1999

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Recommended Citation
9 Temp. Pol. & Civ. Rts. L. Rev. 1 (1999)

THE SILENT RESURRECTION OF *PLESSY*: THE SUPREME COURT'S ACQUIESCENCE IN THE RESEGREGATION OF AMERICA'S SCHOOLS

by LISA M. FAIRFAX*

INTRODUCTION

Brown v. Board of Education of Topeka Kansas[1] represented the United States Supreme Court's repudiation of the *Plessy v. Ferguson*[2] doctrine of separate but equal in the context of public education.[3] *Plessy* has been described as "one of the most irrational opinions ever announced,"[4] and its reasoning has been characterized as both "fundamentally racialist"[5] and "a compound of bad logic, bad history, bad sociology and bad constitutional law."[6] By declaring separate but equal education a violation of the Equal Protection Clause of the Fourteenth Amendment, *Brown* not only invalidated segregation,[7] it appeared to reject the reasoning that supported segregation:[8]

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* A.B., Harvard University, 1992; J.D., Harvard University, 1995. I would like to thank Professor Charles Ogletree and Professor David Wilkins for their support and encouragement. I would also like to thank Roger A. Fairfax, Jr. and Ketanji Brown Jackson for their comments and suggestions on earlier drafts of this article. All errors, of course, are mine.

1. 347 U.S. 483 (1954).

2. 163 U.S. 537 (1896).

3. *See* Bob Jones University v. United States, 461 U.S. 574, 592-93 (1983) (stating that *Brown* rejected *Plessy*). *But see* Gomperts v. Chase, 404 U.S. 1237, 1240 (1971) (noting that *Plessy*'s mandate that racially separate facilities be equal had not yet been overruled); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 154 (1992) (noting similarities between *Brown* and *Plessy* and that *Brown* necessarily implied there was nothing wrong with racial segregation in and of itself).

4. CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 4 (1987) (quoting Ralph T. Jans, Negro Civil Rights and the Supreme Court, 1865-1949 199 (1951) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago)).

5. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 197 (1978).

6. ROBERT J. HARRIS, QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 101 (1960).

7. This article uses the term "segregation" to refer to separation based on race that is legally mandated or maintained by the state or an agent acting on behalf of the state.

8. Indeed, Justice Harlan's dissent in *Plessy*, 163 U.S. at 552, which objected to the majority's segregationist holding, was actually vindicated by the Court in *Brown*. *See id.* After the Supreme Court announced *Brown*, the NEW YORK TIMES noted that "the words [Harlan] used in lonely dissent have become in effect a part of the law of the land." N.Y. TIMES, May 23, 1954, § 4, at E10. Justice Harlan's dissent has been characterized as "one of the most majestic utter-

> Ever since *Brown v. Board of Education*, judicial consideration of school desegregation cases has begun with the standard: "In the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal." This has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law.[9]

Despite the almost wholehearted public acceptance of *Brown*[10] and the coinciding rejection of *Plessy*, the Burger and Rehnquist Courts have acquiesced in the continuance of *Plessy*-like racially separate educational facilities by restricting the desegregation remedies available to lower courts and school boards, even in cases where the evidence showed the persistence of predominantly one-race schools.[11] Modern-era desegregation cases have arisen in the context of the Court's structuring of desegregation remedies for school districts and states that had already been determined to have intentionally segregated their school systems. Although the Court acknowledged that such entities had violated the Constitution,[12] and the continuance of racially separate schools stemmed, at least in part, from their violation,[13] the Court rejected remedies that would have realistically eliminated segregated schools.[14]

In the 1974 case of *Milliken v. Bradley*,[15] the Supreme Court was faced with a "voluminous" record of the Detroit school board's intentional acts of segregation.[16] Yet, the Court invalidated a multi-district remedy that had been characterized by the Sixth Circuit as the only remedy that would feasibly accomplish desegregation.[17] The Court's decision in *Milliken* allowed the

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ances in American law." *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era: Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 467 (1982). Despite its many accolades, Justice Harlan's dissent, like the majority opinion, included "racialist" assumptions regarding the superiority of the white race. *See Plessy*, 163 U.S. at 537 (Harlan, J., dissenting). Probably the most critical difference between his views regarding race and the majority viewpoint was that Justice Harlan believed such views should not be reflected in the law. As he stated, "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time .... But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens." *Plessy*, 163 U.S. at 559.

9. Milliken v. Bradley, 418 U.S. 717, 737 (1974) (citations omitted) (quoting *Brown*, 347 U.S. at 495).

10. A 1994 Gallup poll conducted by USA TODAY and the *Cable News Network* (CNN) found that 87% of Americans believe that *Brown* was correct. *See* Gary Orfield, *Public Opinion and School Desegregation, in BROWN V. BOARD OF EDUCATION*: THE CHALLENGE FOR TODAY'S SCHOOLS 54, 55 (Ellen Condcliffe Lagemann & LaMar P. Miller eds., 1996) [hereinafter THE CHALLENGE].

11. *See, e.g.*, Milliken, 418 U.S. at 717.

12. *See, e.g., id.* at 752-53 (finding that segregation existed in Detroit city schools).

13. *See, e.g., id.*

14. *See* discussion *infra* Part I.B.

15. 418 U.S. 717 (1974).

16. *See id.* at 745.

17. *See id.* at 735 (quoting court of appeals' conclusion that Detroit school system could desegregate by including suburban school districts). In the second phase of the *Milliken* litigation, the Court sought to rectify the inequalities between the racially separate schools by

Detroit school system to operate a plan under which black school children attended schools that were separate from their white counterparts.[18] In the 1991 case of *Board of Education v. Dowell,*[19] the Court adopted a more lenient standard for determining when to dissolve a desegregation decree than the one proposed by the Tenth Circuit. In doing so, the Court rejected the Tenth Circuit's finding that a more stringent test was necessary to ensure that school officials met their obligation to reduce the effects of past discrimination and that such officials do not hinder the establishment of non-segregated schools.[20] Moreover, the Court's less strict standard enabled the school board to implement a policy pursuant to which nearly half of its previously desegregated schools were returned to a one-race status. In the 1992 *Freeman v. Pitts*[21] decision, the Court allowed the district court to relinquish its supervision of student assignments without requiring the school board to prove that its former segregative polices did not contribute to racial imbalances in such assignments.[22] This decision, therefore, ratified the racial imbalances produced by such assignments. Finally, in the 1995 case of *Missouri v. Jenkins,*[23] the Court rejected remedies determined by the district court to be necessary because some thirty years after *Brown* the state of Missouri and its local school board had failed to reform the segregated scheme of their public schools.[24] The Court's rejection preserved a school system characterized by racial isolation. By curtailing the available desegregation remedies in these instances, each recent decision "cripple[d] the ability of the judiciary" to "devise a feasible and effective remedy" for racially segregated schools.[25]

In adopting more lax standards and remedies for desegregation cases, the modern Court has adopted reasoning and employed rhetoric similar to that utilized by *Plessy* and its progeny. The Court's decisions rest on three tenets reminiscent of reasoning found in *Plessy*-era decisions.[26] First, courts in both time periods relied on the proposition that racial separation stems from private preferences in order to discount the state's role in creating and reinforcing such separation. In *Plessy*, the Court not only validated segregation, it de-emphasized the state's participation in segregation by arguing that segregation laws merely reflected private preferences between the races.[27]

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enabling the district court to order the state to fund remedial education programs. *See* Milliken v. Bradley, 433 U.S. 267, 288 (1977) (*Milliken II*).

18. *See Milliken*, 418, U.S. at 752.

19. 498 U.S. 237 (1991).

20. *See* Dowell v. Bd. of Educ., 890 F.2d 1483, 1504 (1989).

21. 503 U.S. 467 (1992).

22. *See id.* at 513 (Blackmun, J., concurring) (noting majority's failure to stress the interactive effect of past acts of segregation on current school systems).

23. 515 U.S. 70 (1995).

24. *See* Jenkins v. Missouri, 593 F. Supp. 1485, 1490-91 (W.D. Mo. 1984).

25. *Milliken*, 418 U.S. at 762 (White, J., dissenting).

26. This article refers to *Plessy*-era decisions as those decisions prior to *Brown* which upheld segregated education. Such decisions implicitly or explicitly adopted *Plessy*'s separate but equal doctrine and used rationale similar to that used or relied on by *Plessy*.

27. *See Plessy*, 163 U.S. at 551.

Modern decisions similarly discounted evidence of the state's intentional acts of racial segregation—as well as the lingering effects of such acts—by relying heavily on the premise that current racially separated schools stemmed from private decisions related to housing.[28]

Second, the modern Court has mirrored *Plessy*'s reliance on local control as a paramount consideration in cases involving education. The reluctance of *Plessy*-era courts to disturb local decision making caused them to defer to state and school board policies, even though such policies segregated students. Similarly, in describing the purpose of desegregation decrees, the modern Court explained that the restoration of local control was equally as important as remedying segregated schools.[29] By granting the issue of local control the same consideration as the elimination of segregation, the Court undermined the importance of reducing racial segregation in school systems.

Third, the modern Court has implicitly accepted that separate educational facilities can provide equal education for all races, with one member of the Court even suggesting that separate education can be beneficial for black school children.[30] While implicit acceptance is not equivalent to acceptance of the separate but equal doctrine articulated by *Plessy*, it is more consistent with the premises of *Plessy* than with *Brown's* assertions that racially separate education is unsuitable.[31] In adopting these three premises, the Court, while appearing to support *Brown* unequivocally, allowed the spirit of *Plessy* to prevail in its analyses and conclusions.

This article argues that there is enough similarity between the Court's reasoning in *Plessy* and its progeny, and its decisions relating to desegregation, to question the validity of the recent opinions and their underlying assumptions. Part I provides a brief overview of major court decisions involving racial challenges in the field of public education. In addition, it reveals the Court's failure to ensure that state school authorities comply with their affirmative obligation (articulated by *Brown* and its progeny) to remedy the continual effects of an intentionally segregated school system. This failure illustrates the Court's implicit acceptance of racially separate educa-

28. Because much of *Plessy* and its progeny focused on the legitimacy of racial separation, these courts' emphasis on the private nature of such separation was important to, though not necessarily dispositive of, their ultimate conclusions. The modern Court's focus on private preferences can be dispositive because such a focus serves to undermine evidence of the state action necessary to assert a Fourteenth Amendment violation. In both instances, however, courts concluded that because racial separation stemmed from private actions, state officials had no duty to overcome such separation.

29. *Freeman*, 503 U.S. at 489 ("[T]he ultimate objective . . . [is] to return school districts to the control of local authorities . . . ."). *See also Jenkins*, 515 U.S. at 102 (citing *Freeman* for same).

30. *See Jenkins*, 515 U.S. at 122 (Thomas, J., concurring) (quoting his concurrence in U.S. v. Fordice, 505 U.S. 717, 748 (1992)). Justice Thomas argued in both *Fordice* and *Jenkins* that black middle and high schools can be a "source of pride" for blacks and serve as examples of black achievement and success. *See Fordice*, 505 U.S. at 748 (Thomas J., concurring); *Jenkins*, 515 U.S. at 122 (Thomas J., concurring).

31. *See, e.g.*, *Brown*, 347 U.S. at 494-95.

tional facilities reminiscent of *Plessy*. This article does not mean to suggest that school authorities have a duty to eradicate all racial separation within their schools. However, when the Court has already acknowledged intentional segregation within a school and there is evidence that such segregation continues to play a role in the current racial imbalance of a school system, consistent with *Brown*'s progeny, school authorities have an affirmative obligation to rectify that imbalance.[32] Part I demonstrates that within the school systems found to be in violation of *Brown*, the amount of separation between the races, coupled with the evidence of the state's creation and perpetuation of such separation, are more consistent with *Plessy* than *Brown*.

Part II of this article outlines the major premises upon which the *Plessy*-era decisions rested and compares the reasoning of such decisions with that adopted in *Milliken* and Supreme Court opinions decided in the 1990s.[33] Part II then reveals the similarities between the reasoning in such *Plessy*-era decisions and the modern cases challenging desegregation. Part II also illustrates the Court's tendency to reject the principles underlying *Brown*. Part III points out some of the major flaws of the *Plessy*-like reasoning adopted by today's Court. Finally, Part IV discusses strategies for shifting the Court's focus away from, or ameliorating the impact of, reliance on the three premises articulated above. Part IV includes a brief discussion of *Sheff v. O'Neill*,[34] the Connecticut Supreme Court decision that overturned a districting scheme that resulted in racially isolated schools. In *Sheff*, the court imposed an affirmative duty on the state to relieve such isolation. Part IV also addresses school voucher systems. This article concludes by arguing that the trend towards racially separate schooling, coupled with the Court's adoption of *Plessy*-like reasoning to ratify the trend, jeopardize the educational opportunity for all children, threatening America's ability to overcome its racial divide.

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32. This article does not seek to prove that the Court has allowed the state of education more generally to return to conditions close to those sanctioned by *Plessy* and its progeny. This article only analyzes the conditions in school districts directly subject to the Supreme Court cases. For an analysis of the broader impact of the Court's decisions in the field of education, see generally, GARY ORFIELD, ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996). Additionally, this article acknowledges that even within school districts subject to Supreme Court litigation, the complete racial separation found in schools during the *Plessy* era does not exist.

33. This article discusses *Milliken v. Bradley*, 418 U.S. 717 (1974), even though it was decided outside of the general time frame of the other cases discussed. This is because *Milliken* undermined the desegregation effort in urban cities. *See, e.g.*, Gary Orfield, *in* ORFIELD ET AL., *supra* note 32, at 10-11; Joshua E. Kimberling, *Black Male Academies: Re-examining the Strategy of Integration*, 42 BUFF. L. REV. 829, 840 (1994) (calling *Milliken* the "death knell of desegregation"). *See also,* Alan D. Freeman, *Legitimizing Racial Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1108 (1978); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 61, 61 (1974); Comment, Milliken v. Bradley *in Historical Perspective: The Supreme Court Comes Full Circle*, 69 N.W.U. L. REV. 799, 801 (1974).

34. 678 A.2d 1267 (Conn. 1996).

I. HISTORICAL OVERVIEW OF MAJOR DECISIONS INVOLVING RACIAL EQUALITY IN EDUCATION

A. *From* Plessy *to* Brown

The 1850 case of *Roberts v. City of Boston*[35] was one of the first to hold that policies requiring segregation of the races in public schools did not violate the equal rights of blacks. The plaintiff was a five-year old black girl who challenged the Boston school committee's refusal to admit her into an all-white primary school.[36] Decided before Congress passed the Fourteenth Amendment,[37] the *Roberts* decision rested on the interpretation of the Massachusetts Supreme Judicial Court of similar language in the Massachusetts Constitution, which provided that all Americans were born "free and equal."[38] Rejecting the plaintiff's contention that separation of children in public schools on account of color violated equality and tended to degrade blacks while fostering prejudice among whites,[39] the court concluded that the school committee's decision represented a reasonable and nondiscriminatory exercise of its power.[40] The *Roberts* decision became a major precedent in nineteenth-century school litigation, and several other courts relied on *Roberts* to validate segregated education.[41]

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35. 59 Mass. 198 (Mass. 1850).

36. Boston had established 117 primary schools, only two of which were for blacks. *See* LEONARD W. LEVY & DOUGLAS L. JONES, EDS., JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE xi (1974). The plaintiff applied for admission into one of the primary schools designated for white children because it was closer to her home. *See id.* at vii. Although the local and general school committees rejected her application, the black girl went to the white school, but was subsequently removed from the school by a teacher. *See Roberts,* 59 Mass. at 200.

37. The Fourteenth Amendment reads in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

38. Both Charles Sumner, arguing for the plaintiff, and Chief Justice Shaw, interpreted the Massachusetts Constitution as providing that all men regardless of color were entitled to equality before the law. *See Roberts*, 198 Mass. at 201, 206.

39. *See Argument of Charles Sumner, Esq., Against the Constitutionality of Separate Colored Schools, In the Case of Sarah C. Roberts vs. The City of Boston Before the Supreme Court of Massachusetts, quoted in* LEVY & JONES, *supra* note 36.

40. *See Roberts*, 198 Mass. at 209.

41. *See, e.g.*, Lehew v. Brummell (Mo. Sup.) 15 S.W. 765, 767 (Mo. 1890); Ward v. Flood, 48 Cal. 36, 52-57 (1874); People *ex rel.* King v. Gallagher, 93 N.Y. 438, 453-54 (1883). In addition, Justice Brown in *Plessy* also cited a number of decisions to support his claim that courts "generally, if not universally" sustained legislation requiring the separation of school children. *See* State *ex rel* Garnes v. McCann, 21 Ohio St. 198 (1871); Bertonneau v. Bd. of Directors of City Schools, 3 Fed. Cas. 294, No. 1361 (C.D. La., 1878); Cory v. Carter, 48 Ind. 327 (1874); Dawson v. Lee, 83 Ky. 49 (1885).

While most courts followed *Roberts* and upheld segregated schooling prior to *Plessy,* a few courts struck down such systems as violating principles of equality.[42] Indeed, in direct contrast to *Roberts*, the Supreme Court of Iowa overturned a school board's decision to establish racially separate schools and ordered the admission of black children into white schools.[43] The Iowa court characterized the board's decision as contrary to "the principle of equal rights to all, upon which our government is founded."[44] In a similar departure from *Roberts*, the Supreme Court of Kansas required a school board to admit a black child to an all-white school and expressed a preference for integrated schooling.[45] Although the opinion rested on state grounds, the court suggested that school segregation violated the Thirteenth and Fourteenth Amendments.[46] A Pennsylvania court even directly held that segregated education violated the Fourteenth Amendment.[47] Thus, while courts before *Plessy* generally upheld and endorsed laws requiring separate educational facilities, a few courts overturned such legislation, finding that separate facilities represented "a plain violation of the spirit of our laws."[48]

Plessy appeared to halt any ambiguity on the subject of segregated schooling by enshrining the doctrine of "separate but equal" into the Constitution and the law. The plaintiff in *Plessy* challenged a Louisiana law requiring "separate railway carriages for the white and colored races" on all

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42. For a review of the cases, see J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION IN RACIAL DISCRIMINATION IN SCHOOLS 4-31 (1986).

43. *See* Clark v. Bd. of Directors, 24 Iowa 266, 277 (1868). *See also* KOUSSER, *supra* note 42, at 16-18 (citing *Clark*, 24 Iowa at 266; Leona Nelson Bergemann, *The Negro in Iowa*, *in* STUDIES IN IOWA HISTORY 50-53 (1969); John Ely Briggs, *The Inalienable Right of Education*, 8 THE PALIMPSEST (1927)). From the 1930s until 1950, attorneys for the NAACP Legal Defense and Education Fund focused most of their attention on education cases involving unequal salaries for public school teachers. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 116-125 (1994). It was not until 1950 that these lawyers focused their attention on cases that directly attacked the separate but equal doctrine in the lower school system. *See id.* at 150-67.

44. *Clark*, 24 Iowa at 269.

45. *See* Ottawa v. Tinnon, 26 Kan. 1, 19 (1881). The court reasoned that it was "better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other . . . ." *Id.* at 19.

46. *See id.* at 18-23. Although expressing doubts, the court assumed school segregation was constitutional for the purposes of the case. *See id.* The Thirteenth Amendment reads in pertinent part: "Neither slavery not involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the Unites States, or any place subject to their jurisdiction. U.S. CONST. amend. XIII, § 1. *See also* Section One of the Fourteenth Amendment, *supra* note 37.

47. *See* KOUSSER, *supra* note 42, at 21-22 (discussing Allen v. Davis, 10 Weekly Notes of Cases 156 (Crawford County, Pa. 1881)). The 1881 *Allen* opinion was announced by a local judge and was never appealed because the Pennsylvania legislature changed the segregated schooling law one month after the decision. Hence, Professor Kousser characterizes the opinion as "obscure." *Id.* at 26.

48. *Clark*, 24 Iowa at 276. It should be noted that in overturning segregated schooling laws, judges mainly relied on narrow state grounds, while avoiding federal questions. *See id.* Also, cases were more successful in the absence of state law mandating segregation. *See* KOUSSER, *supra* note 42, at 10-12.

passenger railways within the state as a violation of the Equal Protection Clause of the Fourteenth Amendment.[49] Over a strident dissent by Justice Harlan, who argued that the separation of citizens on the basis of race was "arbitrary" and "a badge of servitude wholly inconsistent with . . . equality before the law,"[50] Justice Brown, writing for the Court, held that the Louisiana law was constitutional.[51] Justice Brown focused on social, legislative, and judicial acceptance of laws mandating racial separation in other contexts, particularly in education, as a means of demonstrating the validity of the railway legislation.[52] Brown concluded that the importance of local power and private racial preferences coupled with the overwhelming acceptance of separation based on race in other spheres revealed that such separation was constitutional as a reasonable exercise of the state's police power.[53]

Although the facts of *Plessy* did not specifically involve segregated public education, the Supreme Court relied on cases in the field of education for much of its reasoning.[54] The Court relied heavily on *Roberts* to legitimize policies requiring racial separation.[55] Justice Brown believed these decisions strengthened his argument that laws separating the races were a legitimate exercise of a state's legislative authority:

> Laws permitting, and even requiring, separation [of blacks and whites] . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored

49. *See Plessy*, 163 U.S. at 540. The plaintiff also contended that the Louisiana law violated the Thirteenth Amendment, but the Court quickly dismissed the issue by concluding that it was "too clear" that the Act did not implicate that Amendment because such amendment was enacted primarily to abolish slavery. *Id.*

50. *Id.* at 562 (Harlan, J., dissenting).

51. *See id.* at 552.

52. Justice Brown attempted to legitimize enforced separation of the races by citing its acceptance in several spheres: education, *see id.* at 544-45; marriage, *see id.* at 545; and public accommodations, *see id.* at 546.

53. In *The Slaughter-House Cases*, the Court defined the police power as it related to the Equal Protection Clause as granting wide discretion to the state to regulate its affairs. *See The Slaughter-House Cases*, 83 U.S. 36 (1873).

54. *See Plessy*, 163 U.S. at 544-45 (citing cases for legality of separate school systems). *But see* LOFGREN, *supra* note 4, at 79. Professor Lofgren argues that decisions prior to *Plessy* did not provide clear support for the Court's holding and certainly did not require the conclusion that separate but equal was consistent with the equal protection clause of the Fourteenth Amendment. *See id.* He writes that the majority's use of the school cases was "problematic" because the decision in one case "so inflamed equal-rights advocates" that after the court announced its decision, the state legislature outlawed segregated education. Another case did not directly involve a segregated education statute. Finally, Justice Brown ignored decisions overturning segregated education. *See id.* at 180-82. *See also* THOMAS M. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW (1880 & 1889) (finding the state of school segregation law "unsettled"), *quoted in* KOUSSER, *supra* note 42, at 26-27. Kousser also criticizes Justices Brown and Harlan for failing to cite more favorable cases such as *Clark*, 24 Iowa 266, and *Ottawa*, 26 Kan. 1. *See id.*

55. *See id.* at 544-45. One judge noted that "[t]he reasoning of the *Plessy* opinion stems almost completely from [*Roberts*]." *See* Briggs v. Elliot, 98 F. Supp. 529, 544 (E.D.S.C. 1951) (Waring, J., dissenting).

children . . . .[56]

The Court also emphasized that state legislatures and courts approved such distinctions and that Congress, through its exclusive jurisdiction over the school system in the District of Columbia, also sanctioned separate school systems. As the Court noted, "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyance is unreasonable, or more obnoxious to the fourteenth amendment, than the acts of congress requiring separate schools for colored children . . . ."[57] By relying on *Roberts* and judicial and legislative authorization of separate schools to support its reasoning and conclusion, the *Plessy* court appeared to endorse segregated schooling.

Interestingly, just three years after *Plessy,* the Supreme Court suggested in *Cumming v. Richmond County Board of Education*[58] that it had not yet considered the constitutionality of segregation in the field of education. *Cumming* involved an equal protection challenge to a Georgia school board's use of the tax system to maintain a high school for whites without maintaining one for black school children. In an apparent retreat from his racial egalitarianism in *Plessy*,[59] Justice Harlan concluded that the board's action did not infringe upon the Equal Protection Clause of the Fourteenth Amendment.[60] The plaintiff had asserted that "the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools."[61] Without citing *Plessy*, the Court noted that it "need not consider that question in this case" because the plaintiffs failed to object to the board's use of public taxes to support racially separate schools at the primary level.[62] While the plaintiff's procedural default may have prevented the Court from relying on *Plessy*, the Court's failure to cite or refer to *Plessy* suggests a belief that *Plessy* did not extend to the field of public education.

Despite this ambivalence, later courts assumed that *Plessy* extended to cases involving public education. In the 1927 case of *Gong Lum v. Rice*,[63] a Chinese-American girl challenged a school board's action assigning her to a colored school.[64] In *Gong Lum*, the Supreme Court cited both *Plessy* and *Roberts*, noting that the legality of segregation in education "has been many times decided to be within the constitutional power of the state legislature, without intervention of the federal courts under the federal Constitution."[65]

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56. *Plessy*, 163 U.S. at 544.
57. *Id.* at 550-51.
58. 175 U.S. 528 (1899).
59. *See* KOUSSER, *supra* note 42, at 27-28 (arguing Justice Harlan "exhibited a disingenuousness which fully matched Justice Brown's breezy assurances in *Plessy*" in his decision in Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899)).
60. *See Cumming*, 175 U.S. at 545 (speaking for a unanimous Court).
61. *Id.*
62. *See id.*
63. 275 U.S. 78 (1927) (per curiam).
64. *See id.* at 86.
65. *Id.*

In the 1951 case of *Briggs v. Elliott*,[66] the district court had argued that overturning segregated schools would require it to disregard *Plessy*.[67] After a thorough analysis of the legality of segregated schooling, the *Briggs* court pointed out:

> [W]hen seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court . . . it is a late day to say that such segregation is violative of fundamental constitutional rights.[68]

Thus, while *Plessy* did not involve education, by the middle of the twentieth century, "the courts, and virtually everyone else, acted as if *Plessy* stated a legal rule that applied to education."[69]

In *Brown*, the Supreme Court rejected this rule by unanimously concluding that "in the field of public education the doctrine of 'separate but equal' has no place."[70] The Court had consolidated four desegregation cases in *Brown*, including *Briggs*.[71] Acknowledging that the four school systems being challenged had been equalized or were in the process of being equalized, the Court directly addressed the effect of racial separation on public education.[72] The Court first emphasized the importance of education in

66. 98 F. Supp. 529, 537 (1951) (denying injunction abolishing segregation but granting injunction equalizing facilities), *vacated by* 342 U.S. 350 (1952), *aff'd* 103 F. Supp. 920 (E.D.S.C. 1952), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

67. *See Briggs*, 98 F. Supp. at 537.

68. *Id.* The *Briggs* court reasoned that the Supreme Court had approved segregation in education when it declined to reexamine *Plessy* in Sweatt v. Painter, 339 U.S. 629 (1950). *See id.* at 537. In dissent, Justice Waring argued that *Plessy* was not applicable because it concerned railroad matters and not education. *See id.* at 545 (Waring, J., dissenting). Indeed, prior to *Briggs*, the Court had not clearly affirmed *Plessy's* application to education. Before *Brown*, the Supreme court had decided only six cases involving the separate but equal doctrine in education. In both *Cumming*, 175 U.S. 528, and *Gong Lum*, 275 U.S. 78, the Court only implicitly endorsed the doctrine. The other cases involved graduate education in which the Court prohibited separate graduate school systems. *See* McLaurin v. Oklahoma, 339 U.S. 637, 642 (1950) (holding that where a black student admitted to graduate school is assigned to sit apart in classrooms, the library, and cafeteria, the Fourteenth Amendment prohibits such differences in treatment based on race); *Sweatt*, 339 U.S. at 636 (holding that where an equivalent education is unavailable to an admitted black student in a separate law school, the Equal Protection Clause required the state to admit the student to its all-white law school); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938) (holding that arranging for a black resident to travel outside the state for legal education denied him equal protection of the laws).

69. TUSHNET, *supra* note 43, at 170.

70. *Brown*, 347 U.S. at 495.

71. The consolidated appeals were Gebhart v. Belton, 87 A.2d 862 (Del. Ch. 1952); Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952); and Davis v. County Sch. Bd. of Educ., 103 F. Supp. 337 (E.D. Va. 1952). Only in *Gebhart* did the lower court order blacks to be admitted to white schools because the black schools were inferior. *See Gebhart*, 87 A.2d at 870. The lower court in *Gebhart* also hinted that segregation itself was unconstitutional. *See id.* at 865.

72. In *Briggs*, the lower court found that substantial equality had been achieved between the

preparing children for professional life as well as instilling values in school children.[73] The Court then pinpointed the importance to primary school children of the intangible considerations underlying its then-recent rejection of racially separated graduate schools.[74] This rejection was based on the assertion that segregated graduate education could not be made equal because of "those qualities which are incapable of objective measurement" such as "engag[ing] in discussions and exchang[ing] views with other students."[75] According to the *Brown* Court, those qualities "apply with added force to children in grade and high schools."[76] Relying on sociological data,[77] the Court also found that separation between the races generated a feeling of inferiority in black school children that retards their educational and mental development.[78] For these reasons, the Court concluded that racial separation in school systems was "inherently unequal" and violated the Fourteenth Amendment.[79]

Because of the complexity of the issues involved, the *Brown* Court ordered reargument to consider the manner in which relief was to be afforded.[80] Thus, in *Brown II*[81] the Court announced general principles to guide lower courts in determining when states and local school boards had desegregated their school systems in compliance with *Brown*.[82] The Court believed that it should rely on school officials and lower courts to determine the measures needed for full implementation of *Brown*, and therefore, did not outline any specific remedies.[83] *Brown II* remanded each of the cases in *Brown* to the courts that originally heard them.[84] The Court authorized lower courts to enter such orders and decrees consistent with the Supreme Court's opinion and to admit black students into public schools with "all deliberate speed."[85] The Court only instructed school boards to implement plans that would "effectuate transition to a racially nondiscriminatory school

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black and white schools. *See Brown*, 347 U.S. at 486-87 n.1. The public schools in *Davis* were in the process of being equalized. *See Brown*, 347 U.S. at 487 n.1.

73. *See Brown*, 347 U.S. at 483-93.

74. *See id.*

75. *Id.* at 493 (quoting *Sweatt*, 339 U.S. at 634).

76. *Id.* at 495.

77. *See id.* at 494 & n.11 (citing social science studies).

78. *See id.* at 494.

79. *Id.* at 495. The Court accepted that racial separation without legal sanction has a detrimental effect, but found that the impact of racial separation was greater when it had sanction in the law. *See id.* (quoting findings of the lower court in the Kansas case under review in *Brown*, 347 U.S. at 494). Although *Brown* is generally interpreted as holding that separation sanctioned by law violates the Equal Protection Clause, the Court acknowledged that even *de facto* segregation was harmful (but not necessarily unconstitutional).

80. *See Brown*, 347 U.S. at 495.

81. Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

82. *See id.* at 299. The Court concluded that school authorities had the primary responsibility for addressing the problems of desegregation and courts would ensure that their solutions were consistent with constitutional principles.

83. *See id.*

84. *See id.* at 299, 301.

85. *Id.* at 301.

system," and authorized lower courts to oversee such transitions.[86]

The Court's broad outline of the responsibilities of the lower courts proved inadequate to remedy segregation and its accompanying problems within school systems. Not only did many unforeseen problems arise, but some Americans adopted policies that served to perpetuate dual systems and delay desegregation.[87] The Court stressed almost thirteen years after *Brown* that "very little progress had been made in many areas where dual systems had historically been maintained by operation of state laws."[88] In response to this lack of progress, the Court became more assertive and began to "amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts."[89]

In a series of cases, the Court clarified the general principles that should guide courts in determining whether a school system was in compliance with *Brown*. Such cases illustrate three major themes. First, the Court asserted that school plans must provide immediate relief for children within segregated schools. Some thirteen years after *Brown*, the Supreme Court felt compelled to grant certiorari in several desegregation cases because lower courts and school officials had interpreted *Brown II* as enabling them to undermine *Brown* through lengthy deliberation. In *Griffin v. County School Board*,[90] Virginia state and local school officials responded to *Brown* by closing public schools in all areas in which there was a likelihood that compliance with *Brown* would create a mixed-race school.[91] The Court held that the school board's act of closing public schools while contributing tuition grants to private white schools violated the Constitution and ordered the reopening of the public schools.[92] In doing so, the Court argued that relief must be "quick and effective."[93] As the Court announced, "The time for mere 'deliberate speed' has run out . . . ."[94] Four years later, in *Green v.*

86. *Id.*

87. Some Southern leaders indicated that they would obey the *Brown* decision. *See* HARRY S. ASHMORE, HEARTS AND MINDS: THE ANATOMY OF RACISM FROM ROOSEVELT TO REAGAN 216-17 (1988). Some school districts voluntarily complied with the Court's mandate. *See id.* at 222-24. However, the massive and often violent resistance to the opinion has been well documented. *See, e.g., id.* at 224-26; CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 240-50 (1993); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION 78-95 (1979). Indeed, 81 members of the U.S. House of Representatives, *see* FRED POWLEDGE, FREE AT LAST? 141 (1991), and all but three Southern U.S. Senators, *see* ROWAN, *supra*, at 278, signed the "Southern Manifesto" which pledged "to use all lawful means to bring about a reversal of" *Brown*. *See Southern Manifesto, quoted in* POWLEDGE, *supra*, at 141. As the Court noted, "[M]any difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

88. *Swann* 402 U.S. at 13.

89. *Id.* at 14.

90. 377 U.S. 218 (1963).

91. *See id.* at 232.

92. *See id.* at 232-34.

93. *Id.* at 232.

94. *Id.* at 234 (quoting *Brown II*, 349 U.S. at 301).

County School Board,[95] the Court again forcefully stated that it would not allow school officials to delay the implementation of *Brown*. In examining a "freedom of choice plan" under which each student was allowed to choose the school she wanted to attend, the Court argued that any school board action must be evaluated with an eye toward the fact that the board's first step toward actual compliance with *Brown* occurred eleven years after the decision.[96] "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[97] *Griffin* and *Green* underscored the Court's insistence that *Brown* offer immediate relief.

Second, the Court required that school board plans provide meaningful relief and that courts should favor the most effective plan available. In *Green*, the Court rejected the board's freedom of choice plan because it did not eliminate segregation effectively. In the three years of the plan's operation not a single child had chosen a school with a racial makeup different from her race, and the Court concluded that the plan was inadequate.[98] The Court further advised district courts to weigh the legitimacy of a school board's plan "in light of any alternatives which may be shown as feasible and more promising in their effectiveness," and to place a "heavy burden upon the board to explain its preference for an apparently less effective method."[99] More importantly, the Court argued that a school board's constitutional duty did not end merely because it halted discriminatory activities; rather, the board had an affirmative obligation to abolish segregated school systems.[100]

Third, the Supreme Court asserted that a court had broad remedial powers once it ascertained that school officials had violated *Brown*. In *Griffin*, the Court held, over the objection of Justices Clark and Harlan, that the district court's remedial authority was broad enough to extend to ordering the state to reopen its public schools.[101] In *Swann v. Charlotte-Mecklenburg Board of Education*,[102] the Court approved busing as a means of desegregation.[103] The *Swann* Court also noted that a court's remedial power included assigning teachers in a manner that would alleviate racial separation as well as adopting limited racial quotas for school systems.[104] The Court held that its mandate was not only to desegregate schools, but to ensure that the unequal quality of education associated with segregation be remedied. "The objective today remains to eliminate from public schools all vestiges of state imposed segregation."[105] Because of this, the Court held that courts

95. 391 U.S. 430 (1969).
96. *See id.* at 438.
97. *Id.* at 439.
98. *See id.* at 441.
99. *Id.* at 439.
100. *See id.* at 437-38.
101. *See Griffin*, 377 U.S. at 232-33.
102. 402 U.S. 1 (1971).
103. *See Swann*, 403 U.S. at 30.
104. *See id.* at 19-20.
105. *Id.* at 15.

must retain jurisdiction over school systems until it was clear *all* aspects of state-imposed segregation had been removed.[106] These decisions steadily broadened the remedial authority of district courts in order to ensure that states complied with their constitutional mandate to desegregate their school systems.

These cases also pointed out specific factors to which courts should refer when determining if a school was fully desegregated. In *Green,* the Court stated that courts should assess a school's faculty, staff, transportation, extra-curricular activities and facilities to determine the success of the desegregation efforts of states and local school officials.[107] These "*Green* factors" were designed to ensure that previously dual school systems in which schools could be identified by race would be transformed into racially mixed schools.[108] The Court in *Swann* also urged lower courts to carefully scrutinize board plans that included schools that were all or predominately of one race.[109] While the existence of a few one-race schools may be unavoidable, the history of segregation within school systems created a presumption that such schools resulted from intentional state discrimination and should be eliminated.[110] *Swann* also cautioned lower courts to ensure that schools not use techniques such as construction decisions and attendance zone policies to perpetuate or reestablish dual school systems.[111] Under the Court's view, closely assessing such factors would help decrease the number of segregated schools.[112]

B. Keyes *and Segregation Without Statutory Sanction*

In *Keyes v. School District No. 1*,[113] the Court finally made inroads into a racially-polarized northern school system by finding unlawful segregation in the absence of a segregation statute. In that case, the Colorado state constitution specifically prohibited racial separation in public schools.[114] The Court concluded that the school board had used various techniques in spite of this prohibition, ranging from manipulating student attendance zones to school site selection, to create or maintain racially segregated schools throughout the school district.[115] *Keyes* revealed the Court's willingness to attack the more subtle discriminatory policies that were methods of school segregation in the wake of *Brown*'s repudiation of blatant statutes.

After a plaintiff pinpointed discriminatory policies in many areas of a

106. *See Green*, 391 U.S. at 439.
107. *See id.* at 435.
108. *See id.*
109. *See Swann*, 403 U.S. at 26.
110. *See id.*
111. *See id.* at 20-25.
112. *See id.* at 26.
113. 413 U.S. 189 (1973).
114. In fact, the Colorado Supreme Court invalidated a city's exclusion of blacks from local schools in 1927. *See id.* at 191 n.1.
115. *See id.* at 201-03.

school, the *Keyes* Court placed the burden on school officials to prove that all aspects of the school were not invalid.[116] Both the district court and the court of appeals had held that these discriminatory policies could be viewed in isolation and did not prove that the entire school system resulted from state discrimination. The Supreme Court disagreed and argued that if a plaintiff proved that school officials had implemented discriminatory policies with respect to a significant portion of the school system, such officials had the burden of proving that the entire system was not tainted.[117] The officials could not meet their burden simply by asserting a neutral reason for their policies, but were required to show that segregation "was not among the factors that motivated their actions."[118] The Court stated that "[i]f the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continue[d] to exist," then authorities must remedy the segregation.[119]

The lower court had focused on the fact that the intentional acts of segregation occurred more than twenty years before the case was filed.[120] The Supreme Court "reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent."[121] The Court also argued that past acts of segregation may create a natural environment for the growth of further segregation. "We [have] made it clear . . . that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist."[122] *Keyes* dramatically underscored the Court's commitment to *Brown* by making school officials responsible for continuing segregation within their school district regardless of how long ago the discriminatory acts had taken place.

C. The Turning Point: Milliken *and the Decisions of the 1990s*

Recent desegregation opinions retreated from the principles outlined in *Keyes* and *Swann*. The first occurred over two decades ago in *Milliken*. In that case, the court of appeals had ruled that a multi-district remedy would be the only feasible way to desegregate the Detroit school system; yet, the Supreme Court overturned the remedy as going beyond the scope of the court's remedial authority.[123] The Supreme Court agreed with the lower courts that, similar to *Keyes*, the Detroit Board of Education had engaged in policies that caused racial segregation in the Detroit school district.[124] The

116. *See id.* at 200.
117. *See id.*
118. *Id.* at 210.
119. *Id.*
120. *See id.* (noting that the State's segregative acts antedated *Brown*).
121. *Id.*
122. *Id.* at 211.
123. *See Milliken*, 418 U.S. at 735. The district court had also found that a plan that did not include other districts would not accomplish desegregation. *See id.* at 732.
124. *See id.* at 745. The Court also assumed arguendo that the state had participated in the

lower courts had held that a Detroit-only plan would be inadequate to accomplish desegregation; therefore, the lower court sought to implement a plan that would encompass the surrounding suburbs.[125] Over strident dissents, the Supreme Court held that because there was no proof of segregation by the suburban school districts, nor any showing that the state's actions had a cross-district effect, the district court could not order a remedy that encompassed them.[126]

The Court's reasoning appeared to undermine the *Green* and *Swann* decisions, which had emphasized that once the court found a violation, the state had an affirmative duty to take whatever steps necessary to achieve the "greatest possible degree of actual desegregation."[127] The *Milliken* Court also seemed to dismiss *Green's* directive to adopt the most effective desegregation plan available. Contrary to *Milliken*, the *Swann* Court had suggested that if adherence to school district boundaries would impede desegregation efforts, district courts could ignore such boundaries. In focusing on the distinction among school districts, the *Milliken* Court seemed to ignore *Swann*'s assertion that a court had "broad remedial powers" to break up a dual system and could employ "a frank—sometimes drastic—gerrymandering of school districts."[128] Justice Douglas argued, "When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*."[129] In other words, *Milliken* was more consistent with *Plessy* than the principles articulated by *Brown*.

In the early part of this decade, the Court seemed to further undermine *Brown*'s impact. In the 1991 case of *Board of Education of Oklahoma City v. Dowell*,[130] the Supreme Court reversed the Tenth Circuit's test for determining when to dissolve a desegregation decree thereby enabling the reemergence of racially separate schools in more than half of the district.[131] In 1972, after finding that Oklahoma City had intentionally segregated its school system, the district court entered a decree imposing a desegregation plan on the school board.[132] In 1977, the district court terminated the case, finding that the board had complied with the desegregation plan.[133] The

maintenance of the segregated school system. *See id.* at 748.

125. *See id.* at 723-25, 745.

126. *See id.* at 748.

127. *Swann*, 402 U.S. at 26.

128. *Id.* at 27.

129. *Milliken*, 418 U.S. at 759 (citation omitted) (Douglas, J., dissenting).

130. 498 U.S. 237 (1991).

131. *See id.* at 240.

132. *See id.* at 241 (citing *Dowell*, 338 F. Supp. 1256).

133. *See id.* at 241-42. The district court had declared the school system "unitary." The Supreme Court found that "the lower courts [had] been inconsistent in their use of the term 'unitary' " and that the district court's order was unclear regarding the meaning that it had intended. *See id.* at 245-46. In general, the Court described a unitary system as one that complied with the Constitution, while a dual system connoted one in which schools were intentionally segregated by race. *See generally id.* at 237. Some courts used "unitary" to mean that a school system met the mandate of *Brown* and *Green*. *See Dowell*, 498 U.S. at 245. Other courts called districts

district court also held that it did not foresee that termination would result in the dismantlement of the plan.[134] In 1985, the plaintiffs argued that the desegregation decree was still binding and they attempted to challenge the board's implementation of a new plan which would have led to ninety percent single-race student bodies in almost half of the district's schools.[135] Although initially refusing to hear the case, the district court reopened the case and vacated the desegregation decree because it believed that the plan itself had not been designed with a discriminatory intent.[136] The court of appeals reversed. Echoing *Swann*, the Tenth Circuit argued that in the context of a school district found to have been intentionally segregated, school officials had an "affirmative duty" to ensure that their actions did not reestablish a dual school system.[137] Therefore, a decree could not be dissolved unless unforeseen circumstances developed eliminating the school officials' duty to eradicate racial segregation and its effects.[138]

Believing the Tenth Circuit's ruling to be too stringent, the Supreme Court asserted that lower courts could dissolve a desegregation decree upon a showing that school officials had complied in "good faith" with a decree.[139] The Court emphasized that the Oklahoma City school board did not create its plan with a racial animus. The Court's test of good faith compliance initially appeared consistent with *Brown*'s progeny by seeming to require that school boards comply with the objectives of desegregation decrees. Coupled with the Court's rejection of the Tenth Circuit's affirmative obligation standard, this suggested that school boards could show good faith in a manner once rejected by the Court in *Keyes*, that is, by "rely[ing] upon some allegedly logical, racially neutral explanation for their actions."[140] In this way, the Supreme Court's standard seemed to relieve a school board of its affirmative duty to take steps "adequate to abolish its dual, segregated system."[141]

In the Court's 1992 ruling of *Freeman v. Pitts*,[142] in what appeared to be another departure from *Green* and *Keyes*, the Court held that a district court could relinquish control of a school district in incremental stages, even before school officials demonstrated full compliance in all areas of their school

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"with currently desegregated student assignments" unitary. *See id.* Because of the confusion regarding the meaning of the terms "unitary" and "dual," this article will not rely on them to explain the status of school systems.

134. *See Dowell*, 498 U.S. at 241-42.

135. *See id.* at 242. Under the plan, 33 of the 64 schools would be nearly one-race schools. *See id.*

136. *See id.* at 243. The district court found that the 1977 order was res judicata. *See id.* at 242. The court of appeals found that while the order terminated the case, it did not terminate the underlying decree. *See id.* at 243.

137. *See Dowell*, 890 F.2d at 1504.

138. *See id.*

139. *Dowell*, 498 U.S. at 249-50.

140. *Keyes*, 413 U.S. at 210.

141. *Green*, 301 U.S. at 437.

142. 503 U.S. 467 (1992).

operations.[143] The school system in *Freeman* had been under a desegregation decree since 1969.[144] When the school board moved to end the decree in 1986, the district court found that the district was desegregated with respect to some but not all aspects of the decree.[145] The district court then relinquished control over those areas in which the school district was unitary.[146] The court of appeals reversed, holding that because school officials were responsible for the racial imbalances, compliance had to be met and continue for several years in six areas of the district's operation before the decree could be dissolved.[147] The Supreme Court disagreed and held that partial relinquishment was appropriate.[148] While citing *Green* throughout the opinion, the Court's concession appeared to contrast directly with *Green*'s directive that courts "retain jurisdiction until it is clear that state-imposed segregation had been completely removed."[149]

In 1995, the Court retreated further from its earlier desegregation decisions. In *Missouri v. Jenkins*,[150] the Court overturned the lower court's desegregation remedies on the basis that these went beyond the scope of the district court's authority.[151] The school district had been operating pursuant to a decree since 1985, and the court found that the school district failed to dismantle its segregated school system.[152] Finding that the state and school board's intentional segregation caused a reduction in student achievement, the district court had ordered the implementation of quality education programs "to improve educational opportunities and reduce racial isolation."[153] As part of its remedy, the district court ordered salary increases for teachers and administrators.[154] The Supreme Court subsequently held that the district court overstepped its authority.[155] In doing so, the Court appeared to confirm its retreat from *Swann* and *Green* by limiting the broad discretion of courts to remedy violations chargeable to intentional acts of discrimination.

In each of these decisions, the Court reduced the judicial oversight of lower courts as well as their remedial capabilities amidst evidence tending to show that school systems continued to operate racially separate schools. The majority in *Milliken* did not question the lower court's conclusion that "any

143. *See id.* at 471.

144. *See id.*

145. The district court found that the system was unitary with regard to student assignments, transportation, physical facilities and extracurricular activities. However, there was duality in "teacher and principal assignments, resource allocation and quality of education." *See id.* at 474.

146. *See id.* at 471.

147. *See id.*

148. Despite its hesitancy to expand the remedial authority of lower courts, the *Freeman* Court approved the district court's discretionary expansion of the *Green* factors to include quality of education. *See id.* at 492.

149. *See Green*, 391 U.S. at 439.

150. 515 U.S. 70 (1995).

151. *See id.* at 74.

152. *See Jenkins*, 515 U.S. at 139-40 (Souter, J., dissenting).

153. *See* Jenkins v. Missouri, 11 F.3d 755, 766 (1993).

154. *See id.*

155. *See Jenkins*, 515 U.S. at 100.

less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area."[156] The Court's holding thus tolerated the continuance of racial separation in Detroit's public schools. The Court in *Dowell* lowered the standard for dissolution of desegregation decrees and sanctioned a plan that returned thirty-three out of the sixty-four previously-desegregated schools to ninety percent single-race student populations.[157] In *Freeman*, the Court allowed the district court to relinquish control over student assignments and other areas of a school system despite the fact that in the almost thirty-eight years since *Brown* its students "never . . . attended a desegregated school system even for one day [and the] majority of 'black' students never . . . attended a school that was not disproportionately black."[158] In *Jenkins*, the Court overturned the district court's remedies aimed at dismantling a system in which twenty-four schools had more than ninety percent black student enrollment.[159] In each case, the Supreme Court's decision served to preserve school systems separated by race.[160]

Although some school officials began the process of desegregation after *Brown*, desegregation did not begin to occur significantly until the Court imposed an affirmative duty to abolish segregation and granted broad remedial authority to lower courts to ensure that school officials met this obligation. The Court's imposition stemmed from two sources. First, the Court recognized that school officials had made "very little progress" in their desegregation efforts.[161] The "failure of local authorities to meet their constitutional obligations" triggered the Court's more assertive positions on the responsibilities of school officials.[162] The Court ruled that it was within a district court's remedial authority to order that schools be reopened,[163] to

156. *Milliken*, 418 U.S. at 735 (internal quotation marks omitted) (quoting *Bradley*, 484 F.2d at 245).

157. *See Dowell*, 498 U.S. at 242.

158. *Freeman*, 503 U.S. at 509 (Blackmun, J., concurring).

159. *See Jenkins*, 515 U.S. at 140 (Souter, J., dissenting).

160. Coupled with this separation is the evidence of unequal school systems. As Justice Douglas noted in *Milliken*, "Today's . . . decision means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but 'inferior.'" *Milliken*, 418 U.S. at 761 (Douglas, J., dissenting) (referring to the Court's holding on the same day that "poorer school districts must pay their own way," in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). More recently, the Supreme Court approved of the school system in *Freeman* even though it inadequately addressed the district court's finding that teachers in disproportionately white schools tended to be better educated and more experienced than teachers in majority black schools, and that per pupil expenditures were greater for majority-white schools. *See Freeman*, 503 U.S. at 483-84.

161. *Swann*, 402 U.S. at 13. The Court reiterated the need for affirmative steps by school officials. *See id.* At issue in Griffin v. County Sch. Bd., 377 U.S. 218 (1963), and *Green*, 391 U.S. 430, were Virginia school systems, that is, they were located in a state directly held to have violated the Constitution in *Brown* and which continued to operate in a discriminatory fashion 13 years after *Brown*.

162. *Swann*, 402 U.S. at 14.

163. *See Griffin*, 377 U.S. at 233-34.

impose a racial balance requirement on individual schools,[164] to gerrymander school districts and attendance zones,[165] and to require bus transportation.[166] Second, and perhaps more importantly, the Court recognized that past acts of segregation factored into the creation of new patterns of racial segregation. Indeed, the mere existence of an unconstitutionally segregated school system fostered the continuance of racially isolated schools.

For these reasons, the Court believed that it was inadequate to merely require school authorities to discontinue their segregative practices. Rather, such authorities had a duty to ensure that all of the effects of those acts no longer played a role in the school system.[167] Lower courts needed broad authority to implement policies that would combat the lingering effects of formerly mandated segregation. This obligation to eliminate all vestiges of discrimination, coupled with the broad authority of the judiciary, enabled courts to make significant progress in eliminating segregated school systems.[168]

The Court's hesitancy to impose an affirmative obligation as mandated by *Swann*, as well as the Court's recent retreat from finding that lower courts have broad equitable power, threaten to halt or even reverse desegregation efforts. "For the first time since the Supreme Court's ruling in *Brown v. Board of Education* took effect, racial and ethnic segregation—between cities, suburbs, schools and classrooms—is growing worse."[169] While the Court has not created this racial segregation, its decisions reveal a willingness to allow school authorities to maintain it.

II. THE TWO ERAS IN COMPARISON

This section explores the parallels between modern Supreme Court decisions involving desegregation and *Plessy*-era decisions upholding segregated public school systems. In concluding that laws or specific policies mandating racial segregation did not violate equal protection guarantees, courts in the *Plessy* era devoted much of their reasoning to legitimizing racial separation. Similarly, in minimizing the duty of school officials and curtailing the author-

164. *See Swann*, 402 U.S. at 22-25.

165. *See id.* at 27-29.

166. *See id.* at 29-31.

167. *See Keyes*, 413 U.S. at 210.

168. The Court emphasized that during the period from *Brown* until *Green*, several school systems had made little or no progress towards desegregation. *See Swann*, 402 U.S. at 21 (discussing the lack of progress leading up to *Green*). One researcher found that "[m]ost of the decline in racial isolation [in schools] occurred between 1968 and 1972 [and] we have seen no lessening of segregation since 1976." JENNIFER L. HOCHSCHILD, THIRTY YEARS AFTER *BROWN* 3 (1985). These dates correspond with the Court's rulings between *Green* and *Keyes*, suggesting that those decisions casually impacted the degree of segregation in schooling.

169. LaMar P. Miller, *Tracking the Progress of Brown, in* THE CHALLENGE, *supra* note 10, at 11 (citing Gary Orfield's study). In response to research by Harvard Professor Gary Orfield, which found that New York had one of the most segregated school systems in America, New York's education commissioner "acknowledged the existence of two distinct school systems—one urban, minority, poor and failing; the other suburban, white affluent, and successful." *Id.*

ity of lower courts together with the remedies that such courts are allowed to implement, the recent Court has relied on reasoning that enables racial separation to flourish. Such opinions not only have adopted the rhetoric of *Plessy*, but have sanctioned some of the same separate conditions that the *Plessy* system supported.[170] Some jurists recognized the parallels between the majority opinion and *Plessy*. Citing the court of appeals, the dissent in *Milliken* argued that the Court's decision brought "haunting memories of the now long overruled and discredited 'separate but equal doctrine' of *Plessy v. Ferguson* and would be opening a way to nullify *Brown v. Board of Education* which overruled *Plessy*."[171] This section explores the extent to which the Court has allowed the spirit of *Plessy* to resurface.

Court decisions during the *Plessy* era upheld the constitutionality of segregated education, resting on three premises: First, courts argued that separate educational facilities reflected private decisions, as opposed to discriminatory behavior by the state, and that such decisions were beyond the scope of the law. Second, courts emphasized the importance of local control over education and reasoned that state or school board decisions regarding education should not be overturned unless they were clearly unreasonable. Finally, courts maintained that educational facilities separating blacks from whites could in fact be equal.[172] This section analyzes each of these three premises and compares them with the principles on which the modern cases

170. At least one Justice may, in fact, have been predisposed to this restoration of *Plessy* and its principles. In a memorandum written to Justice Jackson during his deliberations with regard to *Brown*, Chief Justice Rehnquist, then Justice Jackson's law clerk, concluded, "I think *Plessy* v. *Ferguson* was right and should be reaffirmed." *See Hearings on the Nomination of Justice William Hubbs Rehnquist, Senate Comm. on the Judiciary,* 99th Cong., 2d Sess. 314-15 (1986). In his nomination hearings, Chief Justice Rehnquist testified that the views expressed in the memorandum were not his own but represented the views of Justice Jackson. However, several authors have noted that the views expressed in the memorandum were consistent with Rehnquist's views on *Plessy*. *See* TUSHNET, *supra* note 43, at 190 & n.10 (explaining that the memorandum was Rehnquist's way of putting into writing that part of Jackson's thinking with which Rehnquist agreed); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 605-09 & accompanying notes (1977) (noting that the only two living people who could have corroborated Rehnquist's statements that the memo did not reflect Rehnquist's views have contradicted Rehnquist—his fellow law clerk described the memo as a combination of the clerk's views on *Plessy* and Jackson's secretary denied that such views could be attributed to Justice Jackson, saying that Rehnquist's claim "smeared the reputation of a great Justice").

171. *Milliken,* 418 U.S. at 767 (citations omitted) (White, J., dissenting).

172. The practice of segregation involves the separation of all races, not just blacks and whites. However, school officials implementing segregation included other races with blacks for the purposes of separation. The court upheld such a practice in *Gong Lum*, when it held that a child of Chinese descent could be categorized among the colored races and banned from the all-white school. *See Gong Lum,* 275 U.S. at 87. In fact, Plessy himself was of mixed descent, only one-eighth African. Certainly as the nation becomes more diverse, the issue of racial classification will become more complex. In *Keyes, the* Court concluded that schools with a combined predominance of Latinos and blacks should still be considered segregated and thus implicitly recognized the desegregation rights of Latinos. *See Keyes*, 413 U.S. at 196-98. For purposes of this article, references to black and white will be used to include the division between whites and people of color.

have rested.[173]

A. *Private Decisions—The Root of All Segregation?*

1. *Plessy*-Era Decisions

During the *Plessy* era, courts de-emphasized the state's role in segregation by relying on the argument that racial separation reflected private decisions neither created by the law, nor capable of being eradicated by the law. In *Plessy,* the Court explained that laws enforcing the separation of races were constitutional as long as the enforced separation was legitimate and reasonable.[174] Courts asserted that such laws were legitimate because they merely reflected the private sentiments of the community. The Court also criticized the view that segregation generated feelings of inferiority by noting that such feelings stemmed from private prejudices and not the law. Courts concluded that because racial separation, and the inferiority that may result from it, did not stem from the law, the law could not abolish it.

This reliance on private conduct to discount state action was central to the *Plessy* Court's argument. Justice Brown explained in *Plessy* that as far "as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation . . . ."[175] The Court believed that laws requiring separation were reasonable because they merely reflected private preferences to remain separate from individuals of other races. Moreover, these preferences could not be overcome by legislation. In the Court's view, "Legislation is power-

173. Another theme underlying decisions during the *Plessy* era was a scientific belief in the racial inferiority of blacks. This "scientific racism" grew out of southerners' desire to justify slavery, but it received support from many whites, liberal and conservative. *See* LOFGREN, *supra* note 4, at 99-111. *See also* ORFIELD, *supra* note 32, at 42-43.

Although such thinking is beyond the scope of this article, one can draw parallels between the scientific racism of the 19th and early 20th centuries and current day theories of innate racial characteristics. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). *But see, e.g.*, INTELLIGENCE, GENES, AND SUCCESS: SCIENTISTS RESPOND TO THE BELL CURVE (Bernie Devlin et al. eds., 1997); INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH (Claude S. Fischer et al. eds., 1996); MEASURED LIES: THE BELL CURVE EXAMINED (Joel L. Kincheloe et al. eds., 1996) (seeking to refute the racial and scientific premises of THE BELL CURVE).

Moreover, there is some evidence that current tracking systems, which have received criticism for channeling most black children into lower level classes, have their roots in scientific racism. For a discussion relating to tracking and the underlying racism that supports it, see Jeannie Oakes, *Foreword to* ANNE WHEELOCK, CROSSING THE TRACKS: HOW "UNTRACKING" CAN SAVE AMERICA'S SCHOOLS x-xi (1992); Note, *Teaching Inequality: The Problems of Public School Tracking*, 102 HARV. L. REV. 1318, 1321-23 (1989).

174. *See Plessy*, 163 U.S. at 550.

175. The *Plessy* Court contended that as long as laws requiring enforced separation of the races were "reasonable," they did not conflict with the Fourteenth Amendment. *See id.* at 551. Although the *Plessy* Court did not use the term "reasonable" as today's Court would, the *Plessy* Court's analysis was similar to rational basis analysis as applied by the modern Court.

less to eradicate racial instincts . . . ."[176] With this argument, the Court effectively absolved the State from any wrongdoing while effacing its duty to take future action to prevent racial separation.

Writing for the Court, Justice Brown's view that racial segregation resulted from private choices not amenable to legal redress also impacted his interpretation of the legislative history of the Fourteenth Amendment. According to Justice Brown:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce . . . a commingling of the two races upon terms unsatisfactory to either.[177]

Because racial separation originated from private preferences that the law could not alter, the Fourteenth Amendment could not have been intended to do so. In other words, the Amendment's "framers and ratifiers . . . would not have sought and intended the impossible."[178] Because of this view, Justice Brown could conclude that separation between the races was reasonable and consistent with the Fourteenth Amendment.[179]

The *Plessy* court buttressed its claim of private action by relying on a similar sentiment articulated by the New York Court of Appeals in *People v. Gallagher.*[180] In upholding segregated education, the appeals court had noted that equality between the races "can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon which they are designed to operate."[181] The New York court added that "a natural distinction exists between the races which was not created[,] neither can it be abridged by law."[182]

Some courts dismissed the argument that a state's separation of races implied an inferiority of the black race by noting that such feelings stemmed from purely private prejudices. In *Roberts*, the Supreme Judicial Court of Massachusetts concluded that "prejudice [between the races], if it exists, is not created by law, and probably cannot be changed by law."[183] The *Plessy* Court mirrored this, calling it a "fallacy" that the separation of the races "stamps the colored race with a badge of inferiority" or "that social prejudices may be overcome by legislation."[184] *Plessy* emphasized the state's inability to overcome social prejudices of the races while maintaining that

176. *Plessy*, 163 U.S. at 551.
177. *Id.* at 544.
178. LOFGREN, *supra* note 4, at 179.
179. *See id.*
180. *See Plessy*, 163 U.S. at 551 (citing People v. Gallagher, 95 N.Y. 438, 448 (1883)).
181. People v. Gallagher, 95 N.Y. 438, 448 (1883).
182. *Id.* at 450.
183. *Roberts*, 59 Mass. at 209.
184. *Plessy*, 163 U.S. at 551. *See also id.* at 555 (Harlan, J., dissenting) (noting that the Thirteenth Amendment "not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude").

such prejudices were essentially private in nature. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities . . . and a voluntary consent of individuals."[185] Thus, both *Roberts* and *Plessy* belittled the effect of the state's actions on racial segregation by stressing the influence of private prejudices.

2. Recent Decisions

Similar to *Plessy*, recent courts have discounted evidence of intentional state segregation by arguing that racial separation in schools reflects private choices that the law cannot alter. Unlike the *Plessy* era, there are no specific laws or policies requiring separation of the races in today's schools. Despite this, many of the school children in *Milliken*, *Dowell*, *Freeman* and *Jenkins* attended schools almost completely separated by race.[186] Ignoring evidence tending to show the state's involvement in school segregation and the lingering effects of such involvement, the Court maintained that most, if not all, of the separation reflected racial separation in housing patterns.[187] This separation had developed from "demographic shifts" in residential housing patterns whereby blacks and whites increasingly chose to live in separate neighborhoods.[188] According to the Court, these demographic changes reflected private voluntary housing choices by blacks and whites that were formed independent of state action.[189] Racial separation within schools thus reflected these private housing decisions.[190] Because the separation did not stem from state action, it did not offend the Equal Protection Clause. As the Court noted, "[W]here resegregation is a product not of state action but of private choices, it does not have constitutional implications."[191]

Additionally, the Court absolved school officials of their obligation to avoid the reemergence of racially separate schools and to adopt plans most likely to eliminate racial isolation. As in *Plessy*, the Court discounted the state's role in the continuance of segregation by relying on the concept that the races privately chose to separate and thus the state was not obligated to alter the separation. In *Milliken*, the Court implied that such segregation resulted from private conduct, arguing that the State's behavior did not produce the all-white school districts surrounding the Detroit system.[192] This conclusion ignored evidence of State- and school-sponsored segregation and its impact on the racial composition of schools in areas both within and surrounding the city of Detroit.[193] Indeed, the Court's failure to recognize

185. *Id.* at 551.
186. *See supra* notes 135 & 156-159 and accompanying text.
187. *See, e.g., Freeman,* 503 U.S. at 467, 478.
188. *See id.* at 478.
189. *See id.*
190. *See id.*
191. *Id.* at 495.
192. *Milliken*, 418 U.S. at 752.
193. *See* PAUL R. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION, 60-61 (detailing evidence presented at trial of intentional acts by school board).

that segregative actions within Detroit influenced the racial character of the surrounding suburbs ignored *Keyes*' assertion that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions."[194]

In *Dowell*, the Court similarly ignored the role of State-sponsored segregation, remanding to the district court the issue of the source of school segregation.[195] The Court, however, hinted that the district court could ignore the effects of residential segregation in perpetuating racially identifiable schools if it found residential segregation to be the result of "private decision making and economics."[196] By focusing on private preferences, the district court had already failed to adequately account for the State and school board's segregative policies and the perpetuation resulting from them.[197] The Supreme Court's suggestion that the district court's conclusion regarding private actions could be satisfactory embraced this failure.

Similarly, in *Freeman,* the Court rejected the assertion of the court of appeals that the racially identifiable schools were the lingering result of the many years in which the school board had "planned, contributed to, and directly caused, racial segregation in its schools."[198] Instead, the *Freeman* Court accepted the district court's conclusion that independent demographic changes unrelated to the State's actions had created racial imbalances in the schools.[199] The Court argued that as blacks migrated from Atlanta to DeKalb County, this caused schools to become majority black.[200] Despite the suggestion by the court of appeals that school board actions contributed to racial imbalances in the current housing patterns,[201] the Court reasoned that State action did not affect population changes nor the changes in school population that developed from it.[202] In this way, the Court focused on private housing decisions instead of State action to explain segregated schooling.

The Court in *Jenkins* similarly disregarded evidence of the State's role in school segregation, choosing to blame such segregation on private behavior. In that case, the district court asserted that the State had intentionally caused segregation within the schools.[203] The Supreme Court questioned this assertion, noting that changes in the housing patterns affected the racial

194. *See Keyes*, 413 U.S. at 203.

195. *See Dowell*, 498 U.S. at 249-50 nn.1-2.

196. *Id.* at 243.

197. *See id. See also* John Dayton, *Desegregation: Is the Court Preparing to Say It Is Finished?*, 84 ED. L. REP. 897, 905 n.26 (1993) (arguing *Dowell* "represents a significant step back from the Court's prior command to eliminate all vestiges of racial segregation 'root and branch' ") (quoting *Green*, 391 U.S. at 438)).

198. *Freeman* 887 F.2d 1438, 1450 (11th Cir. 1989).

199. *See Freeman*, 503 U.S. at 478.

200. *See id.*

201. *See Freeman*, 887 F.2d at 1450.

202. *See Freeman*, 503 U.S. at 478 (citing lower court finding that racial composition of elementary schools was "unrelated to the actions of petitioners or their predecessors").

203. *See Jenkins*, 515 U.S. at 74.

composition of schools. The Court reasoned that these changes were private and were formed independent of State action. It also pointed out that the lower court's argument that school segregation stemmed from State action was "inconsistent with the typical supposition, bolstered here by the record evidence, that 'white flight' may result from desegregation . . . ."[204] In dismissing the district court's conclusion, the Supreme Court elevated a supposition regarding private choices over the findings of a district judge who had overseen the case for over fifteen years.[205] Such a result reveals the Court's refusal to acknowledge evidence of intentional State conduct.

The Court's rejection of evidence of state action and its effect on current segregative patterns also allowed the Court to argue that private conduct, and not state action, produced *resegregation* as well. In *Dowell*, the Court advised the district court to terminate the desegregation decree if it found private decision-making had created the present residential segregation.[206] In *Jenkins*, the Court concluded that as long as "external factors" such as private housing preferences create segregation, these factors should not "figure in the remedial calculus."[207] In the Court's view, when a state did not produce racial separation, courts were not responsible for remedying it. The *Freeman* Court amplified this argument, stating that "[p]ast wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history . . . [and] though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities."[208]

Moreover, in contrast to *Green*'s requirement that school officials choose the most effective plan available, the *Dowell* Court allowed school officials to adopt a school desegregation plan that exacerbated racial separation, despite the availability of more racially integrative plans. In *Dowell*, the school board had abandoned a plan that desegregated schools in favor of a plan that recreated many single-race schools.[209] Not only did the school board fail to show that the previous plan was unworkable, but the court of appeals concluded that the board ignored feasible and less racially isolating remedies.[210] The Supreme Court failed to acknowledge these faults in the school board's actions and ignored the duty under *Green* and *Swann*, that is, a school district must avoid the reemergence of racially identifiable schools and should adopt the most feasible plan available that enables such avoidance.[211] Instead, the Court suggested the new plan was constitutionally permissible as long as racial separation resulted from private housing prefer-

204. *Id.* at 95 (footnote omitted).

205. *See id.* at 74 (noting case had been before the same judge since 1977).

206. *See Dowell*, 498 U.S. at 249-50.

207. *Jenkins*, 515 U.S. at 102 (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976); *Swann*, 402 U.S. at 22).

208. *Freeman*, 503 U.S. at 495-96.

209. *See Dowell*, 498 U.S. at 262 (Marshall, J., dissenting).

210. *See id.* at 267-68 (Marshall, J., dissenting).

211. *See Green*, 391 U.S. at 439 (noting that where more promising courses of action were available and a district failed to take one, this may indicate a lack of good faith); *Swann*, 402 U.S. at 26.

ences.[212] By focusing on private conduct, the Court overlooked other critical considerations in evaluating the legitimacy of a school board's actions.

Similar to *Plessy*-era decisions, the Court's more recent private preferences rationale has caused it to conclude not only that the law should not remedy segregation, but that it can not overcome it. As the *Freeman* Court noted, if resegregation results from private choices "[i]t is beyond the authority and beyond the practical ability of the federal courts to try to counteract" the result of those choices.[213] The Court in *Jenkins* also suggested that overcoming private demographic changes was beyond the control of the State and school boards.[214] In both eras, by insisting that racial separation in schools reflected private actions, the Court failed to give proper weight to the State's role in creating and perpetuating segregation. More importantly, by focusing on private behavior, the Court asserted that legislation was incapable of altering racial separation within school systems and implied that such separation was inevitable.

B. The Predominance of Local Control

1. *Plessy*-Era Decisions

Judges in the *Plessy* era also upheld segregated education by stressing the importance of local control over education. Courts maintained that such control was important both because it was more practical for local authorities to implement the day-to-day activities of schools and because local authorities could best assess the needs of the school children in their communities. Given these concerns, courts granted school authorities wide discretion to shape policies for their schools. As long as local school officials asserted a reasonable basis for their policies, courts were obligated to uphold them. School officials maintained that providing separate schools for the races was reasonable because this practice had a basis in custom and mirrored preferences of the community. Because courts believed school officials were better positioned to judge the reasonableness of racial segregation, courts deferred to their decisions. This emphasis on, and deference to, local control compelled judges to authorize segregated education.

In deferring to local authorities' decisions regarding segregation, *Plessy*-era courts reasoned that such deference recognized that it would be impractical for any entity but local bodies to adopt and implement the varying rules affecting each particular school. Thus, in *Roberts* the Supreme Judicial Court of Massachusetts explained the practical importance of local control over educational decisions and upheld the school committee's refusal to admit a

212. The Supreme Court instructed the district court not to treat the adoption of the new plan as a breach of good faith on remand. *See* Dowell, 498 U.S. at 249 n.1.

213. *Freeman*, 503 U.S. at 495. The Court also accepted the district court's characterization of residential segregation as the "inevitable" result of white suburbanization. *See id.*

214. *See Jenkins*, 515 U.S. at 102 (explaining that demographic changes are "external factors" not to be taken into account in developing a remedy).

black child to an all-white primary school. The *Roberts* court initially noted the lower court's findings of fact which had stated that the city was divided into districts "for convenience."[215] The *Roberts* court also noted that the State had provided for a school committee and had vested plenary authority in the committee to determine how to arrange, classify and distribute children.[216] This provision represented a valid exercise of the State's legislative authority because it was "quite impracticable [for the State] to make full and precise laws" relating to each school within its boundaries. [217]

Similarly, in *Cumming*[218] the Supreme Court relied on the practicality of local control over public education to avoid overturning a racially imbalanced school system. In that case, the school board closed its black public high school while at the same time contributing funds to white high schools. Black plaintiffs argued that a tax system that supported an all white high school while failing to support a black one violated the Fourteenth Amendment.[219] The Court upheld the maintenance of such a system.[220] As in *Roberts*, the Court deferred to local authorities based partially on practical considerations. While reluctantly acknowledging the disparate treatment between the races, the Court argued that "it [was] impracticable to distribute taxes equally."[221] Because of this, the Court allowed local officials to determine how to distribute taxes,[222] even though the distribution had racial consequences.[223] Both *Roberts* and *Cumming* avoided invalidating laws that discriminated by embracing the practical reasons for delegating control over education to local officials.

In addition, courts condoned segregation policies by reasoning that local control over education enabled each school board's policies to reflect the actual differences among people within their town, including differences regarding race. The *Roberts* court agreed that all people are equal before the law, but how "this great principle . . . applied to the actual and various condi-

215. *See id.* at 198.

216. *See id.* at 207-08.

217. *Id.* at 208.

218. 175 U.S. 528 (1899).

219. *See id.* at 529.

220. *See id.* at 545.

221. *See id.* at 542. The Court acknowledged that blacks were barred from sending their children to the white high school supported by their taxes. *See id.* at 545. However, the Court characterized this as plaintiffs "only" complaint because there were separate schools for blacks in lower grades and a high school that charged tuition. *See id.*

222. The school board claimed that it could not maintain both an all-black primary school and an all-black high school. *See id.* at 544. The Court denied the relief sought of closing the white school because "the colored school children would not be advanced in the matter of their education" and of course did not consider compelling the board to allow the black students to attend the white high school. *See id.*

223. The Court found that the school board "could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of [a] high school for white girls and to assist a county denominational high school for boys." *Id.* at 542. The Court suggested that this action may be "more a discrimination as to sex" rather than race because the board had not established a high school for white boys. *See id.* at 543.

tions of persons in society" depended upon laws "adapted to their respective relations and conditions."[224] The court noted that local control enabled schools to reflect such differences as age, sex or race.[225] The *Roberts* court found that, just as it was valid for school committees to adopt different policies for poor or neglected students, it was appropriate for school committees to make separate accommodations for students of different races.[226] *Plessy* asserted that state legislatures should have wide discretion and the reasonableness of their actions could be determined by referring to "the established usages, customs, and traditions of the people."[227] The *Plessy* court appeared to accept the reasoning of the *Roberts* court, that is, a school committee has the power to provide separate instruction for black and white children because such committees must take into account differing "conditions" within their localities.[228]

A century later, the district court in *Briggs* asserted that local control promoted local stability by allowing school officials to implement ideas and customs unique to their community. "In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities."[229] More explicitly, the court noted that approval of segregated education was important because "[i]f public education is to have the support of the people through their legislatures, it must not go contrary to what they deem for the best interests of the children."[230] *Briggs* thus asserted that local control over public education enabled communities to remain stable.[231]

Courts also avoided overturning segregated school systems by crediting the assumption that local officials were in the best position to judge the type of education needed for all school children. The school committee in *Roberts* adopted a report stating that separate schooling for blacks and whites was "not only legal and just, but [was] best adapted to promote the education of that class of the population."[232] The *Roberts* court noted that it was "fair and proper" for the school committee to consider whether requiring black and white children to attend the same school might foster as much prejudice in the community as maintaining separate schools.[233] The court felt that the

224. *Roberts*, 59 Mass. at 206.

225. *See id.* at 209.

226. *See id.* at 208.

227. *Plessy*, 163 U.S. at 550.

228. *See id.* at 544-45. The *Plessy* Court suggested that local control was reasonable because it could encompass the varied traditions of the community. *See id.*

229. *Briggs*, 98 F. Supp 529, 532 (E.D.S.C. 1951) (denying injunction abolishing segregation and granting injunction equalizing facilities), *vacated*, 342 U.S. 350 (1952), *aff'd* 103 F. Supp. 920 (E.D.S.C. 1952), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

230. *Id.* at 535.

231. *See id.* at 532 (finding the legislature acts reasonably when it is "with a view to . . . the preservation of the public peace and good order") (quoting from *Plessy*, 163 U.S. 537)).

232. *See Roberts*, 59 Mass. at 201 (quoting from the statement of facts of the court of common pleas).

233. *See id.* at 209.

school committee had deliberated the issue of segregated schooling and had made its conclusions based on the "honest result of their experience and judgment."[234] Being part of the local community, the *Roberts* court believed school officials were better positioned to make such decisions. Thus, the court relied heavily on their decisions. Consistent with *Roberts*, the *Briggs* court believed that local school bodies were best able to assess student needs and community attitudes. In *Briggs*, there had been testimony that "mixed schools" would provide "better education and a better understanding of the community in which the child is to live."[235] However, the court found the question was one of "legislative policy," with legislators free to decide "depending upon the relationships existing between the races and the tensions likely to be produced."[236]

The Court in *Cumming* also sanctioned racially unequal schooling by emphasizing that local authorities had the ability to best determine the manner in which children from racially different backgrounds would be treated. The Court believed that the school board had assessed the needs of all students, and its assessment revealed that younger black children in the community would be better served by denying older black school children a free public high school. The result was that the district could operate only a primary school for black children, while simultaneously funding a primary and high school for white children.[237] The Court stated that it was not "permitted . . . to regard the decision of the board to have been made with a desire or purpose to discriminate."[238] Thus, in *Cumming*, the Court reasoned that the local board's proximity to the issue as well as its greater experience compelled the Court to defer to the lower court's judgment. Because of this deference, as long as school officials exercised their power reasonably, their decisions were deemed conclusive. Therefore, the Court concluded:

> [T]he 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 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.[239]

The *Roberts* court had also required plaintiffs to show a clear violation by school officials before interfering with such school officials' authority.[240]

234. *Id.* at 209.

235. *See Briggs*, 98 F. Supp. at 535-36. The Court did not seem to reject the proposition that mixed schools provided better education, but believed that such schools could create racial friction. *See id.*

236. *Id.* at 535-36.

237. The Court framed the issue as a choice between maintaining a black high school for 60 students and a black primary school for 300 children and dodged the issue raised by the plaintiffs who contended that the board had appropriated more funds to the white school population. *See Cumming*, 175 U.S. at 534-35, 544.

238. *See id.* at 544.

239. *Id.* at 545.

240. *See Roberts*, 59 Mass. at 209 (finding committee decision "must be deemed conclusive" as

Echoing this sentiment, the *Plessy* court argued that under the Fourteenth Amendment courts "must necessarily" grant large discretion to states in enacting laws for its citizens.[241] The district court in *Briggs* similarly concluded that "the state's regulation of the facilities which it furnishes is not to be interfered with unless constitutional rights are clearly infringed."[242] In each of these cases, the court reasoned that separation of the races was not such an infringement of constitutional rights because classifications based on race were grounded in "reason and experience."[243] While endorsing segregated education in reliance on *Plessy* and *Cumming*, the *Briggs* court confirmed the notion that local control over local matters was "[o]ne of the great virtues of our constitutional system," and furthermore, that courts should not disturb such control without a showing that there was a clear abuse of discretion.[244] During the *Plessy* era, segregation of school children did not qualify as such a clear abuse.

2. Recent Decisions

As in the *Plessy* era, in recent years the Court has avoided remedying racially separate education by relying on the importance of local control. Interestingly, the Court rejected the practical rationale for local control while firmly embracing the idea that local control enabled local officials to take into account differences within the community and to better assess student needs. The Court also firmly dismissed the assertion of the *Roberts* court that local control, and the district lines drawn pursuant to such control, represented a practical convenience. In *Milliken*, the Court rejected the district court's remedy, pointing out that the court had analyzed the issue from the improper starting point—that district lines were "matters of political convenience." [245] In the Court's view, it was contrary to the history of public education to treat district lines as practical conveniences.[246] Apparently, the Court did not consider the reasoning of *Roberts* and *Cumming* regarding the practical role of local control to be relevant aspects of the history of public education in America.

Despite the seeming disparagement of *Plessy*-era reasoning as it related to practicality, the Court relied heavily on the notion found in *Roberts* and *Briggs* that local control enabled differing ideas to be reflected in the educa-

long as its power was not "abused or perverted by colorable pretenses").

241. *See Plessy*, 163 U.S. at 550.

242. *Briggs*, 98 F. Supp. at 529, 536.

243. *See, e.g., Plessy*, 163 U.S. at 550-51; *Roberts*, 59 Mass. at 209.

244. *See Briggs*, 98 F. Supp. at 531-32.

245. *Milliken*, 418 U.S. at 741. The Court dismissed the practical aspect of local control although embracing such an assertion would have enabled the Court to accept what lower courts believed to be the only remedy for one school district intentionally segregated by race. *See id.* In adopting a multi-district remedy for Detroit's racially disparate school system, seeming to echo *Roberts*, the district court concluded that district lines reflected practical considerations. *See id.* Although the *Milliken* appeals court affirmed this assessment, the Supreme Court explicitly rejected it. *See id.*

246. *See id.*

tional process and that local officials could better assess local needs. In *Milliken*, the Supreme Court favored local control able to "fit local needs" and resolve complex educational issues.[247] "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."[248] Similar to *Briggs*, the *Milliken* Court also maintained that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools . . . ."[249] Adopting the language of *Milliken*, the *Dowell* court pointed out that considerations of local control supported the Court's application of a more permissive standard for dissolution of a desegregation decree.[250] The *Dowell* court argued that "[l]ocal control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs."[251] Because of these concerns, just as the *Plessy*-era courts granted wide deference to local control, the modern Court has allowed consideration of local control to predominate in desegregation cases. Indeed, the final prong of the Supreme Court's three-part test for evaluating desegregation decrees directs lower courts to "take into account the interests of state and local authorities in managing their own affairs."[252]

Because the recent Court believed that local control should not be replaced without a clear disregard of constitutional rights, it reasoned that courts should attempt to restore local control to school systems as quickly as possible. In adopting a standard that failed to prevent the reemergence of many one-race schools, the *Dowell* court reasoned that dissolving desegregation decrees after a "reasonable period of time" recognized the importance of local control over the educational system.[253] The Court in *Freeman* held, based largely on the importance of local control to the educational process, that federal courts could relinquish control over desegregation in incremental stages despite the presence of racial imbalances in schools.[254] "Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities."[255] Confronted with a board that had "failed to reform the segregated scheme of public school education" thirty years after *Brown*, [256] the Court advised a

247. *Id.* at 742 (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

248. *Id.* at 741 (citing Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972)).

249. *Id.*

250. *See Dowell*, 498 U.S. at 248.

251. *Id.*

252. *Milliken II*, 433 U.S. at 280-81. The first prong requires that the remedy be consistent with the nature and scope of the violation. *See id.* at 280 (citing *Milliken*, 418 U.S. at 738). The second prong is that the remedy must be "designed . . . to restore the victims of discriminatory conduct to the position they would have occupied absent such conduct." *See id.* at 280 (internal quotation marks omitted) (quoting *Milliken*, 418 U.S. at 746).

253. *See Dowell*, 498 U.S. at 248.

254. *See Freeman*, 503 U.S. at 490-91.

255. *Id.* at 489.

256. *Jenkins*, 515 U.S. at 139 (Souter, J., dissenting).

district court that its "end purpose" was to restore local control.[257] This latest pronouncement was mirrored in both *Dowell* and *Freeman*.[258] Like *Plessy*, the Court's analysis of segregated education seems to have shifted from correcting racial imbalance to emphasizing local control.

Courts in both eras focused on local autonomy in determining the validity of school polices. During the *Plessy* era, courts legitimized segregated education by reasoning that local officials were the best evaluators of the type of education suited for their community. In upholding segregated education, courts deferred to local officials who often claimed under the "thin disguise of 'equal' accommodations"[259] that they made decisions in the best interest of all children. This deference extended even to *Briggs* where the local school district admitted it was providing inferior "educational facilities, equipment, curricula and opportunities" to black children.[260] The court's response to the inequity in *Briggs* was to order local authorities to equalize the facilities, while stressing the necessity of local authorities' continued control over the educational process.[261] In sanctioning separate education, the recent Court has similarly argued that local officials can better assess the needs of students. Because of this, the Court justified adopting less stringent standards for evaluation of desegregation decrees. In both eras, instead of focusing on rejecting racially separate education, courts allowed the importance of local control to guide their decisions relating to education.

C. Separate, Equal and Constitutional

Courts have implied that separate educational facilities could, in fact, provide equal education for both races. In the *Plessy* era, courts explicitly concluded that racially separate education could be equal.[262] In doing so, courts dismissed claims that because racial separation by the state implied an inferiority of blacks, such separation could not be equal. Modern courts appear to have accepted unequivocally *Brown*'s conclusion that racially "separate educational facilities are inherently unequal" and are therefore inconsistent with the Equal Protection Clause.[263] The Court, however, does allow school officials to operate educational systems in which children attend schools largely separated by race. Such districts have come before the Court within the context of desegregation decrees, and the Court has already recognized that, consistent with *Green*, school officials had an affirmative

257. *See Freeman*, 503 U.S. at 489. *See also Jenkins*, 515 U.S. at 102 (internal quotation marks omitted) (directing court on remand to "bear in mind that its end purpose is . . . to remedy the violation . . . . [and] restore state and local authorities to the control" of their school system) (quoting *Freeman*, 503 U.S. at 489)).

258. *See Freeman*, 503 U.S. at 489-90.

259. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting) (arguing doctrine of "separate but equal" on railway cars "will not mislead any one, nor atone for the wrong this day done").

260. *See Briggs*, 98 F. Supp. at 531 (finding undisputed that school facilities for blacks were not equal).

261. *See Briggs*, 98 F. Supp. at 531.

262. *See, e.g., id.* at 536-37.

263. *Milliken*, 418 U.S. at 737 (finding *Brown* is "controlling rule of law").

duty to provide equal schooling for all races. The necessary implication is that racially separate schools can provide equal education for all children. Although not explicit as in the *Plessy*-era courts, the recent Court has thus suggested that the doctrine of separate but equal still has a place in the field of public education.

1. *Plessy*-Era Decisions

In *Plessy,* the Court stated that "a statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races."[264] The Court argued that as long as the separation was equal, it was consistent with the Equal Protection Clause. "When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized."[265]

The *Briggs* court also stated that as long as school officials provided equal facilities for all children, the court could not condemn such facilities as discriminatory. After an exhaustive inquiry into the issue, and over the strident objection of one member of the court who argued that "segregation in education can never produce equality,"[266] the court expressly concluded that segregated education did not violate the Fourteenth Amendment.[267] In that case, the district court found that schools for whites and blacks were unequal and ordered the school district to afford equal facilities to black children.[268] The court believed, however, that the inequality suffered by blacks resulted "not from the law, but from the way it has been administered."[269] The court pointed out that the Supreme Court permitted racial separation within schools solely because it believed that the separation could provide equal education for all children. "The admissibility of laws separating the races in the enjoyment of privileges afforded by the state rests *wholly* upon the equality of the privileges which the laws give to the separated groups within the State."[270] In refusing injunctive relief to black children who attended inferior schools, the court employed *Plessy*'s reasoning that educational equality could be obtained even when the school system provided segregated educational facilities.

Roberts had also embraced the concept that racially separate education could be equal. The *Roberts* court conceded "in the fullest manner" that blacks in Massachusetts were "entitled by law . . . to equal rights, constitutional and political, civil and social."[271] By asserting that regulations

264. *Plessy*, 163 U.S. at 543.

265. *Id.* at 551.

266. *Briggs*, 98 F. Supp. at 547-548 (Waring, J., dissenting) (concluding "[s]egregation is per se inequality").

267. *See id.* at 532-37.

268. *See id.* at 537-38.

269. *Id.* at 537.

270. *Id.* at 531 (emphasis added) (quoting Missouri *ex rel.* Gaines, 305 U.S. at 349).

271. *Roberts*, 59 Mass. at 206.

separating school children did not violate those rights, the court accepted that racial separation within schools provided blacks with equal treatment.

Courts also disregarded arguments that racial segregation could not be equal because it generated feelings of inferiority in black children. The *Plessy* Court had called the plaintiff's argument that state-mandated separation generated a feeling of inferiority among blacks a "fallacy."[272] The *Roberts* court responded to the claim that the "maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice" by noting that the school committee might properly decide that similar feelings of prejudice may be fostered by compelling school children to associate.[273] Rejecting Judge Waring's argument that "all of the legal guideposts, expert testimony, common sense and reasons point unerringly to the conclusion"[274] that segregation could not to be equal because it had "a warping effect on the minds of children,"[275] the majority in *Briggs* claimed that mixed schools could produce racial friction.[276] While the *Plessy* court openly rejected the assertion that state segregation was unequal because it marked blacks as inferior, the *Roberts* and *Briggs* courts equivocated on the issue of inferiority, yet ultimately, both condoned segregation.

2. Recent Decisions

The recent Court has implicitly accepted that separate educational facilities can provide equal education. In fact, in 1983, the Court stated that *Brown* did not overrule the aspect of *Plessy* requiring that racially separate facilities be equal.[277] The *Milliken* court most clearly revealed this acceptance. In *Milliken* the Court rejected the multi-district remedy, thereby sanctioning a racially separate school system with over seventy percent black students while the surrounding suburbs had a predominantly white student population. Indeed, the Court ignored warnings by the dissent that its rejection "guarantee[d] that Negro children in Detroit [would] receive the same separate and inherently unequal education in the future as they [had] been unconstitutionally afforded in the past."[278] Instead, the majority directed lower courts to create another remedy that would enable black children to obtain an education consistent with the Equal Protection Clause.[279]

In the second phase of *Milliken*,[280] the district court rejected a plan de-

272. *Plessy*, 163 U.S. at 551.
273. *Roberts*, 59 Mass. at 209.
274. *Briggs*, 98 F. Supp. at 548 (Waring, J., dissenting).
275. *Id.* at 547 (Waring, J., dissenting).
276. *See id.* at 535-36.
277. *See* Bob Jones University, 461 U.S. at 592-93.
278. *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting). *See also id.* at 759 (Douglas, J., dissenting).
279. *See id.* at 753. The Court remanded the case for a prompt formation of a decree directed at eliminating segregation.
280. *See* generally Milliken II, 433 U.S. 267.

signed to achieve racial balance within the Detroit schools in favor of one that emphasized allocating additional resources and compensatory programs to students.[281] Noting that these resources and programs were "plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system,"[282] the Supreme Court suggested that such resources and programs could bring the education programs of black students on par with those of their white counterparts. The Court explained that "[t]hese specific educational remedies . . . were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed."[283] By forcing the school system to equalize and improve the quality of its programs, the *Milliken* decisions suggested that creating such equality could provide black school children with equal educational opportunity.

Other cases also implicitly accepted that racially separate education was consistent with equal protection guarantees. In *Freeman,* the Court acknowledged the racial imbalance within the student assignment systems but stated that as long as the imbalance was not due to a *de jure* violation, the school district was under no duty to remedy the imbalance.[284] By enabling the district court to relinquish control over student assignments, the Court suggested that a racially disproportionate school could provide equal education. *Dowell* also seemed to accept that a plan that would allow one-race schools to reemerge could comply with the Equal Protection Clause and hence provide equal educational opportunity for students of all races.[285]

Justice Thomas has stated rather definitively that separate education can provide equal education for blacks. He noted in his concurring opinion in *Jenkins* that "there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."[286] Like the court in *Briggs*, Thomas asserted that separation itself is not a harm and the Constitution is only offended when blacks and whites are treated unequally with regard to privileges provided by the state.[287] He assumed not only that equality can be produced despite separation, but that all-black schools can educate blacks as well as an integrated learning environment.[288] Questioning the Court's attempt to remedy racial imbalances, Thomas argued that their position "appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites."[289] He added that black

281. *See* Bradley v. Milliken, 402 F. Supp. 1096, 1116 (1975). The district court criticized the plaintiff and the board's heavy reliance on racial quotas, especially when it contemplated the use of transportation. *See id.*

282. *Milliken II*, 433 U.S. at 290.

283. *Id.* at 282.

284. *See Freeman*, 503 U.S. at 494.

285. *See Dowell*, 498 U.S. at 250-51.

286. *Jenkins*, 515 U.S. at 121-22 (Thomas, J., concurring).

287. *See id.* at 122.

288. *See infra* Part III.C (arguing against this assumption).

289. *Id.* at 118-19 (Thomas, J., concurring).

middle and high schools can benefit black children by functioning as "the center and symbol of black communities, and [can] provide examples of independent black leadership, success and achievement."[290] Thomas not only echoed the views of some black leaders during the *Plessy* era,[291] he has joined with black leaders[292] who express doubt "that mandatory desegregation is either possible or the best available alternative for [black] children."[293]

Courts during both eras have accepted that racially separate facilities can provide equal education. *Plessy* courts maintained that equal educational facilities were synonymous with equal educational opportunities. The modern Court appeared to accept that "racial balance in school assignments [was] a necessary part of the [desegregation] remedy."[294] However, by rejecting what it classified as "heroic measures"[295] to ensure racial balance and arguing that racial balance need not to be achieved for its own sake, the Court implied that racial imbalance is permissible and could be consistent with equal protection guarantees.

III. REJECTING THE REASONING OF PLESSY

The prior sections illustrate the parallels between the reasoning of *Plessy*-era decisions and recent opinions by the Court. This section will demonstrate the flaws of such reasoning. Although *Brown* rejected *Plessy,* it never clearly condemned the reasoning of *Plessy.* In fact, while *Brown* referred to *Plessy* on five different occasions, *Brown* did not specifically

290. *Id.* at 122 (Thomas, J., concurring).

291. Due to *Plessy*, black leaders at the turn of the century publicly expressed the view that separate education was not only appropriate, but could even provide better education for black children. Booker T. Washington publicly emphasized the benefits of separate education, while privately disagreeing with segregation. In a now infamous speech, Booker T. Washington asserted that "in all things that are purely social we can to be as separate as the fingers, yet one as the hand in all things essential to progress." Booker T. Washington, *Address of Booker T. Washington Principal of the Tuskegee Normal and Industrial Institute, Tuskegee Alabama, Delivered at the Opening of the Cotton States and International Exposition* (1895), *quoted in* 3 THE BOOKER T. WASHINGTON PAPERS 584-87 (Louis R. Harlan & Raymond W. Smock eds. 1974). *Compare* Booker T. Washington, *Is the Negro Having a Fair Chance?,* CENTURY, Nov. 1912, at 51 ("What embitters the colored people in regard to railroad travel, I repeat, is not the separation, but the inadequacy of the accommodations."), *with* Booker T. Washington, *My View of Segregation Laws*, NEW REPUBLIC, Dec. 4, 1915, at 113-14 (calling segregation "ill-advised" and stating that it "widened the breach between the two races").

292. In a seeming criticism of *Brown*, Professor Derrick Bell argues that integration may be detrimental to the interests of black children and is unnecessary for a truly equal education. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 107-22 (1987). Indeed, many black leaders argue that separate education for blacks may be desirable, especially in the face of decisions such as *Milliken*, which seemed to undermine hopes that the Court will require desegregated education. As Professor Orfield notes, "Just as it was a century ago[,] this is what is considered the responsible position." ORFIELD, *supra* note 32, at 46.

293. HOCHSCHILD, *supra* note 168, at 11 (citing law professor Derrick Bell, THE JOURNAL OF NEGRO EDUCATION, and black journalists as part of this trend).

294. *See Freeman*, 503 U.S. at 493, *citing with approval* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

295. *See id.*

overrule *Plessy*. The closest it came was rejecting certain language in *Plessy* by concluding that racial segregation in schools could not be equal because such segregation had a detrimental effect on the educational development of black children.[296] In so concluding, the Court noted that "any language in *Plessy v. Ferguson* contrary to this finding is rejected."[297] The Court was not as forceful in rejecting other aspects of *Plessy*. By arguing that the impact of racial separation on school children is "greater when it has the sanction of law," the Court at least acknowledged that the law exacerbated racial separation even if its roots were supposedly private.[298] In overturning the actions of local school officials, the *Brown* court also hinted at what later decisions would note explicitly: "[L]aws with respect to local control[] are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies."[299] As the foregoing reveals, the *Brown* Court failed to directly reject the reasoning of *Plessy*. This section seeks to rectify that failure.

A. Pinpointing the Impact of State Action on Private Choices

During the *Plessy* era, the Court's views regarding private action were problematic at best. Indeed, because racial separation was mandated by law, such separation undeniably resulted in large part from state action. More importantly, by arguing that segregation merely reflected the voluntary preferences of whites and blacks to separate themselves, *Plessy*-era courts ignored the manner in which the law reinforced and strengthened that separation.[300] In *Plessy*, for example, not only did the Louisiana law prohibit passengers of different races from sitting next to each other, it subjected officers of the railroads to a fine or imprisonment for disobeying the law.[301] In *Roberts*, a teacher in an all-white primary school ejected a five-year old girl from her school based on the committee's decision to provide separate schools. Thus, the State effectively deprived citizens of their ability to choose how they would interact with people of different races, helping to reinforce beliefs regarding the status of blacks in society.[302] In sanctioning seemingly private choices, the court strengthened them and made them more acceptable.

Although segregation existed prior to *Plessy,* and probably would have spread without *Plessy*,[303] the decision provided the legal rationale for ex-

296. *See Brown*, 347 U.S. at 483.

297. *Id.* at 494-95.

298. *See id.* at 494.

299. *See Milliken*, 418 U.S. at 744.

300. Courts in both eras also ignored the fact that at the most fundamental level, all laws reflect the private preferences of citizens. If we accept the view that there is no state action when a law reflects the private choices of citizens, it would be difficult to pinpoint state action in any context.

301. *See Plessy*, 163 U.S. at 540-41.

302. *See id.* at 560 (Harlan, J., dissenting) (arguing majority opinion will stimulate aggression, encourage belief that blacks are an inferior class of citizens, and arouse race hate).

303. *See, e.g.*, LOFGREN, *supra* note 4, at 200-04 (explaining segregation would have probably

tending segregation to almost every aspect of American life. After *Plessy*, segregation spread "to every type of transportation, education and amusement; to public housing, restaurants, hotels, libraries, public parks and recreational facilities, fraternal associations, marriage, employment, and public welfare institutions. It [has] pursued the negro even into prisons, wash houses in coal mines, telephone booths, and the armed forces."[304] Thus, when the Court upheld separation based on private conduct, it signaled its acceptance of such conduct and its implicit disapproval of integration.

The recent Court's assertions that school policies only reflect private preferences appear much more legitimate. There are no laws that require separation, or enforce penalties when school officials failed to separate the races.[305] There is evidence that private decision-making has played a role in the resegregation or continuing segregation of school systems. The district court in *Freeman*, for example, heard evidence that although whites preferred a residential mix of eighty percent white and twenty percent blacks, blacks prefer a fifty-fifty ratio.[306] Such differences in residential preference undoubtedly impacted the form of integrated schooling that whites and blacks preferred. Additionally, other demographic forces have affected the racial composition of school systems. As one commentator notes, "[T]he loss of white enrollment attributable to white flight is small compared to the decline produced by long-run demographic trends such as the fall in the white birth rate, the aging of the white population of cities, and the continuing movement of whites away from older central cities."[307] There have been numerous factors, including private decisionmaking beyond the state's control, that affected the racial composition of schools.

However, just as the *Plessy* decision reinforced segregation, today's "private" racial separation reinforces segregated school systems. In the modern desegregation cases, several Justices have emphasized the fact that housing patterns and school patterns were inextricably related. A majority of the Justices in *Freeman* acknowledged that school policies played a role in the demographic shifts that led to residential segregation.[308] In arguing that the district court failed to properly analyze the school board's role in residential segregation, Justices Souter and Blackmun argued that segregated schools may have had a "signaling function" that caused blacks and whites to decide to live apart from one another.[309] In fact, predominantly black and

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spread independent of *Plessy* but *Plessy* legitimized it).

304. Lewis E. Pierce & John M. Gradwohl, Note, *The Fall of an Unconstitutional Fiction—The "Separate but Equal" Doctrine*, 30 NEB. L. REV. 69, 72-73 (1950), *quoted in* LOFGREN, *supra* note 4, at 202.

305. *Brown* made it clear that it was unconstitutional for school boards to segregate children or to adopt policies blatantly establishing and maintaining segregation.

306. *See Freeman*, 503 U.S. at 495.

307. REYNOLDS FARLEY, BLACKS AND WHITES: NARROWING THE GAP? 24 (1984).

308. *See Freeman*, 503 U.S. at 503 (Scalia, J., concurring); *id.* at 507-09 (Souter, J., concurring); *id.* at 513-14 (Blackmun, Stevens, O'Connor, JJ., concurring).

309. *See id.* at 513 (Blackmun, J., concurring) (quoting studies on "signaling function" of segregated schools).

predominantly white schools do provide signals to families regarding the neighborhood in which they should live.[310] In this way, "segregated residential patterns are caused by past school desegregation and the patterns of thinking that segregation creates."[311]

Justice Souter also noted that inequities related to former segregation can create ongoing segregated residential patterns, where, for example, the condition of school facilities factors into a person's choice of neighborhood. When, as was the case in *Freeman*, predominately black schools offer comparably lower quality facilities such as portable classrooms, or operate with lower per-pupil expenditures, people tend to gravitate away from such schools and the neighborhoods associated with them.[312] Thus, the existence of segregated schooling perpetuates residential segregation, which, in turn, leads to resegregation. Even Justice Scalia acknowledged:

> Racially imbalanced schools are hence the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of those factors is guesswork .... Only in rare cases ... can it to be asserted with any degree of confidence that the past discrimination is no longer playing a proximate role.[313]

Despite this, Justice Scalia suggested that the passage of time enables courts to ignore the role of such discrimination and the presumption that it relates to current housing patterns which even he can not wholeheartedly rebut.[314]

Milliken, *Jenkins*, and *Dowell* all produced evidence tending to show that governmental actions had contributed to establishing and maintaining a pattern of residential segregation. In *Milliken*, Justice Marshall rejected the majority's contention that Michigan bore no responsibility for the racial disparity between Detroit's inner city schools and its suburbs. He argued that "[t]he State's creation ... of a core of all-[black] schools inevitably acted as a magnet" to blacks, attracting them to the areas served by such schools, "while helping to drive whites to other areas of the city or [to] the sub-

310. *See* Gary Orfield, *School Segregation and Residential Segregation*, *in* SCHOOL DESEGREGATION 227, 234-37 (Walter G. Stephan & Joe R. Feagin eds., 1980). "There is an interdependent relationship between school segregation and neighborhood segregation." *Id.* at 234. *See generally* Karl E. Taeuber, *Housing, Schools and Incremental Segregative Effects*, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1979).

311. *Freeman*, 503 U.S. at 507 (Souter, J., concurring).

312. *See, e.g.*, Camp et al., *Within-District Equity: Desegregation and Microeconomics Analysis*, *in* THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE 273, 282-86 (Julie K. Underwood & Deborah A. Verstegen eds., 1990) (discussing studies showing predominantly minority schools have fewer resources than white counterparts); G. Scott Williams, Note, *Unitary School Systems and Underlying Vestiges of State Imposed Segregation*, 87 COLUM. L. REV. 794, 801 (1987) (citing "indifference" of school boards toward black schools in the area of student-teacher ratios, quality of teachers, facilities).

313. *Freeman*, 503 U.S. at 503 (citation omitted) (Scalia, J., concurring)

314. *See id.* at 506 (Scalia, J., concurring) (questioning the merits of the *Green* presumption of official discrimination, noting it had been 25 years and active discrimination had "recede[d] into the past").

urbs."[315] In *Jenkins*, the district court had evidence tending to show that discriminatory school systems had played a part in residential segregation. Both the district court and court of appeals found that "the existence of segregated schools led to white flight . . . to suburban districts and private schools."[316] Responding to the majority's "extraordinary" action of overturning the concurrent factual findings of the district court and court of appeals[317] based on an "arbitrary" supposition,[318] Justice Souter pointed out that segregation created the need for desegregation and addressing the attitudes, including white flight, that resulted from it. Thus, "there would be no desegregation orders and no remedial plans without prior unconstitutional segregating . . . and an adverse reaction to the desegregation order is traceable in fact to the segregation that is subject to the remedy."[319] In *Dowell*, the district court had noted that the school board's policy relating to pupil assignment "preserved and augmented existing residential segregation."[320] Justice Marshall challenged the majority's conclusion that the reemergence of one-race schools resulted from private decision-making, pointing out that the existence of segregated school systems created current residential preferences.[321]

All of these cases had evidence supporting the claim that segregated school systems played a role in residential segregation, thus weakening the majority's ultimate conclusion that resegregation within each school system stemmed solely from private action. More importantly, the lower courts found evidence that school boards had implemented policies causing segregation in housing, such as school policies regarding the placement of new schools, attendance zone boundaries, and pupil transfers. All had been used to affect the racial composition of school districts and neighborhoods. Moreover, as a *Milliken* dissenter observed:

> Where a community is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the State creates and nurtures a segregated school system, just as surely as did those States involved in *Brown v. Board of Education*, when they maintained dual systems.[322]

In *Milliken*, the district court found that the State and the Detroit school board had engaged in purposeful acts of discrimination affecting residential

315. *Milliken*, 418 U.S. at 805 (Marshall, J., dissenting). Moreover, the *Milliken* district court had found evidence of intentional segregation by the school board tending to support Justice Marshall's claim. *See supra* note 193 and accompanying text.

316. *Jenkins*, 515 U.S. at 161 (Souter, J., dissenting).

317. *See id.* at 167 (Souter, J., dissenting).

318. *See id.* at 163 (Souter, J., dissenting).

319. *Id.* at 164 (Souter, J., dissenting).

320. *See Dowell*, 498 U.S. at 254 (Marshall, J., dissenting).

321. *See id.* at 265 (Marshall, J., dissenting).

322. *See Milliken*, 418 U.S. at 761 (citations omitted) (Douglas, J., dissenting).

segregation:[323]

> (1) the board drew attendance zones that exacerbated existing residential segregation within the school system,[324]
>
> (2) the board constructed schools in locations that ensured the resulting school would consist of predominately one-race student bodies,[325] and
>
> (3) "the District Court found that the Board destroyed some integrated neighborhoods and schools by adopting inflexible neighborhood school attendance zones that encouraged whites to migrate to all-white areas."[326]

These policies "allowed thousands of white children each year to transfer to schools in which their race was the majority . . . ."[327] The school board also refused to transport white school children into predominately black schools with more space, while at the same time busing black children into predominantly black schools farther away from the more integrated settings.[328]

In *Jenkins*, there was also evidence that school board policies undercut desegregation efforts. Indeed, the school board's transfer policies and optional attendance zones enabled white students to transfer out of integrated school systems.[329] The district court found that a consequence of such policies was that many schools in Missouri remained racially isolated.[330] Similar practices were found in the Oklahoma school system in *Dowell.* In that case, the school board authorized the construction of new schools in areas of the city in which only one race resided when it could have chosen sites that would have fostered a more diverse student body.[331] Like the board in *Jenkins*, the board in *Dowell* implemented transfer policies that enabled children to continue in their segregated schools or to transfer into schools in which they were the majority race.[332] Additionally, in *Dowell* the district court had found that the attendance zones drawn by the school board "encouraged whites to migrate to all-white areas."[333] These policies revealed that through a variety of techniques school boards had engaged in discriminatory practices.

Like *Plessy*, the modern Court has argued that private choices produced racial separation in schools while ignoring or at least discounting the state's involvement in reinforcing and sometimes actively creating the segregation.

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323. *See id.* at 725; *id.* at 784-85 (Marshall, J., dissenting).
324. *See id.* at 725; *id.* at 785 (Marshall, J., dissenting).
325. *See id.* at 726.
326. *Dowell*, 498 U.S. at 254 (Marshall, J., dissenting).
327. *Id.* at 253 (Marshall, J., dissenting).
328. *See Milliken*, 418 U.S. at 725-26. *See also id.* at 725 n.4 (revealing that the State refused to authorize funds for blacks but provided funds for transportation of whites); *id.* at 771 (White, J., dissenting) (noting the State was responsible for transportation).
329. *See Jenkins*, 515 U.S. at 140 (Souter, J., dissenting).
330. *See id.* (Souter, J., dissenting).
331. *See Dowell*, 498 U.S. at 254 (Marshall, J., dissenting).
332. *See id.* at 253-54 (Marshall, J., dissenting).
333. *Id.* at 254 (Marshall, J., dissenting).

Plessy and its progeny ignored the manner in which the law augmented segregation within the school. By allowing boards to rely on so-called private actions, the Court also ignored the state's role in reinforcing and augmenting residential segregation. The Court also failed to give proper weight to evidence of purposeful state discrimination and the effects of past active discrimination on current *de facto* segregation. Instead of focusing on the degree of private action that maintains segregation, the Court should analyze more closely the extent to which any school policies have contributed to maintaining racially separate schooling. As Justice Scalia suggested in *Freeman*, by shifting the focus from state conduct to private action, the Court created a standard under which "the plaintiff will almost always lose."[334]

B. Questioning the Significance and Examining the Limits of Local Control

Local control has always played an important role in the educational process. *Brown II* emphasized that local authorities would be best able to respond to local conditions affecting each school and that their assistance would be necessary to achieve desegregation. "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems. . . ."[335] There are parallels between the Court's emphasis on local control during the *Plessy* era and the modern era that support *Milliken*'s claim that local control has been a feature of our educational process since its inception.

Given that local control has been critical throughout the history of education, today's Court is correct in relying on local control to guide its implementation of desegregation plans. However, because local school authorities already share control with the state regarding educational decisions, the Court's participation in that decisionmaking process need not undermine the state's authority. School officials derive their power from the state, and the state determines the amount of control local bodies retain over the educational process. Local bodies have never exercised complete autonomy with respect to their schools.

In each of the cases under discussion, a State statute defined the nature and scope of the school district's authority.[336] In *Milliken*, the State had the power to consolidate and merge school districts without the consent of the districts or the local citizenry, and had in fact exercised such power to merge, consolidate, or annex districts in the years before the case was decided.[337] Indeed, some states retain the ability to alter districts without the consent of

334. *See Freeman*, 503 U.S. at 503 (Scalia, J., concurring) (noting that housing and school segregation stem from a mix of public and private conduct and it is difficult for state to prove it is not responsible for racial imbalances within its schools). Justice Scalia also noted that if the Court were to shift the burden to the plaintiff to prove that racial imbalances do *not* stem from private conduct, the law would create a standard nearly impossible for plaintiffs to meet. *See id.*

335. *Brown II*, 349 U.S. at 299.

336. *See, e.g., Milliken*, 418 U.S. at 742 n. 20; *Jenkins*, 515 U.S. at 140 (Souter, J., dissenting).

337. *See Milliken*, 418 U.S. at 742 (Marshall, J., dissenting) (citing Michigan laws).

any local bodies. For the Court, along with school administrators, to determine the scope of districts in fashioning desegregation remedies, would no more jeopardize a local entity's ability to exercise control over the educational process than would a similar intervention by the state. *Milliken* revealed that the Court occasionally stresses the importance of local control in areas where local bodies have not, in fact, exercised complete autonomy.

Both *Roberts* and *Cumming* recognized that local control served a practical purpose, because state officers could not make day-to-day decisions regarding schools.[338] The Court also exaggerated the importance of local control by failing to acknowledge that local control represents a practical tool for states. Because local control is partially based on practical considerations, it seems that such control should be replaced when it conflicts with other more substantive considerations. In *Milliken*, the lower court had characterized local control and district lines as "simply matters of political convenience."[339] In doing so, it demonstrated that convenience must yield to desegregation efforts. The Court reformulated this characterization, arguing that treating district lines "as a mere administrative convenience is contrary to the history of public education in our country."[340]

Given the historical recognition of local control as a practical consideration, the Court's conclusion not only appears inaccurate, it is unreasonable in the face of considerations that promote desegregation. Moreover, courts should not defer to the decisions of local bodies when the court finds that such bodies have abused their authority. Faced with a history of delays in desegregation or policies perpetuating segregation, courts must carefully scrutinize school board actions to ensure that their conduct is constitutionally appropriate. In his strident dissent in *Briggs*,[341] District Judge Waring pointed out that the defendant school board initially denied that it discriminated, but five months later admitted that it provided inadequate facilities for blacks and "hoped that in time they would [be able] to improve the school situation."[342] In spite of this evidence, and the fact that school authorities had made no bona fide attempts to equalize their schools, the majority in *Briggs* emphasized local control and deferred to the school board, trusting that it would make the school systems equal.[343] Judge Waring asserted that the court had adopted a "method of judicial evasion."[344]

Just as in the *Plessy* era, the modern Court failed to seriously scrutinize the actions of local authorities, and a similar form of evasion can be seen in the modern cases. As the previous discussion indicates, instead of focusing

338. *See* discussion *supra* at Part I.A.

339. *See Milliken*, 418 U.S. at 733 (citing district court's conclusions).

340. *See id.* at 741.

341. Judge Waring asserted that "[w]e should be unwilling to straddle or avoid this issue [of whether segregation in education is constitutional] and if the suggestion made by these defendants is to be adopted as the type of justice to be meted out by this Court, then I want no part of it." *Briggs*, 98 F. Supp. at 540-41 (Waring, J., dissenting).

342. *See id.* at 540 (Waring, J., dissenting).

343. *See id.* at 537-38.

344. *Id.* at 540 (Waring, J., dissenting).

on and scrutinizing evidence of discriminatory practices by the state and local board, the Court has placed a lot of significance on restoring local control. In *Jenkins*, based on the Court's "supposition" about white flight,[345] the majority rejected the findings of fact of the lower courts. These showed that the State and school board had intentionally created the segregated system and that judicial remedies were designed to dismantle the effects of such a system.[346] Instead, the Court admonished the district court that "[i]nsistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [board] will be able to operate on its own."[347]

The Court also insisted that judges "bear in mind" that one of its end purposes in formulating desegregation decrees was the restoration of local control.[348] In the midst of this consistent focus on local control, the Court in *Jenkins* failed to acknowledge that the State did not even attempt to prove its good faith commitment to comply with the desegregation order. Indeed, the lower courts had found bad faith because the State had opposed the implementation of desegregation orders.[349] In *Jenkins*, the emphasis on local control actually "induce[d] th[e] Court to avoid the primary purpose of the suit."[350]

The *Freeman* Court urged the district court to restore local control at the earliest practicable date; yet, the Court failed to instruct the lower court to critically analyze the extent to which the board's past actions affected school segregation.[351] Instead, the Court stated that the district court's findings regarding the demographic causes of segregation were "consistent with the mobility . . . of our society."[352] Focusing on statistics regarding American society in general, the Court did not focus on the specific evidence needed to support the district court's conclusion of good faith.[353] In fact, the district court had found that the board intentionally failed to desegregate and, even before most of the demographic changes had occurred, the board had intentionally contributed to the racial imbalances in the school.[354] Thus, the *Freeman* Court appeared to allow the district court to relinquish partial control over school systems without truly assessing the board's action.

There was also evidence that the school board in *Freeman* had intentionally failed to comply with desegregation decrees.[355] The Court in *Freeman* stated, "When a school district has not demonstrated good faith under a comprehensive plan to remedy ongoing violations, we have without hesitation approved comprehensive and continued district court supervi-

345. *See supra* note 204 and accompanying text.
346. *See Jenkins*, 515 U.S. at 95.
347. *See id.* at 102.
348. *See id.* (quoting *Freeman*, 503 U.S. at 489).
349. *See id.* at 152.
350. *Briggs*, 98 F. Supp. at 540 (Waring, J., dissenting).
351. *See Freeman*, 503 U.S. at 489-90.
352. *Id.* at 494.
353. *See id.* at 494-95.
354. *See id.* at 517 (Blackmun, J., dissenting).
355. *See id.* (Blackmun, J., dissenting).

sion."[356] However, the conclusion in the *Freeman* case appeared to contradict that assertion. Confronted with segregated school systems controlled by local bodies, courts in both eras have failed to analyze properly evidence of state discrimination and have maintained a preference for local control.

By over-emphasizing the importance of local control, the Court insulated the state from a cause of action alleging discrimination by the state. School boards are agents of the state.[357] States retain the ultimate authority to regulate education. Any power that local bodies have is derived from the state's authority with respect to its citizens.[358] When the *Milliken* Court allowed a local school board's autonomy to take precedence over remedying intentional acts of discrimination, the Court enabled the State to "wash . . . its hands of its own creation."[359] As Justice White noted, "The result is that the state . . . has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts."[360]

Such insulation has been explicitly rejected in the context of voting. In *Smith v. Allwright,*[361] the Court struck down a system in which the State delegated the administration of primary elections to private organizations that discriminated against blacks. The Court argued that "constitutional rights would be of little value if they could be thus indirectly denied."[362] The Court has prevented states from insulating themselves by delegating control to local organizations that discriminate with regard to voting rights. Such a practice should not be sanctioned in regard to education.[363] As Justice Marshall noted in *Milliken*, "[T]he state should no more be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children than it could hide behind its political subdivisions to avoid its obligations to its voters."[364]

The Court's emphasis on local control shifted the focus away from eliminating vestiges of discrimination. Given the detrimental effects of discrimination in education recognized by *Brown* and its progeny, local control should not be given the same importance as remedying such discrimination. Assuming arguendo that it was appropriate for the Court to place

356. *Id.* at 499.

357. *See* Cooper v. Aaron, 358 U.S. 1, 16 (1958).

358. *See, e.g., Milliken*, 418 U.S. at 742 n.20.

359. *Id.* at 762 (Douglas, J., dissenting). Justice Douglas noted that "Michigan by one device or another has over the years created black school districts and white school districts." *Id.* (Douglas, J., dissenting). Despite this creation, the court allowed Michigan to shield itself from constitutional responsibility. *See id.* at 752.

360. *See id.* at 763 (White, J., dissenting).

361. 321 U.S. 649 (1943).

362. *Id.* at 664.

363. The analogy is admittedly imperfect because courts have recognized voting, but not education, to be a fundamental right. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). However, just as states must ensure that the right to vote cannot be denied through delegation to local entities, once a state undertakes to provide education, it must ensure that local bodies provide it on an equal basis.

364. *Milliken*, 418 U.S. at 808 (Marshall, J., dissenting).

equal emphasis on restoring local control and remedying constitutional violations, the Court appeared, however, to give local control *primary* importance by failing to adequately scrutinize board actions and the evidence of its discrimination. In *Briggs*, Judge Waring predicted, "If this method of judicial evasion [is] adopted, these very infant plaintiffs now pupils in [school] will probably be bringing suits for their children and grandchildren decades or rather generations hence in an effort to get for their descendants what [is] today denied to them."[365] Although *Briggs* was overruled by *Brown*, Judge Waring's prediction appears to have come true. Not only did desegregation suits continue well after *Briggs* and *Brown*, but the Court's recent decisions will ensure that these suits continue well into the future.

C. Attacking the Ability of Racially Separate Schools to Provide Equal Educational Opportunity

Plessy explicitly concluded that separate school facilities could provide equal education. In doing so, *Plessy* and its progeny relied on three premises that *Brown* and its progeny would later reject. First, *Plessy*-era courts accepted at face value the promises and explanations of local school boards regarding the *equality* of education between racially separate educational facilities. For example, the court in *Briggs* relied on school officials' promises to equalize black and white schools, even though the court fully conceded that school administrators had failed to provide equal education for black children for years.[366] Even Justice Harlan, who in *Plessy* had argued that "[n]o one would be so wanting in candor as to assert" that the Louisiana statute was not designed to discriminate against blacks,[367] accepted that the board in *Cumming* did not have a discriminatory motive in withdrawing funds from the all-black school even though it would continue to support the white schools.[368] In contrast, *Brown* and its progeny required courts to carefully scrutinize assertions by local school boards.

Second, *Plessy*-era courts rejected evidence or testimony suggesting that racial separation led to feelings of inferiority among black school children.[369] Because of the paucity of research on the subject, the plaintiff in *Plessy* had to rely on mere assertions that separation marked one race as inferior to the other. By the time of *Briggs*, the plaintiff had produced evidence from many people trained in education and sociology to support these assertions.[370] The *Briggs* court also found that two witnesses, untrained in education or sociology, gave countervailing testimony on the effects of racially separate education. The court then concluded that the decision to segregate students

365. *Briggs*, 98 F. Supp. at 540 (Waring, J., dissenting).

366. *See id.* at 531.

367. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

368. *See* KOUSSER, *supra* note 42, at 29-30 (arguing that *Cumming* "set the bound of skepticism very low indeed").

369. *See, e.g., Plessy*, 163 U.S. at 551; *Roberts*, 59 Mass. at 209.

370. *See, e.g., Briggs*, 98 F. Supp. at 547 (Waring, J., dissenting) (explaining witnesses with national reputations in education had testified on deleterious effect of segregation).

was not a constitutional matter, but one of "legislative policy."[371] The *Brown* court fully acknowledged the stigmatic injury associated with racially separated schooling, citing Kenneth Clark's conclusions regarding the effects of racial separation on blacks.[372]

Third, courts during the *Plessy* era dismissed the claim that a state's separation of school children deprived all children of the intangible benefits of a racially mixed education. The *Briggs* court distinguished its ruling from the precedent set by the graduate school desegregation cases, explaining that the professional contacts critical to the Court's reasoning did not apply to schooling at the primary school level.[373] The dissent in *Briggs* argued that such contacts were just as important in primary and middle schools. Judge Waring argued that "the Supreme Court clearly recognized that education does not alone consist of fine buildings, class room furniture and appliances but that included in education must be all the intangibles that come into play in preparing one for meeting life."[374] Consistent with Judge Waring's beliefs, *Brown* embraced the notion that intangible factors prevent separate schools from providing equal opportunities to all children.[375]

The recent Court, in effectively sanctioning racially separate schools under the private preferences rationale, appeared as unconvinced about these issues as were the *Plessy*-era courts. By sanctioning resegregation within school systems and limiting the available remedies, the Court ignored, or at least failed to account for, the practical difficulties of providing equal facilities for racially separate schools. In *San Antonio Independent School District v. Rodriguez,*[376] the Court ruled that it was constitutional for states to rely on property taxes to fund schools.[377] Because of inequities in funding, the ruling has meant that schools within poor neighborhoods can have fewer resources, and thus offer a lower quality education, without violating the Constitution. Moreover, because many minorities continue to have less income than their white counterparts, *Rodriguez* ensured that the inequities in school funding will have unresolved racial implications.

In a symposium honoring the fortieth anniversary of the *Brown* decision, District Judge Robert Carter addressed the limits that *Rodriguez* imposed on *Brown*:

> [U]rban communities, with poor minority children comprising a large segment of their school population, have fewer financial resources to deal with their pressing educational problems than their more affluent neighboring white districts, and the composition of the school population in these urban areas makes meaningful desegregation virtually impossible.[378]

371. *Id.* at 536.
372. *See Brown*, 347 U.S. at 494 n.11.
373. *See Briggs*, 98 F. Supp. at 535.
374. *Id.* at 545.
375. *See Brown*, 347 U.S. at 493-94.
376. 411 U.S. 1 (1973).
377. *See id.* at 37.
378. Robert L. Carter, *The Unending Struggle for Equal Educational Opportunity, in* THE

By allowing racially separate schools to persist, the Court also ignored the danger of resurrecting *Plessy*'s view that such separation does not impart sociological harm on blacks. Even though racially separate schools may still impart stigmatic injury, most Justices fail to address the states' duty to alleviate this injury. As Justice Marshall argued in *Dowell*, "Against the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation."[379] The recent Court's reluctance to ensure that states eliminate such schools when there were feasible methods for doing so, enabled this message to flourish. Moreover, the Court's refusal to require states to counteract the effects of discrimination by local school boards appeared to minimize the concerns relating to stigmatic harms. In these ways, the recent Court's decisions failed to acknowledge or remedy the stigmatic harms that stem from the vestiges of state-sponsored discrimination.

Like the *Briggs* court, the recent Court also appeared to reject the notion that intangible factors undermine the extent to which separate education actually can be equal. A recent study of the long-term effects of desegregation on black students emphasized the importance of intangible considerations and concludes that contacts with white students increases black students' access to information and networks of information.[380] As one researcher writes, "Students in all-black schools . . . lack the contacts and loose acquaintanceships that are apparently extremely important in attaining jobs and promotions."[381] Indeed, the Court has stated that "public schools are an important socializing institution, imparting those shared values though which social order and stability are maintained."[382]

One important value imparted by mixed schooling is the importance of a racially mixed society. It must be difficult for school officials to teach this value while sanctioning separate schools. Given that race relations in America continues to be a problem and that most people believe that education is the key to overcoming these difficulties, the trend toward segregated education, whether state imposed or privately motivated, cannot be viewed with approval. As Justice Marshall wrote, "Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together."[383] As long as there is separation, the state's ability to provide the intangible benefits of a racially mixed education will be limited.

CHALLENGE, *supra* note 10, at 19-20.

379. *Dowell*, 498 U.S. at 263 (Marshall, J., dissenting). Given the pervasive nature of a state's authority with respect to public education, it is arguable that any state-sponsored racial separation in schools, especially when coupled with inequities in facilities, has a tendency to perpetuate feelings of inferiority.

380. *See* Amy Stuart Wells, *Reexamining Social Science Research on School Desegregation: Long versus Short-term Effects*, *in* THE CHALLENGE, *supra* note 10, at 91, 100.

381. HOCHSCHILD, *supra* note 168, at 27.

382. Plyler v. Doe, 457 U.S. 202, 222 n.20 (1982).

383. *Milliken*, 418 U.S. at 783 (Marshall, J., dissenting).

Justice Thomas recently articulated that an insistence on desegregated schooling "assume[s] that anything that is predominantly black must be inferior."[384] While initially appearing to be a legitimate concern, this view fails to account for the practical realities of segregated schools as well as the benefits of an integrated environment. Justice Thomas correctly asserted that historically-black colleges and universities, many of which resulted from discriminatory exclusion of blacks from white institutions, offer quality education and serve as a "source of pride" for many blacks.[385] However, colleges differ dramatically from primary schools, and while some predominantly black primary schools have been considered a success, this has been limited.[386] This limited success may stem in part from the fact that colleges and universities have a variety of funding sources while primary schools must rely on the tax base. Moreover, Justice Thomas' assertion appears to ignore the reality that predominantly black schools tend to suffer from lower quality teachers, inadequate resources and decrepit physical facilities. "[S]tudies of some districts . . . show that black-dominated schools have had smaller budgets, poorer facilities, less-qualified teachers, and other effects of fewer resources."[387]

Although Justice Thomas did not address the issue, there is evidence that some integrated educational environments can disadvantage black children.[388] Black children often bear most of the burdens of busing and their educational skills suffer when they are in environments in which they are not valued by their teachers and administrators. However, researchers have also found that when done correctly integration provides the best learning environment for all students by increasing their achievement scores and their long-term probability of success. A study conducted over a span of ten years found that black students performed best in interracial settings that offered mutual respect and acceptance, and performed the worst in hostile interracial environments.[389] Although there are misgivings regarding state or school boards' abilities to provide the proper form of desegregated education, there remains a consensus that a mixed educational environment, when administered correctly, provides the best educational experience for all children.

Views such as that of Justice Thomas, as well as other Justices, ignore *Brown*'s emphasis on intangible considerations and therefore devalue the importance of mixed education to the success of our society. Although blacks and whites may receive the same quality of education in separate

384. *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring).

385. *See Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).

386. *See* ORFIELD, *supra* note 32, at 86.

387. HOCHSCHILD, *supra* note 168, at 27-28 (citing studies in Chicago, Ill., and Hartford, Conn.). In response to these inequities in funding, there have been proposals to provide tuition vouchers to poor, often black, schools. *See infra* note 402 and accompanying text.

388. *See, e.g.*, Raneta J. Lawson, *The Child Seated Next To Me: The Continuing Quest for Equal Educational Opportunity*, 16 T. MARSHALL L. REV. 35, 41-47 (1990) (discussing negative results of desegregation).

389. *See* Irwin Katz, Review of Evidence Relating to Effects of Desegregation on the Intellectual Performance of Negroes, 19 AM. PSYCHOL. 381, 382-99 (1964).

environments, many understood *Brown* to be seeking to instill the value of appreciating all races. A majority of blacks and whites believe that integrated schools have improved race relations.[390] Studies support that peoples' ideas about race are positively affected when they are educated and take part in an integrated learning environment. Furthermore, "mandatory desegregation increases expectations of more desegregation, acceptance of it, and even support for it from those initially opposed."[391] Even attitudes toward busing became more positive over time.[392] Although a majority of whites opposed busing in theory, those white parents and students involved in it found it satisfactory, some claiming that "children learn to live with each other."[393] Thus, the research indicates that mixed schools offer the best opportunity for children to learn to live in a racially mixed society.

The Court's acceptance of racially separate education is disturbing on several levels. First, as a practical matter such schools may never provide equal facilities. Second, because such schools stem at least in part from segregation and their lingering effects, they serve to continue the message of racial inferiority. Finally, this acceptance by the highest court devalues the importance of racially mixed schools. The value of a mixed society must be instilled at an early age. In the words of Judge Waring:

> [R]acial prejudice is something that is acquired and . . . that acquiring is in early childhood . . . . Let the little child's mind be poisoned by prejudice of this kind and it is practically impossible to ever remove these impressions . . . . If segregation is wrong then the place to stop it is in the first grade and not in graduate colleges.[394]

IV. RETURN TO *BROWN*: A QUEST FOR PRINCIPLES

This article has thus far demonstrated that the Court has departed from the principles in *Brown*. As a result, racially separate educational facilities, created by intentional segregation and maintained by the lingering effects of such segregation, continue to plague our school systems. The Court's adoption of flawed *Plessy*-like reasoning has caused it to rely on principles incompatible with desegregation and racially mixed education. In view of this, we must identify different approaches for discrediting the three premises that underscore the reasoning of the Court's recent opinions. First, we must overcome the assumption that the current racial separation in education stems from private conduct. Given that this rests on housing preferences, such assumptions must be attacked by highlighting state-sponsored housing segregation and its linkage with intentional segregation and school policies.

390. *See* Gary Orfield, *Public Opinion and School Desegregation*, *in* THE CHALLENGE, *supra* note 10, at 56.

391. HOCHSCHILD, *supra* note 168, at 16.

392. *See* Gary Orfield, *Public Opinion and School Desegregation*, *in* THE CHALLENGE, *supra* note 10, at 63.

393. HOCHSCHILD, *supra* note 168, 14 (quoting survey response).

394. *Briggs*, 98 F. Supp. at 547 (Waring, J., dissenting).

Second, the Court's emphasis on local control must be limited. One method of shifting the focus away from local control is to rely on state law and the state court system to implement desegregation plans. Third, we must reassert the notion that integrated school systems represent the most beneficial form of education. This notion, which appears to be losing acceptance, particularly among blacks, requires that we reject solutions that focus on one-race systems and to further analyze and document the successes of racial integration in schools.

A. Curbing the Claim of Private Action With a Renewed Attack on Segregated Housing

Given the Court's heavy reliance on the presumption that segregation in school results from private decisions regarding housing, any strategy for desegregation must include an attack on state-sponsored housing segregation. Indeed, in each of the modern cases discussed in this article the Court either suggested or firmly concluded that segregation in school systems reflects private segregation in housing which can not be overcome by law. Because of this contention, strategies attacking segregation must prove that segregation in housing is rooted in state action. The record for any desegregation case must be fortified with evidence of state action in connection with the specific case at issue so that it will be more difficult for the Court to rely on general suppositions about housing. More important than this initial proof, the strategist must develop a link between state-sponsored housing discrimination and school policies. This link is critical because it will diminish the ability of proponents of the status quo to argue that the remedy for state-sponsored housing segregation is beyond the realm of education cases. In the end, for desegregation policy to be beneficial, it must encompass solutions for segregation in both housing and education.

Desegregation litigation must be aimed at proving that segregated housing is linked to state action. As Professor Gary Orfield writes, "If the courts . . . see housing segregation as unrelated to school desegregation and essentially private, they are likely to conclude that school officials may accept a 'natural' spread of residential segregation occurring through private choice and not public action, and therefore to accept the spread of school segregation as natural."[395]

As this article reveals, each of the modern decisions have rested on the Court's belief that housing segregation was essentially private in nature. *Freeman*, however, indicated that the Justices were divided about the nature of housing segregation and its relationship with school policies. Indeed, while Justices Scalia, Souter, Blackmun, Stevens and O'Connor insisted that there was an inextricable link between the two,[396] the other Justices remained

395. Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1404 (1995).

396. *See Freeman*, 503 U.S. at 503 (Scalia, J., concurring); *id.* at 507 (Souter, J., concurring); *id.* at 513-15 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring).

ambivalent.[397] Because of this division, there must be a concentrated effort to persuade the Court that housing segregation plays a central role in school segregation. Indeed, this issue deserves a much more sophisticated analysis than it has received in the recent cases. Studies must be done concerning the relationship between people's preferences regarding housing and discrimination. That is, one must determine the extent to which prior discrimination caused people to prefer certain racial compositions in their neighborhoods. One study revealed that people's attitudes changed when discriminatory policies changed, and that those with negative attitudes regarding racial integration in housing eventually accepted such integration.[398] More evidence should be gathered to determine the extent to which housing preferences can be altered with new policies. Finally, and most importantly, there needs to be greater research on the direct link between housing and school segregation. These forms of research will diminish the Court's ability to rely on general suppositions regarding housing preferences.

Significantly, creating such linkage may cause courts to impose remedies that encompass both housing and education policies. Efforts in the 1980s revealed that such policies can have positive results. In Chicago, a negotiated consent decree was filed that forced housing and schools officials to work together to find a solution to segregation.[399] In St. Louis, the federal district court approved a school desegregation order that included remedies related to defeating housing segregation.[400] Not only do these efforts reveal the feasibility of combating housing and school segregation together, they represent a way in which the Court's focus on housing issues can be minimized.

The effort to prove that school resegregation does not stem from private decisions may inform the decision whether to support school tuition vouchers.[401] Some have noted that tuition vouchers are a critical aspect of the movement to privatize public schooling.[402] This characterization of the voucher system may lend support to the Court's belief that choices related to

397. *See id.* at 494-95 (Kennedy, J., joined by Rehnquist, C.J., and White, Scalia and Souter, JJ.). Although Justices Scalia and Souter joined the majority that found segregated school patterns to be the product of private choices, both Justices indicated in their concurring opinions that such choices were linked to discrimination in housing.

398. *See* GARY ORFIELD, TOWARD A STRATEGY FOR URBAN INTEGRATION: LESSONS IN SCHOOL AND HOUSING POLICY FROM TWELVE CITIES 20-21 (1981).

399. *See id.* at 25.

400. *See* Liddell v. Bd. of Educ., 491 F. Supp. 351, 354 (E.D. Mo. 1980). *See also* ORFIELD, *supra* note 32, at 405 n.105. For a discussion of combined housing and school efforts, see Meredith Lee Bryant, *Combating School Resegregation through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, 13 HARV. BLACKLETTER J. 127, 139-41 (1997).

401. For a discussion concerning the compatibility of voucher systems with desegregation goals, see *infra* Part IV.C.

402. *See, e.g.*, PAUL C. BAUMAN, GOVERNING EDUCATION: PUBLIC SECTOR REFORM OR PRIVATIZATION 88, 133-34 (1996) (noting privatization through school vouchers and charter schools is gaining support); Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 360 (1997) (noting movement to privatize public schools through tuition vouchers is gaining momentum).

school and housing are essentially private in nature. Because of this, such systems may be incompatible with the goals of *Brown*.

B. Reliance on the State System to Embrace and Curtail the Emphasis on Local Control

In view of the Court's heavy emphasis on local control, one way to ensure that desegregation efforts will continue is to rely on state law. Such a reliance should reduce the concerns related to federalism that caused the Court to hesitate in displacing the system created by local school boards and the state. Also, because the state court system is part of the local community, utilizing the state system enables a court to include principles of local control in desegregation remedies. Finally, state law may provide more flexibility and greater protection than federal law. Because they address some of the Court's concerns regarding local control, these considerations may make the state system a more favorable alternative.

Reliance on the state court system alleviates the federalism concerns noted by the Court in its desegregation decisions. In *Dowell*, the Court stated that "[c]onsiderations based on the allocation of powers within our federal system . . . " supported its view that a less stringent standard should be applied to dissolving desegregation decrees.[403] Likewise, in refusing to overturn the inequitable tax distributions that had created racially isolated schools in *Rodriguez,* the Court stated that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us."[404] While the Supreme Court's active involvement in desegregation cases inevitably impacted federalism and threatened local control, a state court's involvement in such cases is less threatening. Principles regarding federalism and local control do not restrict a state court's authority to enforce its own laws.[405] Moreover, utilizing the state court system has the added benefit of reducing the judicial oversight currently burdening the federal system.

Reliance on state authority also enables the court system to include local values in its remedies. One of the reasons that the Court preferred local control is that such control allows regional custom to be reflected in school systems. The state court system is a part of the local culture. Not only is the state court system in a better position to assess local needs than the federal court, but its interpretations of state law partially create local customs. Thus, state courts allow local values to be reflected in desegregation cases.

State law may also provide more flexible remedies than federal law. The case of *Sheff v. O'Neill*[406] illustrates this flexibility. *Sheff* relied in part on Connecticut's recognition that the right to education is a fundamental right which the court found imposes an affirmative obligation on the state to

403. *Dowell*, 498 U.S. at 248.
404. *Rodriguez*, 411 U.S. at 44.
405. *See* Sheff v. O'Neill, 678 A.2d 1267, 1279 (Conn. 1996).
406. *See id.*

reduce racial isolation in its schools.[407] Thus, *Sheff* held that a school districting scheme which resulted in racially disparate schools was unconstitutional. The Supreme Court has held that education is *not* a fundamental right under the U.S. Constitution.[408] In contrast, nearly half of the state courts have held that their state constitution provides that education *is* a fundamental right.[409] If state courts, like the *Sheff* court, interpret this right as imposing broader duties on school systems and the state, then the state systems may provide better and further reaching remedies than the federal system.

However, there are limits to the advantage of using the state court system. Since the principles articulated by state courts do not serve as binding precedent for other state courts, there is no guarantee that states will interpret similar provisions the same. Moreover, reliance on state laws will be limited because state constitutional provisions do not contain similar language. Indeed, *Sheff* relied on a combination of the fundamental right to education and a provision in its constitution that specifically prohibited segregation in education.[410] It was this combination that compelled the *Sheff* court to conclude that the legislature had an affirmative responsibility to remedy segregation in public schools, regardless of whether the segregation resulted from state or private forces.[411] Only two other state constitutions specifically prohibit segregation.[412] This fact may limit the extent to which other states may rely on *Sheff*.

More importantly, given the historical tendency of state and local authorities to discriminate, reliance on the state court system must be undertaken with caution. Indeed, just as state officials have been reluctant to make some changes in educational policy, state court judges may hesitate to dismantle the educational system in favor of full desegregation. Perhaps most importantly, local values may be inconsistent with desegregation, hence state judges may need the active participation of federal judges to ensure complete compliance with *Brown*.

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407. *See id.*

408. *See Rodriguez*, 411 U.S. at 37.

409. State cases holding that education is a fundamental right under their respective state constitutions include: Hootch v. Alaska State-Operated Sch. Sys., 536 P.2d 793 (Alaska 1975); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Rose v. Council for Better Educ. Inc, 790 S.W.2d 186 (Ky. 1989); Seattle Sch. Dist. No. 1 of King County v. Washington, 585 P.2d 71 (Wash. 1978); Pauley v. Kelley, 255 S.E.2d 859 (W. Va. 1979); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976); and Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

State cases holding that education is not a fundamental right under their respective state constitutions include: Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); and Bd. of Educ. of City Sch. Dist. v. Walter, 390 N.E.2d 813 (Ohio 1979).

410. *See Sheff*, 678 A.2d. at 1281-82.

411. *See id.* at 1283.

412. For example, only New Jersey and Hawaii prohibit segregation, and Hawaii's prohibition only relates to military organizations. *See Sheff*, 678 A.2d at 1281 n.29.

Regardless of these concerns, relying on state law may serve to neutralize the Supreme Court's emphasis on local control while producing some significant gains in desegregation law. In his study of racial discrimination litigation in the nineteenth century, Professor J. Morgan Kousser found that in the era in which many courts were hostile to attacks against segregation, the most successful cases were those that "cit[ed] a state law or precedent if possible, mov[ed] to a state constitutional provision only if necessary, and avoid[ed] federal questions if they could."[413] Given the Court's apparent reluctance to actively prevent racial segregation in education, it may be prudent to follow the pattern of such cases and focus on narrow state provisions to reduce racial isolation in the school system.

C. *Focusing on Interracial Solutions*

Those dedicated to *Brown* and cognizant of the inequalities that result from segregated schooling have a duty to ensure, to the extent possible, that the focus of desegregation litigation remains on diminishing the incidence of one-race schools. Given this focus, strategists must resist solutions that encompass one-race school systems and schemes. This resistance may be difficult given the practical reality that many blacks and whites attend school systems separated by race. Despite this, some solutions tend to exacerbate racial isolation in schools while others allow for more integrated environments. In light of the intangible benefits of racially mixed schooling, and the practical impediments to equal but separate education, it is essential that integrated education remain a priority.

One remedy that poses difficulties for insuring integrated education is the voucher system.[414] Proponents argue that vouchers can provide a more equal education than that received in the current school system.[415] However, while some contend that school vouchers can improve the racial composition of schools, others warn that vouchers may impede racial integration and promote racial isolation.[416] Because of these concerns, proposals for vouch-

413. KOUSSER, *supra* note 42, at 10-11.

414. For a discussion of vouchers, see Jill Jasperson, *Renaissance in Education: The Constitutionality and Viability of an Educational Choice or Voucher System*, 1993 BYU EDUC. & L.J. 126, 126-27; Ronald J. Tocchini, Comment and Note, *Ad Majorem Dei Gloriam: A Performance-Based Argument for Educational Tuition Vouchers*, 1996 BYU EDUC. & L.J. 82, 83.

415. *See, e.g.*, Deborah E. Beck, Note, Jenkins v. Missouri: *School Choice as a Method for Desegregating an Inner-City School District*, 81 CAL. L. REV. 1029, 1047 (1993).

416. *See, e.g.*, Jasperson, *supra* note 414, at 128-29. Some authors note that under a voucher system people tend to choose schools in which the majority race is similar to their own. *See* Kevin B. Smith & Kenneth J. Meirer, *School Choice, Panacea or Pandora's Box*, 77 PHI DELTA KAPPAN 312-16 (1995). *See generally* Jeffrey Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses in* WHO CHOOSES? WHO LOSES? (Bruce Fuller & Richard F. Elmore eds., 1996); Others point out that voucher systems historically have been used to undermine the efforts of blacks to obtain an equal education. *See* Beck, *supra* note 415, at 1035; Tocchini, *supra* note 414, at 85-86.

For court decisions overturning voucher systems designed to thwart *Brown* by enabling whites to opt out of the public school system, see *Green*, 391 U.S. 430 (holding voucher system did not constitute adequate compliance with school board's responsibility in determining

ers must be carefully scrutinized to ensure they do not undermine attempts to establish and maintain desegregated school systems.

CONCLUSION

Judge Carter best sums up *Brown*'s current legacy:

> *Brown* has been hailed as one of the giants of American jurisprudence, but whatever claim it may have to that classification, it cannot be based on its success in providing equal educational opportunity for minority children. Thus far, for most black children the constitutional guarantee of equal educational opportunity that *Brown* held was secured to them has been an arid abstraction, having no effect whatsoever on the bleak educational offerings black children are given in the deteriorating schools they attend.[417]

The similarities between *Plessy*-era decisions and the Court's recent interpretations of *Brown* underscore the flaws in the Court's reasoning and holdings as they relate to education. The Court's reliance on *Plessy*-like reasoning undermines the opportunity for equal education that *Brown* presented to Americans. Although many believe that the current condition of education proves that *Brown*'s commitment to desegregation was shortsighted, the Court has limited the potential of *Brown*. If the Court returned to the principles initially outlined in *Brown*, the nation may be able to capitalize on the dream *Brown* represented. *Brown* stands not only for the opportunity that blacks and whites have to gain equal education, but all Americans have to learn to live together in a mixed society. For these reasons, even if the Court has not fully resurrected *Plessy*, the Court's acceptance of *Plessy*'s principles keeps its spirit alive.

admission on a non-racial basis); Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (holding statute providing state tuition grants unconstitutional because operated on a racially-segregated basis). *See also* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967) (arguing that a freedom of choice plan is a "fantasy" if the plan is not operated to eliminate racial segregation).

417. Robert L. Carter, *The Unending Struggle for Equal Educational Opportunity, in* THE CHALLENGE, *supra* note 10, at 26.