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Revised First Complete Draft

Brown at 50: Reconstructing Brown's Promise

Taunya Lovell Banks*

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* Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law. I would like to thank Penelope Andrews for her helpful comments on an earlier version of this essay and my research assistant Hyon Sim, class of 2006 for his diligence.

“[C]ontemporary racial disparities in education are not always due to racial discrimination, most ... can be traced... to current social policies and educational practices or to the vestiges of the dual systems that scarred the American educational landscape.”¹

I. Introduction

A few days before the fiftieth anniversary of the United States Supreme Court’s seminal decision *Brown v. The Board of Education*² a state district judge ordered the State of Kansas to stop spending funds for public elementary and secondary schools.³ Five months earlier that same judge ruled that the state school financing system was “a blatant violation of Article 6 of the Kansas Constitution and the Equal Protection Clauses of both the Kansas and the United States Constitution.”⁴ According to the judge the funding system resulted in an inequitable distribution of resources among the State’s school age children “dramatically and adversely impact[ing] the learning and educational performance of the most vulnerable and/or protected Kansas children.”⁵ The school-aged children disproportionately affected by the state’s funding scheme are poor and non-white, the same children who were *Brown*’s supposed beneficiaries. Fifty years after *Brown* children in Kansas still do not have equal educational opportunities. If everyone has equal educational opportunity the resulting pool of highly qualified students would look like America – racially, sexually and socio-economically diverse.

¹ Roslyn Arlin Mickelson, Essay: *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat From Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U.L. REV. 1477, 1479 (2003).

² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³ *Montoy v. Kansas*, # 99-C-1738 Decision and Order Remedy, (D. Ct. Shawnee Co. Kan., May 11, 2004) at 2, available at [http://www.shawneecourt.org/decisions/Montoy\(REMEDY\).html](http://www.shawneecourt.org/decisions/Montoy(REMEDY).html) (on file with author). The judge ordered the state to stop spending money for public schools because the legislature failed to restructure its school funding system as ordered by the court. *Id.*

⁴ *Id.*

⁵ *Id.* at 3.

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When the United States Supreme Court decided *Brown* almost all children in the District of Columbia, twelve Southern and Border states attended racially segregated schools mandated by law—*de jure* segregation.⁶ Urban schools in many other states were *de facto* segregated.⁷ Following the *Brown* decision, it took several decades of litigation in federal and state courts to achieve a significant degree of public school racial integration.⁸

Fifty years later, after more than a decade of increasing resegregation,⁹ Professor Robinson and others remind us that school-aged children in the nation's largest and most diverse cities are most likely to attend highly segregated schools.¹⁰ Some education

⁶ See Mary Ann Connell, *The Road to United States v. Fordice: What is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate*, 62 MISS L.J. 285, 305-306 (1993). As I have written before, I intentionally use the term black or black American in lieu of the more fashionable term African American because I believe the former term is more accurate and inclusive. For a more complete discussion of this point, see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1708 n.12 (2000).

⁷ See Pamela J. Smith, *Reliance on the Kindness of Strangers: The Myth of Transracial Affinity Versus the Realities of Transracial Educational Pedism*, 52 RUTGERS L. REV. 1, 102-03 (1999).

⁸ Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994). Professor Klarman writes: "Across the South as a whole, just over 0.15% of black schoolchildren in 1960 and 1.2% in 1964 were attending school with whites. Only after the 1964 Civil Rights Act threatened to cut off federal educational funding for segregated school districts and the Department of Health, Education, and Welfare in 1966 adopted stringent enforcement guidelines did the integration rate in the South rise to 32% in 1968-1969 and 91.3% in 1972-1973." *Id.* at 9-10. Fourteen years after *Brown* Robert Carter, the NAACP lawyer who argued the Kansas case before the Supreme Court wrote: "few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority." Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968).

⁹ GARY ORFIELD & CHUNGMEI LEE, HARVARD U. CIVIL RTS PROJECT, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE* 19 (2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php> (last visited 8-2-04) In fact, some observers argue that we are experiencing the first stage of a *resegregation* of America's public schools. Ten years after *Brown* only 2.3% of black students in the South attended majority white schools, but by 1988 that number had grown to 43.5%. A decade later (1998) the percent of black children in the South attending majority white schools had dropped more than 10 percentage points to 32.7%. *Id.* Appendix, Table 8 at 29. According to Orfield and Lee, "This resegregation is linked to the impact of three Supreme Court decisions between 1991 and 1995 [*Dowell v. Okla. City*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 79 (1995)] limiting school desegregation and authorizing a return to segregated neighborhood schools." *Id.* at 17.

¹⁰ Mildred Wigfall Robinson, *Fulfilling Brown's Legacy: Bearing the Costs of Realizing Equality*, ___ WASHBURN L. J. ___, __ (200_); ORFIELD & LEE, *supra* note 9, at 32 (87% for black students and 86% for Latino students). Ironically students in rural communities and small towns and not students in the nation's largest cities are more likely to attend racially integrated schools.

advocates argue that highly segregated public schools—schools where one-race constitutes 80-100% of the population—are inherently unequal.¹¹ To these advocates the resegregation of public schools in America seems like a betrayal of *Brown's* spirit.

Today the measure of equal education for black children often is the racial composition of the school population rather than the quality of education received.¹² This measure of educational equality implies that schools without white students are presumptively inferior. Yet the “belief[,] that black students cannot get a decent education unless there are white students in the classroom[,] ... has always been disputed by some [black]-Americans.”¹³ Increasingly today educational achievement for children of all races is tied to socio-economic status.¹⁴ Since whites as a group are more affluent than non-whites, race and class tend to get conflated leaving uninformed people to conclude that racial integration alone is the measure of equal educational opportunities for black and other non-white children.¹⁵

¹¹ ORFIELD & LEE, *supra* note 9, at 29.

¹² Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 471 (1976); Derrick Bell, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 119-20 (2004). The United States Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* wrote that the extent of racial integration was the most important factor in determining whether a previously segregated system was now unitary. 402 U.S. 1, 26 (1971). For a more contemporary view of *Brown's* meaning see Louis Menand, *Civil Actions: Brown v. Board of Education and the Limits of Law*, THE NEW YORKER, Feb. 12, 2002, at 92; Peter Kirsanow, *The Glass Is Half Full*, National Review Online (May 17, 2004), at <http://www.nationalreview.com/comment/kirsanow200405170730.asp>; Ellis Cose, *A Dream Deferred*, Newsweek, May 17, 2004, at 52; David E. Thigpen, *An Elusive Dream in the Promised Land*, Time Magazine, May 10, 2004, at 32..

¹³ Louis Menand, *Civil Actions: Brown v. Board of Education and the Limits of Law*, THE NEW YORKER, Feb. 12, 2002 at 92. The esteemed black educator Dr. Benjamin Mays speaking in 1974 said “Black people, while working to implement *Brown*, should recognize that integration alone does not provide a quality education, and that much of the substance of quality education can be provided to Black children in the interim.” Bell, *Serving Two Masters*, *supra* note 12 at 486-487 n. 50 (citing the writings of several other black scholars)

¹⁴ See *infra* notes 137-143 and accompanying text.

¹⁵ The discussion of educational equality cannot be limited to black children, *Brown's* original parties in interests. Today, Latino children in particular have educational experiences that mirror those of a disproportionate number of black school age children.

Legal scholars writing about equal educational opportunities tend to focus either on ways to achieve racial integration¹⁶ or funding equality.¹⁷ Few scholars explore how to structure new theories of educational equality that acknowledge and squarely address the twin tensions inherent in *Brown* — racial integration and equal educational opportunity for all children.¹⁸ This country's experience over the past fifty years illustrates how you can have one without the other. Achieving both in a racially polarized society like America will be a real challenge for future lawyers.

Recently the Supreme Court reminded us of why new theories about educational equality are so urgently needed. In *Grutter v. Bollinger*, a bare majority ruled that a public college or university's desire to create a diverse student body is a compelling educational interest.¹⁹ Yet Justice O'Connor, writing for the majority cautioned:

race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.... The requirement that all race-conscious admissions programs have a termination point 'assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.'... *We*

¹⁶ See generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COL. L. REV. 728 (1986); WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

¹⁷ See generally Bell, *supra* note 12; Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, *supra* note 16.

¹⁸ See generally, Ronald R. Edmonds, *Effective Education For Minority Pupils Brown Confounded or Confirmed*, in *SHADES OF BROWN: NEW PERSPECTIVE ON SCHOOL DESEGREGATION* (Derrick Bell ed., 1980). (arguing that desegregation is useful only if it provides equal and effective education to minority students and that the focus should be on factors such as class size, teacher experience, per pupil expenditure, etc.).

¹⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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*expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.*²⁰ (emphasis added)

At the same time members of the Court are quite aware that of the glaring educational inequities in public education that disproportionately impact non-white children.²¹ Justice Ruth Bader Ginsburg, joined by Justice Stephen Breyer, concurring in *Grutter* wrote that despite a “strong ... public[] desire for improved education systems ... it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.”²² (emphasis added)

Professor Robinson accurately describes why it is difficult to achieve meaningful school integration, but her recommendation that better school funding methods be developed as an *interim* measure to counteract the unequal education non-white students in highly segregated schools received mischaracterizes the problem. Like some scholars and the lawyers who litigated *Brown*, Professor Robinson conflates the twin goals of *Brown*, integration and equal educational opportunities. In this response to her essay I

²⁰ *Id.* at 342-43.

²¹ I intentionally limit my discussion to black Americans and Latinos because the status of Asian Americans is more complex. Although Asians are characterized by some as a “model minority” there is considerable variation in high school graduation rates among Asian ethnic groups. For example, a high percentage of Asian Indian, Chinese, Filipino, Japanese, and Korean are high school graduates (85.4%, 77.6%, 87.4%, 91.4%, 86.4% respectively), whereas a low percentage of Cambodian, Hmong, Laotian, and Vietnamese graduate from high school (47.1%, 40.7%, 50.5%, 61.9% respectively). MAX NIEDZWIECKI & T.C. DUONG, SOUTHEAST ASIA RESOURCE ACTION CTR., SOUTHEAST ASIAN AMERICAN STATISTICAL PROFILE 15 (2004), at <http://www.searac.org/resourcectr.html>. (last visited 7-25-04) Similar variations are reflected among these groups when comparing the percentage with bachelor or higher degrees. (Asian Indian (60.9%), Chinese (46.6%), Filipino (41.7%), Japanese (40.4%), Korean (43.1%), Cambodian (9.1%), Hmong (7.4%), Laotian (7.6%), Vietnamese (19.5%).) *Id.* I also do not specifically address the separate circumstances of America's indigenous populations, but believe that my argument for educational equity developed more fully in this essay also applies to these groups as well.

²² *Grutter*, 539 U.S. at 343. She continues: “Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.” *Id.* at 343-44.

explain how these goals got conflated and why unlinking and more clearly articulating the rationale for each may ultimately lead to the achievement of both goals.

II. *Brown* the Icon: Social Equality, the Measure of Full Citizenship

A. *Plessy v. Ferguson* Reexamined

The *Brown* decision is a mirror image of *Plessy v. Ferguson*,²³ and thus the shadow of the Court's unanimous consensus that blacks are not the social equals of whites still hangs over us.²⁴ In *Plessy* all but one of the Supreme Court Justices agreed that a state law mandating separate train cars for whites and blacks when applied to travel within the state was constitutional. The majority opinion, written by Justice Henry Billings Brown from Massachusetts, said that racial segregation laws were merely *legal distinctions* that did not "necessarily imply the inferiority of either race to the other."²⁵ He distinguished what he characterized as political equality (exclusion from juries) from social equality (separation of the races in schools, theaters and trains).²⁶ In essence, riding integrated train coaches was an expression of *social equality*; blacks were not the social equals of whites; and the Fourteenth Amendment, Justice Brown wrote, only protects legal or political equality.²⁷

²³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁴ For a discussion of this point in the context of education, see generally A'lelia Robinson Henry, *Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education*, 27 J.L. & EDUC. 47, 63-64 (1998) (arguing that the spirit of *Plessy* is being re-evoked in ways that deprives African Americans access to, and representation in, quality public and higher education, thus further widening the disparity between black and white public and higher educational attainment).

²⁵ And therefore did not constitute a badge of slavery prohibited by the 13th Amendment. *Plessy*, 163 U.S. at 543. Specifically the Court wrote: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude." *Id.*

²⁶ *Id.* at 545.

²⁷ *Id.* at 544. The Court distinguished political equality (exclusion from juries) from social equality (separation of the races in schools, theaters and trains). *Id.* at 545. If enforced segregation suggests racial

The lone dissenting justice, John Marshall Harlan, a former slave-owner from Kentucky, agreed that blacks were not and probably never would be the *social equals* of whites.²⁸ Nevertheless he chastised the majority for being disingenuous in saying that riding in racially separate train cars constitutes legal equality for black Americans. Justice Harlan believed that separating the races in public spaces like train cars violated the Fourteenth Amendment's equal protection clause because state laws cannot treat people different solely based on race.²⁹ Thus, he wrote those now famous words: "There is no caste here. Our Constitution is color-blind."³⁰

Although Justice Harlan never advocated social equality for black Americans, he probably would consider the underlying premise of *Brown*, that public schools cannot be segregated based solely on race, an example of *legal* equality.³¹ In contrast, Thurgood Marshall, when Special Counsel for the NAACP Legal Defense and Education Fund (NAACP), and many other civil rights advocates saw *Brown* as signaling the end of social inequality between whites and non-whites, especially black Americans.³² Educational equality between races is an essential component of social equality.

inferiority, wrote Justice Brown, it is only because that is the interpretation African Americans put on the practice!

²⁸ He wrote, "[t]he white race deems itself to be the dominant race in this country So, I doubt not, that it will continue to be for all time." *Id.* at 559.

²⁹ *Id.* The *Plessy* decision was met by "relative silence and apparent indifference" in the nation. In truth *Plessy* was the culmination of a whole series of court cases of that era under mining attempts to secure racial equality for blacks dating back to the 1870s.

³⁰ *Id.* at 559.

³¹ Historian Charles Lofgren cites an editorial that appeared in the New York Times following the *Brown* decision that stated: "the words [Harlan] used in his lonely dissent . . . have become in effect . . . a part of the law of the land [T]here was not one word in Chief Justice Warren's opinion that was inconsistent with the earlier views of Justice Harlan." Editorial, *Justice Harlan Concurring*, N.Y. TIMES, May 23, 1954 at sec. 4 E10 (quoted in CHARLES LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 204 (1987).)

³² See *infra* note 43 and accompanying text.

B. The Promise of *Brown*

Three years after the Supreme Court decided *Plessy v. Ferguson*³³ it quickly became clear that the “separate but equal” doctrine never would result in educational equality for black Americans. The Supreme Court in *Cumming v. Richmond County Board of Education* ruled that a state is not required under the Constitution to maintain a high school for black children even though it maintains a high school for whites.³⁴ Since the Court in *Cumming* failed to detail what constitutes equality in public education for black Americans,³⁵ black lawyers begin to litigate this issue in a wide range of cases.³⁶ The *Brown* decision represents the culmination of an assault on the “separate but equal” doctrine.

By the mid 1930s NAACP lawyers under the direction of Charles Hamilton Houston initiated a legal campaign to attack application of the *Plessy* doctrine in the area of education.³⁷ At first the lawyers did not challenge the “separate but equal” doctrine directly. The legal strategy was to accept segregation in racially segregated primary and secondary schools but to demand equalization -- genuine equality -- in facilities, per pupil expenditures³⁸ and teacher pay.³⁹

³³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁴ *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899).

³⁵ Instead the Court wrote: “The education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.” *Id.* at 545.

³⁶ For a discussion of this litigation, see Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 430-35 (1954) and Arthur Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 482-83 n.27.

³⁷ See generally GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

³⁸ Thurgood Marshall did a survey of southern schools in 1948-49 and found wide-spread disparities. For example, the public school system in Atlanta annually spent \$570 per white student compared to \$228.05 per black student. Menand, *supra* note 13, at 94.

³⁹ See *Alston v. School Bd. of Norfolk*, 112 F.2d 992 (4th Cir. 1940) (issuing an injunction restraining the school board from discriminating on the grounds of race or color in fixing salaries to be paid school

The lawyers also began litigating a series of cases aimed at white-only state professional schools. On their face the higher education cases focused on enforcing the “separate but equal doctrine,” arguing that desegregation was warranted where the state failed to provide comparable facilities for blacks seeking graduate degrees, and the United States Supreme Court agreed.⁴⁰ The ultimate goal of both the public and professional school cases, however, was the elimination of the “separate but equal” doctrine.⁴¹

Thurgood Marshall and the other NAACP lawyers chose public school segregation cases to challenge the doctrine partly because they and other civil rights advocates believed that “education was the path to *social* advancement for [black] Americans, and partly because [they] thought that if blacks and whites mixed together as children they would be less susceptible to racial prejudice as adults.”⁴² This second

teachers); *Morris v. Williams*, 149 F.2d 703 (8th Cir. 1945) (holding that the custom or usage of discrimination against colored teachers, with respect to salaries, solely on the account of race or color violates the 14th Amendment); *Davis v. Cook*, 80 F. Supp. 443 (N.D. Ga. 1948) (holding that salaries, when fixed, may not be discriminatory because of color or race).

⁴⁰ Starting in the mid 1930s NAACP lawyers litigated a series of cases directed at state supported professional schools that barred blacks. In 1935 NAACP lawyers successfully tried out their strategy when they represented Donald Murray who was suing in state court for his admission to the law school at the University of Maryland alleging that restricting entry to the state’s only public law school denied Murray equal protection of the law. *Pearson v. Murray*, 169 Md. 478 (1936). In a series of cases the Supreme Court affirmed the ruling of the Maryland Court of Appeals. *See, e.g., Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (refusal to admit black applicant to the Missouri State University Law School violates the equal protection clause where no separate facility existed for blacks in the state); *Sipuel v. Bd. of Regents of the Univ. of Oklahoma*, 332 U.S. 631 (1948) (refusal to admit a qualified black applicant to the University of Oklahoma School of Law violates the equal protection clause of the 14th Amendment); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950) (refusal to admit a black applicant to the University of Oklahoma in pursuit of a Doctorate in Education violated the equal protection clause of the 14th Amendment because there was no separate facility within the state for black students); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the separate law schools at the University of Texas were not equal with regards to books, rooms, faculty, staff, accreditation, and other certain intangibles).

⁴¹ Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1088 (1988) (reviewing MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987)).

⁴² Menand, *supra* note 13, at 92.

objective, racial integration, we now know, does not automatically result in the first objective, equal educational opportunities.⁴³

The NAACP's strategic goal became more apparent during the litigation of *Sweatt v. Painter*. Buoyed by their success in two earlier cases where the Supreme Court ruled that states cannot exclude blacks based on race from the only state graduate or professional school, the NAACP lawyers sued the University of Texas.⁴⁴ The lawsuit sought admission by a black applicant to the only state law school.⁴⁵ Ultimately the trial

⁴³ Former Harvard Law Professor Derrick Bell writes that Thurgood Marshall and the lawyers in *Brown* were serving two masters—their clients, the parents of the black school children who wanted equal educational opportunities for their children, and the liberal, primarily white, financial backers of the litigation effort who believed that integration (and assimilation) was the key to equality for black Americans. Bell, *supra* note 12, at 489-90. Robert Carter argued before the Supreme Court that equal educational opportunities are cornerstones in preparing one for American citizenship and that “Negro” children were denied that opportunity: “appellants showed that they and other Negro children similarly situated were placed at a serious disadvantage with respect to their opportunity to develop citizenship skills.” Robert L. Carter, *Brown v. Board of Education* (Oral Argument Dec. 9, 1952), in *BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 13* (Leon Friedman ed., 2004). Furthermore James Nabrit argued before the Supreme Court that black citizens who fought in the country's wars were also fighting for full citizenship for them, and their children:

It would appear to me that in 1952, the Negro should not be viewed as anybody's burden. He is a citizen. He is performing his duties in peace and in war, and today, on the bloody hills of Korea, he is serving in an unsegregated war. All we ask of this Court is that it say that under the Constitution he is entitled to live and send his children to school in the District of Columbia unsegregated with the children of his war comrades. That is simple. The Constitution gives him that right.

James M. Nabrit, Jr., *Bolling v. Sharpe* (Oral Argument Dec. 10, 1952), in *BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT*, *supra*, at 142.

⁴⁴ Judge Carter writes that NAACP lawyers actually first made a direct challenge to the “separate but equal” doctrine in their amicus brief in *Westminster School District v. Mendez*. 161 F. 2d 774 (9th Cir. 1947) (holding that by enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, respondents have violated the federal laws as provided by the 14th Amendment to the Federal Constitution by depriving them of liberty and property without due process of law and by denying to them the equal protection of the laws). Carter, *The NAACP's Legal Strategy Against Segregated Education*, *supra* note 41 at 1084 n. 5.

⁴⁵ Instead of granting the plaintiff the request relief, the trial judge gave the State six months to create a separate law school for black Texans, dismissing the suit when the State hastily complied. *Sweatt*, 339 U.S. at 632. On appeal the Texas Court of Civil Appeals, at the State Attorney General's request, reversed and remanded the case “requesting the [trial] court to rule on the question of segregation and . . . for further evidence showing the establishment of a separate but equal law school.” Letter from Thurgood Marshall to William Hastie (Apr. 3, 1947) NAACP Papers, Box III-B-15 at 268 (Thurgood Marshall Law Library, Univ. of Md., Baltimore, Md.). Surprised at the ruling, Thurgood Marshall in a letter to William Hastie, a prominent black lawyer and Marshall confidant who then was serving as the Governor of the Virgin Islands, wrote:

The interesting thing is that the court refused to rule as a matter of law that segregation was invalid and the Chief Justice made the statement from the bench that it was the

judge found the newly established black state law school to be “substantially equivalent” to the University of Texas Law School, and the state appellate court affirmed the ruling.⁴⁶ In the petition for certiorari to the United States Supreme Court, Marshall attacked the “separate but equal” doctrine head-on, but the Court declined to address the *Plessy* issue, ruling in Sweatt’s favor on a narrower point.⁴⁷

Instead of striking down the “separate but equal” doctrine the Court made compliance with the doctrine more difficult. A unanimous Court held that in determining whether racially separate state facilities are equal under the Constitution it would consider both tangible and intangible factors like the reputation of the school, its faculty and alumni.⁴⁸ The Court’s further working out of what constitutes equal educational opportunity was cut short by its decision in *Brown*.

By shifting the arguments in *Sweatt* and *Brown* from equalization to desegregation both the NAACP lawyers and Court in *Brown* assumed that desegregation constituted equalization.⁴⁹ In fact, the graduate and professional school cases had always been about integration.⁵⁰

appellant’s position that segregation and discrimination were tied up together and could not be separated and that he was not willing to rule that that point was precluded from the case So, whether we want it or not, we are now faced with the proposition of going into the question of segregation as such.

Id. The letter from Marshall continues:

I think we should do so because even if we don’t take the case far, we at least should experiment on [sic] the type of evidence which we may be able to produce on this question. For example, we want to produce experts such as Charlie Thompson to testify as to the inevitable effects of segregation in per capita expenditures, etc. We are also contemplating putting up Otto Kleinberg to testify as to the racial characteristics not being present and other evils of segregation. We are also contemplating putting on anthropologists to show that there is no difference between folks.

Id. at 268-69.

⁴⁶ *Sweatt*, 339 U.S. at 632.

⁴⁷ *Id.* at 631.

⁴⁸ *Id.* at 633-35.

⁴⁹ Judge Carter also writes that the NAACP lawyers used the same strategy in *McLaurin v. Oklahoma State Regents*. 339 U.S. 637 (1950) (once admitted blacks must be treated the same as whites) argued before the Supreme Court around the same time as the *Sweatt* case. Carter, *The NAACP’s Legal Strategy Against Segregated Education*, *supra* note 41 at 1089.

⁵⁰ Marshall in a searing letter to the editor of a black-owned Houston newspaper wrote:

While the petitioner's brief in *Brown* does not specifically state that the black schools are equal, it shifts the focus to desegregation as the ultimate equalizer rather than equalization itself.⁵¹ Thus it is unsurprising that "equal" education in a post *Brown* world became synonymous with *racially* integrated schools.⁵²

C. Rereading *Brown* I

In the United States Supreme Court NAACP lawyers in *Brown* argued strategically that "segregated public schools are not 'equal' and cannot be made 'equal,'"⁵³ and hence black children are denied the equal protection of the law. Using studies by Kenneth and Mamie Clark, black social scientists, Marshall and Robert Carter

[H]ere is our position. The United States Supreme Court in the *Gaines* case said that in the absence of equal facilities in a separate system, Negroes are entitled to admission in the existing facilities. As I understand your position, we should not even use this precedent, weak as it is but should rather seek to have the court compel the school officials to set up separate but equal facilities. To my mind, if we do this, we not only do not advance from the *Gaines* case, but we would be actually ... making a step backward.... We will not ask for segregated facilities and will not admit the validity of the segregated facilities and will not admit the validity of the segregated [sic] statutes of Texas....

Letter from Thurgood Marshall to Carter Wesley (October 3, 1947) NAACP Papers, Box III-B-15 at 436 Thurgood Marshall Law Library, Univ. of Md., Baltimore, Md.).

⁵¹ The brief states:

Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population. Such injury and inequality are established as facts on this appeal by the uncontested findings of the District Court.

Brief for Appellants at 5, (1952 WL 47265); See also MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 151-52 (1994).

⁵² Bell, *supra* note 12, at 120.

⁵³ *Brown*, 347 U.S. at 488. As the Court notes, in two of the six public school cases involving the "separate but equal doctrine" (*Cumming v. Co. Board of Education*, 175 U.S. 528 and *Gong Lum v. Rice*, 275 U.S. 78) the validity of the doctrine was not challenged. *Id.* at 491. In the four remaining cases, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, *Sipuel v. Oklahoma*, 332 U.S. 631, *Sweatt v. Painter*, 339 U.S. 629, and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637) all graduate school cases, the inequality was based on the absence for blacks of specific educational benefits available to similarly qualified whites. *Brown*, 347 U.S. at 491-92.

argued that racially segregated schools stamp black children with a badge of inferiority,⁵⁴ a direct counter to the claim of the majority in *Plessy*. The Supreme Court agreed.⁵⁵

The direct attack on segregation rather than equalization adopted by the NAACP lawyers was resisted by some southern local NAACP branches.⁵⁶ Many parents simply wanted better *black* schools for their children.⁵⁷ Reluctant to disregard the *Plessy* doctrine, the lower courts in the four states addressed the equalization issue.⁵⁸

Unresolved is whether the NAACP lawyers should have pushed more specifically for

⁵⁴ *Brown*, 347 U.S. at 494.

⁵⁵ The Court wrote: “our decision, therefore, cannot turn on merely a comparison of these tangible factors We must look instead to the effect of segregation itself on public education.” *Brown*, 347 U.S. at 492.

⁵⁶ Robert Carter, writing in 1991, said that when in late 1949 and early 1950 he and Marshall wanted to challenge segregation head-on, they encountered considerable opposition. But by 1950 Marshall had persuaded the NAACP board to “endorse[] a new policy of refusing to take any cases fighting school discrimination except those that attacked segregation per se.” Robert L. Carter, *A Tribute to Thurgood Marshall*, 105 HARV. L. REV. 33, 40 (1991). Several black lawyers from the South connected with the NAACP opposed the change in policy resigning from the National Legal Committee in protests. They “believed that the NAACP should not abandon litigation that sought to equalize educational facilities.” *Id.* One of those lawyers, Oliver Hill from Virginia was later counsel in *Davis v. County School Board*, one of the five cases in *Brown*. *Id.*; Carter, *The NAACP's Legal Strategy Against Segregation*, *supra* note 41 at 1089.

⁵⁷ Derrick Bell writes that *Davis v. County School Board*, one of the cases consolidated with *Brown*, stemmed from a request to the NAACP by blacks in Prince Edward County for legal assistance “‘following an unsuccessful year-long effort to obtain a new high school.’” But they were told by the NAACP representatives that the organization “‘could not help with litigation unless a suit was filed to abolish school segregation.’” Bell, *Serving Two Masters*, *supra* note 12 at 477 n. 21 (citing [redacted] Wilkerson, *The Negro School Movement in Virginia: From 'Equalization' to 'Integration'*, in II THE MAKING OF BLACK AMERICA 259, 269 (August Meier & Elliott Rudwick, eds. 1969).

⁵⁸ In Kansas the three-judge district court found that segregation in public education has a detrimental effect upon black children, but denied relief on the ground that the black and white schools were *substantially equal* with respect to buildings, transportation, curricula, and educational qualifications of teachers. *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 798 (D. Ka. 1951). The district court found no substantial difference in the school physical plants, student transportation, curricula or teacher qualifications. *Id.* When the Supreme Court ruled in *Sweatt v. Painter* that both tangible and intangible factors determined whether schools were equal, at least in higher education, the equalization question in the Kansas case would have been whether the *Sweatt* rationale also applied to primary and secondary public schools. But this issue was never raised by either the courts or lawyers in *Brown*.

In contrast, the South Carolina court found that the black schools were inferior to the white schools and ordered the state to begin immediately to equalize the facilities. *Briggs v. Elliott*, 98 F. Supp. 529, 538 (E.D.S.C. 1951). Similarly in Virginia the court admitted that the facilities were unequal, but sustained the validity of the contested provisions mandating segregation and denied the plaintiffs admission to the white schools during the equalization program. *Davis v. County Sch. Bd.*, 103 F. Supp. 337, 340-41 (E.D. Va. 1952). In Delaware the Chancellor's decree ordering desegregation was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. *Belton v. Gebhart*, 87 A.2d 862, 870-71 (1952).

both equalization *and* the end of *de jure* segregation,⁵⁹ rather than assume that integration would automatically result in equal educational opportunities for black children.⁶⁰ In hindsight it is difficult to predict whether a theory that encompassed both goals as separate but connected rights would have been as readily accepted by the Court and the nation.

The legal strategy of the NAACP lawyers in *Brown* reflects the naïveté of racial progressives in the 1930s and 1940s. They believed that elimination of the “separate but equal” doctrine would solve the problem of racial discrimination against black Americans.⁶¹ They did not factor in the effect on equal educational opportunities of class differences among whites *and* blacks.

⁵⁹ Mark Tushnet wrote in his 1987 book examining the strategy of the NAACP lawyers that there was no single conception of equality, and the NAACP engaged in a process of constructing one out of many possible conceptions of equality. Tushnet believed that sacrificing desegregation for educational equity would have resulted in a better quality of education for black children, TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION*, *supra* note 41, at 158-65 (1987), a point with which Judge Carter heartily disagrees. Carter, *The NAACP's Legal Strategy Against Segregation*, *supra* note 41 at 1091. (citing TUSHNET, *supra*).

⁶⁰ Professor Robinson cites Robert Carter's reflections twenty-five years later. He wrote:

[W]hile the pre-*Brown* thesis that equal education and integrated education are synonymous has never had a fair test, its chance of being afforded a just demonstration in the foreseeable future seems quite unlikely. Whether our views about the necessity of school integration were correct is really beside the point. Current public intransigence makes clear that we cannot allow ourselves to become the prisoners of dogma. While integration must remain the long-range goal, we must search for alternatives, because the reality is that hundreds of thousands of black children are attending all black or predominantly black schools in the urban North and South. These schools are woefully inadequate and provide no tools which will enable poor blacks to become a part of the mainstream of the social, economic, and political life of the country.

Robert L. Carter, *Reexamining Brown Twenty-five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L.L. REV. 615, 621 (1979).

⁶¹ See Bell, *supra* note 12, at 489 (“For many civil rights workers, success in obtaining racially balanced schools seems to have become a symbol of the nation’s commitment to equal opportunity—not only in education, but in housing, employment, and other fields where the effects of racial discrimination are still present.”); Robert L. Carter, *A Reassessment of Brown v. Board*, in SHADES OF BROWN, *supra* note 18, at 23. (“[T]he basic postulate of our strategy and theory in *Brown* was that the elimination of enforced segregated education would necessarily result in equal education.”).

III. The Aftermath of *Brown*

*"Once you begin the process of segregation, it has its own inertia. It continues on without enforcement."*⁶²

A. Generally

The 1954 *Brown* decision (*Brown I*) represented a tremendous victory because it signaled the beginning of the end of Jim Crow laws, but the celebration was short-lived. *Brown II* involved the question of how to implement the decision given the different circumstances of individual cases.⁶³ In *Brown II* the Supreme Court for the first and only time in more than two hundred years deferred enforcement of a constitutionally protected right delaying implementation of *Brown I* by ordering that school desegregation to be carried out "with all *deliberate* speed."⁶⁴ As Robert Carter, the lawyer who argued the Kansas case before the Supreme Court reminds us, the dictionary defines "deliberate" as "slow and even; unhurried."⁶⁵ In other words, concern about white resistance in the South was elevated above the constitutional rights of black Americans.⁶⁶

⁶² *Brown v. Bd. of Educ.*, 892 F.2d 851, 854 (10th Cir. 1989) (statement by demographer William Lamson during the district court trial. Rec., vol. II, at 162-63.)

⁶³ The Delaware Supreme Court had ordered immediate desegregation of the state schools. By 1955 the Kansas and District of Columbia schools had already initiated desegregation, so less time might be needed for those schools than for the South Carolina and Virginia school systems.

⁶⁴ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 889 (1993).

⁶⁵ Robert Carter, Speech at the University of Maryland (Nov. 2003). Carter writes: "after more than ten years of waiting for *Brown II*'s objectives to be attained 'with all deliberate speed,' the United States Supreme Court lost patience and began to press for adherence to *Brown* by requiring that the dual system be dismantled in fact." Carter, *A Reassessment of Brown v. Board*, *supra* note 61, at 24. Carter writes: "it is clear that what the formula required was movement toward compliance on terms that the white South could accept." Carter, *The Warren Court and Desegregation*, *supra* note 8, at 243.

⁶⁶ Reginald Oh writes that there was an important linguistic shift between *Brown I* and *Brown II*. The Court in *Brown II* states that *Brown I* declared "racial discrimination" unconstitutional. However, the Court in *Brown I* never mentions the phrase "racial discrimination." *Brown I* states only that "segregation" is unconstitutional. Professor Oh argues that this is a significant shift making it more difficult for petitioners to achieve racial desegregation. Reginald Oh, *Constructing a Critical Linguistic Analysis of Law* (2004) (draft on file with the author).

All deliberate speed notwithstanding, there still was massive resistance to *Brown* in the white South lasting for more than a decade.⁶⁷ It took yet another decade — over twenty years in total — to significantly desegregate public schools in Southern and Border States.⁶⁸ During this time NAACP lawyers continued to press for racial integration, doing nothing to minimize the existing education inequality of all-black schools, leaving a generation of post-*Brown* children poorly educated.

Today most black children in large urban areas attend highly segregated public schools,⁶⁹ but the lack of racial integration per se is not the most pressing problem. The real problem with today's *de facto* segregation is that black and other non-white “students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty.”⁷⁰ Studies find a link between concentrated poverty, school opportunities and achievement levels.⁷¹ Orfield and Lee conclude that

children in these schools tend to be less healthy, to have weaker preschool experiences, to have only one parent, to move more 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

⁶⁷ Carter, *A Reassessment of Brown v. Board*, *supra* note 61, at 24.

⁶⁸ See *supra* note 8.

⁶⁹ Maryland, a border state, ranks fourth among the top ten states in the country. Ironically, only two deep southern states, Mississippi and Alabama, rank among that top ten. ORFIELD & LEE, *supra* note 9, at 26. Also included among the top ten states are New York, Illinois, Michigan, New Jersey, Pennsylvania, Wisconsin, Alabama and Mississippi. *Id.* Orfield and Lee write:

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, segregation began to increase in spite of evidence from the 2000 Census of further declines in residential segregation during this decade. This resegregation is linked to the impact of three Supreme Court decisions between 1991 and 1995 [*Dowell v. Okla. City*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995)] limiting school desegregation and authorizing a return to segregated neighborhood schools.

Id. at 17.

⁷⁰ ORFIELD & LEE, *supra* note 9, at 20.

⁷¹ *Id.*

turnover. Many of these schools are also deteriorated and lack key resources.”⁷²

Integration without equalization does not constitute equal educational opportunity. In some instances equalization, especially during the early school years, may be more important to the achievement of equal educational opportunity than racial integration. Equalization in primary and secondary school will correct racial imbalances in the pool of highly qualified college applicants. School-aged children in school districts where it is impossible to dismantle highly race-segregated public schools should get the resources necessary for them to excel without having to rely on the presence of more affluent racially diverse families to generate these resources.

B. The *Brown* Case on Remand

Derrick Bell writes that NAACP lawyers handling post *Brown* cases pushed for integration at the expense of equalization and their clients' interests.⁷³ The outcome of the *Brown* case on remand to the District Court of Kansas reflects the consequences of this decision. Immediately after the 1954 Supreme Court decision the Kansas federal district court concluded that the Topeka school district had made a good faith effort to end *de jure* segregation. Nevertheless the court retained jurisdiction over the case until it felt that the district had fully complied with the Supreme Court's mandate.⁷⁴ This judicial oversight lasted more than forty years.⁷⁵

Tellingly in 1955 the federal district judge wrote: “[d]esegregation does not mean that there must be intermingling of the races in all school districts. It means only that

⁷² *Id.* at 20-21

⁷³ Bell, *supra* note 12, at 490-92.

⁷⁴ *Brown v. Bd. of Educ.*, 139 F. Supp. 468, 470 (D. Kan. 1955).

⁷⁵ The court finally relinquished jurisdiction over the case in 1999. *Brown v. Unified Sch. Dist. No. 501*, 56 F. Supp. 2d 1212 (D. Kan. 1999).

they may not be prevented from intermingling or going to school together because of race or color.”⁷⁶ In other words, while there was no affirmative duty to create a racially diverse learning environment, states could not actively prevent racial integration in public schools.

No further judicial action occurred until Linda Brown, now an adult and parent herself, along with other black parents of school aged children intervened in 1979. Their lawyers argued that the *Brown* mandate had not been realized.⁷⁷ The primary focus of the interveners was whether the Topeka schools were sufficiently integrated.⁷⁸ The school district responded that

[the] plaintiffs place too much emphasis on the racial balance of students as a measure of a constitutional violation. . . . factors other than student assignment count in the determination of a constitutional violation, and that these factors (e.g., allocation of resources, uniformity of curricula and instruction) indicate the district operates a unitary school system.⁷⁹

⁷⁶ *Id.* at 469.

⁷⁷ *Brown v. Bd. of Educ.*, 671 F. Supp. 1290, 1292 (D. Kan. 1987).

⁷⁸ *Id.* at 1294. The trial judge found that

[t]he student attendance figures for the 1985-86 school year bear little resemblance to the figures for 1954. None of the former *de jure* black schools was open in 1985. Of the twenty-six elementary schools, only one had a majority black student population. Three had majority minority populations Roughly twenty-nine percent of all black elementary students attended these schools. Five elementary schools had student populations over ninety percent white. These schools accounted for approximately twenty-four percent of the white elementary student population. No school had a ninety-five percent white student population None of the three high schools . . . had a majority minority population in the 1985-86 school year. One high school, Topeka West High School, had a white student population exceeding ninety percent It served roughly forty-one percent of all white high school students in the district.

Id.

⁷⁹ *Id.* at 1295.

The district judge, consistent with his earlier statements, ruled that racial imbalance even in previously *de jure* school systems is unconstitutional only if purposefully maintained,⁸⁰ and that was not the case in Topeka.⁸¹

Interestingly, the school districts asserted measures of equality -- uniformity in resource allocation, curriculum and teachers -- sound more like an incomplete application of the *Sweatt* criteria. Had the federal district judge really applied the *Sweatt* criteria as part of his analysis, he might have concluded that equal educational opportunity for black children had not been achieved. But the specific issue of equalization did not arise because the school district closed the four *de jure* black schools, and because the court found no evidence to suggest that these school closings were done to avoid racial integration.⁸² Based on these conclusions the district judge declared the *Brown* mandate satisfied.⁸³

Closure of the all-black schools ended the equality inquiry. But their closure did not result in meaningful racial integration or equalization of educational opportunities for the poorest black children. Like most post *Brown* courts the federal judge focused only on the existence of purposeful racial segregation and not on the persistence of unequal

⁸⁰ *Id.* at 1296 (citing *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979); *Dayton v. Brinkman*, 433 U.S. 406, 417, 420 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971); *Milliken v. Bradley*, 433 U.S. 267, 280 n. 14 (1977)).

⁸¹ *Brown*, 671 F. Supp. at 1297.

⁸² The court wrote:

All four *de jure* black schools have been closed. The *de jure* black school (McKinley) in North Topeka ... was closed in 1955 and the black children were assigned to Grant or Quincy elementary schools. Grant was closed in 1977. Now all elementary students in North Topeka attend Quincy School. Washington and Buchanan schools were both closed by 1962. Monroe was closed in 1978. The Pierce School was closed in 1959, one year after its attendance zone was annexed into the district. It was an all-black school. When Parkdale was closed in 1978, it had a minority student population of 85.62%. Three schools in central Topeka closed with relatively high minority populations. ... Three schools with relatively low minority populations have been closed. ... Three schools were closed when they had minority populations near the district average.

Id. at 1299.

⁸³ *Id.*

educational resources allocated to schools with substantial numbers of black children, a legacy of Jim Crow laws.

In 1989 the district court ruling that Topeka had achieved a unitary system was reversed by the Court of Appeals for the 10th Circuit.⁸⁴ The failure of the school district's failure to make significant efforts to eliminate racially identifiable schools effectively permitted continuation of a dual educational system.⁸⁵ Once again the focus of the court was racial integration, not equalization of educational opportunities. The federal appellate court ruling, however, was vacated by the United States Supreme Court which ordered the court of appeals to reconsider its decision in light of two recent cases where judicial oversight was removed because the school districts made "good faith" efforts to end racial segregation.⁸⁶

Upon remand the Tenth Circuit decided that neither case affected its original ruling and reinstated its order saying "that because Topeka has not fulfilled its affirmative duty in the areas of student and faculty/staff assignments, the district court erred in concluding that the system as a whole had achieved unitary status. The district court must instead formulate an appropriate remedy."⁸⁷ It took another decade before the federal courts were satisfied.⁸⁸

⁸⁴ *Brown v Bd. of Educ.*, 892 F.2d 851 (10th Cir. 1989).

⁸⁵ *Id.* at 886.

⁸⁶ *Bd. of Educ. v. Brown*, 503 U.S. 978 (1992). (citing *Freeman v. Pitts*, 503 U.S. 467 (1992) (holding that the district court may withdraw its supervision over school desegregation plans in increments and retain judicial supervision only in those areas where the school district is not in compliance, i.e. transportation, physical facilities, school assignments) and *Board of Education of Oklahoma City Public Schools, Independent School District No. 80, Oklahoma County, Oklahoma v. Dowell*, 498 U.S. 237 (1991) (holding that a court may order the dissolution of a desegregation decree if there has been good-faith compliance in terminating past discrimination)).

⁸⁷ *Brown v. Bd. of Educ.*, 978 F.2d 585, 593 (10th Cir. 1992).

⁸⁸ *Brown v. Unified Sch. Dist. No. 501*, 56 F. Supp. 2d 1212 (D. Kan. 1999).

Around the same time that the appellate court was considering whether Topeka have achieved a unitary system another case, *Montoy v. State*, was working its way through the Kansas courts. The focus of this case more directly addressed the concerns of black parents who still longed for equal educational opportunities for their children.

IV. Measuring Educational Equality Post-*Brown*

A. *Brown* Recasted: *Montoy v. State* and Educational Equity

In 1949, at a time when the NAACP’s school litigation efforts attacking “separate but equal” were becoming more successful, the State of Kansas committed itself to educational equality.⁸⁹ In 1966 the State revised Article Six of the Kansas Constitution strengthening its historic commitment to public education; giving the responsibility for the maintenance of public schools to both the state legislature and the local school boards⁹⁰; and requiring the legislature to “make suitable provisions for finance of the educational interests of the state.”⁹¹ The State’s unfulfilled constitutional and statutory promise of educational equity stimulated litigation in the 1960s and early 1970s resulting in enactment of the School District Equalization Act (SDEA).⁹²

⁸⁹Charles Berger, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J. L. & EDUC. 1, 5 (1998). Kansas, however, had legislation providing mandating some state support of its public schools since the early twentieth century. But in 1949 the state legislature explicitly added “equalization . . . to state aid formulas.” *Id.* at 4-5.

⁹⁰ Kan. Const. art. 6, §§ 1, 2, 5.

⁹¹ *Id.* at § 6.

⁹² Berger, *supra* note 89, at 2. School funding measures were considered during three periods when Kansas considered major educational reforms. The first period occurred in the 1960s and was stimulated in part by a lawsuit, *Tecumseh v. Throckmorton*, 195 Kan. 144 (1965), filed by 148 school districts challenging a 1963 law requiring unification of school districts. The legislature enacted the 1965 School Foundation Act followed by a revamping the Article 6, the Education Article, of the 1966 Kansas Constitution. Berger, *supra* note 89, at 8. A second period of reform occurred in the early 1970s prompted again by a lawsuit, *Caldwell v. State*, Case No. 50616 (Johnson Co. Dist. Ct. Aug. 30, 1972), in which a state district court declared the state funding system unconstitutional because it made funding “dependent on [] the wealth of the district in which the child resides.” Berger, *supra* note 89, at 11 (citing *Caldwell*)

Like most states the wealth of individual Kansas school districts determined the amount of funding received by public schools. This funding system resulted in wide disparities in per pupil expenditures between school districts.⁹³ Charles Berger writes that “the blurring of the goals of public education finance between educational equity, taxpayer equity, adequacy, and local control of resources, hampered efforts to achieve a sustainable and conceptually consistent system of finance.”⁹⁴

The SDEA “was conceived as a way to dissociate educational opportunity and [school] district wealth.”⁹⁵ Under this act the State provided each school district with monies for public education and the districts had to contribute local funds amounting to 1.5 percent of the districts wealth – assessed valuation and taxable income.⁹⁶ During the 1970s two cases unsuccessfully challenged the constitutionality of the SDEA, but by the late 1980s financial inequalities among the school districts worsened.⁹⁷ A reappraisal of property state-wide in 1989 significantly reduced the level of funding for education.⁹⁸

In 1991 four lawsuits from forty-two school districts challenging the SDEA were consolidated into *Mock v. State*.⁹⁹ Unlike the earlier cases the plaintiffs in *Mock* were not concerned about the constitutionality of the SDEA; rather they were worried about

⁹³ Berger, *supra* note 89, at 11 (citing *Caldwell*)

⁹⁴ *Id.* at 16.

⁹⁵ *Id.* at 12.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 12. The first challenge occurred in 1974 when taxpayers, individual students and 42 schools districts challenged the constitutionality of SDEA in *Knowles v. State Board of Education*. 219 Kan. 271 (1976). “The district court judge allowed time for the legislature to respond before effectuating his order The 1975 amendments to the SDEA were designed to correct some of the irrationalities . . . found in the 1973 act.” Berger, *supra* note 89, at 14. The district court dismissed the case as moot, but the state supreme court overruled and remanded the case. *Knowles, supra*, at 279. Seven years later the district court once again upheld the constitutionality of the SDEA and the parties did not appeal this ruling. Berger, *supra* note 89 at 14 (citing *Knowles v. Kansas*, 77 CV 251 (Kan., Shawnee Co. Ct. Jan. 26, 1981)).

⁹⁸ Berger, *supra* note 89, at 17.

⁹⁹ *Id.* (citing *Mock v. State*, Case No. 91-CV-1009 (Shawnee Co. Dist. Ct. Oct. 14, 1991)).

the shrinking state funds devoted to public education.¹⁰⁰ But Kansas District Court Judge Terry Bullock quickly realized that the plaintiffs' complaints went to the way public schools were financed.¹⁰¹ The key question was the nature of the state constitution's educational mandate and resulting legislative duty which the judge declared to be that "each child ... receive[s] ... [an] educational opportunity which is neither greater nor less than that of any other child."¹⁰² Judge Bullock's articulation of this legislative duty was grounded in two earlier Kansas Supreme Court cases.¹⁰³

Based on the stated legislative duty Judge Bullock also concluded that "[e]qual educational opportunity need not mean exact equality of dollar expenditures; ... sometimes equality of opportunity may require unequal expenditures."¹⁰⁴ The educational opportunity provided, however, must be "suitable," as determined by the needs of the students.¹⁰⁵ The SEDA formula was constitutional defective because it did not take these considerations into account.

Following the *Mock* decision the Kansas legislature enacted the 1992 School District Finance and Quality Performance Act (SDFQPA) which mandated a uniform state-wide basic property tax and set a fixed budget for each district based on weighted

¹⁰⁰ *Id.* at 16-17.

¹⁰¹ *Id.* at 18.

¹⁰² *Id.* at 20. (citing *Mock v. State*, Case No. 91-CV-1009 (Shawnee Co. Dist. Ct, Oct. 14, 1991)).

¹⁰³ In 1942 that court said that "[t]he general theory of our educational system is that every child in the state, without regard to race, creed, or wealth, shall have the facilities for a free education" *Smith v. State*, 155 Kan. 588, 595 (1942). In 1982 the state high court said in that "[t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded equally to all. *Provance v. Shawnee Mission U.S.D.* No. 512, 231 Kan. 636, 643 (1982).

¹⁰⁴ *Berger*, *supra* note 89, at 20. (citing *Mock v. State*, Case No. 91-CV-1009 (Shawnee Co. Dist. Ct, Oct. 14, 1991)). Judge Bullock cites, as examples, "students requiring transportation to school and students speaking English as a second language, . . . [which] may require disproportionate expenditures to ensure equal educational opportunity. *Id.* at 20 (citing *Mock v. State*, Case No. 91-CV-1009 (Shawnee Co. D. Ct, Oct. 14, 1991)).

¹⁰⁵ *Id.* at 20.

enrollment.¹⁰⁶ Unlike the SDEA the SDFQPA “start[ed] from a presumption of equal dollar [per pupil] expenditures” but compensated for disparities between districts using six weighing factors.¹⁰⁷ Satisfied with the result Judge Bullock dismissed the case with the parties’ mutual consent.¹⁰⁸ Nevertheless, the issue of unequal educational opportunity simply would not go away.

More than a decade later, Judge Bullock made similar findings about the SDFQPA in *Montoy v. State*.¹⁰⁹ But his ruling went even further, finding the school financing scheme unconstitutional.¹¹⁰ Judge Bullock hoped that the legislature would act quickly to rectify the situation. The Kansas Legislature, however, was unwilling and perhaps financially unable to remedy the harm. According to one scholar, the Kansas legislature played politics with public education. Rejecting bill after bill due to presumed financial costs/burdens and bi-partisanship.¹¹¹

¹⁰⁶ 1992 Kan. Sess. Laws Ch. 280.

¹⁰⁷ Berger, *supra* note 89, at 29. Those factors were transportation, vocational education, bilingual education, at-risk pupil, low enrollment, and school facilities. *Id.*

¹⁰⁸ *Id.* at 28.

¹⁰⁹ *Montoy v. Kansas*, Case No. 99-C-1738 (Shawnee Co. Dist. Ct., May 11, 2004)).

¹¹⁰ Judge Bullock wrote that the scheme:

- (1) failed to equitably distribute resources among children equally entitled by the Constitution to a suitable education, or in the alternative, to provide a rational basis premised in differing costs for any differential;
- (2) failed to supply adequate total resources to provide all Kansas children with a suitable education (as that term was previously defined by both this Court and the Legislature itself); and
- (3) ... dramatically and adversely impacted the learning and educational performance of the most vulnerable and/or protected Kansas children. This disparate impact occurred by virtue of underfunding, generally, and selective underfunding of the schools were these vulnerable and/or protected children primarily attend, specifically. Those vulnerable and/or protected children, of course, were and are; the poor, the minorities, the physically and mentally disadvantaged, and those who cannot or nearly cannot yet speak the primary language of America and its schools.

Id. at 2-3.

¹¹¹ Note the legislative history set out by Judge Bullock. *Id.* at 6-9.

In his December 2003 ruling Judge Bullock gave the legislature a few more months to repair the state school financing scheme.¹¹² When the 2004 legislative session closed with no changes the frustrated judge wrote:

Hundreds of thousands of these children have gone through the Kansas educational system during this period of time. According to the evidence, many thousands of them have been permanently harmed by their inadequate educations and forever consigned to a lesser existence. Further delay will unquestionably harm more of these vulnerable and/or protected of our students.¹¹³

In essence students who needed the most funding aid were getting the least, and being blatantly neglected by the legislative and executive branches. These failings are quite similar to the complaints advanced by educational advocates like Gary Orfield and others about the current status of non-white children educated nation-wide in highly segregated urban public schools.¹¹⁴

In measuring equality Judge Bullock once again remarked that the equal educational opportunity requirement is not satisfied merely by spending equal amounts of money on each student. He wrote: "some children are more expensive to education than others (especially the poor or at risk; physically and mentally disabled; racial minorities; and those who cannot or are limited in their ability to speak English)."¹¹⁵ Yet Judge Bullock's ruling did not give parents, lawyers, legislators and educators a clear picture of how to measure educational equality.

¹¹² *Id* at 1.

¹¹³ *Id.* at 10.

¹¹⁴ *See supra* notes 69-72 and accompanying text.

¹¹⁵ *Montoy*, at 4-5.

B. Integration without Equality: *Hobson v. Hansen*

Derrick Bell and a few others argue that black American students do not need to attend school with white children to receive a good education.¹¹⁶ Given the racial composition of most large cities in this nation, racial integration, if it means white majority schools, is unattainable. Some of our largest cities have overwhelmingly non-white public school populations.¹¹⁷ In many of these same cities a substantial majority of residents are non-white, so even if white children returned to those public schools, highly segregated school would still exist.¹¹⁸ Since the United States Supreme Court in *Milliken v. Bradley* restricted transporting students across school district lines to achieve racial balance,¹¹⁹ we are faced with determining how to achieve educational equality for poor, predominately non-white public school students. This was the issue facing the federal district court in *Hobson v. Hansen*.

Thirteen years after *Brown* black and poor students sued the Superintendent of Schools and the members of the Board of Education in the District of Columbia to determine whether the District's public schools were in compliance with the mandate

¹¹⁶ BELL, *SILENT COVENANTS*, *supra* note 12, at 165-66. "Simply placing black children in 'white' schools will seldom suffice." Bell, *supra* note 12, at 514; "Desegregation plans can never yield the instructional gains to which black children are entitled... demographic desegregation must take a backseat to instructional reform or we will remain frustrated by a continuing and widening gap between white and black pupil performance in desegregated schools." Ronald R. Edmonds, *supra* note 18, at 23.

Many advocates of nonpublic schools serving urban black children maintain that *Brown's* integrative mandate is essentially assimilative. Black students are sent to white schools where teaching, curricula, and conceptions of merit express the homogeneity of their history. Because little attention is given to multiracial, multicultural, or multiclass issues, black students often feel their school environment is alien to their experience. This institutional closed-mindedness makes inclusion as stigmatizing as exclusion.

¹¹⁷ As of 2000, between 85 and 90 percent of the students in New York, Los Angeles, Chicago, Miami-Dade, and Houston—the five largest central-city school districts—were minorities. CASHIN, *supra* note 16, at 219.

¹¹⁸ See ORFIELD & LEE, *supra* note 9, Table 18 at 34-35.

¹¹⁹ *Milliken v. Bradley*, 418 U.S. 717 (1974). Further, I am not advocating that racial integration be achieved by bussing students across district lines.

announced by the Supreme Court in *Bolling v. Sharpe*,¹²⁰ the companion case to *Brown*.¹²¹ At the time black Americans constituted 60% of the city's population and 90% of the public school population.¹²²

J. Skelly Wright, a federal circuit judge sitting as district judge in the case,¹²³ found that "the school administration's response to the fact and dilemma of segregation has been primarily characterized by indifference and inaction."¹²⁴ Not only had school officials not taken any serious steps to correct *de facto* segregation, Judge Wright found that post-*Brown* school policies actually encouraged segregation.¹²⁵ Specifically, the court found continuing segregation of school personnel:¹²⁶ in the teacher placement policies¹²⁷ and in the placement of principals.¹²⁸

¹²⁰ *Bolling v. Sharpe*, 344 U.S. 873 (1952).

¹²¹ *Hobson v. Hansen*, 269 F. Supp. 401, 405 (D.D.C. 1967).

¹²² *Id.* at 421.

¹²³ At that time the federal district judges in the District of Columbia appointed the members of the Board of Education, defendants in the case, so they could not sit because of conflict of interest concerns. Susan Low Bloch and Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 588 n.237 (2002) (citing ARTHUR SELWYN MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT 57 (1984)). Chief Judge Bazelon of the D.C. Circuit assigned Judge Wright to the case because of his experience "as district judge superintending school desegregation in New Orleans." *Id.* His leadership in enforcing the Brown mandate in New Orleans was a reason President Kennedy appointed Judge Wright to the D.C. Circuit bench. "Judge Wright was not a popular figure in the Fifth Circuit, and many in that community were pleased to see him move to Washington." *Id.* at 563 n.66 (citing J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 221-29 (1971).)

¹²⁴ *Hobson*, 269 F. Supp. at 414. The trial judge continued: "School officials have refused to install actual integration as an objective for administration policy, or even to recognize that in the District segregation is a major problem. Over the years they have expressed little interest in and done nothing about locating schools on the borders of white and Black communities, or busing students from east of the Park into the underutilized schools west of that divide to achieve integration, or building schools in the Park accessible from east and west alike. Many of these ideas, indeed, have apparently never been considered." *Id.*

¹²⁵ *Id.* at 415-16.

¹²⁶ The judge wrote that "a significant if not startling degree teachers and principals have been assigned to schools where their own race mirrors the racial composition of the schools' student bodies. In a nutshell, white schools are usually paired with white faculties, Black schools with Black faculties; and integrated schools have integrated faculties." *Id.* at 423-5.

¹²⁷ "The Board's policies thus plainly entailed the entrenchment and perpetuation of the teacher segregation of the past with a minimum of change. The court finds that at least a part of today's segregation is attributable to the Board's 1954 failure to shuffle faculties and thereby undo the *de jure* segregation which had theretofore been the rule." *Id.* at 426. "In short, defendants have not shown that policies and practices free of racial criteria have been responsible for the patterns of teacher segregation in the District." *Id.* at 429.

The court also found glaring inequalities in the distribution of educational resources, looking at the age of school buildings, their physical condition and educational adequacy; the number of library books, the existence and quality of school libraries, librarians; the degree of school congestion, the quality of faculty, and by considering factors like teacher experience, the use of temporary teachers, textbooks and supplies, and per pupil expenditures.¹²⁹ Judge Wright concluded that school administrators were indifferent about these inequalities.¹³⁰

As a result, he concluded that where *de facto* segregation exists due to factors beyond the control of school administrators, the “separate but equal doctrine” of *Plessy* applies, and “the principle of equal educational opportunity requires that schools must be materially equal whenever, for whatever reasons, these schools are substantially segregated racially or economically.”¹³¹ Under Judge Wright’s reasoning, *de facto* segregation in public schools is especially harmful if it results in unequal educational opportunities for non-white and poor students.

His reasoning seems more an extension of *Sweatt v. Painter* than *Brown*, although Robert Carter writes that “*Brown* surely must require the abandonment of all state educational policies and practices that result in a disparate allocation of public

¹²⁸“Testimony at trial verified that none of the white elementary schools in the Northwest has had a Black principal at any time since desegregation.” *Id.* at 429.

¹²⁹ *Id.* 431-38. The trial court also examined the student “ability-based” tracking system. The school official initiated to tracking system as “a response to problems created by the sudden commingling of numerous educationally retarded Black students with the better educated white students.” *Id.* at 442. The trial judge concludes, however, that the system’s policy of “ability grouping as presently practiced . . . is a denial of equal educational opportunity to the poor and a majority of the Blacks, a denial that contravenes not only the guarantees of the Fifth Amendment but also the fundamental premise of the track system itself.” *Id.* at 443.

¹³⁰ *Id.* at 441-42.

¹³¹ *Id.* at 493-94. One commentator writes: “By applying the *Plessy v. Ferguson* aphorism, ‘separate but equal,’ the court discovers violations of equal protection in the inferiority of the predominantly Negro schools.” Pamela K. Quinn, *Hobson v Hansen: A Substantial Step in the Evolution of the Equal Educational Opportunity of Equal Protection*, 29 U. PITT. L. REV. 149, 154 (1967-1968).

educational resources between blacks and whites.”¹³² Clearly the *Sweatt* decision influenced how Judge Wright went about determining what constitutes equal educational opportunities.¹³³ Even the court’s discussion of why an integrated education is valued mirrors the Supreme Court’s language in *Sweatt*:

The Court finds that actual integration of students and faculty at a school, by setting the stage for meaningful and continuous exchanges between the races, educates white and Negro students equally in the fundamentals of racial tolerance and understanding.¹³⁴

The Court in *Sweatt v. Painter* stated:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.¹³⁵

¹³² Robinson, *supra* note 10, at __n.56 (quoting Robert Carter, *Reexamining Brown Twenty-five Years Later*, *supra* note 60, at 622).

¹³³ The Court in *Sweatt* similarly found that the separate Law Schools at the University of Texas for African American and white were clearly unequal:

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school’s alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State.

339 U.S. at 632-33.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; nor was there any full-time librarian. The school lacked accreditation. Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas bar.

Id. at 633.

¹³⁴ *Id.* at 419.

¹³⁵ 339 U.S. at 634.

Judge Wright's discussion about the value of racially integrated public schools also is roughly analogous to the justification for integration being advanced today by education scholars like Gary Orfield. In *Hobson* Judge Wright wrote that

[r]acially and socially homogeneous schools damage the minds and spirit of all children who attend them—the Black, the white, the poor and the affluent—and block the attainment of the broader goals of democratic education, whether the segregation occurs by law or by fact....[Further t]he scholastic achievement of the disadvantaged child, Black and white, is strongly related to the racial and socioeconomic composition of the student body of his school. A racially and socially integrated school environment increases the scholastic achievement of the disadvantaged child of whatever race.”¹³⁶

Significantly, in *Hobson* Judge Wright extends the reasoning of *Brown* to encompass educational inequities due to socioeconomic class. Thus it is not simply racial isolation mandated by law that contributes to educational inequities, rather similar inequities exist where affluent families, particularly white families, are absent from public schools.¹³⁷ Given these conclusions a simplistic approach would be to place poor children in schools with affluent white majorities. But Judge Wright's findings in *Hobson* also illustrate how attending the same school as affluent whites is not always a guarantee of equal educational opportunity.¹³⁸

¹³⁶ *Hobson*, 269 F. Supp. at 406.

¹³⁷ Judge Wright notes:

Washington's white families, . . . are increasingly few in number; further their residences are heavily concentrated in one area of the city, the area west of Rock Creek Park The Park is a verdant curtain which draws through the city. It has long been true that virtually every residence west of the Park is white [E]ast of the Park the city is very heavily Negro. Twenty-seven years ago whites constituted at least a one-third minority in every neighborhood in the city. But the rapid white out-migration from Washington into the Virginia and Maryland suburbs ever since 1948, the year of peak white population, has evidently depleted the supply of whites in many areas.

Id. at 410.

¹³⁸ The District of Columbia school system used a four-part tracking system that divided students into “Honors”, “College Prep”, “General” and “Basic” based ability. *Id.* at 406-07. Judge Wright found that “[o]nly a small number of predominately Negro elementary schools offer the Honors “Track,” the highest rung in the school system’s track system of ability grouping. By contrast, virtually all of the predominately white elementary schools have Honors Tracks.” *Id.* at 439. Further he concluded that the aptitude test used

Segregation existed within the District's integrated but majority white schools due to the tracking system adopted by the School Board shortly after the *Bolling* decision.¹³⁹ Judge Wright, like Professor Robinson, concludes that the tracking system perpetuates the evils of *de jure* racial segregation.¹⁴⁰ Recently a sociologist who studied public schools in North Carolina found "[s]ome of the most widespread and harmful sources of racially disparate educational processes and outcomes are racially segregated schools and classrooms segregated by tracking."¹⁴¹ She concludes that using socioeconomic diversity in school assignment is "a promising strategy [that]... do[es] not employ racial prescriptions or sacrifice excellence on the altar of equality"¹⁴² But few urban school systems have substantial affluent student populations, a point I address in the next section. Further, her suggestion does not address the evils caused by tracking within racially integrated schools that result from biased assignment criteria and earlier unequal educational opportunities.

V. Equally Funded and Racially Integrated Education As Reconcilable Goals

A. Resegregation and Decline in Educational Quality

Much post-*Brown* scholarship has been devoted to how meaningful integration was thwarted by (1) white parents who fled the cities for white suburban enclaves fearing that their children would receive an inferior education in racially integrated public

to determine a student's track was inappropriate "since these tests do not relate to the Negro and disadvantaged child, track assignment based on such test relegates Negro and disadvantaged children to the lower tracks from which, because of the reduced curricula and the absence of adequate remedial and compensatory education, as well as continued inappropriate testing, the chance of escape is remote." *Id.* at 407. For a discussion of the use of tracking post-*Brown*, see Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469 (1996).

¹³⁹ *Hobson*, 269 F. Supp. at 442-43.

¹⁴⁰ *Id.* at 515. See Professor Robinson's discussion of tracking as means of resegregation. Robinson, *supra* note 10 at ____.

¹⁴¹ Mickelson, *supra* note 1, at 1481.

¹⁴² *Id.*

schools¹⁴³ or white parents in deep southern states with substantial black minorities who placed their children in private segregationist academies leaving virtually all-black public school districts;¹⁴⁴ and (2) a Supreme Court that refused to read *Brown* as mandating racial integration across school district lines.¹⁴⁵ Some scholarship also exists describing the decline in the quality of education generally in public schools across the nation and offering suggestions for educational reforms.¹⁴⁶

The support by black parents in large urban areas for school vouchers surprised many public school proponents.¹⁴⁷ The continuing concern of these parents is not

¹⁴³ Diane Ravitch, *Desegregation: Varieties of Meanings*, in SHADES OF BROWN, *supra* note 18, at 38-39.

¹⁴⁴ "In November 1952, South Carolina voters approved a constitutional amendment eliminating the state's duty to educate all children, thus allowing conversion to a private school system to avoid racial desegregation. The governors of Mississippi and Virginia considered submitting similar proposals in 1953. Following the Supreme Court decision in 1954, states across the south passed tuition grant programs." Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 385 (1997); "In Prince Edward County, Virginia, where white intransigence had been so strong that the public schools were closed entirely from 1959 to 1964, most white schoolchildren – about 1,000 of them – were attending the private white academy while 1,728 black youngsters went to the public schools, preferring to abandon the public schools rather than desegregate." RICHARD KLUGER, *SIMPLE JUSTICE* 778 (1977). See generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* 67-81 (1969).

¹⁴⁵ See *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that the white/suburban school districts of Detroit did not have to be included in a desegregation plan unless the white/suburban school districts were actively discriminating against minority students).

¹⁴⁶ See Suzanne Hansen, *School Voucher: The Answer to a Failing Public School System*, 23 HAMLINE J. PUB. L. & POL'Y 73 (2001); Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From the Lemon Test*, 70 ST. JOHN'S L. REV. 273 (1996); Edmonds, *supra* note 18, at 108.

¹⁴⁷ "In a 1997 survey, sixty-two percent of blacks supported vouchers compared with forty-nine percent of the total population." Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1024 n.99 (2002) (citing Lowell C. Rose et al., *The 29th ANNUAL PHI DELTA KAPPA GALLUP POLL OF PUBLIC ATTITUDES TOWARD THE PUBLIC SCHOOLS* 48-49 (1997)). "In another, fifty-seven percent of blacks supported vouchers compared with forty-seven percent of whites." *Id.* (citing JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* 5-6 & nn.14-16 (1999) (citing DAVID BOSITIS, *1997 NATIONAL OPINION POLL--CHILDREN'S ISSUES* 7 (Joint Center for Political and Economic Studies 1997)).

See generally Michael Leo Owens, *Why Blacks Support Vouchers*, N.Y. Times, Feb. 26, 2002, at A2; Sara Horowitz, *Poll Finds Backing for D.C. School Vouchers; Blacks Support Idea More Than Whites*, Washington Post, May 23, 1998, at F01; James Brooke, *Minorities Flock to Cause of Vouchers*, N.Y. Times, Dec. 27, 1997, at A1. "A 1998 national survey of black parents reported a "distinctive lack of energy and passion for integration" and found that eighty-two percent preferred schools to focus on achievement instead." Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1028 (2002) (citing PUBLIC AGENDA FOUNDATION, *TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS* 11, 26 (1998) (quoted in VITERITTI, *supra*, at 33 & n.60).

whether their children are attending racially integrated school, but rather whether their children are receiving a quality education.¹⁴⁸ Education scholar Jeannie Oakes succinctly states the problem:

What happened to educational equality? Perhaps, in the decades following *Brown v. Board of Education* we were naïve enough to think that wanting schools to make things right was enough.... In all our searching, we almost entirely overlooked the possibility that what happens within schools might contribute to unequal educational opportunities and outcomes. We neglected to examine the content and processes of schools itself for the ways they may contribute to school failure.¹⁴⁹

Since most school districts continue to rely disproportionately on property taxes for funding,¹⁵⁰ school districts with the least affluent families get less money than those with the most affluent families. Large urban school districts with weak property tax bases cannot provide the same level of funding as more affluent suburban districts. The result is the same type of inequity in educational expenditure experienced by black *de jure* racially segregated schools, a point Professor Robinson addresses.¹⁵¹

Today faulty state-wide funding formulas are more directly related to unequal educational opportunities than integration. Yet we know from history that the two issues

¹⁴⁸A 1998 study conducted by Public Agenda and the Public Education Network found the 80% of black parents and 88% of white parents cited raising academic standards as more of a priority than racial integration of public schools. Only 9% of black parents and 5% of white parents cited racial integration as a top priority. (available at: www.publicagenda.org/issues/angles_graph2.cfm?issue_type=race&graph=majpropra (last visited 8-4-04). Individual accounts support these statistics. “Let’s focus on what children need and their parents’ desire for them,” said Kaleem Caire, immediate past president of the Black Alliance for Educational Options. “We think that’s more important than desegregation for black children.” Kim Cobb, *Cleveland is Heavy into Vouchers, But Whether They Improve Education is Debatable*, THE HOUSTON CHRONICLE, June 3, 2002, at A9. “I’m not speaking for any of the other parents in the voucher program, but when I search for schools, I look for a school that would academically give my children what they needed” said Kitchen, who is black, “And secondly, I do look for diversity.” *Id.* “Increased black representation in urban public education has had positive symbolic effects...nevertheless...the educational achievement of black children and the overall quality of urban public schools have failed to improve significantly.” Michael Leo Owens, *Why Blacks Support Vouchers*, N.Y. TIMES, Feb. 26, 2002, at A2.

¹⁴⁹ Robinson, *supra* note 10, at ___ n.70 (quoting JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUITY (1985).

¹⁵⁰ Carter, *Public School Desegregation*, *supra* note 64, at 888.

¹⁵¹ Robinson, *supra* note 10, at ___.

are related. This is why some civil rights advocates still cry put black children where the money is—with white children.

An important caveat is warranted here, the flight from inner city public schools by middle-class and affluent blacks has not resulted in substantially improved educational opportunities for their children.¹⁵² Since school funding is still tied to property taxes, and homes in black neighborhoods are generally assessed at lower rates than comparable homes in white neighborhoods,¹⁵³ public schools in more affluent black suburban neighborhoods remain under-funded compared to their white counterparts.¹⁵⁴ Thus we need to uncouple the two related goals – racial integration and equal funding— because today the old integrationist rationale does ensure meaningful educational equality for blacks, Latinos and poor whites.

Once more the Supreme Court by a bare majority thwarted early efforts to achieve equity in the funding of education. The Court in *San Antonio School District v. Rodriguez* refused, despite dicta in several cases emphasizing the importance of education,¹⁵⁵ to recognize public education as a fundamental right for all precluding any

¹⁵² For example starting in the 1970s, many black families fled Washington, D.C. settling in suburban Prince George's County Maryland. By 2000 blacks constitute 62.7 percent of that county's population. U.S. Census Bureau, Maryland Quick Facts, Prince George's County (2000), available at <http://quickfacts.census.gov/qfd/states/24/24033.html> (Last Revised: July 9, 2004). The median household income for Prince George's County is \$55,256 whereas the median household income for the state of MD is \$52,868. *Id.* The median household income in Mitchellville [an affluent black community in Prince George's County] is \$85,000. CASHIN, *supra* note 117, at 128. Another middle-class haven is the older community of Fort Washington in the southern part of the county. *Id.* at 129. According to the most recent census data, Fort Washington is two-thirds black with a median income of \$81,000. *Id.* at 130.

¹⁵³ See CASHIN, *supra* note 1176, at 135-36.

¹⁵⁴ See, e.g., *Id.* at 145-47.

¹⁵⁵ In *Brown* an unanimous Supreme Court wrote: "Education is perhaps the most important function of state and local governments. . . . 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I*, 347 U.S. at 493. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). The importance of public schools in the preparation of individuals for participation as

consideration of whether the Constitution requires all children to be educated on an equal basis.¹⁵⁶ Notwithstanding the *Rodriguez* precedent, I contend that a new battle must be waged for recognition of education as a fundamental right under the national constitution. This right would consist of two components, a guarantee of equality in school financing and a guarantee of a racially/culturally/ethnically diverse learning environment. Given the composition of the current court many readers may question the rationality of this suggestion, but remember the lawyers who successfully litigated the series of decisions leading to *Brown* faced similar circumstances.

Another alternative would be a constitutional amendment guaranteeing basic education. The South Africa Constitution contains an affirmative right to basic education.¹⁵⁷ Unlike the United States, the national government in South Africa has the primary responsibility for funding public education;¹⁵⁸ and unlike South Africa the United States Constitution contains no positive rights. Yet to be effective a constitutional amendment guaranteeing a right to basic education must create an affirmative right to an equal basic education. Further since state and local government are the primary funding

citizens, and in the preservations of the values on which our society rests, long has been recognized by our decisions. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). "Education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all . . . education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). "The diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003).

¹⁵⁶ The Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), upheld the constitutionality of Texas' school financing scheme ruling that differences in educationally funding based on wealth does not trigger strict scrutiny review under the Equal Protection guarantee of the Fourteenth Amendment.

¹⁵⁷ S. Afr. Const. ch. II, 29 (1) (a). See generally, Alfreda Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Development in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South Africa Constitution*, 26 HAST. CONST. L. Q. 853 (1999).

¹⁵⁸ Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 41-2 (2003) (arguing against the user-fee system)

sources for public education in this country, a constitutional amendment should direct the states to provide equal basic public education to all its residents. Since a federal constitutional amendment is unlikely in the near future, state courts remain the best arena to push for educational equality.

B. Achieving Equal Funding for Education

Most recent success in achieving some level of financial educational equality has come in state courts where a state constitution guarantees free public education.¹⁵⁹ Like Judge Bullock in Kansas, a few state judges, while mindful of financial constraints placed on state legislatures, seem willing to require some form of educational equality and able to measure what constitutes equality.¹⁶⁰ Increasing numbers of states are now rethinking

¹⁵⁹ See, e.g., *Columbia Fall v. Montana*, Case No. BDV-2002-528 (Mont. 1st Judicial Dist. Ct., April 15, 2004), available at <http://www.mtsba.org/currenttemp/litigation/schoolfundingdecision.htm> (on file with the author); *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31 (2002); *State v. Campbell County Sch. Dist.*, 19 P.3d 518 (Wyo. 2001); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326 (App. Div. 2001); *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *McDuffy v. Secretary of Executive Off. of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993). *But cf.* *Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997). Courts in three states struck down state school financing schemes based on state constitutional: *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Edgewood Ind. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). For further discussion of school finance litigation, see *Campaign for Fiscal Equity v. State*, *supra*, at 480-83; Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547 (1999); R. Craig Wood, *Constitutional Challenges to State Education Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531 (2004); Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Sage of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499 (2004); David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 ARK. L. REV. 519 (2003); Karen Swenson, *School Finance Reform Litigation: Why are some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000); Jennifer L. Fogle, *Abbeville County School District v. State: The Right to a Minimally Adequate Education in South Carolina*, 51 S.C. L. REV. 420 (2000); J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607 (1999); Kent K. Anker, *Differences and Dialogue: School Finance in New York State*, 24 N.Y.U. REV. L. & SOC. CHANGE 345 (1998); Troy Reynolds, *Education Finance Reform Litigation and Separation of Powers: Kentucky Makes its Contribution*, 80 KY. L.J. 309 (1992);

¹⁶⁰ See *Columbia Fall v. Montana*, Case No. BDV-2002-528 (Mont. 1st Judicial Dist. Ct., April 15, 2004), available at <http://www.mtsba.org/currenttemp/litigation/schoolfundingdecision.htm> (on file with the author); *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31 (2002); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

Taunya Lovell Banks, *Brown at 50: Reconstructing Brown's Promise*
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how to fund public education more equitably.¹⁶¹ Perhaps the time is ripe to develop a strategic plan for raising this issue again in the United States Supreme Court.

A close reading of the plaintiffs' argument in *San Antonio School District v. Rodriguez* discloses that the harm alleged is based not solely on socio-economic status, but implicitly racialized status as well. The majority opinion by Justice Powell begins:

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools [as] a class action on behalf of school children throughout the State who are *members of minority groups or who are poor* and reside in school districts having a low property tax base."¹⁶² (emphasis added)

Race, in its broadest sense, was the elephant in the courtroom.¹⁶³ Plaintiffs by characterizing themselves as poor Mexican Americans seem to be arguing in addition to the fundamental right issue, that state educational funding determinations based on wealth which disproportionately impact racialized groups are suspect under the Equal Protection clause of the Fourteenth Amendment. Prior to *Brown* Texas law only authorized separate schools for whites and blacks.¹⁶⁴ The state never formally segregated

¹⁶¹ See *supra* note 160. "In over twenty-four states, parents and coalitions of property-poor school districts have launched challenges to state education financing systems alleging that disparities in expenditure per pupil between low-wealth districts and high-wealth districts violate their state constitution's equal protection and education clauses. Arkansas, California, Connecticut, Kentucky, Minnesota, Montana, New Jersey, Texas, West Virginia and Wyoming have struck down financing schemes where the funding differences are due to unequal property tax bases or unequal demands on local revenue." Carter, *Public School Desegregation*, *supra* note 64, at 893-94.

¹⁶² 411 U.S. at 4-5.

¹⁶³ Although Justice Thurgood Marshall in his dissent in *Rodriguez* never mentions race as a factor, he cites, in addition to *Brown*, three of the old favorably decided NAACP Supreme Court separate but equal cases, *Missouri ex rel. Gaines*, *McLaurin* and *Sweatt*. *Id.* at 84-85. Marshall also cites *Hobson v. Hansen* and two other post *Brown* race cases, *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 231 (1964), and *McGowan v. Maryland*, 366 U.S. 420, 427 (1961). *Id.* at 86, 92.

¹⁶⁴ George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 574-75 n.95 (1994) (detailing desegregation efforts of Mexican-Americans since 1930).

Mexicans/Mexican Americans in public schools,¹⁶⁵ even though Mexicans/Mexican Americans in Texas experienced discrimination in other areas like public accommodations¹⁶⁶ and housing.¹⁶⁷ Further, Mexicans/Mexican Americans were classified under Texas law as white,¹⁶⁸ so the plaintiffs were precluded from alleging race-based discrimination in education.

The three judge district court in a per curiam opinion declared the Texas school financing scheme unconstitutional.¹⁶⁹ In concluding that education was a fundamental right the court relied on a similar ruling by the California Supreme Court¹⁷⁰ that same year and the language of the Supreme Court in *Brown*.¹⁷¹ Without the race component it is unsurprising that the Supreme Court in *Rodriguez* focused only on the wealth claim ruling in favor of the state.

The narrowly divided Court was mindful that states still were smarting from interference by federal courts with local control of public schools pursuant to its *Brown* mandate. The amicus briefs filed by thirty states, including Kansas, on behalf of the State

¹⁶⁵ This did not mean that individual districts did not discriminate. *Id.* at 574-75 (discussing *Independent School District v. Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App. 1930), in which a school for Mexicans/Mexican Americans upheld for linguistic and other reasons).

¹⁶⁶ *Id.* at 563-65. (citing *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824 (Tex. Civ. App. 1944) (swimming pool)).

¹⁶⁷ *Id.* at 569 (citing *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948) (restrictive covenant)).

¹⁶⁸ *Id.* at 575 (citing language from *Salvatierra*).

¹⁶⁹ *Rodriguez v. San Antonio Independent Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971).

¹⁷⁰ *Serrano v. Priest*, 5 Cal. 3d 584 (1971).

¹⁷¹ *Rodriguez*, 337 F. Supp. at 281, 283. The court also cited *Hobson v. Hansen*. *Id.* at 284. The equality claims of the plaintiffs in *Rodriguez* were rather modest. They asked only for “fiscal neutrality . . . that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole.” *Id.* Justice Thurgood Marshall dissenting in the Supreme Court case noted that “[t]he District Court . . . postponed decision for some two years in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme . . . only after the legislature failed to act in its 1971 Regular Session . . . the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision. The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing. 411 U.S. at 71 n.2. (citations omitted)

of Texas reflected these serious federalism concerns.¹⁷² But as the *Montoy* decision suggests, attitudes have changed in some of these states since the early 1970s.

C. The Value of a Truly Racially Integrated Education

As the previous sections suggest, experts are still divided about whether racially integrated schools are the remedy for educational inequality. This section briefly explores whether there are other reasons to press for racially integrated schools.

I have always been troubled by a sentence in *Brown* that reads: “To separate [black school 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.”¹⁷³ What the Court did not say, but what seems equally true is that racially segregated schools harm white children too, especially in a society where they are unlikely to encounter their racial counterparts in everyday life.¹⁷⁴

Jim Crow laws and practices harmed all segments of American society, even though whites benefited politically and economically during the period. The harm of racial segregation mandated by law cuts both ways. United States Supreme Court Justice Sandra Day O'Connor writing for the majority in *Grutter* noted how: “numerous studies

¹⁷² *Rodriguez*, 411 U.S. at 57 n. 111.

¹⁷³ *Brown*, 347 U.S. at 494.

¹⁷⁴ John Payton argued before the Supreme Court in *Gratz v. Bollinger*:

Michigan is a very segregated state...The University's entering students come from these settings and have rarely had experience across racial or ethnic lines. That's true for our white students. It's true for our minority students. They've not lived together. They've not played together. They've certainly not gone to school together. The result is often that these students come to college not knowing about individuals of different races and ethnicities. And often not even being aware of the full extent of their lack of knowledge. This gap allows stereotypes to come into existence.

John Payton, *Gratz v. Bollinger* (Oral Argument Apr. 1, 2003), in *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 2002 TERM SUPPLEMENTAL 15* (Gerhard Casper et al. vol., 321).

show that student body diversity promotes [better] learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’¹⁷⁵

The study that most impressed the Court was done by the United States Military whose history of integration pre-dates *Brown*.¹⁷⁶ The amicus brief by Lt. General Julius Becton, Jr. and other retired military personnel argued that presently “no alternative exists to limited, race-conscious programs to increase the pool of high quality minority officer candidates and to establish diverse educational settings for officers,”¹⁷⁷ and that “the military must both maintain selectivity in admissions and train and educate a racially diverse officer corps to command racially diverse troops.”¹⁷⁸ Harvard sociologists Gary Orfield and Chungmei Lee in their 2004 report, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE*, also remind us that:

Whites are becoming minorities in some major parts of the country and may be increasingly willing to admit that they need what can only be learned in desegregated institutions—how to function very effectively in a society where they must understand and work with those of other racial and ethnic backgrounds.¹⁷⁹

So, today, unlike America in the 1950s, integrated educational experiences are in the best interests of whites. This argument needs to be advanced with more force until Americans truly believe it is true. This may be difficult. Even though the country mouths a belief in racially integrated education evidence over the past fifty years suggests that many whites still believe in black inferiority and still resist placing their children in

¹⁷⁵ *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

¹⁷⁶ See Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr. et al. at 10-17, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

¹⁷⁷ *Id.* at 9.

¹⁷⁸ *Id.*

¹⁷⁹ ORFIELD & LEE, *supra* note 9, at 40.

racially integrated schools where whites are not a substantial majority. Thus black children who attend integrated high performing public schools remain in the minority, reinforcing in the minds of both black and white students the notion of black intellectual inferiority and black exceptionalism.

While I agree with Professor Robinson that ideally racial integration is a laudable goal, especially in a racially pluralistic democracy like the United States, I still wonder whether the damage black children consigned to *de jure* racially segregated school suffered is replicated today when they attend high achieving schools with low non-white populations. As long as blacks and Latinos are seen as intellectually inferior second class citizens, white Americans will continue to doubt that sustained interactions with non-whites in school settings benefit them. Squarely addressing the equal funding issue that disproportionately impacts black children is one component of an overall program to make black and Latino children more competitive and better educated.¹⁸⁰ As black and Latino children become more competitive arguments suggesting perceived intellectual inferiority will be harder to advance.

¹⁸⁰ Erik W. Robelen, *Taking on the Achievement Gap*, Prepared for the North Central Regional Educational Laboratory (June 2002), at www.ncrel.org/gap/takeon/toc.htm (last visited 8-3-04) (stating that unequal expectations, differences in financial resources, and differences in teacher quality all contribute to the achievement gap); Kati Haycock, *Closing the Achievement Gap*, Educational Leadership, Vol. 58, Issue 6, Mar. 2001, at 6 (lack of standards, lack of challenging curriculum, need for additional help for students, and differences in teacher quality increase the achievement gap); CASHIN, *supra* note 16, at 228 (stating that malnutrition, poor health care, lack of parental involvement, frequent changes of residence, exposure to violence, and drug use contributes to the burgeoning achievement gap).

Robert Carter acknowledges that "Equalized funding by itself will not lead to higher achievement in inner-city schools, for at the core quality education comes about by human interaction. We need to change human behavior, and how instruction at inner-city schools is organized." Carter, *Public School Desegregation*, *supra* note 64, at 894. He cites as a positive exam the reaction of the Kentucky legislature to a state supreme court ruling, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), declaring the state funding system unconstitutional. In response "the Kentucky state legislature passed legislation not only to equalize funding, but to create an entirely new school system with upgraded teacher quality, new management techniques and expanded preschool programs. The Kentucky Supreme Court was able to provide the legislature with the legitimacy to make these changes that might otherwise have been politically impossible." *Id.*

VI. Conclusion: *Brown* Failed case and Icon Reconciled

Today the struggle for equality in education is different from the 1954 struggle due in part to the increased presence of Latinos along with African Americans in educationally substandard public schools.¹⁸¹ Fifty years after *Brown* the vast majority of white school age children in a far more racially diverse America still have little or no contact with non-white students.¹⁸² Further, the composition of the current United States Supreme Court is radically different from the Court that decided *Brown*. Today we live in a country with a Chief Justice of the Supreme Court, William Rehnquist, "who has consistently opposed school desegregation"¹⁸³ and [with] an Attorney General, John

¹⁸¹ "The percent of Latino students in predominately minority schools in the West has almost doubled from 42 percent in 1968 to 80 percent in 2001." ORFIELD & LEE, *supra* note 9, at 20. In Maryland 23.2% of Latino students attend highly segregated and substandard minority schools. *Id.* at 27. For a discussion of this point, see Kristi L. Bowman, Note: *The New Face of School Desegregation*, 50 DUKE L. J. 1751 (2001).

¹⁸² "In the twenty most segregated large [school] districts, the average white exposure to blacks is about 12%. This means that the average white student in these districts attends schools with less than 12% blacks, indicating highly segregated schools for white students. Five of these districts are among the 40 largest school districts." ERIC FRANKENBERG AND CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 14 (2002) http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf (last visited 8-2-04); "The average white child attends a school that is over 78% white. John R. Logan, *Choosing Segregation: Racial Imbalance in America's Public Schools, 1990-2000* 2 (2002) available at: <http://www.albany.edu/cpr/LoganChoosingSegregation2002.pdf> (last visited 8-2-04).

¹⁸³ During Rehnquist's initial confirmation hearing a memorandum he wrote while a law clerk for Supreme Court Justice Robert H. Jackson about the petitioner's argue in *Brown* surfaced, the pertinent parts of this memorandum read:

In these cases now before the Court, the Court is, as [Attorney John] Davis suggested, being asked to read its own sociological views into the Constitution. . . . If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. . . . To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind -- whether those of business, slaveholders, or Jehovah's witnesses -- have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. . . . I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed.

Nomination of William H. Rehnquist, 92d Cong., 117 CONG. REC. 45815 (1971) (William Rehnquist's memorandum to Justice Jackson concerning *Brown v. Board*). At the time Rehnquist denied that the memorandum reflected his personal opinions, a claim countered by Justice Jackson's long-time secretary,

Ashcroft, who has made much of his political career in Missouri attacking the federal courts' efforts to desegregate" that state's schools.¹⁸⁴ Thus, social scientists Orfield and Lee write: "The immediate question is about the possibility of progress in a society with huge minority populations, massive segregation, a court system that has dismantled critically important policy tools, and a public that supports desegregation but has not consensus about how to get it."¹⁸⁵ Robert Carter states the problem in even starker terms:

The need to ensure equal educational opportunities for African-Americans is even more important now than when *Brown* was decided in 1954. In today's economy, education is a prerequisite simply for opportunity, let alone equal opportunity....the decline in manufacturing and blue-collar jobs, once the mainstay of blacks in segregated communities, has caused many working class blacks to slip into poverty and the poor to become poorer. At the time of *Brown* there were at least still hard labor jobs in which a high school diploma was not really a necessity. Now, even factory jobs require skill. Problems with our economy and competitiveness cannot be separated from our education system. This country cannot afford to have a huge segment of our society that is not well-educated, well-skilled, well-trained and productive.¹⁸⁶

For most black American parents fifty years after *Brown* the ultimate goal, to secure equal educational opportunities for their children, remains unchanged. There also is the question of how to measure what constitutes equality in a multi-racial/multi-cultural society with a long history of racial discrimination and white supremacy. Currently we seem to be in a catch-22 because equality is usually measured by the

Elsie Douglas. Sue Davis, *JUSTICE REHNQUIST AND THE CONSTITUTION* 15 n.14 (1989). More recently Chief Justice Rehnquist wrote a dissenting opinion in *Columbus Board of Education v. Penick*: "the Constitution does not command that school boards not under an affirmative duty to desegregate follow a policy of 'integration uber alles.'" 443 U.S. 449, 513 (1979).

¹⁸⁴ ORFIELD & LEE, *supra* note 9, at 6.

¹⁸⁵ *Id.* at 38. Among the steps they suggest to help address resegregation are housing subsidies to help low income families gain access to middle class schools; increased use of magnet, charter schools and school vouchers to increase the educational choices for all students; and emphasizing to Americans the substantial benefits white children gain from integrated experiences. *Id.* at 39.

¹⁸⁶ Carter, *Public School Desegregation*, *supra* note 64, at 893.

educational opportunities and attainments of middle and upper income white Americans. Perhaps we need to develop alternate measures of equality, at least in public education.

Likewise, diversity in higher education is more than a short-term remedy for past and continuing societal discrimination. The remedial approach ignores the importance of an integrated education to the maintenance of a healthy racially pluralistic democracy. Further, the remedial diversity rationale does not even acknowledge that black Americans still are not accepted as social equals, full American citizens. Robert Carter in explaining the continuing educational deficiencies of black students writes: “Low educational achievement among African-Americans ... resulted not from educational inferiority of blacks but from racism as evidenced by the structure of school financing, and by the structured expectation in our schools that black children will fail.”¹⁸⁷ Integration alone will not address this reality.

Despite the somewhat gloomy picture painted in this essay, there still are many reasons to celebrate the 1954 *Brown* decision. First, *Brown* was the product of black lawyers¹⁸⁸ who with black and white civil rights activists successfully fought against legally mandated racial segregation—Jim Crow laws. Second, *Brown* signaled the end of the *Plessy* “separate but equal doctrine.” Third, the post-*Brown* era opened educational and economic opportunities not previously available to most black and other non-white Americans. Finally, *Brown* held out the promise of full equality—full citizenship — for black Americans. This last promise which unfortunately remains

¹⁸⁷ *Id.* at 889.

¹⁸⁸ Robert Carter argued the case against Kansas; Thurgood Marshall argued the case against South Carolina; Spotswood Robinson, III argued the case against Virginia; Louis Redding and Jack Greenberg argued the case against Delaware; and George C. Hayes and James M. Nabrit, Jr. argued the companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1952) against the District of Columbia. All but Greenberg were black. Numerous other African American lawyers aided in crafting the briefs in these cases.

unrealized fifty years later must be our focus today and for the near future. But as one scholar reminds us: “[b]ecause discrimination in education is intimately connected to discrimination in other social institutions[;] we cannot expect to alleviate the former without concomitant efforts to eliminate the latter.”¹⁸⁹

¹⁸⁹ Mickelson, *supra* note 1, at 1481.