remedy for school segregation. It is as if we actually believe that the damaging effects of segregation in American education and the resultant complexities involved in educating America's diverse youth can be corrected by the simple expedient of appropriately mixing Black and White bodies. While no one can dispute that the ideal of integration should be vigorously pursued, I am concerned that pursuit of that ideal, with what appears at times to be a myopic zeal, may hamper the development of potentially effective remedies for the lingering effects of segregation. It is also worth noting that blind allegiance to the integration ideal over the last forty years has accomplished relatively little in terms of achieving a truly integrated public education system.\(^7\)

When I was asked to participate in a rethinking of the \textit{Brown} opinion, I saw it as an opportunity to suggest a modification to the opinion that would have allowed policymakers the flexibility to address the real concerns that affect the education of African-American children. It is clear that our fixation on integration as the solution derives from Chief Justice Warren's opinion in \textit{Brown}. In my view, while integration may well have been the best strategy to address the concerns of the African-American community in 1954, it may not be the best strategy in 1994 and beyond. There are circumstances in which a blind determination to achieve integration works against the goal of improving


\(^{6}\) 347 U.S. 483 (1954).

\(^{7}\) Data suggests that public schools today are at least as segregated as they were in 1968. \textit{See GARY ORFIELD & FRANKLIN MONFORT, Status of School Desegregation: The Next Generation (1992)GARY ORFIELD, The Growth of Segregation in American Schools: Changing Patterns of Separation and Poverty Since 1968} (1993). Why the integration strategy has not accomplished an integrated public education system is a question beyond the scope of this paper.
educational opportunity. When such is the case, policymakers should have the flexibility to implement policies that, at the least, do no damage to the quality of educational opportunities provided, and preferably, maximize their quality and quantity.

I believe that the Brown opinion could have been written in a way that would provide the necessary flexibility. I have come to this conclusion with the inestimable benefit of hindsight; yet even with that hindsight, I cannot conclude that Brown was wrongly decided or that its strategists were misdirected. What I can say is that today, an inflexible allegiance to the ideal of integration that produces an impediment to the maximization of educational opportunity for African-American children is wrong. The Brown opinion could have been written so as to provide the flexibility that is needed to create educationally effective remedies for the vestiges of segregation. It is the purpose of this essay to provide a rationale for that modification.

I. THE QUESTION

After four decades of school desegregation effort under Brown v. Board of Education, American cities have become more segregated by race and income, and public schools have continued to deteriorate. Reasonable observers of the American educational system will readily conclude that despite Brown, our system of education does not meet the needs of a majority of our African-American students. Today, the majority of Black students “experience 9 to 13 years of inconsequential public education and leave school, with or without a diploma, deficient in basic skills, marginally literate, and confined to lower levels of employment or virtual unemployability.” A number of commentators and researchers recognize the state of education for African-Americans as troublesome, but argue that improvements in the quality of education for Blacks and in a variety of other areas are evidence of the success of the desegregation effort over the past forty years. Others point out that the racial dimension of

desegregation accounts for only a portion of the positive results found, and that the economic level of the students in attendance plays an important part in individual student performance.\textsuperscript{11} Others, while acknowledging limited success in achieving a degree of improvement in several areas, point to the loss in the Black community of many high quality Black schools, the isolation, insensitivity, and rejection that many Black students experience in White dominated school settings, and the lack of significant gains in the tested academic achievement of Black students as evidence of the failure of the desegregation effort.\textsuperscript{12}

\begin{itemize}
\item MAHARD, DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH 35–45 (1982) (rise in tested achievement scores and in I.Q. scores in desegregated schools); ROBERT L. CRAIN & JACK STRAUSS, CENTER FOR SOCIAL ORGANIZATION OF SCHOOLS, THE JOHNS HOPKINS UNIVERSITY, SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT (1985) (students who experienced desegregated education more likely to work in private sector White-collar and professional jobs, while those in segregated schools more likely to work in government and blue-collar jobs). See also, James McPartland & JoMills Braddock, Going to Colleges and Getting a Good Job: The Impact of Desegregation, in EFFECTIVE SCHOOL DESEGREGATION 141, 146, 150 (Willis D. Hawley ed., 1981); James McPartland, Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?, 42 LAW & CONTEMP. PROBS. 108, 110–13, 124, 131 (1978) (students who attend desegregated schools more likely to attend college, complete more years of college, and have better jobs); James S. Liebman, Desegregation Politics: “All-Out” School Desegregation Explained, 90 COLUM. L. REV. 1463 (1990) (among African-American children attending desegregated schools the likelihood of teenage pregnancy, dropping out, and delinquent behavior is substantially lower than among African-American children in segregated schools); Jomills Henry Braddock et al., A Long Term View of School Desegregation: Some Recent Studies of Graduates as Adults, 66 PHI DELTA KAPPAN 259, 260 (1984) (Blacks and Whites who attended integrated schools more likely to live in integrated neighborhoods and have personal relationships with persons of the other race than those who attended segregated schools).
\end{itemize}
There is general agreement on at least two points with regard to our forty year school desegregation effort—the racially integrated school systems we sought have not been produced to the extent hoped, and the equal educational opportunities envisaged by the architects of the Brown strategy have not been realized. There are those who argue that the desegregation effort has failed to achieve either racial balance or educational equity for Black children, and therefore the effort should be re-focused on enhancing the quality of education provided in Black schools. Others argue that the racial balance approach has not been given the time or the resources to achieve full success, and that the effort to integrate America's education system should be significantly enhanced. There are arguments offering educational voucher systems as a means of improving public schooling, and “controlled choice” plans as a means of both enhancing the quality of education and fostering desegregation. There are suggestions that multiculturalism is the appropriate focus for the effective education of all Americans. Others offer afrocentrism as a strategy for enhancing the academic achievement of African-American students. There have been efforts to establish publicly supported all-Black, or even all-Black-male schools as a means of enhancing the chances of success for these currently “at risk” individuals.

18. See supra note 5.
Some of our greatest minds have been grappling with this dilemma for as long as there have been free Blacks in America. Even during the development of the strategy for pursuing the school desegregation effort in the early 1950s, it was not universally agreed that integration was a more appropriate solution than equalization. As Jack Greenberg, former Director-Counsel of the NAACP Legal Defense and Education Fund, noted,

In some of the school cases, plaintiffs and the local NAACP had come to us because they wanted to integrate. In others, the impetus stemmed from a desire to equalize badly inferior buildings or get transportation where Whites rode to nearby schools and Blacks walked or were bused past the White school to far-off Black schools.

As Judge Robert L. Carter noted, “[w]hile we fashioned Brown on the theory that equal education and integrated education were one in the same, the goal was not integration but equal educational opportunity.” In the early 1980s, and even today, the debate continues.

of racially identifiable schools looks very much like the wrong that was outlawed in Brown, and critics have questioned whether the call for a diminishment in focus on racial integration and a concern for enhancing the quality of education provided to Black children is a “return to Plessy v. Ferguson.” See, e.g., Miller & Repa, Equity and Excellence: An Emerging Trend in the Desegregation of Schools, presented at the Daisy Bates Summit (1991) (unpublished manuscript on file with author). Even though I have at times resorted to such hyperbolic advocacy, I recognize that there is a difference between the state mandated “separate but equal” allowed in Plessy and state sponsored race conscious programs narrowly tailored to achieve compelling governmental goals. See, e.g., Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987). Racial separatism may under appropriate circumstances serve as a positive empowerment for people of color. See Frederick Hord, African Americans: Cultural Pluralism and the Politics of Culture, 91 W. VA. L. REV. 1047 (1989); T. Alexander Aleinikoff, A Case for Race Consciousness, 91 COLUM. L. REV. 1060 (1991). Under inappropriate circumstances, however, it is unconscionable. The danger of course is in who decides, and how it is decided, that any particular circumstance is appropriate.

20. For a review of our historically shifting attitude on this separation/integration quandary, see Derrick A. Bell, Chapter 7 in Race, Racism, and American Law (2d ed. 1980).
II. BROWN'S ANSWER

In Brown, the Supreme Court declared that "[s]eparate educational facilities are inherently unequal." One year later, in Brown II, the court ordered that de jure segregated schools be desegregated "with all deliberate speed." After thirteen years of inactivity, ineffective activity, and obvious obstruction, the Court in Green v. School Board of New Kent County charged all school districts in non-compliance with Brown with an affirmative duty to develop plans "necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green, while establishing "unitary status" as the goal of the desegregation effort, failed to provide any clear measure for determining how or when unitary status would be achieved.

Since Green, courts that have been faced with the question of how to identify the successful end of a desegregation effort have answered it quite differently. The Supreme Court's effort to answer the question has focused primarily on the extent to which an acceptable level of racial balance has been achieved. The Court's focus on racial balance is understandable in light of the

27. See, e.g., Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964) (county school system was closed for four years to avoid desegregation; public funds were used to support White private schools).
29. Schools that failed to comply with Brown were those that continued to operate "dual systems," the indicia of which were found to be, inter alia, segregation among students, faculty, and staff; segregation of transportation; and segregation of extracurricular activities and facilities. Id. at 435.
30. Id. at 437-38.
31. Id. at 435.
32. United States v. Overton, 834 F.2d 1171 (5th Cir. 1987) (districts that have rid themselves of all vestiges of past discrimination); Pitts & Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989) (districts that have maintained at least three years of racial equality in the six enumerated Green categories); Dowell v. Board of Educ., 890 F.2d 1483 (10th Cir. 1989) (any district currently having desegregated student assignments); Georgia State Conference v. Georgia, 775 F.2d 1403 (11th Cir. 1989) (distinguishing between a "unitary school district" and a district which has achieved "unitary status").
33. The Supreme Court has consistently discussed school desegregation in terms of the Green factors; that is, the extent to which a system has met its affirmative duty to desegregate in six critical areas. See supra note 29. In Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991), the Court addressed the question in terms of "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." The Dowell Court made specific reference to the Green factors as those facets of school operations that must be scrutinized. It was not until the Court's decision in Freeman v. Pitts, that it recognized that quality of education was also a legitimate concern. Freeman v. Pitts, 112 S. Ct. 1430, 1446 (1992). Most recently, the Court heard argument in Missouri v. Jenkins, 115
holding in Brown that "in the field of public education the doctrine of 'separate but equal' has no place," and the fact that the most visible and obvious vestige of segregation is the physical separation of Black and White children in school.

The declaration that separate was inherently unequal and the requirement that all students receive the same educational opportunity by eliminating differences in schools based on race may have been a reasonable solution in 1954. As of today, however, we know that integration has not been accomplished to the degree anticipated, and even where achieved, the evidence suggests that integrated education is often problematic. In most large urban areas, demographics render integration of student bodies in all schools virtually impossible. Even where physical integration is achievable in a school building, social integration has proved elusive and physical segregation within the building has become the commonplace.

In light of the initial goal of the desegregation effort, to improve the educational opportunities for Black children, the more critical contemporary issue is not in determining how much integration is enough, but what "desegregation" activity is truly in the best interest of African-American school children, the intended beneficiaries of the effort. W.E.B. DuBois set what I consider the appropriate tone for this debate in the epigram to this essay-Black children need "neither segregated schools nor mixed schools. What [they need] is Education." The goal of this essay is to explain, with the benefit of our experience and current knowledge, the basis for a revision of the Brown opinion. In approaching this task, four factors influence my thinking. First, there is the

S. Ct. 2038 (1995), to address the appropriateness of utilizing measures of academic achievement in determining the success of desegregation efforts. The district court below, monitoring the implementation of its desegregation decrees, had ordered continued funding of "quality education programs" in the Kansas City Metropolitan School District (KCMSD). Id. at 2042. The Court of Appeals for the Eight Circuit affirmed by stating that "[t]he success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the systemwide reduction in student achievement in the KCMSD schools." Jenkins v. Missouri, 11 F.3d 755, 766 (8th Cir. 1993).

34. Brown, 347 U.S. at 495.
35. See supra note 7.
38. CARTER, supra note 22.
39. See DuBois, supra note 1, at 328.
consistent criticism of Chief Justice Warren's opinion as based not on neutral constitutional principles but on contestable social science data.\textsuperscript{40} Second, there is the concern that the remedy that grew out of the \textit{Brown} decision replicates the wrong in that it stigmatizes African-Americans as second class citizens.\textsuperscript{41} Third, there is the concern that the effort to enforce the \textit{Brown} mandate has been unsuccessful in enhancing the academic achievement or life chances of African-American children.\textsuperscript{42} Finally, there is my personal reluctance to challenge in any significant way the monumental accomplishment of the brilliant lawyers, scholars, and activists who have inspired me through my professional life. I believe that \textit{Brown v. Board of Education} could have been decided in a way that would satisfy at least the first two concerns, while at the same time providing the flexibility necessary for the exploration of a variety of approaches to solving the problems of educating an economically and racially diverse American population in the late 20th and early 21st century.

As written, the \textit{Brown} opinion rendered inconsequential the tangible differences between Black and White education under segregation and grounded its finding of an equal protection violation in the fact of segregation and its presumed harm to African-American children. To support its finding of harm to African-American children, the Court relied on evidence of the psychological effects of segregation. The use of that data has served as the focal point for criticism of the Court's decision as not based on neutral principles of constitutional analysis. That same data has also resulted in a branding by the Court of the African-American children subjected to segregated education as perhaps being permanently damaged.\textsuperscript{43}

Focusing not on the harm of segregation so much as the fact of segregation based on an unjustifiable racial classification would both eliminate the stigmatizing of Black children as being damaged, and provide a neutral principle upon which the equal protection violation could have been based. Recognizing the tangible differences that existed between the Black and White education systems extant at the time and the relative inadequacy of the Black system to meet the educational needs of its students, would have provided a basis for a broader array of potentially effective remedial approaches than could be justified under the racial balance approach adopted in \textit{Brown}.

\textsuperscript{40} Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
\textsuperscript{41} See, e.g., Kevin Brown, Has the Supreme Court Allowed the Cure for DeJure Segregation to Replicate the Disease?, 78 CORNELL L. REV. 1 (1992).
\textsuperscript{43} See infra notes 40, 44-45.
The modifications that I propose do not challenge in any significant way the work of the Brown strategists. They do recognize, however, that the goal of the desegregation strategy was not to achieve integration for the sake of integration, but for the sake of improving educational opportunities for African-American children. With the modifications I propose, segregation as it existed in 1954 would remain unconstitutional. The remedy for that segregation, however, is not primarily integration, and integration is not the primary goal of the remedy. Integration is merely one of many components of a remedial scheme designed to enable school systems to serve equally the needs of all students.

III. SEGREGATION'S HARM

The Brown opinion is grounded in the notion that segregation inflicted harm on African-Americans. The harm identified by the Court included psychological harm and educational harm. Commentators have advanced several other theories of harm that could have justified the Brown remedy. These theories generally include stigmatic harm, corruption of the political process, denial of associational rights, and invidious value inculcation. None of these theories fully describes the damage done by segregation in public
schools and none alone justifies a remedial scheme that could repair that damage.

The educational plight of African-American children cannot be attributed to their segregation in the public schools alone, just as it cannot be attributed alone to discrimination in housing, employment, access to political power, or the many other places in American life where racism and other vestiges of slavery appear. As the Court noted in *Swann v. Charlotte-Mecklenburg Board of Education*:

> We are concerned . . . not with the myriad factors of human existence which cause discrimination in a multitude of ways . . . . The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.

Recognizing the limited impact that judicial action in the public schools can have in improving the general condition of African-American citizens or the educational condition of their children, and recognizing the need to limit the scope of constitutional remedies to the constitutional wrongs found, the Court in *Brown* could have increased its baggage-carrying capacity and created the opportunity for far greater flexibility in future remedial action had it refocused its finding of harm and recognized the need for action on a broader scale.

It is generally understood among commentators that there are two basic models of civil adjudication in the American system of justice. The traditional dispute resolution model has as a defining feature the concept that right and remedy are interdependent. The scope of the remedy under this model is derived from the substantive violation, and compensation is in proportion to the harm done. Under the dispute resolution model, the party structure is bipolar—a contest between at least two unitary interests. The public law litigation model, on the other hand, is characterized by an amorphous party structure, and relief is forward-looking and not logically derived from the substantive harm done, but broad, flexible, and policy oriented.

51. Id. at 22.
53. Chayes, supra note 57, at 1282.
54. Chayes, supra note 57, at 1302.
While Chief Justice Warren seemed to be engaged in dispensing classic expository justice under the public litigation model, he also seemed to be bound to a traditional dispute resolution model of adjudication. The opinion approaches the questions presented with a clear concern for identifying tangible harms to the plaintiffs that could be made right by judicial decree. Perhaps the Chief Justice was drawn into this method of analysis by a need to respond to Justice Brown's opinion in *Plessy v. Ferguson* finding that segregation produced no harm to African-Americans. Perhaps the Court saw a need to dramatize the harm done to the plaintiff children in order to generate sufficient feelings of collective national guilt to pull together the political consensus it viewed as necessary to make the decision as palatable as possible to the American public. Perhaps the Court was truly convinced by the social science testimony offered by plaintiffs. Perhaps the Court wished to limit the impact of its decision only to the public schools, and thereby avoid the appearance of effecting segregation in other aspects of American life. Whatever the reason (more likely, all of these factors played a part in shaping the Court's opinion), the Court's concern for establishing the harm of segregation seems to have structured its description of the constitutional wrong, and consequently, its construction of a remedy. Unfortunately, the remedy it constructed had only minimal success in either providing integrated educational experiences for, or improving the quality of education available to, African-American children.

Moreover, the Court's approach has served to perpetuate the myth of Black inferiority and to detract from a potentially more effective remedial focus. Of course, the exclusive adoption of any one of the many theories of harm advanced since *Brown* would carry similar limitations, in that the remedy designed to address the harm found would likely be minimally effective because of its narrowness.

An approach to resolution of the school cases that would have offered greater potential for equalizing educational opportunity for Black children

55. While I seem to criticize Justice Warren for not fully embracing the "public law" model, I recognize that his *Brown* opinion is what prompted the scholarly movement recognizing the "public law" litigation model. The *Brown* Court can hardly be faulted for failing to apply fully a model of adjudication that had not yet been fully articulated.

56. 163 U.S. 537 (1896).

57. *Plessy* had rejected the notion that segregation was harmful to African-Americans, stating that "enforced segregation of the two races stamps the colored race with a badge of inferiority . . . not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Plessy*, 163 U.S. at 550.

would have been for the Court to focus more clearly on its role as a dispenser of expository justice. Had the Court embraced in these cases its function of giving positive meaning to the values expressed in the Fourteenth Amendment, and not viewed itself as resolving a dispute by identifying harm and devising a compensatory remedy, it could have avoided the criticism it has been subjected to for both relying on social science data rather than on neutral principles,\textsuperscript{59} and for re-victimizing the primary victims of segregation.\textsuperscript{60}

Moreover, by identifying the violation without reference to the damage purportedly done by segregation to Black children, the Court could have recognized the significant damage actually done, and established a basis for a broader array of remedial approaches. This is not to say that segregation did no harm. The harm, however, was not that segregation, in and of itself, somehow damaged the psyches of Black children in ways likely never to be undone,\textsuperscript{61} nor that it retarded their educational and mental development.\textsuperscript{62} The harm done under segregation, as it existed in 1954, was that Black children were provided an inferior educational opportunity in three major ways. First, the educational opportunity offered Black children was diminished by virtue of the severe underfunding and undervaluing of the schools to which they were relegated. Second, the education system was unresponsive to the educational needs of Black children that were a product of the unique place in American culture that they occupied as a result of slavery, segregation, and racism. Lastly, all children were denied the better educational opportunity that presumptively exists in a setting where children can interact and learn in a pluralistic, non-

\textsuperscript{59} Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

\textsuperscript{60} Kevin Brown, Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?, 78 Cornell L. Rev. 1 (1992). As an African-American who received his early education in the segregated Black schools of Jackson, Mississippi, in the 1950s, I have always been offended reading the personally insulting words of the Court that "segregation... has a tendency to (retard) the educational and mental development of Negro children." Brown v. Board of Educ., 347 U.S. 483, 494 (1954).


\textsuperscript{62} There is evidence that African-American children can learn in an all Black setting. See, e.g., Thomas Sowell, Black Education: Myths and Tragedies 259-63 (1972); U.S. Dept. of Educ., Schools That Work: Educating Disadvantaged Children 17 (1987).
Symposium

rational setting. Recognizing the harm of segregation in these terms rather than in terms of damage to a particular set of plaintiffs would have allowed the Court to construct more flexible and meaningful remedies.

IV. NEUTRAL PRINCIPLES

The Warren court was wise not to rely solely on the inferior resources that had consistently been provided to Black schools as the basis for its finding of inequality. A finding of inequality only in the allocation of resources might, in the long run, justify as a remedy only the redistribution of resources. An exclusively redistributionist remedy would leave available to recalcitrant judges and public officials the discretion to find equality where it clearly did not exist, as had been the case under Plessy. At the time of the Brown decision, the efficacy of this approach had been debated in the Black community for over one hundred years, and the conventional wisdom was that integration was the way to ensure that Africa-American children could be assured of equal educational opportunity. In the view of the Brown strategists, and apparently the Court, a simple redistribution of resources could not eliminate the adverse psychological and developmental effects of the then segregated schools. The question, whether an end to segregation could either eliminate those effects or achieve the ultimate goal, equal educational opportunity, appears to have either been assumed to be answered in the affirmative or lost in the shuffle.

I believe that a more direct and effective approach would have been for the Court to have fully embraced its expository function and grounded its decision in the notion that state-imposed segregation of the races violated the equal protection of the law mandated by the Fourteenth Amendment even without regard for the unequal allocation of public resources or the harm done to Black children. While a reading of the text of the Fourteenth Amendment may not clearly evidence the intent of its ratifiers with regard to the effect of the amendment on extant segregated schools, it could have been made clear in Brown that the general language used, "equal protection," is broad enough to

64. Id. at 118. Greenberg cites Judge Robert Carter's recollection of the period:
   I believe that the majority sentiment in the Black community was a desire to secure
   for blacks all of the educational nurturing available to whites. If ending segregation
   was the way to that objective, fine; if, on the other hand, securing equal facilities
   was the way, that too was fine.
   Id.
be reasonably construed as prohibiting state enforced racial segregation in public schools, *Plessy* notwithstanding. The neutral principle relied on under this analysis is that the use by government of a racial classification without a compelling governmental interest constitutes the violation.\(^6\) The mere existence of state-supported segregation of the races was enough to find the constitutional violation and effect a remedy of unsegregation.\(^6\) The fact that the purpose of segregation was “to stigmatize and subordinate” a class of people on the basis of race\(^6\) makes the absence of any legitimate government purpose clear. Had the Court relied on the simple fact of unjustified state-supported segregation as the basis for its finding, it could also have avoided the insult to the African-American community that its questionable findings of psychological and developmental damage entail.\(^6\)

Beyond the equal protection violation found as a result of the existence of unjustified state supported segregation, the Court could have found on the facts presented in the cases before it, and as a matter of historical fact, that the segregated schools that served the educational needs of the Black community were generally not only insufficiently funded, and therefore unequal by all objective measures,\(^7\) but also oriented on a model that perpetuated the

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\(^6\) My colleagues at this conference addressed as a question of constitutional interpretation whether there was a legitimate constitutional underpinning for the *Brown* decision. Professor Perry concluded that the Privileges or Immunities Clause of the Fourteenth Amendment would have been a more supportive basis for the decision. Professor Kelley found that racial segregation in the public schools would violate both the Privileges or Immunities and Equal Protection Clauses. Professor Maltz finds nothing in section 1 of the Fourteenth Amendment that would preclude a state from mandating segregation of the races in its public schools. My concern here is that whatever constitutional basis we settle on to justify our conclusion that the racial segregation practiced in public schools as of 1954 was unconstitutional, we understand the need for developing effective remedies for the real harm done. There was ample support for the position that such segregation violated equal protection at the time of *Brown*. See *Strauder v. West Virginia*, 100 U.S. 303 (1879); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *Guinn v. United States*, 238 U.S. 347 (1915); *Buchanan v. Warley*, 245 U.S. 60 (1917). For the purposes of this paper, I see no reason to challenge that conclusion. Even our noted contemporary originalist, Professor Bork, suggests that the original understanding of the Fourteenth Amendment supports a finding of an equal protection violation in the case of segregated schools. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 76–82 (1990).

\(^7\) The term “unsegregation” is used to distinguish this remedy from “desegregation,” which has acquired a variety of meanings. By unsegregate, I mean to cease using race as the sole factor in making school assignment decisions.


\(^6\) See supra notes 57, 59–60.

\(^6\) See, e.g., Denise C. Morgan, *What Is Left To Argue in Desegregation Law?: The Right to Minimally Adequate Education, 8 HARV. BLACKLETTER J. 99 (1991)* (Black schools were insufficiently funded, staffed by less qualified teachers than those used in White schools, offered a narrower curriculum
messages of Black inferiority and White superiority. These tangible deficiencies in the education system that were integral components of the segregation practiced at that time bolster the segregation violation and may constitute an additional equal protection violation in that the system, as operated, failed equally to address the educational needs of African-American children, thus denying them an equal educational opportunity. It was not that the message of white supremacy had been internalized by Black victims to their psychological and emotional detriment, nor was it that segregation denied associational rights, corrupted the political process, or inculcated invidious values that constituted the equal protection violation. It was both that the racial classification could not be justified and that an educational system oriented on such a morally and factually deficient world view as white supremacy was wholly inappropriate and ineffective—particularly for the education of African-American children. The system of education at issue in Brown failed to accommodate equally the educational needs of African-American and White children.

V. REMEDIES

Unlike the original Brown opinion, which justified a remedial focus only on unsegregating the races in public schools, the finding proposed here would call for a remedy that transcends the racial dimension and addresses the educational disparities that exist in American schools as a result of segregation as practiced before Brown. By requiring schools that serve African-American children to meet their educational needs on a basis equal to that to which White children's needs are met, the Court could have required education providers to address more specifically and effectively the uniquely different situations in which Black and White children found themselves as a result of segregation.


71. "[T]he fundamental vice was not legally enforced racial segregation itself,... this was a mere by-product, a symptom of the greater and more pernicious disease-white supremacy." Robert L. Carter, A Reassessment of Brown v. Board, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 23 (Derrick Bell ed., 1980).

72. It seems clear that such a system is ineffective and inappropriate for the education of White children as well. The argument could therefore be made that so long as the system is equally ineffective and inappropriate, there is no equal protection violation. I doubt that many would seriously contend, however, particularly in light of the resource allocation inequities and the clear purposes of segregation, that Blacks and Whites were equally disadvantaged under segregation as it existed at the time of Brown.
Far more important than requiring that the same educational opportunity be provided to Black and White children is that each group receive educational programs that work for them. It is true that since the Supreme Court's decision in *Milliken II*, the possibility that a court could order the kind of relief that would clearly be justified under my revision of *Brown* is enhanced. Despite its broadening of available potential remedies, the Court's decision in *Milliken II*, because it provided what appeared to be an alternative to integration, was viewed by many proponents of equal educational opportunity for African-Americans as a major setback. Consequently, even after *Milliken II*, remedial and compensatory educational programs were largely thought of as ancillary to the primary goal of eliminating segregation, and were justified either on the basis that they were a useful tool for encouraging integration or as an alternative to the preferred remedy of integration where integration was not feasible.

My shift in focus for *Brown* sets a tone that provides to those responsible for designing remedies for segregation the flexibility to reach beyond mere integration as the solution. Indeed, this shift in focus provides positive constitutional support for many of the race specific programs now advanced by some educators. Moreover, it calls for remedies that work to accomplish the original goal of the *Brown* strategists, to provide equal educational opportunity for African-American children.

Measuring the extent to which each group is provided equal educational opportunity must go beyond both a simple assessment of the extent to which they are integrated and a simple comparison of resources expended; instead, that

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76. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 291–92 (1977) (*Milliken II*) (Marshall, J., concurring) ("[T]hat a program of remediation is necessary to supplement the primary remedy of pupil reassignment is inevitable."); *Bradley v. Baliles*, 639 F. Supp. 680, 688 (E.D. Va. 1986) ("The elimination of the vestiges of segregation . . . is ancillary to and separate from the primary goal of eliminating the segregation itself." (emphasis omitted)); *Liddell v. Board of Educ.*, 731 F.2d 1294, 1314 (8th Cir. 1984) ("When no other feasible desegregation techniques exist, then specific remedial programs for students in the remaining one-race schools may be included as a means of ensuring equal educational opportunity.").
77. *See supra* note 22.
assessment must be made on the basis of outcomes, the extent to which the educational needs of African-American children are met by the school system.\(^7\)

VI. CONCLUSION

The *Brown* Court was correct in finding an equal protection violation based on the segregation of public schools as practiced in 1954. The decision can be supported purely on the basis that the racial classification involved, that is, with the purpose and effect of subordinating a class of people on the basis of race, could not be justified as promoting any legitimate governmental interest. The Court, however, apparently feeling a need to identify a tangible harm to underlie its finding, accepted questionable evidence of long term psychological and educational damage to the African-American children exposed to segregation. The problem is that the Court, in identifying the harm to the children, neglected to recognize that if African-American children had been harmed by segregation, it was likely that segregation in and of itself was not the sole cause of the observed “damage.” Rather, it seems clear in hindsight that any educational deficit that might have been observed in African-American children was caused by the unequal educational opportunities afforded them through the systematic underfunding of the schools to which they were relegated, and through curricula designed and implemented in an apartheid-like social context of White domination and Black subjugation.\(^7\)

In focusing on segregation as the cause of the harm and ignoring the subordination of the educational needs of Black children, the Court fixed on desegregation, or integration, as the appropriate remedy. In doing so, the Court missed an opportunity to develop potentially more effective remedies targeting the specific educational needs of African-American children. Recognizing the inequality in physical facilities, curricular material, and other tangible factors in the schools provided for Black children as an integral part of the constitutional violation would have allowed for an additional remedial focus on educational innovations designed to improve the quality of education provided.

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78. The question whether educational outcomes are relevant factors in judging the effectiveness of desegregation remedies was, at the time of this essay, before the Supreme Court in Missouri v. Jenkins, 115 S. Ct. 2058 (1995). Obviously, under my approach accurate measures of educational outcomes are essential in assessing whether the educational needs of each group are equally met. The problems associated with determining which measures of outcome should be used and what relative levels of performance should be expected are best left to educators.

79. That there was psychological damage done to the Black victims of segregation is a questionable proposition at best; even if it could be established, it is not clear that desegregation is an appropriate and effective therapy.
to them. Such an approach would not only justify traditional remedial and compensatory programs designed to improve the quality of education, such as those authorized in *Milliken II*. But also provide a constitutional basis for the more controversial and innovative approaches that have more recently appeared in the literature. If these controversial measures identified the beneficiary of the remedy in the same terms as he or she was identified for victimization, so be it-this is the compelling governmental purpose that justifies the consideration of race in governmental decision making. If these measures did not work immediately to maximize integration, so be it-the remedy is tailored to the harm accurately identified. By eliminating the dubious notion that segregation in and of itself caused psychological and developmental harm to Black children from the *Brown* decision and thus from the lexicon of desegregation discourse, policy makers would be freed to structure remedies for state imposed segregation that focus on the undeniable harm that was done.

This approach is not anti-integrationist. The requirement that school systems unsegregate would put an end to active efforts to segregate the races. Beyond that, however, the Court should have noted that integrated schools, all other things being equal, are as a general matter superior to schools that are not integrated. Assuming that comparable schools are equal in terms of resources, facilities, and academics, one that excludes citizens on the basis of race is clearly inferior to one that does not. A school that operates in this pluralistic society in a manner inconsistent with one of America's fundamental values, equality among its citizens, cannot be equal in quality to one that does not. While unsegregation could be required to remedy the constitutional wrong of segregation, integration can be viewed as a quality enhancement that should be vigorously pursued in every school, except where it interferes with other legitimate remedial programs. Those other legitimate remedial programs might well, in educationally appropriate circumstances, include overt racial concerns or even segregation.

The constitutional inequality on which the Fourteenth Amendment equal protection violation could have been founded was in the simple fact of state imposed segregation of the races. Segregation of the races is inherently unconstitutional because it is inconsistent with the fundamental value embodied

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81. See supra notes 5, 17, 19.
82. "Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex." DuBois, supra note 1, at 328.
83. See supra notes 5, 17, 19.
in the Equal Protection Clause. The Court functioning in its expository capacity could easily have made that declaration and ordered that the practice cease. The tangible inequality that is the result of discriminatory treatment of Black students attending segregated schools through resource inequities and curricular deficiencies and the general inferiority of schools that are segregated without compelling reason must be addressed more directly than through assumptions that integration will work its magic.

Identifying the harm of segregation both in terms of its inherent inconsistency with the constitutional norms expressed in the Fourteenth Amendment and in terms of its rendering ineffective the education system in meeting equally the needs of all children, would allow the Court to fashion remedies focused on quality improvements for African-American children, in whatever form those improvements may take.

The question of when the remedy could be said to have been achieved would have to be answered in terms much more difficult to measure than a particular degree of racial balance. The remedy would be achieved when the schools equally meet the educational needs of their African-American and White students as measured by outcome based measures of academic achievement.

84. U.S. CONST. amend. XIV, § 1.
85. See Denise Morgan, What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education, 8 HARV. BLACKLETTER J. 99 (1991); Betsy Levin, The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament, 39 MD. L. REV. 187 (1979). I recognize that there are serious concerns with regard to the utility of standardized tests to accurately measure academic achievement particularly among minority group individuals. For purposes of this essay, I have placed that concern on the shelf.