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INTRODUCTION

As a result of persistent educational achievement disparities between black and white American students,[1] and particularly in response to the current educational plight of black American males,[2] educators are proposing and implementing various novel remedial measures.[3] One of the more prominent, but controversial, of these measures is the creation of all black, male, public academies (Academies).[4] This current search for educational equality for blacks seems similar to the quest which gave rise to the landmark case of *Brown v. Board of Education* (*Brown I*).[5] Yet, while achieving equal

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1. *See infra* notes 130-33 and accompanying text (discussing the current gap in education attainment levels between African-American and white public school students).

2. *See infra* notes 134-36 and accompanying text (examining the particularly severe crisis facing African-American males).

3. One prominent attempt to remove the obstacles facing black youths, particularly males, is being made by black church groups. Their efforts to save America's inner-city schools and provide for the educational and social needs of black students has recently become more widespread. Church-sponsored secular academic programs have been created in Chicago, New Orleans, Detroit, Oakland, Atlanta, Washington, D.C., and Indianapolis. The various programs provide non-religious educational and social training. These include after-school tutoring programs, computer and math instruction, Saturday educational classes, conflict resolution teaching and black manhood training. *See* Tamara Lewin, *Black Churches: New Mission on Families*, N.Y. TIMES, Aug. 24, 1988, at A1. What is novel about the efforts of black church groups is not their degree of activism, but that the programs are being partially financed with government resources. *See* Susan Chira, *Black Churches Renew A Mission: Education*, N.Y. TIMES, Aug. 7, 1991, at A1; Hugh Hart, *After School Fun Learning Begins*, CHI. TRIB., Apr. 26, 1992, at 14.

4. My discussion is limited to the Academies, which clearly focus on the needs of black males to the exclusion of black females. In no way do I mean to minimize the problems affecting black females. For a critique of the creation of male-only schools, see Donna Britt, *What About The Sisters?*, WASH. POST, Feb. 2, 1992, at F1. *But cf. Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination*, 105 HARV. L. REV. 1741 (1992) (arguing that single-sex schools should be permitted to combat severe educational problems).

5. 347 U.S. 483 (1954). Although *Brown* stands out as an important turning point in American social and legal history, the case does not represent the beginning of the fight for equal schools for blacks. In fact, "American blacks have sought effective public schooling for their children for two centuries." DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 364 (3d ed. 1991) [hereinafter BELL, RACE]. For a "behind-the-scenes" account of the *Brown* decision, see generally Mark Tushnet, *What Really Happened in*

educational opportunity was the ultimate goal of *Brown* and remains the object of the Academies, the strategies implemented to achieve this goal could not be more dissimilar.

Following the seminal Supreme Court desegregation cases,[6] civil rights leaders and educators had reason to be optimistic about the potential for attaining educational equality through the eradication of racially segregated schools. For the first time in American history, the Constitution was held to support and mandate the desegregation of public schools. However, after an initial period of Supreme Court commitment to desegregation,[7] the Court's jurisprudence quickly diminished the likelihood for achieving desegregation in many areas of the country, particularly urban areas of the North.[8] Moreover, recent Court decisions permitting the relinquishment of judicial involvement and supervision have continued to further frustrate integration efforts.[9] According to one commentator, the ultimate result of this devolution is that "the great mass of urban black children [are] locked in all-black schools, many of which are today as separate and unequal as they were before 1954."[10]

In reaction to what many believe to be ineffectual Supreme Court jurisprudence for purposes of achieving integration, educators are searching for alternative educational approaches which provide black students with quality public schooling.[11] This search has

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Brown v. Board of Education?, 91 COLUM. L.REV. 1867 (1991).

I recognize that *Brown* and its progeny did not distinguish between black girls and boys, while the Academies are geared to black boys. However, because the Academies are purely a non-integration strategy, they present a provocative contrast to the integration strategy of *Brown*.

6. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954). For a further discussion of these cases, see *infra* notes 28-56 and accompanying text.

7. *See infra* parts II.A., II.B., II.C.

8. *See* Milliken v. Bradley, 418 U.S. 717 (1974); *see also infra* notes 65-75 and accompanying text.

9. *See* Freeman v. Pitts, 112 S. Ct. 1430 (1992); Board of Educ. v. Dowell, 498 U.S. 237 (1991); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); *see also infra* notes 77-91 and accompanying text.

10. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470, 515-16 (1976) [hereinafter Bell, *Two Masters*]. This is not to say that desegregation is dead. There has recently been desegregation action in several cities across the nation. *See* James S. Liebman, *Desegregation Politics: "All-out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1468-69 nn.17-34 (1990) [hereinafter Liebman, *Politics*].

11. Some scholars are altogether opposed to integration, irrespective of constitutional doctrine. They criticize integration as being educationally and emotionally damaging to black students. *See, e.g.*, Raneta J. Lawson, *The Child Sitting Next To Me: The Continuing Quest For Equal Educational Opportunity*, 16 T. MARSHALL L. REV. 35, 37 (1991) (arguing that racial balancing may be "distracting to the effective education of children"); LeRoy Pernell, *Suffering the Children: 35 Years of Suspension, Expulsion, and*

caused many educators to reexamine the longstanding ideology espoused by civil rights groups, such as the NAACP, which have historically viewed integration as the only way to achieve educational equality for black students.[12] No longer is it universally agreed upon that integration and equal education are synonymous. Increasing scrutiny has been directed at the *Brown* strategy, which has "treat[ed] desegregation litigation as a matter solely of racial balance and assume[d] quality education [would] come with that balance."[13] Due to this reexamination, non-integration approaches, such

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Beatings—The Price of Desegregation, 7 HARV. BLACKLETTER J. 119, 125 (1990) (describing the "forgotten consequence[s] of desegregation").

I believe that the failure to achieve complete desegregation is *the* major factor causing the reexamination of the *Brown* strategy. The fact that the critique of *Brown* and its progeny followed the emergence of the deficiencies of desegregation supports this conclusion. *See, e.g,* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 107-22 (1987) [hereinafter BELL, SAVED]; RAYMOND WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 273-89 (1984); Derrick A. Bell, Jr., *The Legacy of W.E.B. DuBois: A Rational Model for Achieving Public School Equity For America's Black Children*, 11 CREIGHTON L. REV. 409 (1978) [hereinafter Bell, *Legacy*]; Robert L. Carter, *A Reassessment of* Brown v. Board, *in* SHADES OF BROWN: NEW PERSPECTIVE ON SCHOOL DESEGREGATION 21 (Derrick Bell ed., 1980). Prior to this trend of criticism of *Brown*, widespread advocacy for non-integration strategies was not prevalent. One notable exception was Malcolm X, who recognized that single-race schools could be appropriate in certain situations:

> If we can get an all-black school, that we can control, staff it ourselves with the type of teachers that have our good at heart, with the type of books that have in them many of the missing ingredients that have produced this inferiority complex in our people, then we don't feel that an all-black school is necessarily a segregated school.

MALCOLM X, BY ANY MEANS NECESSARY, 16-17 (2d ed. 1992). Although this Comment focuses on efforts to aid black students as a subset of the American student body, there may be a need to revamp the entire U.S. education system. It is argued that all American students are not receiving a quality education. Recent studies have documented this situation. NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK 5 (1983). This report began with an alarm: "Our Nation is at risk.... [T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." *Id.* Although this warning was published over ten years ago, the troubling situation continues today. In 1992, one authority affirmed this point by stating that "[i]t has now been nine years since that sober pronouncement, yet we haven't significantly turned the situation around." Chester E. Finn Jr., *Up From Mediocrity*, POL'Y REV., Summer 1992, at 80. A 1992 report asserted that American "[s]tudents fell short in most areas." Nanette Asimov, *Schools Still Don't Meet Goals*, S.F. CHRON., Sept. 30, 1992, at A3.

12. *See* Julius Chambers, *Adequate Education For All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55 (1987) (arguing that, although integration should be the ultimate goal, alternatives should be considered).

13. Ronald R. Edmonds, *Effective Education for Minority Pupils:* Brown *Confounded or Confirmed, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION, *supra* note 11, at 121. Even those involved in the *Brown* litigation question the soundness of relying exclusively on integration to solve the educational problems facing African-Americans. *See* Carter, *supra* note 11, at 21.

as the Academies, are gaining increasing acceptance.

One of the central issues raised by the development of the Academies is whether it is necessary to reexamine the enduring civil rights ideology that links educational equality with integration.[14] Should alternative, non-integration strategies be employed to attack modern social realities besetting many black students in urban schools, and to react to a federal judiciary which has been unresponsive, if not hostile, to calls for integration?[15] Should these strategies be praised as innovative, realistic, and necessary measures in the continual search for equal education; or should they be condemned as regressive, separatist actions which are damaging to the students sought to be aided?

Part I of this Comment examines the distinct variations in the most innovative, yet disputed, manifestation of the reexamination of the integration strategy—the black male Academies. Part II discusses the evolution of the Supreme Court's approach to desegregation remedies which, in part, has caused non-integration proposals such as the Academies to arise. Part III analyzes the overall impact of desegregation on educational equality, and asserts that when integration is attained, black students' achievement levels increase. Part IV argues that in addition to integration's achievement benefits, integration inherently protects against race-based funding disparities—disparities which will preclude the racially isolated Academies from providing equal educational opportunity. However, Part IV further suggests that an integration approach should not

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14. This Comment will not address the question of whether the Academies are constitutionally permissible. For a discussion of the constitutionality of the Academies, see Helaine Greenfield, *Some Constitutional Problems with the Resegregation of Public Schools*, 80 GEO. L.J. 363 (1991); Steven Siegel, *Race, Education, and the Equal Protection Clause in the 1990s: The Meaning of* Brown v. Board of Education *Re-Examined in Light of Milwaukee's Schools of African-American Immersion*, 74 MARQ. L. REV. 501 (1991). Most important to the question of the constitutionality of the Academies would be the issue of whether they restrict enrollment based on race. Academy administrators vehemently deny claims that they do, and assert that the schools are open to all students regardless of race. Even though the schools are disproportionately attended by blacks, as long as their admissions policies are found to be race-neutral, they are likely to pass constitutional muster. This is because of Washington v. Davis, 426 U.S. 229 (1976), which held that race-neutral policies which merely have racially disproportionate impacts are not subjected to a strict scrutiny level of review under the Fourteenth Amemdment. If the Academies can avoid this generally insurmountable "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), then they are likely be held constitutional.

For a discussion of the Academies in an affirmative action context, see Christopher Steskal, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187 (1992).

15. *See generally* NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988); Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong?*, 1985 U. ILL. L. REV. 785 (1985).

blindly overlook and discount the central elements of the Academies. Past efforts indicate that "[t]o be effective, [a] school remed[y] must address all aspects of racism—not just separation."[16] For this reason, a modern strategy must combine integration and the non-integration principles on which the Academies are based.

I. BLACK MALE ACADEMIES

In response to the United States Supreme Court's failure to desegregate many public schools, and because of the perpetuation of racially skewed educational achievement, non-integration remedial avenues are being proposed and implemented with greater frequency. The most trafficked of these new routes are public academies for black males. The cities of Milwaukee, Detroit, New York, Baltimore, and Minneapolis have proposed, and in some cases created, these Academies.[17] These schools are designed to remedy the most problematic issues facing black boys.[18] The precise structure of the schools varies, from merely having separate black male classrooms within a typical school,[19] to black schools which allow female attendance,[20] to exclusively black male academies.[21]

Despite the variations of the Academies, their underlying purpose is indistinguishable—to provide quality education. Focusing on techniques to create a positive learning environment for black males, the Academies are designed to "emphasize black culture, build self-esteem and promote the rewards of responsible male be-

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16. BELL, RACE, *supra* note 5, at 629.

17. *See infra* notes 19-27 and accompanying text.

18. *See infra* note 136.

19. *See* Kenneth J. Cooper, *Three Rs and Role Model in Baltimore Third Grade*, WASH. POST, Dec. 5, 1990, at A1.

20. *See* Dirk Johnson, *Milwaukee Creating 2 Schools for Black Boys*, N.Y. TIMES, Sept. 30, 1990, § 1, at 1; James Walsh, 'Brown' *Revisited: Can Separate Schooling Be Equal?*, MINNEAPOLIS STAR TRIB., Sept. 19, 1992, at 1A; Laurel Shaper Walters, *The Plight of Black Male Schools*, CHRISTIAN SCI. MONITOR, Sept. 9, 1991, at 8.

21. *See All-Male School Gets Green Light in Detroit*, N.Y. TIMES, Mar. 1, 1991, at A16. However, the creation of all-male schools has been successfully challenged. *See* Garrett v. Board of Educ., 775 F. Supp. 1004, 1014 (E.D. Mich. 1991)(holding that the important purpose of the Academies "is insufficient to override the rights of females to equal opportunities"). Yet, by 1991, only 27-of-136 female spots had been filled in Detroit's male Academies. *See* Walters, *supra* note 20.

Thus, although the schools are called all-male black schools, it seems evident that the name does not accurately reflect the true composition of many of the Academies.

One important commonality among the Academies is that, in order to avoid equal protection challenges, they do not explicitly exclude students according to race. *See, e.g.*, Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Suit*, N.Y. TIMES, Aug. 14, 1991, at A1. For this reason they are likely to survive constitutional scrutiny. *See* Greenfield, *supra* note 14, at 367-68, 370-72.

havior."[22] For example, many of the schools are providing longer days, Saturday programs, and a lengthier school year.[23] Furthermore, "African centered" curriculum is a centerpiece of the Academies, as is teaching about "what it means to be a man."[24] Along with focusing on black history, the schools' teaching emphasizes family issues and business skills, and incorporates various conflict resolution programs.[25]

An additional central function of the Academies is to provide role models for the students. To achieve this, students in some schools will spend an hour with a mentor every day.[26] The legal counsel to the Milwaukee schools summarized the aim of the Academies by stating that the goal of the Academies is not to create "separate schools for black males," but instead to find an "effective program for . . . black male students."[27] Although advocates for the Academies argue that the non-integration Academies represent a step in the right direction to finding such a program, critics assert that the schools represent a dangerous step backward which will result in enormous inequality.

II. DEVOLUTION OF DESEGREGATION REMEDIES

A. Brown I *and* Brown II*: The Foundation*

This section examines the legal precedents that have provided the impetus for the Academies, and fostered the belief in the need to depart from the traditional integration strategy for attaining equal educational opportunity for black pupils. This examination begins with the landmark case of *Brown v. Board of Education*.[28] In contrast to the modern, non-integrative approach of Academies, *Brown* focused on desegregation.[29] Accordingly, the *Brown* Court declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[30] This explicitly overruled the notion that equality is provided when the races are accorded substantially equal, although

22. Johnson, *supra* note 20, § 1, at 1.

23. David Tatel, *Misunderstanding Milwaukee Schools*, TEX. LAW., Feb. 11, 1991, at 26.

24. Wilkerson, *supra* note 21, at A1.

25. Mereya Navarro, *Segregation or a Solution?*, N.Y. TIMES, Jan. 18, 1991, at B1.

26. Johnson, *supra* note 20, § 1, at 1.

27. Tatel, *supra* note 23, at 26.

28. 347 U.S. 483 (1954). For an overview of Supreme Court analysis in the central desegregation cases, see Donald E. Lively, *Separate But Equal: The Low Road Considered*, 14 HASTINGS CONST. L.Q. 43 (1986).

29. *See* Carter, *supra* note 11, at 21.

30. *Brown I*, 347 U.S. at 495.

separate, facilities.[31] In holding that separate schools violated the Equal Protection Clause,[32] the Court did not focus on whether or not tangible factors, such as buildings, curricula, and teacher qualifications and salaries, were provided on an egalitarian basis.[33] Instead, the Court based its conclusion on the intangible factors necessarily excluded from the racially segregated schools.[34] Equally significant to the Court was its finding that government mandated segregated schools "generate[] a feeling of inferiority" in the segregated group, which has dramatic repercussions.[35] Thus, because of the importance of education for both the child and society,[36] the inequities that are inherent in segregated public schools violate the Equal Protection Clause and cannot be tolerated.

The rejection of the separate but equal doctrine was only the Court's first step in transforming public education in the United States. The difficulty of implementing the *Brown* mandate through remedial orders presented an equally great challenge.[37] Neverthe-

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31. *Id.* at 488. The doctrine of separate but equal was first articulated in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1894). However, Plessy v. Ferguson, 163 U.S. 537 (1896), is more infamously known for validating this principle.

32. U.S. CONST. amend. XVI, § 1.

33. *Brown I*, 347 U.S. at 492.

34. *Id.* at 494. In so doing, the Court "look[ed only] . . . to the effect of *segregation itself* on public education." *Id.* at 492 (emphasis added).

35. *Id.* at 494. The Court, relying on the testimony of psychologist K.B. Clark, concluded:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . [T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children. . . .

Id. (second alteration in original).

Today, Mr. Clark continues to believe in this phenomenon and is vehemently opposed to the Academies. *See* Tom Dunkel, *Self-Segregated Schools Seek to Build Self-Esteem*, WASH. TIMES, Mar. 11, 1991, at E1; Todd S. Purdum, *Dinkins Backs Schools Geared to Minorities*, N.Y. TIMES, Mar. 9, 1991, at 25.

36. *See Brown I*, 347 U.S. at 493 ("[Education] is the very foundation of good citizenship . . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

37. The Court acknowledged this in stating that "the formulation of decrees in these cases presents problems of considerable complexity." *Id.* at 495. As a result, the Court decided to defer making a decision as to the specifics of remedial decrees. However, the Court did set-forth the issues to be decided:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
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> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
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> (b) may this Court, in the exercise of its equity powers, permit an effective

less, just two years later in *Brown v. Board of Education* (*Brown II*),[38] the Court formulated remedies consistent with *Brown I*. The majority stressed the need for local control by both the particular school authorities and the district courts.[39] Furthermore, a "prompt and reasonable start"[40] toward the goal of "effectuat[ing] a transition to a racially nondiscriminatory school system" was paramount to the Court.[41]

B. *Post*-Brown *Commitment to Integration*

While *Brown I* and *Brown II* laid the foundation for remedies designed to dismantle state-sponsored segregated public schooling, the litany of cases that followed further defined the Court's view of the proper scope of desegregation decrees. Beginning in the late 1960s, the Court handed down decisions indicative of a strong commitment to integration. First, *Green v. County School Board*[42] applied, strengthened and expanded the mandate " 'to achieve a system of determining admission to public schools on a nonracial basis'."[43] The *Green* Court analyzed the legitimacy of a "freedom-of-

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gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Id. at 495-96 n.13.

38. 349 U.S. 294 (1955). The "follow-up" task to *Brown I* was well recognized: "There remains for consideration the manner in which relief is to be accorded." *Id.* at 298.

39. *Id.* at 299. The Court stated that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems," and that "[b]ecause of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." *Id.*

40. *Id.* at 300. The Court stated that the parties having to implement such remedies may receive extra time, but "[t]he burden rests upon [them] to establish that such time is necessary." *Id.* In deciding this issue, courts will consider "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems." *Id.* at 300-01.

41. *Id.* at 301. The oft-quoted phrase "with all deliberate speed" characterized the appropriate time frame for carrying out this order. *Id.*

42. 391 U.S. 430 (1968).

43. *Id.* at 432 (quoting *Brown II*, 349 U.S. at 300-01).

choice" plan,[44] which allowed students within the district to choose to attend one of two racially isolated schools. The adoption of this plan resulted only in the perpetuation of racially distinct schools.[45] Finding the plan insufficient in carrying out *Brown II*, the Court emphatically stated that the ultimate end to be brought about is the creation of a "unitary, nonracial system of public education."[46] The freedom-of-choice policy was merely an initial step in complying with the affirmative obligation to dismantle the segregated system "root and branch."[47] The policy was incomplete because it failed to "promise[] realistically to work, and promise[] realistically to work *now*."[48] While *Brown I* held dual educational systems to be unconstitutional, *Green* demanded that they be eradicated,[49] placing the burden squarely on the school district to "carry out the [*Brown I*] ruling in an effective manner."[50]

Swann v. Charlotte-Mecklenburg Board of Education[51] consis-

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44. *Id.* at 433. Under this plan, the school board opened the doors of the former white school to black students, and of the black school to white students. Every student, irrespective of race, could choose to attend either school. *Id.* at 437.

45. *Id.* at 438. In the county, there was no residential segregation. However, two schools—one black and one white—served the entire county. Racial segregation resulted because "school buses . . . travel[ed] overlapping routes throughout the county to transport pupils to and from the two schools." *Id.* at 432.

46. *Id.* at 436.

47. *Id.* at 437-38. Professor Alan Freeman asserts that *Green* "stand[s] for the proposition that an established violation will not be deemed remedied until integrated results are achieved." Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1091 (1978). The language of the decision clearly supports this view. The Court asserted that it was necessry to analyze the *"effectiveness* of [the] 'freedom-of-choice' plan," and to "assess the *effectiveness* of a proposed plan in *achieving* desegregation." *Green*, 391 U.S. at 437, 439 (emphases added).

48. *Green,* 391 U.S. at 437, 439. As evidence of the plan's failure, the Court noted that "[i]n three years of operation not a single white child has chosen to attend [the predominantly black] school and . . . 85% of the Negro children in the system still attend the all-Negro . . . school. In other words, the school system remains a dual system." *Id.* at 441.

However, the Court did not rule out the possibility of a valid choice plan: "We do not hold that a 'freedom of choice' plan might of itself be unconstitutional . . . . Rather, all we decide today is that in desegregating a dual system, a plan utilizing 'freedom of choice' is not an end in itself." *Id.* at 439-40.

In this case, a simple remedy was available because there was no residential segregation:

> [T]he establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School.

Id. at 442 n.6.

49. *Id.* at 435.

50. *Id.* at 436.

51. 402 U.S. 1 (1971).

tently followed the Court's early integration commitment evidenced by *Brown I*, *Brown II*, and *Green*. *Swann* "amplif[ied] guidelines . . . for the assistance of school authorities and courts" to combat the "dilatory tactics of many school authorities" opposed to desegregation.[52] The Court defined the degree of latitude available to district courts in fulfilling the duty imposed by prior desegregation cases,[53] ruling that if schools fail to achieve a unitary school system and eradicate racial segregation, broad and flexible district court powers can be invoked.[54] The Court proceeded to analyze the specific issues of racial balancing, single-race schools, attendance zones, and student busing as they pertain to pupil assignments.[55] It concluded by allowing for the limited use of mathematical ratios; reluctantly permitting single-race schools; agreeing to the use of altered attendance zones; and recognizing the importance and appropriateness of busing as a remedial tool.[56]

The first major "northern" desegregation case, *Keyes v. School District No. 1*,[57] was the last of the trilogy of cases which adhered to the commitment to racial integration. *Keyes* enunciated two important principles related to desegregation remedies. The first arose because the challenged school district had not statutorily mandated segregation. Therefore, the Court wrestled with the distinction be-

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52. *Id.* at 14. The Court described the district courts' task of formulating remedies as "grappl[ing] with the flinty, intractable realities of day-to-day implementation of th[e] constitutional commands [of *Brown I*, *Brown II* and *Green*]." *Id.* at 6.

53. *Id.* at 8-9. There were two different remedial plans offered: a school board plan and a court plan. The school board plan restructured school attendance zones to attain some racial integration, provided for student transfers, and mixed faculty and staff. The plan would have resulted in an African-American student population of 17%-36% in nine of the ten high schools. The tenth high school, however, would have had only a 2% African-American population. The percentages of black students in junior high and elementary schools would have been far less than those of the majority of high schools. *Id.*

The court plan was similar to the board plan, except it would have further integrated the one 98% white high school as well as the junior high and elementary schools. *Id.* at 9.

54. *Id.* at 15. The Court qualified this power by stating that such supervision may be employed "only on the basis of a constitutional violation." *Id.* at 16. In my opinion, this restriction was easily diluted because of the Court's liberal interpretation of what constituted a constitutional violation. *See id.* at 21. However, in subsequent cases this proved to be a major obstacle in desegregating schools in the northern urban areas. *See infra* part II.C. (discussing Milliken v. Bradley, 418 U.S. 717 (1974)).

55. *Id.* at 22-31.

56. *Id.* *Swann* has been considered significant in its impact on later cases. One author has stated that *Swann* "provided building blocks for the assault in [Keyes v. School Dist. No. 1, 413 U.S. 189 (1973)] upon Northern school segregation." Drew S. Days, III, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737, 1744 (1986) (reviewing PAUL R. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985)).

57. 413 U.S. 189 (1973).

tween *de jure* and *de facto* segregation.[58] The majority distinguished the two concepts by asserting that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[59] While *de jure* segregation is propelled by such an intent, *de facto* segregation is void of such purpose. This distinction is important because, while a finding of " '*de jure* segregation . . . calls for an all-out effort to desegregate'," the presence of *de facto* segregation does not provide a court with the basis to order desegregation.[60] Although the presence of statutes effecting segregation proved vital in later cases,[61] the lack thereof in *Keyes* was not dispositive because the Court found intent to segregate in that "school authorities [had] carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system."[62] Having thus found intentional segregation, the Court was empowered to order desegregation.

The second principle established the Court's ability to mandate system-wide desegregation. *Keyes* articulated the notion that "where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in [*Keyes*], . . . it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions *as to other segregated schools within the system* were not also motivated by segregative intent."[63] This greatly expanded the authority of courts to implement broad desegregation orders because it permitted district-wide relief when

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58. *Id.*, 413 U.S. at 208. *De jure* segregation is defined as "segregation directly intended or mandated by law or otherwise issuing from an official racial classification or in other words to segregation which has or had the sanction of law." BLACK'S LAW DICTIONARY 425 (6th ed. 1990). *De facto* segregation, that which existed in *Keyes*, is defined as "[s]egregation which is inadvertent and without assistance of school authorities and not caused by any state action, but rather by social, economic and other determinates." *Id.* at 416.

Some scholars consider *Keyes* to be a severe setback to desegregation because of this distinction. *See* Lively, *supra* note 28, at 58-63. However, because the Court inferred a discriminatory intent from the actions of the school board and thus did not strictly require overt intent to be proved, I do not think the *de jure* issue was the most important factor in this case. *See Keyes*, 413 U.S. at 201-02.

59. *Keyes*, 413 U.S. at 208.

60. *Id.* at 193 (quoting Keyes v. School Dist. No. 1, 313 F. Supp. 61, 73 (D. Colo. 1970)).

61. See Milliken v. Bradley, 418 U.S. 717 (1974), discussed *infra* part II.C.

62. *Keyes*, 413 U.S. at 201. The Court made this conclusion based on the district's use of attendance zones, placement of newly constructed schools, student transfer practices, and faculty and staff assignments.

63. *Id.* at 208-09 (emphasis added). This burden on the school authorities was to prove that "segregative intent was not among the factors that motivated their actions"; it was not merely to prove the existence of race neutral policies. *Id.* at 210.

only a portion of a school district was found to have engaged in purposeful discrimination.[64]

C. Milliken: *Restricting the Integration Mandate*

The Supreme Court's commitment to integration seemed to vanish in a case which many believe to be the deathknell of desegregation.[65] In *Milliken*, the Court reversed a lower court's rejection of a Detroit-only desegregation plan.[66] The Court focused on and linked

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64. There were two similar concurring opinions. Justice Douglas agreed with the majority but asserted that "it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation." *Id.* at 216 (Douglas, J., concurring). He went on to state that *de facto* policies "are only more subtle types of state action that create or maintain a wholly or partially segregated school system. *Id.*

Justice Powell, in a more lengthy opinion, also advocated the elimination of the distinction. He stated that "[n]o comparable progress has been made in many nonsouthern cities with large minority populations primarily because of the *de facto/de jure* distinction." *Id.* at 218-19 (Powell, J., concurring) (footnote omitted). Broadly interpreting prior desegregation cases, he opined that "the concept of state neutrality was transformed into the . . . constitutional doctrine requiring affirmative state action to desegregate school systems." *Id.* at 220-21.

65. Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*). One commentator has observed that "the justices must have feared that *Milliken v. Bradley* might one day be regarded as this century's *Plessy v. Ferguson*." J. HARVIE WILKINSON, III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978, at 228 (1979). Others have recognized the monumental impact of *Milliken I*. *See, e.g.*, A. Charles Dell'Ario, *Remedies For School Segregation: A Limit on The Equity Power of the Federal Courts?*, 2 HAST. CONST. L.Q. 113, 149-50 (1974) (recognizing that the decision "leaves a patent constitutional violation essentially remediless"); Freeman, *supra* note 47, at 1108 (stating that "the Court for the first time applied antidiscrimination law to rationalize a segregated result in a case where a constitutional violation had been found to exist"); Frank T. Read, *Judicial Evolution of the Law of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMP. PROBS. 7, 43 (1975) (stating that *Milliken* "caused rejoicing by those who opposed massive integration in large metropolitan areas and drew an anguished response from civil rights advocates"); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 61, 61 (1974) (stating that the Court "limited the power of federal courts to treat a largely black, urban school district and a largely white, suburban districts as a single unit"); Comment, Milliken v. Bradley *in Historical Perspective: The Supreme Court Comes Full Circle*, 69 N.W. UNIV. L. REV. 799, 801 (1974) (recognizing that the case "thwarted [the] evolution" of desegregation attempts). *But see* Liebman, *Politics, supra* note 10, at 1656-57, 1660-61.

66. *Milliken I*, 418 U.S. at 732. Both the district court and the court of appeals rejected the plan because they concluded that it would not result in any meaningful desegregation. The plan basically limited any busing to the city of Detroit, thereby excluding suburban districts from having to participate in any desegregation scheme. The district court concluded that although the outlining districts were not parties and were not found to have engaged in discriminatory actions, an effective desegregation plan must look beyond district boundary lines, which are mere political conveniences. *Id.* at 739. The court of appeals concurred, saying "any 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." Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973).

two concepts—school district boundary lines and the *de jure/de facto* distinction—to insulate the suburban school districts from any desegregation orders for Detroit.

First, the majority emphasized the importance of boundary lines for ensuring local control of school affairs,[67] asserting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[68] Such a structure fosters local participation and decisionmaking, allows for local needs to be met, and encourages competition between schools within the district.[69] Consequently, boundary lines may not "be casually ignored or treated as a mere administrative convenience."[70]

The Court further shielded the suburbs from the Detroit desegregation plan with its analysis and tightening of the *de jure/de facto* distinction.[71] The Court held that a deliberately maintained separate school system clearly offends the Constitution; *de facto* segregated systems do not. This conclusion, coupled with the Court's determination that the scope of a remedy is limited by the extent of the constitutional violation,[72] restricted any remedy to the Detroit school district because only Detroit was implicated in engaging in the constitutionally impermissible *de jure* segregation.[73] The limited intra-district remedy ordered by the Court greatly minimized the chances for an effective decree because the entire school district of Detroit was predominantly comprised of minority students.[74] This

67. *Milliken I*, 418 U.S. at 741-43. The dissents in *Milliken* disputed the strict boundary analysis. Justice Douglas argued that because education is a state project, an entire metropolitan decree would not be invalid and, in fact, would be necessary to prevent the creation of separate and inferior schools. *Id.* at 758-61 (Douglas, J., dissenting). Justice Marshall also focused on the statewide aspect of education in characterizing the decision as "a giant step backwards." *Id.* at 782 (Marshall, J., dissenting). Others have questioned the basis for holding school boundary lines and local control to be so important. *See, e.g.*, Freeman, *supra* note 47, at 1109 (concluding that " 'local autonomy' is a codeword for rationalizing and protecting the prior appropriation of financial resources, environmental amenity, and . . . racial homogeneity").

68. *Milliken I*, 418 U.S. at 741.

69. *Id.* at 742.

70. *Id.* at 741.

71. Early in the opinion, the Court provided forewarning that it was concentrating on this distinction, and consequently placed great emphasis on *de jure* segregation, by asserting that "[t]he target of the *Brown* holding was clear and forthright: the elimination of *state-mandated or deliberately maintained* dual school systems." *Id.* at 737 (emphasis added).

72. *Id.* at 744.

73. Thus, the fact that the suburban districts were predominantly white was irrelevant because no intentional discrimination was proven to have existed outside of Detroit. *Id.* at 745.

74. Because of the demographics of the Detroit school district, only an inter-district remedy, which included the outlining suburban districts, would have been entirely effective. Justice White, joined by Justices Douglas, Brennan and Marshall, specifically ob-

point was disregarded by the majority. Thus, it seems that the *Milliken I* opinion signified the Court's retreat from its initial commitment to remedies designed to eradicate segregated public schools "root and branch."[75]

D. *Modern Issue: Relinquishment of Judicial Supervision*

A further limitation to effective integration has recently been articulated by the Court in its resolution of the modern issue in desegregation cases: When should judicial supervision of desegregation orders be terminated, thereby returning authority to the local school districts?[76] Two recent cases, *Board of Education v. Dowell*,[77] and *Freeman v. Pitts*,[78] articulate the Court's current approach to this question.[79] *Dowell* involved a protracted and complex litigation bat-

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jected to this analysis, arguing that the decision of the majority would "cripple[] the ability of the judiciary" to "devise . . . feasible and effective remed[ies]." *Id.* at 762 (White, J., dissenting).

75. The cause of the Court's failure to develop effective remedies may lie in the fact that "[i]n the years following *Brown*, the Supreme Court has viewed the [E]qual [P]rotection [C]lause as a means of righting discreet wrongs rather than as a means of doing right." Daniel McNeel Lane, Jr., *Durable School Desegregation in The Tenth Circuit: A Focus on Effectiveness in the Remedial Stage*, 67 DENV. U.L. REV. 489, 491 (1990). For a comprehensive discussion of this notion, see generally Freeman, *supra* note 47.

In *Milliken I*, the Court also chose not to apply the *Keyes* burden-shifting principle to an entire metropolitan area. *See supra* part II.C. Therefore, although the urban district was found to have been motivated by discriminatory purposes, the Court did not impute such purposes to the racially segregated schools that happen to be in separate, suburban districts.

76. There was an extensive time period between the *Milliken* decision and the modern cases discussed in part II.C. of this Comment. During this era, the Court did not decide any cases which are believed to be as important as those discussed in the text. However, two cases decided after *Milliken* seemed to favor integration. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) and Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979). In *Brinkman*, the Court held that

> [g]iven intentionally segregated schools in 1954, . . . [a school district] was thereafter under a continuing duty to eradicate the *effects* of that system, and . . . the systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts.

Brinkman, 443 U.S. at 537 (emphasis added) (citations omitted).

In *Penick*, the Court focused on effectuating desegregation and held that a school district has an affirmative duty to disestablish its dual system. *Penick*, 443 U.S. at 458. Further, and what was believed to be more important, the Court agreed with the district court in asserting that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Id.* at 464.

Although these cases seem to indicate the Court reverting to its pre-*Milliken* result-oriented focus, the cases discussed in part II.C. will suggest otherwise.

77. 498 U.S. 237 (1991).

78. 112 S. Ct. 1430 (1992).

79. The case of Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), despite

tle.[80] The Supreme Court decided to hear the case in 1990 and squarely confronted the termination issue.[81] It asserted that federal supervision of local school districts was never intended to supersede local control for an extended period of time.[82] The Court believed an approach that "would condemn a school district, once governed by a

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being decided twenty-five years ago, foreshadowed this issue. *Spangler* provided the genesis for the reasoning applied in *Dowell* and *Pitts*. The Court held that although a school had yet to achieve unitary status, "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court ha[s] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 436-37. The fact that integration had not been achieved was not governing, because the Court concluded that the resegregation of the Pasadena schools was not due to the actions of the school authorities. *Id.* at 435.

80. The litigation in *Dowell* began more than three decades ago, when a district court concluded that Oklahoma City intentionally segregated its public schools. Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963). Nine years later, in Dowell v. School Bd., 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972), the district court found that desegregation attempts were insufficient and thus ordered the implementation of the "Finger Plan." The plan provided that

> kindergartners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1-4 would attend formerly all-white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools.

Dowell, 498 U.S. at 241.

Five years later, following a determination that the Finger Plan had been fully complied with, an unpublished order by the district court terminated the case. *Id.* at 241-42.

More recently, in 1984, a new student reassignment plan (SRP) was implemented to contend with increasing demographic shifts. The SRP "relied on neighborhood assignments for students in grades K-4 . . . . Busing continued for students in grades 5-12. Any student could transfer from a school where he or she was in the majority to a school where he or she would be in the minority. Faculty and staff integration was retained . . . ." *Id.* at 242. This plan resulted in single race schools. A motion to reopen the case was then filed, contending that the SRP was a return to segregation. The district court denied the motion, Dowell v. Board of Educ., 677 F. Supp. 1503 (W.D. Okla. 1987), but the court of appeals reversed, indicating that part of the school board's affirmative duty was the "the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." Dowell v. Board of Educ., 890 F.2d 1483, 1504 (10th Cir. 1989) (quoting Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979)). *See* Note, *Ignoring the Soul of* Brown*:* Board of Education v. Dowell, 70 N.C. L. REV. 615, 617 n.12 (1992) [hereinafter *Ignoring*].

81. The Court in Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239 (9th Cir. 1979), succinctly described this issue by asking: " 'If not now, and on this showing, when, and on what showing,' will the governance of the school system be restored to the elected officials who are charged with that governance under state law?" *Id.* at 1240 (quoting the school board and noting their concern over the duration of court-supervised desegregation).

82. *Dowell*, 498 U.S. at 247-48.

board which intentionally discriminated, to judicial tutelage for the indefinite future" would be misguided.[83] Categorizing this as a "[d]raconian result," the Court remanded the case, instructing the lower court to focus on "whether the [local School] Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated *to the extent practicable.*"[84]

Following the lead of *Dowell*, *Pitts* further simplified the instances in which termination of judicial supervision is permissible.[85] In *Pitts*, the Court confronted a situation in which a county had undergone severe demographic changes since an initial desegregation order. This resulted in the desegregation of many student bodies within the school system.[86] Yet, in analyzing whether the school district was in compliance with the *Brown* mandate, the majority did not limit its focus to student populations, but instead examined five additional factors put forth in *Green*: faculty, staff, transportation, extracurricular activities, and facilities.[87] The Court concluded that federal courts in school desegregation cases are authorized "to order an incremental or partial withdrawal of its supervision and control."[88] This incremental relinquishment of judicial authority can

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83. *Id.* at 249.

84. *Id.* at 249-50 (emphasis added) (footnote omitted). In deciding this issue, a court should consider "not only . . . student assignments, but . . . 'every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.' " *Id.* at 250 (quoting Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).

The dissenters, Justices Marshall, Blackmun and Stevens, believed that prior desegregation cases mandated the elimination of racially segregated schools, and a "decree cannot be lifted so long as conditions . . . condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions." *Id.* at 252 (Marshall, J., Blackmun, J., Stevens, J., dissenting).

On remand, Dowell v. Board of Educ., 778 F. Supp. 1144 (W.D. Okla. 1991), the district court held that a complete dissolution of the initial decree was appropriate because the school district had complied in good faith with the 1972 decree and was not likely to return to a system of *de jure* segregation. *Id.* at 1156-60. Further, the vestiges of the segregative system had been eradicated to the extent practicable. *Id.* at 1160-79. Last, the new SRP was adopted for legitimate, non-discriminatory reasons, and although some predominantly African-American schools had emerged, the SRP was valid. *Id.* at 1179-95.

85. The significance of *Pitts* in defining the Court's commitment to integration was clear before the decision was handed down. One commentator looked to *Pitts* to "test the Supreme Court's resolve in addressing a public school system's duty under *Brown* to overcome the effects of resegregation . . . ." Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1291 (1992). From the outcome, I am confident advocates of integration would be united in concluding that the Court failed this test.

86. The Court concluded that in 1969, the year the district court ordered desegregation, the school system had only 5.6% black students. In 1986, the school system had 47% black students. *Pitts*, 112 S. Ct. at 1438.

87. Green v. County Sch. Bd., 391 U.S. 430, 435 (1968).

88. *Pitts*, 112 S. Ct. at 1444-45.

be employed even "before full compliance [with the desegregation order] has been achieved in *every area of school operations*."[89] Thus the Court repudiated the holding of the court of appeals which held that judicial supervision of a school district should be retained until the district achieves unitary status in all six *Green* categories for several years.[90] The Court's acceptance of judicial termination once a remedy has been partially attained (and conversely partially unrealized), and its assertion that the ultimate objective is to "return school districts to the control of local authorities,"[91] indicates a clear departure from the earlier result-oriented aim[92] of implementing orders that effectuate desegregation.

Examining the Supreme Court's approach to public school desegregation indicates that constitutional jurisprudence in this area has been far from consistent.[93] The Court has moved from outlawing race-based school segregation,[94] to demanding racially integrated schools,[95] to restricting the effectiveness of integration orders,[96] and finally to permitting the hasty relinquishment of judicial supervision.[97] This evolution has led to the current reexamination of the value of integration, a strategy which seemed promising in 1954, yet for many seems bleak today.

III. THE IMPACT OF DESEGREGATION

An analysis of the effectiveness of the Supreme Court's evolving desegregation jurisprudence is significant to the fundamental issue presented by the Academies: whether the strategy of integration should be subordinated to alternative, non-integration approaches?

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89. *Id.* at 1445 (emphasis added). This seems like the antithesis of the rationale employed in *Keyes*. Whereas *Keyes* allowed for district wide *relief* when only a segment of the district was found to have engaged in discriminatory actions, *Pitts* allows for district wide *termination* when only a portion of the district has complied with a desegregation order.

90. Pitts by Pitts v. Freeman, 887 F.2d 1438, 1450 (11th Cir. 1989). The court held that "[a] school system achieves unitary status or it does not," and the school district in question failed to achieve unitariness for the *Green* factors of student assignments, faculty and staff. *Id.* at 1446-49.

91. *Pitts*, 112 S. Ct. at 1445.

92. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (duty to eradicate segregation "root and branch").

93. One author summarized the Court's changing constitutional interpretation, between 1954 and 1968 by asserting that "the Constitution, without being relevantly amended, first permitted racial discrimination in public schools to separate the races, then prohibited such discrimination, . . . [then] require[d] discrimination in order to achieve racial balance." WOLTERS, *supra* note 11, at 3-4.

94. Brown v. Board of Educ., 347 U.S. 483 (1954).

95. Green v. County Sch. Bd., 391 U.S. 430 (1968).

96. Milliken v. Bradley, 418 U.S. 717 (1974).

97. Board of Educ. v. Dowell, 498 U.S. 237 (1991).

The impact of these cases can be examined both quantitatively and qualitatively. First, has the racial composition of pre-*Brown* segregated schools become less polarized? Second, has the educational achievement of blacks been equalized with respect to that of whites and, more importantly, has this academic achievement paralleled integration?

A. *Quantitative Impact of Desegregation Remedies*

Desegregation has proved to be an ineffective remedy in many school districts in the United States. Numerically, the impact of school desegregation orders has been uneven and incomplete.[98] Nationwide, "the litigation of the 1950s and 60s [has been] only partially successful in getting Black children out of segregated schools and into integrated schools."[99] Although a quarter of a century after Brown the number of black students attending racially segregated schools has decreased by fifty percent,[100] and the percentage of black students attending schools with a white student body population of between twenty-six and seventy-five percent has risen from nearly seventeen to nearly fourty-four,[101] in 1980 one-third of black students still attended racially segregated schools, while almost two-thirds attended schools which had at least fifty percent minority population.[102] Further, the comparative results of desegregation in the South and the North present uneven levels of effectiveness. These results indicate that desegregation was more successful in the South, where *Brown* was aggressively applied.[103] As of 1980, less than twenty-five percent of black students in the South attended racially isolated schools.[104] The corresponding figure in 1968 was more than three times as great.[105] In 1980, approximately five times as many black children attended integrated schools as in 1968.[106]

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98. For a comprehensive review of the effectiveness of integration, see FINIS WELCH & AUDREY LIGHT, NEW EVIDENCE ON SCHOOL DESEGREGATION (1987).

99. Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 109 (1991).

100. James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 357 (1990) [hereinafter Liebman, *Implementing* Brown].

101. WELCH & LIGHT, *supra* note 98, at 15.

102. Morgan, *supra* note 99, at 109.

103. Liebman, *Politics*, *supra* note 10, at 1465-66.

104. Morgan, *supra* note 99, at 109; *see also* Liebman, *Politics*, *supra* note 10, at 1466 n.6 (citing Orfield, *School Desegregation in the 1980's*, EQUITY & CHOICE, Feb. 1988, at 25-26) (stating that "as of 1984, less than 30% of all black children in the South attended 90%-plus minority schools compared to over 55% in the Northeast").

105. Morgan, *supra* note 99, at 109 (stating that 77.8% of blacks were racially isolated in 1968).

106. WELCH & LIGHT, *supra* note 98, at 19.

One commentator has stated that "[t]he greatest progress in desegregation has been in the South where changes have been dramatic and lasting."[107]

However, it has been asserted that in many northern urban school districts desegregation is nonexistent.[108] This has created a "dual society . . . in public education" in the North.[109] In 1980, three decades after *Brown*, almost half of all black students attended schools in which nine out of ten students were minorities.[110] The situation in northern school systems may still be deteriorating. One author has asserted that "in the twenty-five largest inner-city school districts there are actually more racially segregated schools today than existed in 1954."[111]

The relative intransigence of racial segregation in northern cities results, in large part, from modern Supreme Court jurisprudence. This doctrine has prevented desegregation remedies from effectively reaching areas in which *de jure* segregation did not exist, yet *de facto* segregation was widespread.[112]

B. *Qualitative Impact of Desegregation*

The quantitative measurements of desegregation indicate that although segregation has been diminished, it is still preserved in many school districts. In measuring the qualitative impact of desegregation, one generally finds more positive results. While educational disparities between white and black students persist, substantial gains have been made. For example, the graduation-rate gap between black and white students has been narrowing. Between 1972 and 1991, dropout rates for black students had decreased from

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107. WILLIS D. HAWLEY ET AL., STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH 4 (1983). In fact, the South has become the least segregated section of the country. WELCH & LIGHT, *supra* note 98, at 18.

108. Liebman, *Politics*, *supra* note 10, at 1470 (asserting that northern "school desegregation is not alive").

109. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 4 (1991).

110. Morgan, *supra* note 99, at 109.

111. Jarvis, *supra* note 85, at 1285.

112. See Milliken v. Bradley, 418 U.S. 717 (1974), discussed *supra* part II.C. A comparison between specific northern districts, where *de facto* segregation existed, and southern districts, were *de jure* segregation existed, provides evidence of the significance of this distinction. The school system of Detroit, the city involved in *Milliken*, exemplifies the limited effectiveness of integration in the North. The school system remains about 90% African-American, and effective integration seems to be out of reach. *Detroit Plan to Aid Blacks With All-Boy Schools Abandoned*, L.A. TIMES, Nov. 8, 1991, sec. A [hereinafter *Detroit Plan*]. In contrast, of the ten school districts which Welch and Light determined to have achieved the greatest integration, eight were from the South and had adopted at least one major desegregation plan. WELCH & LIGHT, *supra* note 98, at 40-41.

21.3% to 13.6%.[113] During the same period, the comparable figures for white students were 12.3% and 8.9%.[114] Additionally, in 1989, 11.8% of black students and 21.8% of white students completed four or more years of college.[115] While this represents almost a two-to-one disparity, it is somewhat less then that which existed in 1970.[116] Lastly, in 1970, whites completed 12.1 years of school, while blacks completed only 9.8.[117] However, by 1989, the figures were nearly equal—12.7 years and 12.4 years for whites and blacks, respectively.[118]

Yet, merely indicating that there has been a narrowing of the gap between the academic achievement levels of black and white students does not prove that integration has stimulated such academic success. There is, however, evidence of a nexus between integration and educational achievement.[119] Although desegregation attempts have not yet produced uniformly integrated schools,[120] where integration has been attained, achievement levels for minority students have increased.[121] One author has recently asserted that "[t]he rationale which supports integrated schools is buttressed by compelling evidence showing Black students' achievement has signifi-

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113. *Hispanic Dropout Rate Stays High, Since Children Work in Hard Time*, N.Y. TIMES, Oct. 14, 1992, at B9.

114. *Id.*

115. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 138 (1991) [hereinafter ABSTRACT].

116. *Id.*; *see also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 112 (1972).

117. ABSTRACT, *supra* note 115, at 138.

118. *Id.*

119. *But see, e.g.*, DERRICK BELL, SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION, *supra* note 11, at viii (stating that "there is little hard evidence of overall educational improvement for blacks in desegregated schools"); NANCY H. ST. JOHN, SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN (1975); WOLTERS, *supra* note 11, at 245 (arguing that "one thing that characterizes the work of scholars in [their analysis of the social science data pertaining to integration] is a lack of consensus. For every study that proves desegregation is accompanied by academic gains, another proves the opposite"); Lawson, *supra* note 11, at 41-47 (discussing the negative consequences of desegregation); Walter G. Stephan, *School Desegregation: An Evaluation of Predictions Made in* Brown v. Board of Education, 85 PSYCHOL. BULL. 217 (1978).

120. *See supra* parts III.A., III.B.

121. The effect of desegregation cannot merely be measured by limiting one's analysis to the school setting. In analyzing the success or failure of *Brown* we cannot overlook the fact that it "did effect a radical social transformation in this country and whatever its limited impact on the educational community, its indirect consequences of altering the style, spirit, and stance of race relations will maintain its prominence in American jurisprudence for many years to come." Carter, *supra* note 11, at 21. *See also* Greenfield, *supra* note 14, at 383 (arguing that "[s]egregating African-American students would cut them off from the community of full citizens and create new, or strengthen existing, boundaries between racial groups").

cantly improved in desegregated schools."[122] The most recent and extensive study of the status of blacks concluded that educational attainment rises with integration.[123] The conclusion of the study indicated that an extensive desegregation order is likely to result in improved academics for blacks and diminished racial segregation overall.[124]

In contrast to the uneven quantitative effectiveness of integration regionally, the qualitative impact of integration has been beneficial nationally. Successful integration in the North has had a substantially beneficial impact on black students' achievement, as it "has shown itself capable of erasing one-third of the achievement-score disparity that normally characterizes black and white children."[125] In the South, the findings have been even more positive. As desegregation in the South has proven numerically more successful,[126] great improvements have been measured in black elementary students' reading levels.[127] In addition, research indicates that "disadvantaged children fare better in schools and classrooms which are made up largely of advantaged students rather than being isolated with others of the same background."[128] Even the most vocal advocates for non-integration strategies concede that "desegregation may improve substantially the opportunities available for black adults in every arena."[129]

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122. Grover G. Hankins, *Like a Bridge Over Troubled Waters: New Directions and Innovative Voluntary Approaches to Interdistrict School Desegregation*, 58 J. NEGRO EDUC. 345, 345 (1989). He also asserts that integration improves employment opportunities and residential integration. *Id.*

123. A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 373-74 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter COMMON DESTINY].

124. *Id.* at 19. Possibly more importantly, the study indicated that while the relationship between achievement and desegregation is well-supported, the beneficial results of integration may have even been underestimated as a result of "methodological defects in sampling, design or techniques of analysis." *Id.* at 374 (analyzing Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROBS. 17 (1978)).

125. Liebman, *Implementing* Brown, *supra* note 100, at 356 (citing C. JENCKS & S. MAYER, THE SOCIAL CONSEQUENCES OF GROWING UP IN A POOR NEIGHBORHOOD: A REVIEW 55-65 (Center for Urban Affairs and Policy Research, Northwestern University, Apr. 1989)).

126. *See supra* part III.B.

127. William L. Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1704 n.17 (1986).

128. *Id.* at 1710.

129. BELL, RACE, *supra* note 5, at 602 n.93. In support of this concession, Professor Bell acknowledges the link between integration and black school achievement in noting that there is "almost complete consensus that desegregation increases the academic achievement of black students. Black children attending desegregated schools perform better on standardized achievement and IQ tests and are more likely to complete high school and to enroll in and graduate from college than black students in single-race

The widespread benefits of integration, however, cannot conceal the abundant contrary data indicating the continuing educational crisis many black students face. For example, reading levels of minority pupils continue to be well below that of their white counterparts.[130] Black students are twice as likely to drop out of school as white students.[131] In New York State, while almost seventy-nine percent of white students graduate from high school, the corresponding figure for black students hovers at approximately sixty-six percent.[132] Furthermore, white high school graduates are forty-five percent more likely to continue their education than black high school graduates.[133]

For black males, the current educational crisis is particularly acute. In many cities a large portion of black males are failing to receive adequate education. In Washington, nearly four-times as many black men were jailed as graduated from its public schools.[134] In Detroit, a city in which ninety percent of the students are black, the dropout rate for males is an astounding forty-five percent.[135] In Milwaukee, less than twenty percent of black male high school students have a C or better average, while approximately sixty percent choose to drop out.[136] This data suggests that integration has failed to

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schools." *Id.* Similarly, Professor Liebman points to

> desegregation's positive impact on dropout, teenage pregnancy, and delinquency rates; on the likelihood that blacks will attend and succeed at college (particularly four-year colleges), secure employment in predominantly white job settings, and live in integrated neighborhoods as adults; and on the salary levels blacks attain in the labor market.

Liebman, *Implementing*, *supra* note 100, at 356-57.

130. Luix Overbea, *Helping Black Children Cope With High-Tech*, CHRISTIAN SCI. MONITOR, Jan. 14, 1986, at 5. Dr. Shirley Malcolm, Director of the Office of Opportunity of the American Association for the Advancement of Science has observed that " '[t]he level of reading is (11 to 18%) below white achievements.' " *Id.*

131. *Id.* For example, almost 50% of Chicago's black students fail to graduate from high school. *A World Apart*, ECONOMIST, Mar. 30, 1991, at 17 [hereinafter *World Apart*].

132. ABSTRACT, *supra* note 115, at 140 (78.5% of white students and 66.1% of black students complete high school). Other areas of the country have similar disparities. In Washington D.C., the comparable percentages for white students and black students is 91.7% and 62.5% respectively, while in Michigan the figures are 79.5% and 59.2%. *Id.*

133. Overbea, *supra* note 130, at 6.

134. *World Apart*, *supra* note 131.

135. *Detroit Plan*, *supra* note 112.

136. Carleton R. Bryant, *All-black School Plan Gets Praise*, WASH. TIMES, Aug. 23, 1991, at A6. In detailing this educational deterioration, it is necessary to discuss factors which affect, and are affected by this educational plight. Various societal factors exemplify the gravity of the situation. Homicide is the leading cause of death for African-American males between ages 15 and 24. Steven A. Holmes, *Conference on Black Males Finds Many Problems but No Consensus*, N.Y. TIMES, May 25, 1991, § 1, at 11. Black males in Harlem are less likely to reach the age of forty than males in Bangladesh. *Id.* While black males comprise 6% of the U.S. population, they make up 46% of the federal prison population. Dennis Kelly, *Detroit Academies Develop Black Males*, USA TODAY,

reach, and thus benefit, a significant number of black pupils.[137]

IV. MISGUIDED CRITIQUE

Despite the suggested benefits of integration,[138] the current plight of many black public school students reflects one of the major criticisms of the *Brown* focus on integration—because *Brown* focused entirely on destroying the separateness in the "separate but equal" doctrine, equality has been ignored.[139] Such a strategy, critics assert, has been fixated on the goal of racial balancing. Therefore, what should have been the central focus—achieving equal educational opportunity—may have been lost. Critics cite the limited quantitative effectiveness of desegregation[140] to support their contention that blind adherence to *Brown* has resulted in an "exchange[] of 'separate but equal' for separate period."[141] Accordingly, integration opponents claim that the strategy has been detrimental to black students and must be rejected. Their strategy would embrace separateness, but demand equality.

However, this attack on the *Brown* strategy is misguided. Integration's potential for beneficial impacts suggests that the failure to achieve educational equality is not a result of a faulty strategy of integration, but instead reflects its failed implementation. Although the courts have failed to effectuate meaningful integration in many sections of the nation, blaming the integration approach is erroneous. While *Brown* and its progeny focused on integration, it did not necessarily overlook or sacrifice equality. In fact, the educational

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Jan. 15, 1992, at 7A. On any given day, nearly 25% of the black men between the ages of 20-29 are under the control of the criminal justice system. Don Terry, *More Familiar, Life in a Cell Seems Less Terrible*, N.Y. TIMES, Sept. 13, 1992, at 1, 40. The unemployment figures paint an equally bleak picture. Generally fluctuating at twice that of white unemployment, the black male youth unemployment rate is 30% or greater. YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES 7 (Jewelle T. Gibbs ed., 1988).

137. I am not arguing that the continued educational disparities are per se attributable to segregated schools. Although this may be in fact true, there are no studies which indicate that this is the case. I am arguing, from the other perspective, that the available data reveals that these disparities are ameliorated through integration. While there is no direct evidence showing that segregation causes this disparity, there is substantiated data proving that segregation's "opposite," integration, alleviates it. Therefore, by including this data I am merely indicating that the proven benefits of integration have failed to reach a substantial number of black pupils, and this has resulted in the perceived need to reexamine the integration strategy of *Brown*.

138. *See supra* part III.B.

139. *See, e.g.*, Lawson, *supra* note 11, at 36 (arguing that, "in the zeal to combine what had been socially accepted and legally mandated as separate, the courts and other proponents of the 'process' may have overlooked the primary goal of *Brown*: equal educational opportunity").

140. *See supra* part III.B.

141. Lively, *supra* note 28, at 68.

improvements where integration was implemented suggest integration's effectiveness in achieving educational equality.[142] Integration must continue to be pursued as an immediate and long-range strategy for obtaining equal education for blacks. It is clear that the objective of integration is not the problem; rather, the problem is the Supreme Court's refusal to actively implement and supervise effective remedies.[143]

Nevertheless, the continued existence of race-based educational achievement disparities, coupled with the perpetuation of many racially isolated schools, has overshadowed the gains which have resulted where integration was implemented. Consequently, some support remedial schemes which ignore the separateness portion of the "separate but equal" doctrine and profess to focus on the equality notion. This is the theoretical underpinning of non-integration strategies, such as the Academies, which their advocates assert are the most effective formulae for achieving equality for blacks. But are such non-integration strategies as the Academies the best means to ensure equal educational opportunity for black Americans? Can they provide a learning experience which is truly "equal where separate"?[144]

Although other appropriate supplementary approaches may be necessary to combat an unresponsive Supreme Court,[145] the Academies do not fall within this classification. They are destined to fall short in their educational mission because they will continue to lack the essential fiscal resources, which are necessarily provided on a more egalitarian basis when segregated schools do not exist.[146] However, this does not mean that integration is a panacea in and of itself. The critique of the *Brown* strategy provides important insight

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142. *See supra* notes 121-29 and accompanying text.

143. Despite the Supreme Court's unwillingness to aggressively implement integration, desegregation remains a tenable, and arguably the best, means of attaining equality for blacks. In fact, there have been recent examples of desegregation. *See* Liebman, *Politics, supra* note 10, at 1467. There has even been interdistrict desegregation. *See id.* at 1656 nn.839-50.

144. Lively, *supra* note 28, at 49.

145. Robert L. Carter, a participant in the *Brown* litigation, advocates for the need to recognize appropriate alternatives while maintaining the objective of integration:

> While integration must remain the long-range goal, [there] must [be a] search for alternatives because the reality is that hundreds of thousands of black children are attending all black or predominantly black schools in the urban North and South. These schools are woefully inadequate and provide no tools that will enable poor blacks to become a part of the mainstream of the social, economic, and political life of the country. In the short run, we have to concentrate on finding ways of improving the quality of education in these schools, even if it means or results in less effort being expended on school integration.

Carter, *supra* note 11, at 26.

146. *See infra* part IV.A.

into the inadequacies of integration which must be reconciled in order to provide all students with an equal educational opportunity.

While the essential goal in 1954—to eradicate the evil of *enforced* racial segregation—has been fully achieved, the underlying premise that this would result in equal educational opportunity has not. There remains inequality and a large degree of racial segregation.[147] To combat this situation, there must be a united effort to implement an effective educational strategy. To achieve this goal a modern strategy must recognize the benefits, and avoid the deficiencies, of both integrationism and non-integrationism, and incorporate elements of both approaches into an all-encompassing strategy. This calls for increased emphasis on integration yet requires the inclusion of innovative measures which go beyond "simply . . . moving the [black] child to a desegregated school."[148]

A. *Educational Funding and School Resources*

Because a disproportionate percentage of blacks reside in urban centers[149] and because the urban schools of America "tend to have lower funding than their suburban counterparts,"[150] all-black schools are often inadequately funded.[151] This usually creates a situation where black students are relegated to unsafe schools with inexperienced and minimally paid teachers.[152] These teachers often employ outmoded curriculum in classes with exceedingly high pupil-

147. *See supra* notes 98-112 and accompanying text.

148. Milliken v. Bradley, 433 U.S. 267, 288 (1977).

149. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 34-38 (1990).

150. Brenna B. Mahoney, Note, *Children At Risk: The Inequity of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161, 166 (1991) [hereinafter *Children at Risk*]. Jonathan Kozol powerfully describes the effects of inadequately funded urban public schools. In portraying the dilapidated conditions of one school in New York he asserts that "[b]lackboards . . . are 'so badly cracked that teachers are afraid to let students write on them for fear they'll cut themselves. . . . [F]allen chips of paint cover classrooms like snow [and there is a] waterfall that courses down six flights of stairs after a heavy rain.'" KOZOL, *supra* note 109, at 99-100. He also describes the tragic environment at a Chicago elementary school: "[The] building is . . . depressing. There is no playground. There are no swings. There is no jungle gym. . . . [A]n eighth grade history class [is] taught from 15-year-old textbooks. . . . There are no science labs, no art or music teachers. . . . There are two working bathrooms for some 700 children." *Id.* at 63.

151. *See* BELL, RACE, *supra* note 5, at 611 n.134; *see generally* KOZOL, *supra* note 109.

152. Pitts by Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989), provides evidence of the ramifications of separate schools with relation to teacher qualifications. For example, in 1986, in the white elementary schools, the average length of teaching experience was 9.79 years, while in the black elementary schools the corresponding figure was only 5.19 years. *Id.* at 1442. Similarly, while 75.76% of the teachers in the white elementary school had graduate degrees, only 52.63% of the teachers in the black elementary schools had the same qualifications. *Id.*

to-teacher ratios.[153] Because schools with predominantly minority student bodies "do not receive the same resources in funding as white suburban schools," black students attending these schools are at a serious disadvantage.[154] The fact that "[a]ll-black public schools before *Brown* were notorious for the scandalously inferior quality of their education" should provide ample "warning[] regarding the prospects of single-race schools."[155]

Integration would remedy the current predicament of black students who are relegated to single-race schools which are desperately underfunded.[156] With integration, the tangible factors essential for effective education would more likely be provided on a more egalitarian basis. These include providing basic equipment such as books and computers, maintaining a school environment conducive to teaching and learning, and hiring experienced and qualified teachers. These crucial educational elements are dependent on funding levels and will only be provided on a non-racial basis if racially isolated schools are eradicated through integration.[157] Unfortunately, the best way to desegregate the funding and the tangible necessities to providing a quality education is to desegregate the students. The inadequacies of underfunded, predominantly black, urban schools will not be alleviated by such proposals as the Academies; rather, they will remain unpenetrable barriers to achieving equal educational opportunity for black American pupils.[158]

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153. Mahoney, *Children at Risk*, *supra* note 150, at 169. For recent documentation of the insufficiently equipped minority schools, see Nick Chiles, *For Minorities Little Access to Computers,* N.Y. NEWSDAY, July 28, 1992, at 4 (describing how New York City public schools with high minority populations were much less likely to have adequate numbers of computers; such schools had a 1:25 computer to student ratio, while other N.Y.C. schools had a 1:20 ratio and suburban schools had a 1:12 ratio). Some urban schools have been described as being

> extraordinarily unhappy places . . . [reminiscent] of 'garrisons' or 'outposts' in a foreign nation. Housing projects, bleak and tall, surrounded by perimeter walls lined with barbed wire, often [were] adjacent to the schools . . . . Their doors were guarded. Police sometimes patrolled the halls. The windows of the schools were often covered with steel grates.

KOZOL, *supra* note 109, at 5.

154. Jarvis, *supra* note 85, at 1293.

155. BELL, RACE, *supra* note 5, at 611.

156. Derrick Bell, *A Model Alternative Desegregation Plan, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION, *supra* note 11, at 124, 135. There is a theory that "green follows white." It is premised on the notion that "the money in the public schools follows the white students, and the blacks must enroll their children with white children in order to get the quality of education the school system will provide for the whites." *Id.* While this is overly simplistic, there is certainly some validity to the notion that there is a correlation between race, school financing, and adequacy of education.

157. *See* Edmonds, *supra* note 13, at 111 (discussing how financial resources affect class size, facilities, and teacher quality).

158. It is also important to note that "effective programs to remedy or alleviate the

B. *Curriculum Concerns and Academic Resegregation*

Despite the clear benefits which result from integration, simply putting black "youngsters in a room [or school] together [with white students] and . . . shaking well" will not suffice.[159] The gains which flow from integration will be useful only if they facilitate the complete attainment of the ultimate objective: equal educational opportunity for black American students. For this goal to be realized, an

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problems of severe underachievement and failure cost much more money per pupil than [a] regular educational program," which in its ownright is difficult to fund. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 795 n.53 (quoting Board of Educ. v. Nyquist, 408 N.Y.S.2d 606, 634 (Sup. Ct. 1978)). Thus, although the Academies will need to develop a program which requires additional expenses, they will not have sufficient resources for even a conventional educational program.

Although it is beyond the scope of this Comment, the only possible means for the Academies to gain access to more funds have proven ineffective. First, there could be a federal constitutional challenge to unequal funding. However, this mechanism of equalizing school finances was abruptly foreclosed by the Supreme Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), in which the Court declared that education is not a fundamental constitutional right. Second, there could be state constitutional challenges. However, this strategy has "not been very successful, despite [its] longevity and persistence." *Children at Risk, supra* note 150, at 194. Third, and more closely related to this Comment, equalizing resources through "compensatory remedies" could be attempted. In Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*), the Court confronted the issue of whether a school desegregation remedial order could mandate funding for a compensatory educational program which included such components as remedial reading programs, in-service training for teachers and administrators, revised test taking procedures, and counseling and career guidance programs. *Id.* at 275-76. The Court upheld the implementation of compensatory programs as constitutionally permissible.

However, despite the fact that *Milliken II* "extended prior [desegregation] doctrine by recognizing a broader range of legally redressable effects of segregation," it nevertheless restricted the potential of compensatory measures by "invok[ing] the classics of . . . desegregation jurisprudence." Tracy E. Sivitz, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful Segregation*, 97 YALE L.J. 1173, 1174, 1176 (1988). These "classics" include the requirement that "the nature of the desegregation remedy . . . be determined by the nature and scope of the constitutional violation," the remedy be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," and that any remedy be cognizant of the strong "interests of state and local authorities in managing their own affairs." *Milliken II*, 433 U.S. at 280-81 (citations omitted). These three limitations make it difficult to implement a broad enough remedy to result in significant remedial action.

Further, even when implemented, the optimistically perceived compensatory remedy has proved ineffective. One merely has to look at the situation in Detroit, the city involved in *Milliken II*. Other cities have attempted to allow all-black schools to receive alternative remedies, such as funding, and have likewise had little success. *See* BELL, RACE, *supra* note 5, at 611 n.134.

159. R. STEPHEN BROWNING, FROM BROWN TO BRADLEY: SCHOOL DESEGREGATION, 1954-1974, at 15 (1975).

educational strategy must go beyond mere integration to ensure that the characteristics common to effective schools[160] are fully achieved. Although adequate funding unquestionably influences whether a school attains these characteristics, the overall ideological basis and the specific elements of such strategies as the Academies are equally determinative. Therefore, such components must be implemented to develop an educationally effective integrated school environment.

First, an integrated school must offer Afrocentric classes.[161] With such a program, the goals of emphasizing black culture and building self-esteem in black students[162] are likely to be fostered. This inclusion will provide more "culturally sensitive curricula," resulting in significant benefits for black American students.[163] Specifically, this "opportunity to study from an Afrocentric perspective," is likely to result in "Black children . . . no longer feel[ing] a need to reject their Blackness as a 'badge of inferiority.' "[164]

Second, an integrated student body must be taught by an integrated teaching staff. Thus the recruitment of black teachers is essential. This serves two purposes. First, it enables the schools to achieve the goal of providing mentors for black students. Second, and more importantly, it safeguards against a common critique of integrated schools: that the teacher-pupil relationship between white teachers and black students is damaging to the pupil.[165] The theory is that black students are relegated to "low achievement" academic programs because of "negative attitudes and expectations concerning the prospective achievement of black students."[166] This

160. Among the common traits of quality schools are: "(1) the principal's leadership and attention to the quality of instruction; (2) a pervasive and broadly understood instructional focus; (3) an orderly, safe climate conducive to teaching and learning; (4) teacher behaviors that convey the expectation that all students are expected to obtain at least minimum mastery." Ratner, *supra* note 158, at 801 (quoting Ronald Edmonds, *Programs of School Improvement: An Overview*, EDUC. LEADERSHIP, Dec. 1982, at 4).

161. These classes must be required to be taken by all students to preclude any class tracking from developing. See *infra* note 166 and accompanying text.

162. *See supra* note 22 and accompanying text.

163. Jarvis, *supra* note 85, at 1293.

164. *Id.* at 1287.

165. *See* BELL, RACE, *supra* note 5, at 599; Lawson, *supra* note 11, at 43. This critique of integration may not be entirely accurate. See COMMON DESTINY, *supra* note 123, at 373, which argues that the "findings on the self-esteem and educational aspirations of black children in desegregated schools are so diverse that overall generalizations are not warranted." Moreover, the study concludes that "intergroup attitudes and relations improved after schools are desegregated" when certain conditions are met. *Id.* at 19.

166. Lawson, *supra* note 11, at 43; *see also* BELL, RACE, *supra* note 5, at 599. This phenomenon is known as tracking. For a discussion of tracking as it relates to minorities, see Florence A. Fredman, *Getting Back on Track: Challenging Racially Discriminatory Effects of Educational Tracking*, 20 COLUM. J.L. & SOC. PROBS. 283 (1986); Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318 (1989).

wholly nullifies the benefits of integration and therefore must be prevented to ensure that integration's advantages are not negated by potential deficiencies.[167]

CONCLUSION

Education is an integral means to overcome societal inequities.[168] Unfortunately, education has been far from equal for black

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167. Some may criticize the continued attempt at integration as inherently flawed due to the phenomenon of "white flight." For a discussion of white flight, see Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983). Critics argue that even if judicial commitment to integration existed, desegregation would not succeed because of the societal reality of demographic shifts which occur in response to desegregation orders. However, to dismiss integration because of white flight is erroneous. It is a mistake to allow

> white flight [to be] used as a free-wheeling argument to block desegregation .... Allowing white flight to justify avoiding desegregation creates a perverse incentive: It places the least pressure on areas in which whites are extremely hostile to busing and, consequently, which are the least likely to voluntarily desegregate. It also takes the dangerous step of making constitutional guarantees of equal protection dependent upon popular opinion.

BELL, RACE, *supra* note 5, at 597-98.

The potential benefits of integration should not be sacrificed because of the possibility of white flight. It is illogical to "deliberately preserve some virtually all-black schools for the purpose of preventing white flight from the school system." Gewirtz, *supra*, at 631.

However, if the past effectiveness of desegregation was entirely circumvented by white flight, then those who point to white flight as a sufficient reason to abandon integration would have a strong argument. Thus the ultimate question which must be answered is, are schools more or less integrated now than before integration attempts? "The answer ... is that racial balance improves when desegregation plans are implemented." WELCH & LIGHT, *supra* note 98, at 62. Summarizing the Welch and Light study, one author asserts that

> (1) desegregation halved the proportion of black students in this country attending all-minority schools at a time when housing segregation among blacks and school segregation among Latinos ... substantially increased; (2) the more intrusive—that is, the more mandatory and geographically extensive—a desegregation plan is, the greater its desegregative impact is likely to be, without concomitant increases in white flight; (3) the hypothesis that 'desegregation might trigger such a large exodus of white students that racial isolation actually increases' is false; and (4) several categories of desegregation plans in fact seem to *decelerate* preexisting rates of white loss from urban districts.

Liebman, *Implementing* Brown, *supra* note 100, at 357-58.

Further, the white flight that does arise when desegregation is implemented subsides after the first year of desegregation. *See* Liebman, *Politics, supra* note 10, at 1622 (analyzing WELCH & LIGHT, *supra* note 98, at 54-62). Moreover, during subsequent years, white flight decreases to pre-desegregation levels and may even "fall *below* pre-desegregation levels." *Id.*

This data proves that although white flight is powerful, it must not overshadow the significant gains of desegregation.

168. W.E.B. DuBois and Malcolm X were cognizant of the importance of education for black Americans. "DuBois felt that education was the lever to uplift the people ...." Dr. Mary Hoover, *The Politics of Education: Illiteracy and Test Bias*, 10 NAT'L BLACK L.J.

Americans throughout a long history of racially separate schools and a more recent period of attempted integration. Growing increasingly frustrated with the history of the Supreme Court's desegregation jurisprudence, some educators are now reexamining the longstanding commitment to integration and are asserting that separate schooling may in fact be the most effective formula for achieving educational equality. This recent reexamination, symbolized by the development of the Academies, is extremely valuable. It has raised the issue of equality of educational opportunity and placed it at the forefront of the American consciousness. It has also exposed the weaknesses and revealed the strengths of both integration and non-integration. Such recognition can prevent the unfortunate result which will arise if either an integration or non-integration strategy is rigidly adopted. W.E.B. DuBois recognized this nearly sixty years ago in stating that "[a] mixed school with poor and unsympathetic teachers, . . . and no teaching of truth concerning black folk, is bad. A segregated school with . . . inadequate equipment, poor salaries, and wretched housing, is equally bad."[169]

An encompassing strategy which incorporates the fiscal benefits and proved academic achievement gains of integration, with the social, cultural, and emotional benefits of non-integration strategies such as the Academies would truly be the best means to overcome the historical inequity in public school education. The various factions advocating their respective ideologies must not overlook the fact that their objective is identical and can best be attained through cooperative efforts. However, it may be unlikely that a unified strategy will be agreed upon in the near future, for "[i]f history is any indication, the debate between those who would work for racially balanced schools at all costs, and those who seek more flexible remedies including efforts to improve the quality of education within all-black schools as a desegregation mechanism, will not soon be resolved."[170] As a result, the desperate need to revitalize the fight for equal educational opportunity for black public school students may be sacrificed by ideological divisiveness.

65, 65 (1987). Malcolm X believed education to be black Americans' " 'passport to the future.' " *Id.* (quoting MALCOLM X, *supra* note 11, at 43).

169. W.E.B DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

170. BELL, RACE, *supra* note 5, at 615.