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THE LIMITS OF LITIGATION: PUTTING THE EDUCATION BACK INTO *BROWN V. BOARD OF EDUCATION*

*T. Alexander Aleinikoff**

SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION. Edited by *Derrick Bell*. New York: Teachers College Press. 1980. Pp. x, 150. $11.95.

Brown v. Board of Education[1] has been a conundrum from the start. Perhaps no Supreme Court decision reaches a more unassailably just holding with less scholarly support for its reasoning.[2] Depending on one's view of what it promised, *Brown* is either a monument to the law's power to change social conditions or a beacon on a distant ridge of unfulfilled hopes.[3] The desegregation of public schools has required massive judicial involvement in the restructuring of social institutions. Yet, nearly three decades after *Brown*, racially segregated schools remain the norm in many American cities.[4]

In *Shades of Brown*, Derrick Bell has collected eight essays that

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I would like to thank Vincent Blasi, Christina Whitman, and Michael Rosenzweig for their thoughtful comments on an earlier draft.

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

2. *See, e.g.*, Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955); Kurland, "Brown v. Board of Education *Was the Beginning*:" *The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U. L.Q. 309, 316-20; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

3. *Compare* Bell, p. viii ("The *Brown* decision has accomplished much that is worthwhile, but the twenty-fifth anniversary of that decision has come and gone, leaving in its wake more basis for commiseration than celebration."), *with* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 127 (1978) ("The promise of *Brown* was realized. Black children may not be denied admittance to any school on account of their race . . . .").

4. *See* Bell, p. viii:

> More than half of the nation's seven million black students reside in the 100 largest school districts. Over two million of these black children attend schools in the nation's twenty largest urban districts. Nine out of ten of them are attending predominantly black schools. The twenty largest districts average about 60 percent nonwhite, and many major districts, like Atlanta, Detroit, and Chicago, are more than 80 percent nonwhite.

See also U.S. COMMN. ON CIVIL RIGHTS, WITH ALL DELIBERATE SPEED: 1954-19?? 31 (1981) (while percentage of black students attending majority-white schools has increased from 23% in 1968 to 38% in 1978, in the 1978-1979 school year 60.2% of all minority students attended schools that were at least 50% minority and 37% attended schools that were at least 80% minority).

argue it is time to reassess the promise and progress of *Brown*. That promise, the authors assert, was primarily one of a better education for black children. Yet *Brown* has come to stand more for racial balance and busing than for a quality education. *Shades of Brown* is an attempt to set a new course — "to uncover remedies supported by Brown along heretofore uncharted routes" (p. ix).

Bell recognizes that the view that *Brown* mandates books, not buses, is likely to draw fire from the civil rights community, which has sought strenuously to maintain a united front.[5] But Bell and his coauthors believe that black parents are increasingly disenchanted with busing and that no solid empirical evidence establishes that busing substantially improves the quality of education. These concerns, together with strong white opposition to busing, suggest the need to consider alternative remedial strategies. Thus the essayists are willing to "depart from the unwritten civil rights Commandment: Thou shalt not publicly criticize" (p. ix). An evaluation of their proposals requires first a revisit with the history of *Brown* and its aftermath.

I. From Equalization to Integration

The road to *Brown* was carefully planned, brilliantly executed, and appropriately conservative. The litigation strategy adopted by the NAACP attorneys in the early part of this century has had a significant, if not a determinative, impact on the development of post-*Brown* remedies. From the start the school litigation had two intertwined goals: better schools for black children and integration. *Brown*, when it arrived, was not just a school case; it was the NAACP's flagship in its attack on Jim Crow in all its social manifestations.

The chief obstacle to ending segregation was the Supreme Court's 1896 decision in *Plessy v. Ferguson*,[6] which held that separate-but-equal facilities for blacks and whites did not offend the fourteenth amendment. *Plessy* spawned scores of suits demonstrating the inequality of facilities provided to blacks.[7] These cases, how-

5. *See, e.g.*, Jones, *School Desegregation*, 86 YALE L.J. 378 (1976) (letter to the editor). The most celebrated case in which anti-busing heathens were thrown out of the civil rights temple occurred in 1973 in Atlanta. When the local NAACP chapter approved a plan calling for a drastic reduction in busing in exchange for more black school administrators, the national NAACP office suspended the Atlanta office. *See* J. WILKINSON, FROM BROWN TO BAKKE 233 (1979).

6. 163 U.S. 537 (1896).

7. These cases are collected in Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 482-83 n.27; Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 430-35 (1954).

ever, tended to produce court orders requiring equalization, rather than integration. *Plessy* demanded no more.

In the second quarter of this century, the NAACP began to craft a litigation strategy that sought integration, not simply equalization of separate facilities.[8] The litigators decided to launch their attack on the graduate and professional school level. There, the general lack of any facilities for black students would give the courts nothing to "equalize." Since states were unlikely to "build a cyclotron for one student,"[9] victory at the graduate level seemed to assure a court order requiring the segregated institution to admit the black plaintiff. The graduate strategy had the additional benefit of demanding integration in its most modest form: the entry of a single black student into an all-white program — a far less threatening prospect than the mixing of separate black and white school systems. In cases where states had provided separate, but vastly inferior, graduate programs for blacks, the NAACP began to argue that the educational opportunity provided in the black institution was necessarily inferior to what would be offered in an integrated program. The plan produced important victories in *United States* ex rel. *Gaines v. Canada*,[10] *Sweatt v. Painter*,[11] and *McLaurin v. Oklahoma State Regents*.[12]

In 1950, the NAACP attorneys turned their attention to their primary goal: desegregation of elementary and secondary schools. The existence of separate black school systems made the achievement of integration far less certain, since courts were likely to hold that *Plessy* demanded only equalization. In *Sweatt* the NAACP had argued that *Plessy* was no longer controlling, but the Supreme Court had ruled for the plaintiffs without reconsidering the earlier decision.[13] In order to bring down Jim Crow schools with one bold stroke, the NAACP lawyers had to persuade the Court that *Plessy* — at least in the field of education — was no longer good law.

The civil rights litigators gave the Court two choices. They made a direct assault on *Plessy*, arguing that segregation constituted an arbitrary classification based on race and was thus *per se* unconstitu-

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8. *See generally* J. GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE 49-89 (1977).

9. Kelly, *The School Desegregation Case*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 243, 254-55 (J. Garranty ed. 1964) (quoting Oklahoma University President George L. Cross).

10. 305 U.S. 337 (1938).

11. 339 U.S. 629 (1950).

12. 339 U.S. 637 (1950).

13. 339 U.S. at 636.

tional.[14] But they also provided the Court with an argument that did not call for the express overruling of *Plessy*. Relying upon findings and testimony in the district courts,[15] the NAACP asserted that segregation inflicted psychological harm on black schoolchildren whether or not the physical school facilities provided to blacks and whites were equal.[16] As Robert Carter told the Supreme Court at oral argument: "Here we abandon any claim . . . of any constitutional inequality which comes from anything other than the act of segregation itself."[17] If segregation, *ipso facto*, created inequality, then *Plessy* did not apply. Furthermore, equalization of the separate school systems could not be an effective remedy.[18] The Constitution demanded one school system — *i.e.*, integration.

The Court, as all know, held that separate schools for blacks and whites are inherently unequal. Its approach was no doubt counseled by caution. It did not expressly abandon *Plessy*, and held only that "in the field of public education the doctrine of 'separate but equal' has no place."[19] An alternative holding that state-enforced separation of the races was a *per se* constitutional violation would have proscribed segregation everywhere.[20] Because it focused on the *educational* harm caused by segregation, the Court could be seen as taking the limited step of condemning only segregated schools.

The determination that separate schools were inherently unequal naturally suggested an integration remedy. Had the Court found that the constitutional harm had arisen solely from the insult of assignment by race, any neutral school assignment plan would have satisfied the fourteenth amendment. But if segregated schools were by definition inferior schools, ending assignment by race would not be sufficient where it did not yield integrated schools. Pragmatic and

14. Brief for Appellant at 6-8, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES (P. Kurland & G. Casper eds. 1975).

15. *See* 347 U.S. at 494 & n.10.

16. The district court in *Brown* found that the black and white schools in Topeka were effectively equal in terms of physical plant, educational programs, and quality of teachers. Brown v. Board of Educ., 98 F. Supp. 797, 798 (D. Kan. 1951) (three-judge court).

17. *Quoted in* ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 at 13 (L. Friedman ed. 1969).

18. Brief for Appellant (*Brown v. Board of Educ.*), *supra* note 14, at 8-13. *See* Brief for Appellant, Briggs v. Elliott (companion case of Brown v. Board of Educ., 347 U.S. 483 (1954)), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 12-16 (P. Kurland & G. Casper eds. 1975).

19. 347 U.S. at 495.

20. Of course, the subsequent *per curiam* opinions desegregating public parks, beaches and buses made clear that *Brown* was not limited to schools. *See* New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958); Gayle v. Browder, 352 U.S. 903 (1956); Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).

paternalistic considerations also supported an integrationist remedial strategy. One could assume that white-dominated school districts would look after schools attended by white children. Ensuring that black children attended the same schools as white children thus made it more likely that black children would receive an adequate education. As Bell has noted elsewhere, "to get what the white kids have, you must go where the white kids are."[21] Integrating the schools also lessened the courts' remedial duties. Rather than evaluating whether white and black schools were in fact providing equal resources and programs, courts could guarantee equality by placing blacks and whites in the same schools, where every child would receive the same educational package. The choice for integration was further supported by the prevailing belief that black children would learn better if they were exposed to white children.[22] The ideal America, in short, was one in which diverse groups lived as neighbors — sharing schools, friends, and an ideology of equality.[23]

Whether these considerations alone would have produced a virtual requirement of integrated public schools, massive Southern resistance to *Brown* (or token compliance with it) ensured the result. Thus, while an early interpretation of *Brown* held that it required only an end to racial assignment, not integration,[24] the Fifth Circuit

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21. Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257, 275.

22. *See* J. WILKINSON, *supra* note 5, at 46. One court has termed this notion the "osmosis effect." Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 191 (M.D. Tenn. 1980).

23. The integration remedy may also be viewed as a reaction to radical black groups who argued in the 1960s and 1970s that separate schools run by and for blacks would be a more effective remedy for past discrimination in education than integration in a white-dominated school system. The Congress on Racial Equality (CORE) filed an amicus brief in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), which argued:

> Integration, as it is designed, places the Black child in the position of implied inferiority. Not only is he asked to give up much of his culture and identity, but with the dispersal of Blacks he loses many of the communal ties which have traditionally been the cornerstone of the Black community. Moreover, there can never be true integration between groups until there is a real parity relationship existing between them.
>
> . . . .
>
> White schools at this time do not constitute the kind of environment which can foster the healthy development of Black children. White school boards make it difficult for even Black schools to respond to the special needs of Black children. In this respect, however, many Black teachers and administrators have tried, within the narrow limits allowed them, to satisfy these needs.
>
> With the guarantee of equal resources and with the freedom to proceed as is expedient, Black schools would be a superior learning environment and could graduate students who can succeed in an interracial world.

Brief for CORE as Amicus Curiae, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), *reprinted in* EDUCATION FOR WHOM? 205 (C. Tesconi & E. Hurwitz eds. 1974). *See generally* C. WOODWARD, THE STRANGE CAREER OF JIM CROW 195-208 (3d ed. 1974).

24. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (three-judge court).

resoundingly rejected this view.[25] Soon thereafter, the Supreme Court required integration in everything but name in *Green v. County School Board*.[26] In *Green*, the Court held that a freedom-of-choice assignment plan that maintained the pre-existing pattern of segregated schools did not satisfy *Brown*. School systems that were segregated by law in 1954 would have to be dismantled "root and branch."[27] Although subsequent cases continued to speak the language of desegregation, they made clear that the only acceptable remedy for unlawful dual school systems was, in fact, integration.[28]

Thus remedial, pragmatic, and moral considerations all helped to transform *Brown* into a case that effectively mandated integration. This is not to say that a choice was being made between education and integration. Consistent with the language of *Brown*, the strategy of the NAACP, and the prevailing liberal ideology, integration was viewed as guaranteeing equality of educational opportunity.[29] A quarter century of experience, however, has produced revisionism in the civil rights ranks. White opposition to busing plans, the frustration experienced by courts in supervising decrees in the face of shifting demographic data, and doubts about whether integration demonstrably improves educational performance have led some to reassess the progress of *Brown*.

Shades of Brown is a dramatic example of that reassessment. The essays, presented in earlier versions at a 1978 Harvard Law School symposium, tell different parts of the story. Several note the transformation of *Brown* from an education to a busing case.[30] Others assert that a proper appreciation of the nature of racial discrimination would produce remedies that demand equality of results, not merely integration.[31] Two educators argue that black children need

25. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 846 n.5, 861-78 (1966); *affd. en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

26. 391 U.S. 430 (1968).

27. 391 U.S. at 438.

28. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See* Keyes v. School District No. 1, 413 U.S. 189, 219-23 (1973) (Powell, J., concurring in part and dissenting in part). *See generally* L. GRAGLIA, DISASTER BY DECREE (1976); Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3 (1974).

29. Derrick Bell has described this development in an earlier piece:

> Somewhere in the struggle to overcome the fierce resistance to desegregation, civil rights lawyers and others, and particularly the courts, began to equate the elimination of the dual school system with the attainment of equal educational opportunity.

Bell, *Waiting on the Promise of* Brown, 39 LAW & CONTEMP. PROB. 341, 344 (1975).

30. *E.g.*, Bell, Brown *and the Interest-Convergence Dilemma*, p. 90; Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization*, p. 70; Ravitch, *Desegregation: Varieties of Meaning*, p. 30.

31. *E.g.*, Freeman, *supra* note 30; Lawrence, *"One More River to Cross" — Recognizing the Real Injury in* Brown*: A Prerequisite to Shaping New Remedies*, p. 48.

not attend an integrated school to receive an effective education.[32] Finally, Bell offers a model alternative desegregation plan that concentrates on education instead of on racial balance.[33] This Review will evaluate several of the essays before confronting the book's central thesis.[34]

II. A Sampling of the New Perspectives

A. "*A Lawyer in the Case*"[35]

Robert Carter, presently a federal district judge and one of the lawyers who argued *Brown*, states that the "basic postulate" of the litigative strategy in 1954 was that "the elimination of enforced segregated education would necessarily result in equal education" (p. 23). To the NAACP, "[i]ntegrated education appeared to be an indispensable means to equal education. Indeed, to us equal education meant integrated education" (p. 22).

Carter believes that the NAACP's thesis "never had a fair test" (p. 25) because of residential segregation in the North and resistance to busing. While Carter believes that "integration must remain the long-range goal," he recognizes that "the reality is that hundreds of thousands of black children are attending all black or predominantly black schools" (p. 26). He thus asserts that in the short-run "we have to concentrate on finding ways of improving the quality of education in [racially imbalanced urban] schools, even if it means or results in less effort being expended on school integration" (p. 26).

An approach that strives to improve educational opportunities in predominantly black schools is arguably at odds with the "separate is inherently unequal" language of *Brown*. But Carter believes that his new approach is attainable under *Brown*:

> While we fashioned *Brown* on the theory that equal education and integrated education were one and the same, the goal was not integration but equal educational opportunity. Similarly, although the Supreme Court in 1954 believed that educational equality mandated integration, *Brown* requires equal educational opportunity. If that can be achieved without integration, *Brown* has been satisfied. [P. 27.]

To realize this new interpretation of *Brown*, Carter calls on "educators [to] articulate the indispensable ingredients of educational

32. Edmonds, *Effective Education for Minority Pupils:* Brown *Confounded or Confirmed*, p. 108; Lightfoot, *Families as Educators: The Forgotten People of* Brown, p. 20.

33. Bell, *A Model Alternative Desegregation Plan*, p. 124.

34. The two essays that argue that integrated schools are not a prerequisite for effective educations for black school children, *see* note 32 *supra*, will not be reviewed.

35. This Section reviews Carter, *A Reassessment of* Brown v. Board, p. 21.

equality to enable judges and lawyers to develop an accommodating constitutional doctrine" (p. 26). That doctrine, according to Carter, should go beyond simply guaranteeing equality of inputs (such as per capita expenditures, curriculum, and quality of instruction); it should focus as well on educational output.

The problems with Carter's approach, however, seem intractable. While it is likely that educators could produce the desired definition of equal educational opportunity, it is unlikely that judges will fashion a constitutional doctrine to accommodate it. To reinterpret *Brown* as mandating equal educational opportunity irrespective of the racial composition of the schools will present severe difficulties for the courts. Under the separate-is-inherently-unequal doctrine, equality of educational opportunity can be achieved by placing black and white students in the same schools. Courts are not required to weigh the benefits of particular educational programs; they must simply ensure that students of both races receive the same education, whatever the content of that education. Under Carter's strategy, courts would be thrust into the role of evaluating the merits of educational programs provided to black and white children in separate schools.

Courts have been unwilling to embrace a constitutional theory based upon judicial evaluation of the educational process.[36] Interestingly, the NAACP brief in *Briggs v. Elliott* (a case argued with *Brown*), specifically noted the unworkability of a remedy aimed at equalizing educational opportunity:

> Education is not an inert subject. Teachers differ in ability, personality and effectiveness, and their teachings correspondingly vary in value. Schools differ in size, location and environment . . . . Public education . . . is an ever-growing and progressing field. Facilities and methods improve as experience demonstrates the need and the way. Buildings and facilities are constantly increased to accommodate the expanding school population. It seems clear that no two schools can retain a constant and fixed relationship on the flux of educational progress. Certainly this relationship cannot be fixed or maintained by judicial decree. Resolution of the basic issue in this case — the right to equal educational benefits — by an equalization decree will engage the parties and the court interminably.[37]

Furthermore, many independent variables, such as family involve-

36. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *affd. per curiam*, 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *affd. per curiam sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). *But see* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973). The argument that the fourteenth amendment guarantees a right to an effective education is discussed in text preceding note 87 *infra*.

37. Brief for Appellant (*Briggs v. Elliott*), *supra* note 18, at 30.

ment, neighborhood conditions, and teacher expectations, are likely to affect individual academic achievement.[38] Any resulting disparity between the value of the education received in racially identifiable schools may be difficult to attribute directly to the school authorities and the educational program. Carter's reinterpretation of *Brown* thus raises serious problems of measurement and causation — problems that courts are likely to avoid by maintaining the current view that *Brown* requires dismantlement of dual school systems, not effective education.

Just as the Court in *Brown* could not "turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,"[39] neither can Carter turn the clock back to 1954 and rewrite his brief. Integration — in schools, public buildings, public parks — was the goal of the litigation strategy that produced *Brown*. That is the way Carter argued it and the way the Court wrote it. It is doubtful that we can get beyond *Brown* by "rediscovering" it.

B. *"The Viewpoint of History"*[40]

Diane Ravitch, a professor at Columbia University's Teachers College, ably reviews the NAACP's arguments in *Brown*. She asserts that the plaintiffs' primary argument was that state-imposed segregation is *per se* unconstitutional — a position not directly answered by the Court. She labels as "secondary" the claim accepted by the Court, that minority children are psychologically harmed by state-imposed segregation. Ravitch states that the psychological harm claim ran in two directions, each with different remedial implications: (1) Segregation caused harm by officially sanctioning the doctrine of black inferiority (suggesting a remedy of color-blind policies); and (2) black school children were harmed by a lack of interaction with white children (suggesting an integration remedy) (p. 37).

Ravitch notes that this remedial ambiguity can be traced throughout the entire record of *Brown*; "[i]n essence, the civil rights lawyers were simultaneously advocating both color-blind legal equality and color-conscious school integration" (p. 37). The ambiguity evolved into "an outright contradiction" in the quarter-century

38. *See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 400-35 (1972); Lightfoot, *supra* note 32, at pp. 11-17. *See generally* ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972).

39. 347 U.S. at 492.

40. This Section reviews Ravitch, *supra* note 30.

following *Brown*, "since color-blind policies became, in many places, an obstacle to school integration" (p. 37). Ravitch maintains that the shift in the meaning of desegregation from color-blindness to color-conscious integration was due to massive resistance in the South, liberal support for an integrated society, and the notion of a "common school ideal" that could "hasten the assimilation of minorities to American culture" and serve as a "pillar of democracy" by equalizing cultural and class differences (pp. 39-40). These considerations, coupled with prevailing sociological and historical notions of the 1960s that blacks "had been culturally and psychologically damaged by historical discrimination," lent intellectual support to the view that a black school could not be a good school (p. 42).

In assessing the meaning of *Brown* today, Ravitch argues that "we must recognize that it deals not just with the question of access to schools, but with the question of how to define Black people and what part Blacks should play in defining their own purposes" (p. 44). She thus argues that "the role of government must be to provide Blacks with the opportunity and the means to make choices for themselves" (p. 44). Desegregation

> should mean the removal of all barriers based on race, but it should not mean the dismantling of autonomous Black institutions . . . . It should mean a heightened consciousness of the value of interracial contact in every sphere of activity, but it should not mean that a stigma must be attached to any activities pursued by Blacks without the participation of non-Blacks. [P. 45]

Ravitch's essay persuasively suggests that the integrationist model may disserve minority interests to the extent that it hampers opportunities for the development of autonomous black institutions. Moreover, as she notes, the intellectual underpinnings of the model — that, as Bell states, black culture is seen "as a stigma by whites and a handicap to blacks" (p. 30) — are open to serious challenge. The legal implications of her approach, however, are not spelled out. Ravitch concedes that the essay is an attempt to reexamine "the intellectual bases of social policy" and that it "raises questions instead of providing answers" (pp. 45-46).

The major question that it raises is: How can Ravitch's preferred definition of "desegregation" be implemented in the context of a school case? Her reinterpretation would appear to authorize — if not favor — "freedom of choice" plans that eliminate school assignment based on race and permit students to attend any school within a district. These plans, developed early on by school officials in response to post-*Brown* desegregation orders, were ultimately rejected by the courts because they resulted in the maintenance of separate

and unequal schools.[41] Although Ravitch would probably not read *Brown* to permit the use of freedom-of-choice plans that intentionally result in the retention of dual school systems, it is not clear how she would distinguish benign from stigmatizing plans. One answer may be to permit adoption of freedom-of-choice plans where minority plaintiffs request them: Blacks are not likely to feel stigmatized by racially identifiable schools where they have chosen them as a route to self-realization. Ravitch's reinterpretation of *Brown*, therefore, could form the basis for a remedial strategy that eradicates barriers based on race without mandating integration.[42]

But two problems remain. First, no matter how blacks view separate schools, whites may continue to view black schools as bad schools. Thus Ravitch's solution could reinforce white perceptions that hinder the attainment of full citizenship and equal opportunities for blacks. More important, Ravitch's essay offers little to predominantly black inner-city school districts. Schools in such districts may come close to Ravitch's goal of "autonomous" black institutions, but many of them remain, in Judge Carter's words, "woefully inadequate [in providing] tools that will enable poor blacks to become a part of the mainstream of the social, economic, and political life of the country" (p. 26). Ravitch's interpretation of *Brown* appears to do no more for these schools than does the integrationist interpretation that she rejects.

C. *"The True Nature of Segregation"*[43]

The thesis of Charles Lawrence's essay is that the Supreme Court's fundamental misunderstanding of the nature of segregation produced an incorrectly reasoned opinion in *Brown* and fostered an inappropriate remedial scheme. Lawrence asserts that segregation constitutes a *per se* violation of the fourteenth amendment because its sole purpose is to label blacks as inferior. Had the Court so reasoned in *Brown*, it would have demanded remedies that destroyed the system of segregation and removed the badge of inferiority. Instead, by focusing on the psychological harm caused by separation,

41. *See* Green v. County School Bd., 391 U.S. 430 (1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (1966), *affd. en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

42. Goodman, *The Desegregation Dilemma: A Vote for Voluntarism*, 1979 WASH. U. L.Q. 407.

43. This Section reviews Lawrence, *supra* note 31. Charles Lawrence is a professor at the San Francisco School of Law. Portions of this essay appeared in Lawrence's article, *Segregation "Misunderstood": The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15 (1977).

Lawrence argues, the court necessarily adopted a more limited remedial strategy of integration (p. 52).

Lawrence's broad view of segregation as a system leads him to criticize the Court's requirement that unlawful segregation be demonstrated by particular segregative acts of school authorities. For Lawrence, the insult of segregation is communicated by the entire social system that labels black schools as bad schools solely because they are attended by black children. Any state action that reinforces a segregated society becomes relevant to determination of the constitutional issue, including segregated housing and zoning practices and discriminatory acts (even those outside of the particular school district) that tend to label blacks as inferior (p. 53).

Lawrence also takes issue with the Court's unwillingness to extend liability to school districts that ceased practicing segregation before 1954. He argues that the label of inferiority remains even after the name-calling stops. "Once the system is established," Lawrence states, "any attempt to distinguish 'active' governmental involvement in racial segregation from 'passive' or 'neutral' tolerance of private segregation is illusory. Present passivity is merely a continuation of past actions" (p. 56).[44]

Lawrence's definition of the constitutional violation has obvious implications for his views on appropriate remedies. If any state action that labels blacks as inferior contributes to a denial of equal opportunity, all such sources of injury should be removed:

> The injury inflicted by a segregated school system is inseparable from the injury inflicted by segregated housing or public accommodations because each reinforces the other and because removal of one will not heal the injury without the removal of the other. [P. 59.]

Lawrence's analysis is carried furthest in his discussion of the Court's decision in *Washington v. Davis*,[45] which held that the plaintiffs must prove the defendant's intent to discriminate in order to establish that a police hiring examination violated the fourteenth amendment. Relying upon the Supreme Court's decision in *Green*,[46] Lawrence argues that it should be enough to prove that a segregated police department had once operated as part of a state-sanctioned system of segregation and that present underrepresentation of blacks is a remnant of that system. "The burden would rest on the state to

44. Other scholars have argued that government bears a moral responsibility for present inequalities due to its failure to outlaw private discrimination. *See, e.g.*, Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 558 (1977).

45. 426 U.S. 229 (1976).

46. 391 U.S. 430 (1968).

prove that they had effectively destroyed the Institution of Segregation . . ." (p. 63).[47] This approach, urges Lawrence, would mean that individuals who benefit from past acts of segregation would take some responsibility for the system's continuing effects (p. 64).

Lawrence's thesis may be assessed on at least two levels. As a foundation for a redirection of litigative efforts to achieve equal educational opportunity, it almost certainly fails. There is no reason to believe that the Court that decided *Washington v. Davis* and *Milliken v. Bradley*[48] would adopt Lawrence's broad definition of segregation and his correlative systemic remedy.[49] Nor does Lawrence spell out in any detail what his remedy might be. Assuming that one could prove that "[b]lack children in San Francisco do not escape the stigma when the state calls blacks in Los Angeles inferior" (p. 53), what follows? That the schools in San Francisco should be integrated? That black children in San Francisco should be compensated for the dignitary harm? That busing in Los Angeles will remedy the effects of segregation in San Francisco? We are not told. Similarly, Lawrence argues that state involvement in housing discrimination labels black children's families as inferior and thus "violates [the children's] right to equal educational opportunity under the Fourteenth Amendment as defined by *Brown*" (p. 58). Accord-

47. Lawrence would attribute poorer black performance on the standardized test at issue in *Washington v. Davis* to the existence of a segregated school system in the District of Columbia until 1954 and a tracking system in the public schools that was not dismantled until 1967. P. 64.

48. 418 U.S. 717 (1974).

49. The Court has been generally unwilling to analyze racial discrimination in systemic terms. In Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion), the Court rejected a challenge to the at-large election of city commissioners. The plaintiffs argued that the discriminatory nature of the election process was demonstrated in part by the history of official racial discrimination in Alabama as well as the fact that white commissioners elected under the challenged system discriminated against blacks in municipal employment and in dispensing public services. Justice Stewart's opinion, which announced the judgment of the Court and which was joined by Chief Justice Burger and Justices Rehnquist and Powell, disposed of these assertions as follows:

> [E]vidence of discrimination [in employment and services] by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.
>
> . . . [Furthermore,] past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

446 U.S. at 74 (footnote omitted). *See also* J. WILKINSON, *supra* note 5, at 140:

> [The Court] might have seen school segregation as a product of prejudice in jobs, housing, politics, public facilities, the military, with discrimination and segregation in each part of American life reverberating throughout the whole. . . .
>
> But this broad view, which most accurately accounts for present school segregation, is more congenial to historians than to lawyers. . . . Quite apart from analytical obstacles, the panoramic view offends the law's caution and pragmatism. It suggests that past guilt is indigenous and universal, and that drastic amends must immediately be made.

ingly, says Lawrence, an appropriate remedy would be "to include the school system in formulating [a] remedy" for the housing discrimination (p. 58). Again it is far from clear what sort of remedy is being proposed: Added funds to schools in areas walled off by discriminatory housing practices? Busing to remedy a neighborhood school policy that created segregated schools?

On a different level, much can be said for Lawrence's thesis that state-imposed school segregation is likely to be but a small part of continuing invidious discrimination against blacks. Jim Crow was not limited to schools. In the not so distant past, segregation and discrimination pervaded housing, transportation, recreational facilities, government offices, and the armed services. "White flight" from "changing neighborhoods" and declining white enrollment in schools integrated by court decrees evince, at least in part, a lingering ideology that stamps blacks as undesirable neighbors or classmates. To the extent that segregation in the schools is only one manifestation of the present effects of past segregation, a remedial strategy limited to guaranteeing racial balance in the classroom will be unlikely to remove the underlying causes of segregation.

Lawrence recognizes the pervasiveness and durability of the institutional racism that he describes. He knows that his argument for systemic relief — veritably a *Green*-ing of America — will not fare well in the courts.[50] He is thus forced to conclude that "[t]he oppressor's understanding of his oppression is limited by self-interest, and ultimately we must find ways to make an oppression operate against the self-interest of those in power" (p. 66). Lawrence's gloomy analysis of the problem and his ambitious solution provide no realistic way of improving educational opportunities for black children under the regime of *Brown*.

D. *"The Protection of Class Structure"*[51]

Alan David Freeman, a visiting professor at the S.U.N.Y. Buffalo Law School, paints with as broad a brush as Lawrence. Free-

50. Theodore Eisenberg's argument that policy reasons justify imposition of a "proximate cause" requirement in race discrimination cases would severely undercut Lawrence's sweeping analysis. Eisenberg states that "[i]t would be unjust to inflict the entire cost of undoing past wrongs on people who are not reasonably responsible for those wrongs. This argument applies with particular force when the cost is imposed on third parties who had no part in the prior discrimination." Furthermore, if one accepts the conclusion that not all disproportionate impact is unconstitutional, a proximate cause requirement helps establish workable rules for distinguishing permissible from impermissible uneven impact. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 59-60 (1977).

51. This section reviews Freeman, *supra* note 30.

man's piece, a condensation of an article he has published elsewhere,[52] is the most interesting in the collection.

The core of Freeman's analysis is his distinction between the "perpetrator perspective" and the "victim perspective" — a distinction that turns on one's attention to results. The perpetrator perspective views discrimination as "the atomistic behavior of persons and institutions who have been abstracted out of actual society as part of the quest for villains" (p. 74). The perpetrator perspective implies a simple remedy: neutralize the villains. It also clears most citizens of responsibility; discrimination is not viewed as systemic or as part of a social structure that benefits nonminority groups. The solution to racism, from this perspective, is simply color-blindness.

The victim perspective, on the other hand, focuses on results. To black Americans in the 1950s, Freeman suggests, *Brown* must have promised more than an end to discrimination. It must have fostered an expectation that when discrimination is finally eradicated, there would be "some significant change in the conditions of life that one associates with past practices of discrimination — segregated schools, lack of jobs, the worst jobs, lack of political power" (p. 73).[53]

In tracing the development of antidiscrimination law, Freeman argues that the Supreme Court's "impatience, fear of embarrassment [and] desire for some results" (p. 85) led it to "[toy] with the victim perspective" until the mid 1970s (p. 75). With the decisions in *Washington v. Davis* and *Milliken v. Bradley*, however, the Court has "reasserted the substantive primacy of the perpetrator perspective by pretending never to have strayed away" (p. 76).

Freeman believes that the Supreme Court's ultimate rejection of the victim perspective in cases like *Milliken v. Bradley* "can be understood as an instance of law as legitimation of the existing class structure" (p. 83). The perpetrator perspective "serves to legitimize (legally and morally) the major institutions that maintain a disproportionate number of black people as an underclass" (pp. 83-84). It is not obvious, as Freeman notes, that maintenance of a black underclass is in the interests of the ruling class. An underclass is not needed for strictly economic reasons, and its existence is an embar-

52. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

53. Freeman's analysis is somewhat analogous to Owen Fiss's distinction between a process-oriented interpretation (which emphasizes "purification of the decisional process") and result-oriented interpretation (which emphasizes "the achievement of a certain result, improvement of the economic and social position of the protected group"). Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. CHI. L. REV. 742, 764 (1974).

rassment to the United States in the world arena. Why, then, has the victim perspective failed to take hold? Freeman suggests several answers.[54]

First, a remedy attuned to results will necessarily have an adverse effect on others. It is hard to imagine the ruling class burdening itself to any degree; thus, the dislocative impact will be borne primarily by lower-class whites. This redistribution of burdens is likely to produce "hostility and instability which only coercive force can contain" (p. 85). Since the perpetrator perspective guarantees only the punishment of villains, not the bestowing of benefits on the underclass, it is far less likely to have a destabilizing effect on class structure.

Second, Freeman argues, rejection of the victim perspective preserves "a basic presupposition of legal ideology and of the existing class structure — the legitimacy of vested rights" (p. 85). Vested rights are not threatened by the perpetrator perspective because that view "presupposes the innocence of those not implicated, and the legitimacy of positions of advantage previously obtained" (p. 86).

The perpetrator perspective also protects the "ideology" of equality of opportunity — a concept that Freeman describes as "the major rationalization of class domination in this country" (p. 86). Equality of opportunity legitimizes class relationships by presupposing "an objective, transcendent notion of merit or qualification" (p. 86). It thus explains the existing class structure in unobjectionable terms — as a function of ability, not domination.

Freeman's attack on equality of opportunity leads him to a position fundamentally at odds with several of the other essays and the major theme of *Shades of Brown*. He writes:

> [T]he movement for "effective education," however pragmatic the impulse behind it, operates to place responsibility on "victims" while presupposing a structure of equality of opportunity ready to receive them. Similarly, I perceive academic efforts to denounce the worth of busing, extol segregated schools as representative of "American pluralism," and recast the issue of *Brown* as never having had to do with anything but the measurable "effectiveness" of education, as, however sincerely offered, a structural part of the same process of rationalization represented by the recent Supreme Court cases. [Pp. 87-88.]

For Freeman, to reinterpret *Brown* as mandating quality education simply reinforces the regime of equality of opportunity by accepting merit as a legitimate explanation and justification for class structure.

54. Freeman rejects the parlor Marxist explanation that racism is "rationally useful to keep the class structure intact" because it serves as a "necessarily divisive ideology for blocking access to class consciousness." P. 84.

Freeman's analysis is insightful, but open to challenge. Elsewhere, he has applied the victim/perpetrator distinction to areas of racial discrimination other than schools.[55] Whatever strength it has in those areas,[56] the analysis seems weak in the context of school cases. At least insofar as the Court is defining the constitutional violation, the Denver, Columbus, and Dayton cases create broad, almost irrebuttable, presumptions in favor of plaintiffs.[57]

But Freeman's argument has force on a deeper level. While it may be true that the Court has facilitated *proof* of unlawful school segregation, this says little about the kind of *remedy* granted after a violation has been established. Freeman's point is that the perpetrator perspective will not produce substantive remedies no matter how easily proved the violation because such remedies threaten the American class structure.

His argument finds unlikely support in Nathan Glazer's *Affirmative Discrimination* — a book that is a paean to the perpetrator perspective.[58] Glazer recognizes the destabilizing effect on American society that acceptance of the victim perspective would have:

> Many assert that [the development of affirmative action into requirements for even statistical distribution in employment and education] is essential if the promise of real freedom and equality for the blacks and other American minority groups is to be fulfilled. I have argued . . . that equal opportunity, not even statistical distribution, is the proper objective of public policy. That argument can be made on constitutional [and] . . . pragmatic grounds. . . . And that argument can also be made on political grounds: that equal opportunity represents the broadest consensus possible in a multiethnic and yet highly integrated society, and that this consensus would be broken if requirements for statistical representation were to become a permanent part of American law and public policy.[59]

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55. *See* Freeman, *supra* note 52.

56. The Court, while tightening the definition of a constitutional violation, has sanctioned broad remedial federal legislation in the voting and employment areas. Thus, even though the Constitution might not embody the victim perspective, it apparently does not prohibit Congress from enacting statutes that do. *Compare* Mobile v. Bolden, 446 U.S. 55 (1980), *with* City of Rome v. United States, 446 U.S. 156 (1980); Washington v. Davis, 426 U.S. 229 (1976), *with* Fullilove v. Klutznick, 448 U.S. 448 (1980), *and* Griggs v. Duke Power Co., 401 U.S. 449 (1979).

57. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (Denver); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

58. N. GLAZER, *supra* note 3. Glazer, however, would strenuously disagree with Freeman's reading of the cases; he believes that the Court, through imposition of statistical requirements, has in fact enthroned the victim perspective. *Id.* at 33-167.

59. *Id.* at 168-69. Glazer describes the bitterness between blacks and "ethnic" white groups in raw terms:

> From the point of view of the white ethnics, they entered a society in which they were scorned; they nevertheless worked hard, they received little or no support from government or public agencies, their children received no special attention in school or special

Despite Glazer's fear that affirmative action has produced a constitutional commitment to results, Freeman is right that the Court has never really transcended the equality-of-opportunity construct. *Brown* itself is the best example. The question framed by the Court was not, "Does the denial to black children of a decent education or an education equal to that provided whites violate the fourteenth amendment?" It was, instead, "Does segregation of children in public schools . . . deprive the children of the minority groups of *equal educational opportunities*?"[60] Answering the question in the affirmative merely insists that white and black students be offered the same educational programs. Indeed, this was a primary purpose of the integration remedy: to ensure that a black child receives the same education that a white child receives. Focusing on "opportunity" permits the courts to ignore the value of the education. *Brown* is not read as requiring that school systems graduate black students fully equipped to function in American society. Nor does the "equal opportunity" approach examine whether black children enter the educational process at a comparative disadvantage and thus are less able to benefit from the "equal" education provided.[61] When plaintiffs began to raise these types of issues, the courts slammed the door on the argument that the Constitution embraced a fundamental right to education or guaranteed equal educational results.[62]

If the victim perspective and the concept of equality of opportunity embodied in *Brown* are incompatible, it is clear why Freeman does not attempt to return to the "true meaning" of *Brown*. Even recasting *Brown* as guaranteeing an "effective education" would produce a remedy that merely equips blacks to compete in the existing meritocracy. Under this interpretation, *Brown* loses its potential for critiquing race or class domination.

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opportunity to attend college, they received no special consideration from courts and legal defenders. They contrast their situation with that of blacks and other minority groups today and see substantial differences in treatment. They consider themselves patriotic and appreciative of the United States even though they received no special benefit. They look at the minority groups and find them abusive of the state though they do receive special benefit. This may be a crude and unfair comparison; after all, the blacks were brought in chains as slaves and the whites came as free men, blacks have continually dealt with the most severe and unbending prejudice, whereas that met by immigrants was mild and scarcely to be found after the second generation, and we could continue the comparison. But the perception cannot be dismissed as false either, and however we disagree over how "true" it is historically, it plays a great weight in politics and in the belief of white ethnic groups that they are subject to unfair policies.

Nothing is so powerful in the modern world as the perception of unfairness.

Id. at 194-95.

60. 347 U.S. at 493 (emphasis added).

61. *See* text at notes 87-95 *infra*.

62. *See* cases cited in note 36 *supra*.

What Freeman seeks is not fulfillment of *Brown*'s promise of equal educational opportunity. He seeks instead the realization of black perceptions of what *Brown* symbolized: substantive improvements in the lives of black people. This result, he acknowledges, is unlikely to be achieved through litigation (p. 83). Freeman, then, is as pessimistic as Lawrence about the likelihood of achieving meaningful results through the courts. But Freeman goes a step further by directly challenging the goal sought by the other contributors to *Shades of Brown*. For him, an "effective education" is meaningless unless one is willing to confront the ideology that supports and justifies prevailing class relations — equality of opportunity. If Freeman is correct, the programmatic suggestions of *Shades of Brown* must be viewed as ultimately self-defeating.

But one need not go this far. It seems clear that improving the quality of education provided to black children is a legitimate short-term goal that can only facilitate the achievement of one's long-term goal, whatever it might be (Carter's is integration; Freeman's, an end to class oppression). Freeman may be right about the intractability of the American class structure and its supporting ideologies. But this should not stop the effort, as Bell describes it in the Introduction, to "move school desegregation policies toward alternative visions of what *Brown* and its promise might still mean for those who need it most" (p. x) — that is, a decent education for black children.

E. *"The Relationship to White Interests"*[63]

In addition to introductory notes, Bell contributes an essay and a model alternative desegregation plan. In "*Brown* and the Interest-Convergence Dilemma,"[64] he seeks to answer Herbert Wechsler's challenge to develop a neutral principle that decides *Brown*.[65] He offers what he terms a principle of "interest convergence":

> The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites; however, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites. [P. 95.]

The interests that converged in *Brown*, according to Bell, were black interests in ending segregation and white interests in answering the

63. This Section reviews Bell, *supra* note 30.

64. P. 91. This essay may also be found at 93 HARV. L. REV. 518 (1980). *See also* D. BELL, RACE, RACISM AND AMERICAN LAW 437-44 (2d ed. 1980).

65. *See* Wechsler, *supra* note 2.

attack of Communism on American racism, in reassuring blacks returning from World War II that notions of equality and freedom might be realized at home, and in helping the South transform itself from a rural to an industrial society.

Fulfillment of *Brown*, however, breeds interest-divergence. Bell argues, as does Freeman, that racial equality comes at a price to whites, who must sacrifice local school policies and resources. This divergence was manifest in massive Southern defiance of desegregation orders. The defiance was initially met with the full force of judicial power;[66] but once judicial supremacy had been reestablished, the Court began to erect barriers (such as the intent requirement) to limit *Brown* in the face of growing white opposition.

Bell believes that white and black interests are more likely to converge in the context of a remedial strategy that focuses on equality of educational opportunity than on racial balance.[67] Although Bell does not so state, one can infer that whites may be willing to buy their way out of busing by supporting improvement of educational programs in predominantly black schools. The Department of Justice has apparently recognized the likelihood of convergence implicit in Bell's approach. It has recently announced that it will no longer seek "mandatory busing" in school cases; instead, it will concentrate its efforts on school districts that provide inferior education in minority schools.[68]

Both Bell and the Administration have understandably been accused of returning, not to *Brown*, but to *Plessy v. Ferguson*. It is a charge that Bell does not wholly deny:

> Desegregation remedies that do not integrate may seem to step backward toward the *Plessy* "separate but equal" era. Some black educators, however, see major educational benefits in schools where black children, parents, and teachers can utilize the real cultural strengths of

66. *See* Cooper v. Aaron, 358 U.S. 1 (1958) (ordering desegregation of the Little Rock, Ark. schools).

67. It is interesting that both Bell and John W. Davis (arguing on behalf of segregated schools in *Brown*) have quoted with approval W.E.B. DuBois's 1935 article, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935). *See* ARGUMENT, *supra* note 17, at 51; Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515 (1976).

68. *See U.S. May Sue Boards on Schooling Equality*, N.Y. Times, Oct. 6, 1981, at 10, col. 1. *Cf.* Taylor, *Lawyers Assail U.S. Stand on Chicago School Plan*, N.Y. Times, Feb. 14, 1982, at 14, col. 3 (reporting that William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights division of the Justice Department said: "Any students who want to have an integrated education ought to have it. But if there are students out there who do not want an integrated education, we should not be compelling them to get on a bus to have one."). The Reagan Administration has also announced that it will no longer rely on the "*Keyes* presumption" in desegregation suits. *U.S. Alters Policy on Desegregation: Integration of Whole District Won't Be Pursued if Only a Portion is Involved*, N.Y. Times, Nov. 20, 1981, at 9, col. 1.

> the black community to overcome the many barriers to educational achievement. [P. 101.]

He has written elsewhere that the separate-but-equal doctrine of *Plessy* was "re-oriented," but not overruled in *Brown*,[69] and that "[t]he principles of *Plessy v. Ferguson* as well as [those of] *Brown v. Board of Education* can be used effectively."[70]

Bell's argument is aimed primarily at civil rights attorneys. For the past decade, he has criticized the single-minded pursuit of integration.[71] His attacks have drawn heavy fire from his former colleagues in the civil rights bar[72] — "a fact," as he puts it, "that has brought me much sadness" (p. 136). But clearly he is no traitor to the movement. Bell's plan is obviously not to return to the unequal days of *Plessy*, but rather to resurrect the educational promise of *Brown*. Such a strategy, he believes, will accord more closely to the wishes of black parents, will be more likely to provide black children with a decent education, and will be less likely to provoke the strenuous opposition of whites.

There is interesting evidence that Bell's views are gaining adherents among minority groups involved in school cases. In a recent district court opinion in the unending Dallas desegregation litigation, the court noted the intervention of a new party, the Black Coalition to Maximize Education.[73] The court described the Black Coalition as "a broad-based minority community group composed of parents, patrons and taxpayers with children in the [Dallas school district], as well as representatives from a number of civic, political and ecumenical associations in the black community."[74] After quoting a statement in one of Bell's articles to the effect that courts should recognize the "growing disagreement in black communities over the nature of school relief," the court stated:

> By its intervention in this lawsuit, the Black Coalition merely gives formal recognition to the same undercurrents of tension and disunity among blacks that were experienced over the lengthy course of desegregation litigation in such large cities as Atlanta, Detroit, Nashville and Boston . . . .
>
> The Black Coalition represents a substantial body of blacks who are opposed to any escalation in the use of racial balance remedies to cure the effects of school segregation. The Coalition prefers remedies

69. *See* Bell, *supra* note 29, at 353.

70. *Id.* at 373.

71. *See generally* Bell, *supra* note 21; Bell, *supra* note 67.

72. *See, e.g.*, Jones, *supra* note 5.

73. Tasby v. Wright, 520 F. Supp. 683, 689 (N.D. Tex. 1981).

74. 520 F. Supp. at 689.

> designed to improve educational quality and to eliminate the disparity in academic achievement that can be attributed to past segregation, as alternatives to remedies that require public assignments to non-contiguous attendance zones and mandatory transportation.[75]

The court went on to find that further busing to desegregate the Dallas schools was not feasible due to considerations of time, distance, and demographic trends. The position taken by the Black Coalition clearly made the court's decision easier: "[T]he imposition of mandatory transportation on minority parents and children who are opposed to such a remedy is unfair and paternalistic."[76]

It appears, then, that judges — faced with massive white opposition, declining respect for their orders, and the prospect of burdensome superintendency of a school system — may use disunity in the minority ranks as a reason for denying traditional remedies in desegregation cases. To ensure that his criticism of current desegregation policies does not create a remedial void, Bell must provide a compelling theory that authorizes and justifies new remedies in school cases. He meets this challenge by proposing a "model alternative desegregation plan" in the final chapter of *Shades of Brown*.

III. Putting Education into Desegregation

A. *Bell's "Model Alternative Desegregation Plan"*

Bell's proposal would require the establishment of a small committee of educators, minority parents, a social scientist, and perhaps a lawyer[77] to draft an alternative desegregation plan based on the community's comments. The plan would "aim to bring minority schools up to the academic standards of mainly white schools in the district," provide for strong, dynamic school board leadership and

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75. 520 F. Supp. at 690 (footnotes omitted).

76. 520 F. Supp. at 733. The changing perspective of minority representatives is also apparent in recent developments in the Nashville desegregation litigation. In an opinion handed down in May 1980, the district judge noted that a "dramatic role reversal has taken place" in the twenty-five-year-old litigations:

> Historically, black plaintiffs felt the necessity to be in a majority white school in order to be assured of equal distribution of educational funding. The assertion and recognition of the right to equal protection of the laws has rendered this reason irrelevant in today's climate . . . . In this case, we have a white majority in the school board, acting on the advice of a white desegregation expert, recommending to the Court *more* bussing to achieve *more* racial balance. Equally contrary to earlier posture, the black plaintiffs' urge upon the Court *less* bussing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools.

Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 184 (M.D. Tenn. 1980) (emphasis in original).

77. Bell states that "a lawyer knowledgeable in school desegregation law, but sympathic to the idea of alternative desegregation plans could prove a helpful addition to the committee, but may prove difficult to find." P. 129.

parent involvement, ensure equalization of funding between white and black schools, and include a "majority to minority provision" to give black parents the right to have their children attend predominantly white schools (p. 130). Plans could also include bilingual and bicultural courses, vocational training and counseling components, and new disciplinary procedures for school districts in which disproportionate numbers of black children are suspended or expelled (p. 131).

Bell's strategy of attaching educational components to desegregation remedies has been approved by the Supreme Court. In *Milliken II*,[78] the Court sanctioned such provisions in a decree that required the Detroit school board to adopt reading programs and end discriminatory examinations. The Court also approved the establishment of in-service training programs for staff and counseling programs for students to help with the desegregation effort.[79] Lower courts have relied on *Milliken II* in ordering similar educational components.[80]

While *Milliken II* appears to indicate the feasibility of Bell's plan, it actually demonstrates the weakness of the strategy. Unlike Carter, Bell does not argue for a new definition of the right recognized in *Brown*; he does not contend that a plaintiff showing that he or she is receiving a poor education has established a violation of the fourteenth amendment. Rather, he proposes a new *remedy* once a court has found unlawful segregation in a school system. Thus, the efficacy of his proposal depends upon the ability of plaintiffs to continue to demonstrate unconstitutional segregation. There are, however, indications that we are approaching the end of the road for desegregation suits. Indeed, it appears that the judicial intervention so vigorously contested by school districts can now serve as a shield against charges of unlawful racial imbalance. This occurs in the following way.

Once the plaintiffs prove unlawful segregation, *Green* demands "root and branch" dismantling of the dual system. Since *Swann*, this

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

79. 433 U.S. at 283-88. There is less to *Milliken II* than meets the eye. The petitioner in the case was the State of Michigan, which had been ordered by the district court to pay half the cost of the remedial program ($5.8 million). The school board joined the plaintiffs in seeking affirmance of the district court decree. Justice Powell, in his separate opinion, stated that the board and the plaintiffs had "joined forces apparently for the purpose of extracting funds from the State treasury." 433 U.S. at 293 (Powell, J., concurring).

80. *See, e.g.*, Evans v. Buchanan, 582 F.2d 750, 767-74 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); Tasby v. Wright, 520 F. Supp. 683, 741-42 (N.D. Tex. 1981); Kelley v. Metropolitan County Bd. of Educ., 511 F. Supp. 1363, 1368-71 (M.D. Tenn. 1981); Reed v. Rhodes, 455 F. Supp. 569, 597-602 (N.D. Ohio 1978).

has meant some form of racial balance in the schools. To ensure effective desegregation, district courts often review and direct the activities of school authorities for a substantial period of time. Under the court's close supervision, a range of remedial activities may be undertaken, such as the redrawing of school zones and feeder patterns, busing, and the establishment of so-called "magnet" schools. At some point, the court will become convinced that the dual system has been obliterated — that the school system has purged itself of all vestiges of segregation. The court can then attribute any subsequent resegregation — absent a radical shift in district policies — to private choices, not impermissible state action. If racial imbalance reappears, it will be nonactionable.

The Court, as long ago as *Swann*, indicated that judicial supervision of a school district should end once a "unitary" system had been achieved.[81] This was made more explicit in *Pasadena City Board of Education v. Spangler*,[82] where the Court held that the district court had exceeded its authority in requiring annual readjustment of attendance zones to guarantee that there be no school in Pasadena with a majority of minority members. The Court stated:

> [H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.[83]

District courts, faced with seemingly unending supervision of school systems, have begun to find that school boards have met the *Swann* test.[84] Although some of these attempts to withdraw jurisdiction

81. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971):

> At some point, these school authorities and others like them should achieve full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our [earlier] decisions . . . .
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

82. 427 U.S. 424 (1976).

83. 427 U.S. at 436-37.

84. *See* Calhoun v. Cook, 522 F.2d 717, 719 (5th Cir. 1975); United States v. South Park Independent School Dist., 491 F. Supp. 1177 (E.D. Tex. 1980), *revd. sub nom.* United States v. Texas Educ. Agency, 647 F.2d 504 (5th Cir. 1981); Liddell v. Board of Educ., 469 F. Supp. 1304, 1360-64 (E.D. Mo. 1979), *revd. sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir.

have been rejected by the courts of appeals,[85] it seems likely that "purge cases" will appear with increasing frequency in the days ahead.

The result, of course, will be irremediable racially imbalanced schools. Once the current crop of desegregation cases run their course, Bell will be left with no decrees to which he can append his educational components. Litigation will return to the pre-*Brown* strategy of "equalization," that is, demonstrating that black schools have funding, programs, or staffs inferior to those of white schools. But even these lawsuits are unlikely to be effective. First, there is little evidence that predominantly black schools are receiving lower per-pupil allotments than white schools in the same district.[86] Furthermore, in inner-city school districts, there may simply be no majority white schools with which to make a comparison. In short, under a regime that recognizes purge and demands only equalization, the blatant inadequacies of inner-city schools will become largely immune to fourteenth amendment challenge.

B. *The Undiscoverable Right to an Effective or Equal Education*

The preceding bleak line of reasoning follows from Bell's strategy of proposing a new remedy rather than attempting to redefine the underlying right at issue in *Brown*. An apparently simple solution would be to argue that *Brown*, or the fourteenth amendment, guarantees a quality education. But Bell is no doubt aware that the courts have firmly rejected this argument. In *San Antonio Independent School District v. Rodriguez*, the Court held that education is not a "fundamental right" protected by the fourteenth amendment, and that interdistrict comparisons of educational quality are not subject to constitutional scrutiny.[87]

But even if the fourteenth amendment does not embrace a right

1980), *cert. denied*, 449 U.S. 826 (1981). *Cf.* Lee v. Macon County Bd. of Educ., 584 F.2d 78 (5th Cir. 1978) (upholding the district court's finding of a unitary system).

85. *See* the *South Park* and *Liddell* cases cited in note 84 *supra*.

86. *See* Brown v. Board of Educ., 386 F. Supp. 110 (N.D. Ill. 1974) (average disparity in per-pupil expenditures between white and black schools in Chicago approximately one percent; complaint dismissed); 1 B. LEVIN, T. MULLER, W. SCANLON & M. COHEN, PUBLIC SCHOOL FINANCE: PRESENT DISPARITIES AND FISCAL ALTERNATIVES 271-308 (1972) (finding that while a district's discretionary funds may be concentrated in schools serving higher-income, low-minority neighborhoods, state and federal compensatory funds are directed to lower-income, high-minority schools).

87. 411 U.S. 1 (1973). Indeed, Bell has been told this before. In response to his earlier criticism of the civil rights bar for pursuing integration instead of education, *see* Bell, *supra* note 67, Nathaniel Jones, then NAACP General Counsel, wrote: "The Bell indictment of civil rights lawyers . . . fails . . . most conspicuously for the simple reason that there is *no* cause of action for educational quality per se." Jones, *supra* note 5, at 379.

to a quality education, we may be able to interpret the guarantee of "equal educational opportunity" in such a way as to advance the cause of improved education for black children.[88] A number of social scientists have suggested that a proper definition of equal opportunity would take into account unequal starting positions of white and black students.[89] Equal opportunity under this interpretation would not mean simply that white and black students should be provided the same educational package or that per-pupil expenditures should be equalized. Rather, equal educational opportunity would mean the attainment of certain minimal standards of proficiency that would enable initially disadvantaged students to compete on more equal terms upon leaving school. Students would thus be entitled to different educational programs depending upon how far away they start from acceptable levels of academic achievement. As James Coleman has written, this perspective requires transformation of the view of the school from "an agency within which the child is taught" to an agency "responsible for seeing that the child learns."[90] This conception of equal educational opportunity might make it possible for the courts to chart a middle course between the quality sought by Bell (but denied by *Rodriguez*) and the equality *cum* integration demanded by current interpretations of *Brown*. *Brown* could be read as guaranteeing a right to educational programs that compensate for the unequal starting positions of blacks and whites.

While this may be a plausible reading of the fourteenth amendment, it is not one that the courts are likely to adopt. Such an interpretation would place an intolerable burden on the judiciary to examine initial inequalities, plan special curricula to meet the needs of disadvantaged students, and undertake on-going evaluations of the particular educational programs chosen.[91] As one court has

88. There is no agreed-upon definition of equal educational opportunity. For collections of different formulations, see Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968); McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?*, 38 LAW & CONTEMP. PROB. 415, 416-23 (1974); Mosteller & Moynihan, *A Pathbreaking Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY, *supra* note 38, at 6-7.

89. Edmund Gordon, for instance, has written, "[e]qual educational opportunity demands that, where what children bring to school is unequal, what the school puts in must be unequal and individualized to insure that what the school produces is at least equal at the basic levels of achievement." Gordon, *Toward Defining Equality of Educational Opportunity*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY, *supra* note 38, at 423, 433.

90. Coleman, *Responsibility of the Schools in the Provision of Equal Educational Opportunity*, in EDUCATION FOR WHOM?, *supra* note 23, at 100, 107.

91. Commentators have argued that the measurement of educational need and value is beyond the competence of the judiciary. *See, e.g.*, Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411, 472-85 (1973).

stated:

> [T]he courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of . . . students throughout the state. We can only see to it that the outlays for one group are not invidiously greater or less than that of another.[92]

It is not surprising, therefore, that the Supreme Court has summarily affirmed the dismissal of two suits that claimed that the fourteenth amendment requires states to fund school systems based on the educational needs of the students.[93]

It is thus understandable why Bell's strategy for a better education for black children involves adding an educational component to traditional desegregation remedies rather than redefining the right at issue.[94] As the Detroit and Dallas cases demonstrate, Bell's strategy can spark an important shift in thinking about desegregation remedies; the inclusion of compensatory and remedial programs may have a substantial impact on the educational opportunities of blacks. But ultimately Bell's plan, focused as it is on remedies, can achieve only short-term results. "White flight" and "purge" will, at some point in the near future, mean the end for traditional desegregation efforts. When racial imbalance becomes nonactionable, Bell's remedial strategy will dissolve.[95]

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92. Burruss v. Wilkerson, 310 F. Supp. 572, 574 (W.D. Va. 1969) (three-judge court), *affd. per curiam*, 397 U.S. 44 (1970). *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973).

93. Burruss v. Wilkerson, 397 U.S. 44 (1970), *affg. per curiam*, 310 F. Supp. 572 (W.D. Va. 1969); McInnis v. Ogilvie, 394 U.S. 322 (1969), *affg. per curiam*, McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968).

94. Bell's proposed model decree would "aim to bring minority schools up to the academic standards of mainly white schools in the districts." P. 130. This nebulous formulation is spelled out later when Bell suggests that "[t]he courts, school boards, and concerned parents can utilize standard test-score results to measure the improvement in effectiveness of black schools. They might also note dropout rates; disciplinary statistics; the percentage of graduates going on to college, training programs and/or into full-time employment; and similar measures." P. 137. These factors are identified in order to define appropriate remedial components, not the fourteenth amendment violation.

95. It is surprising that, in the face of *Rodriguez*, Bell does not recall the O. Henry ending to Henry Hart's classic *Dialectic*: "the state courts." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). Under state constitutions, a number of state supreme courts have ordered the inter-district equalization of financing that was denied in *Rodriguez*. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 594 (1971); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978); Washakie County School Dist. No. One v. Hershler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1981). These cases may have a greater potential for permanently improving educational opportunities in predominantly minority school districts than further federal desegregation suits. However, not all state courts have been persuaded to grant such relief. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976); Danson v. Casey, 484 Pa. 415, 399 A.2d 360

CONCLUSION

It would be a mistake to allow the present conflict over the benefits of further school desegregation to cloud *Brown*'s achievements. *Brown*, quite simply, buried Jim Crow. It would also be a mistake to cling uncritically to our original understanding of *Brown*. That understanding, in the minds and arguments of those who litigated and decided *Brown*, was that education and integration were inextricably linked. But the hopes and theories that bound these two concepts have been buffeted for more than two decades by demographics and politics. As a result, integration has been rendered virtually unattainable in large urban areas. These facts have led the contributors to *Shades of Brown* to chart a new course for *Brown* — one that seeks to ensure that education does not go down tied to the mast of the integration ship.

The essays adopt different approaches in attempting to reinterpret *Brown*. Carter and Ravitch seek to redefine the right at issue in *Brown*. Lawrence and Freeman argue that racial discrimination in schools must be understood as part of a larger social phenomenon, and that desegregation remedies will fail if they do not attack the system as a whole. Bell sets out a remedial plan that can be implemented under the current law. These approaches, as should be apparent from the preceding discussion, sometimes conflict with one another and vary in likelihood of success in the courts. But the significance of *Shades of Brown* lies not in the cogency of any particular essay; the essays are more suggestive than persuasive. The book's significance lies in the fact that seven scholars dedicated to education and the vindication of civil rights can begin to question the prevailing liberal interpretation of *Brown*, the interpretation that has shaped three decades of litigation and had massive social consequences.

Shades of Brown is successful in returning our attention to the educational aspects of *Brown*. The problem is that the essays do not provide a convincing solution to the problem they identify. Courts are unlikely to accept Carter's attempt to make *Brown* into a case that requires the evaluation of the benefits of the educational process. Bell's plan is modest and short-term at best. Lawrence is aware that his systemic remedy cannot be achieved through the courts. And Freeman recognizes that a guarantee of substantive results is

(1979). Furthermore, the relationship of "dollars spent" to "quality achieved" remains problematic. *See* McDermott & Klein, *supra* note 88, at 423-54.

fundamentally inconsistent with the prevailing regime of equality of opportunity.

A decade ago, Alexander Bickel prophesied that "*Brown v. Board of Education*, with emphasis on the education part of the title, may be headed for — dread word — irrelevance."[96] Although Bickel's prediction appears accurate as a judicial matter,[97] there exist other arenas for achieving important social goals: the political branches of local, state, and federal governments. If *Shades of Brown* is persuasive in stimulating reconsideration of the single-minded pursuit of integration, resources expended in desegregation suits could be rededicated to a political fight for improving educational opportunities afforded black children. Nonjudicial institutions may ultimately prove no more interested than the courts in the quality of education in inner-city schools. But we should not close the book on *Brown* simply because the courts refuse to write the next chapter.

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96. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151 (1970).

97. Dean Read has perceptively observed:

> [T]he problem of providing equal educational opportunities to all defies a legal solution based solely on a race theory of equal protection. As long as "blackness" and poverty are inescapably linked, and as long as minority plaintiffs cannot themselves agree on the proper remedy, perhaps the twenty year effort to implement the promise of *Brown* has, in fact, reached its logical conclusion. The problems of school segregation in the cities may be so intractable that one tool — the constitutional command of equal educational opportunity for all races articulated in *Brown* — cannot and should not be expected to solve alone the problem of segregated education. Until new tools are found and implemented — a negative income tax or experimentation with John Rawls' theories of distributive justice or some other, yet unborn, idea — it is at least arguable that the limits have been reached in using the Constitution alone as a means for attaining school desegregation.

Read, *Judicial Evolution of the Law of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMP. PROB. 7, 48-49 (1975) (footnotes omitted).