

January 2005

Why Segregation is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessy

Gary Orfield
Harvard Graduate School of Education

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

 Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), [Law and Race Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Gary Orfield, *Why Segregation is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessy*, 49 N.Y.L. SCH. L. REV. (2004-2005).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

WHY SEGREGATION IS INHERENTLY UNEQUAL: THE
ABANDONMENT OF *BROWN* AND THE CONTINUING
FAILURE OF *PLESSY*[†]

GARY ORFIELD*

No big city in the country has de facto school segregation.¹ In every big city case that has ever been litigated, segregation has been found to be the responsibility, to a very considerable extent, of official action taken by schools, housing authorities, and other municipal officials. There is no major city where segregation has ever been found to be the result of de facto segregation when it has actually been examined by a federal court. The promise of *Brown v. Board of Education* in urban America has never been realized because society has never taken seriously its demand to desegregate “with all deliberate speed.”² When we think about *Brown*, we need to think about what *Brown* was, what it was applied to, what it aimed at, as well as what it failed to do, and what the courts have never done.

There are three systems of racial subordination in American history: slavery, Jim Crow or apartheid, and metropolitan housing segregation. Today, it is completely illegitimate for New York to pass a law that says “minority children cannot have equal educational opportunity,” but completely legitimate to give them totally unequal educational opportunity on the basis of housing segregation and school district boundary lines. This is done regularly and systematically, and its effects are devastating, yet such discrimination is considered legitimate. We have never enforced fair housing with any seriousness at all, and, as a result, housing discrimination is absolutely rampant today. Housing markets reflect discrimina-

[†] This essay is based on a presentation given at *Brown is Dead? Long Live Brown!: A Commemorative Symposium* at New York Law School, New York, April 26, 2004.

* Professor of Education and Social Policy at the Harvard Graduate School of Education.

1. BARRON'S LAW DICTIONARY 131 (4th ed. 1996). De facto segregation occurs without purposeful action by government officials as compared with de jure segregation, which refers to segregation directly intended and approved by law.

2. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

tion, they do not reflect choice. African-American and Latino families would overwhelmingly prefer to live in 50-50 neighborhoods.³ Whites do not even prefer to live in all white neighborhoods.⁴ Studies show that only a very small part of residential segregation is due to economics because most neighborhoods have a range of housing prices. For example, in 2000, poor whites who were living in Boston and earning \$20,000 per year were living in neighborhoods with fewer poor people than blacks who earned more than \$50,000.⁵

To a considerable extent we have solved the direct problem that *Brown* was aimed at, namely the apartheid laws of the South. But, we have not even begun to address the issues of metropolitan segregation in the northeast United States, a society that has 80% of its people living in metropolitan areas, and 90% of its minority families. Further, most of the segregation today is between school districts, not within school districts, and such segregation was sanctioned by the Supreme Court in *Milliken v. Bradley*,⁶ in a very devastating way.

In celebrating *Brown*, we celebrate something that is complicated, because what really happened didn't happen until after *Brown*, and after a political revolution took place. Most of what happened after *Brown* was aimed at the South, along with most of the civil rights revolution. During the first ten years following *Brown*, there was almost no enforcement of the rights set forth in *Brown*.⁷ When President Kennedy called for the enactment of the 1964 Civil

3. *Freeman v. Pitt*, 503 U.S. 467, 495 (1992); see also Reynolds Farley et al., *Chocolate Cities, Vanilla Suburbs – Will the Trend Toward Racially Separate Communities Continue?*, 7 SOC. SCI. RES. 319, 328-33 (1978) (studies show that African-Americans and Latinos prefer to live in integrated communities).

4. *Freeman*, 503 U.S. at 495.

5. U.S. Census Data 2000 Summary File (SF-3).

6. 418 U.S. 717 (1974). The Supreme Court held that there was no basis to enforce desegregation plans for Detroit suburbs when there was no finding of a constitutional defect in those school districts. The Supreme Court reversed the lower court's decision to implement a desegregation plan on the grounds that "[t]here were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort. It follows that the decision to include in the desegregation plan pupils from school districts outside Detroit was not predicated upon any constitutional violation involving those school districts." *Id.* at 757.

7. See Gary Orfield & Chungmei Lee (2004), *Brown at 50: King's Dream or Plessy's Nightmare?*, The Civil Rights Project at Harvard University (chart on cover page).

Rights Act, 99% of African-Americans were in completely segregated schools in the South.⁸ There were no black teachers teaching white children in the South.⁹ There had been no white teachers transferred to predominantly black schools, in any place in the South.¹⁰ The schools in Prince Edward County, Virginia, which was one of the original school districts fighting for desegregation in the *Brown* cases, shut down altogether to avoid having to integrate.¹¹

Then, we go from apartheid to the incredibly rapid transformation of our schools, as a result, not of *Brown*, but as a result of the 1964 Civil Rights Act and the political revolution behind it. We should be celebrating the 40th Anniversary of the 1964 Civil Rights Act, which is at least as important as *Brown*. It is more profound in the sense that it created social equality and racial justice. It was not just a court decision. Of course, the 1964 Civil Rights Act could not have happened without *Brown*, and the movement and legal framework that *Brown* created, but enforcement of *Brown* could not have happened without the civil rights movement, the commitment of political leaders, and the determination of President Johnson to make it happen.

In 1964 when Lyndon Johnson got the Civil Rights Act enacted, 98% of black students were still in completely segregated schools.¹² Within five years, the South went from almost total apartheid to becoming the most integrated region in the United States and having the most integrated schools. During that period, the Supreme Court issued its decisions in *Green v. County School Board*¹³ and *Alexander v. Holmes*,¹⁴ which together gave content to *Brown*. Prior to 1968, there was no definition of what rights were

8. *Id.*

9. *Race-Based Faculty Hiring and Layoff Remedies In School Desegregation Cases*, 104 HARV. L. REV, 1917, 1919 (1991).

10. *Id.*

11. See Kathryn Orth, *Education Obligation Hits Snags; Virginia's Brown v. Board Scholarship Program Has Yet to Award School Grants*, RICHMOND-TIMES DISPATCH, Nov. 7, 2004, at A1 (noting that between 1954 and 1964 schools such as those in Prince Edward County, VA closed to avoid desegregation).

12. Orfield & Lee, *supra* note 7, at 17, 19 (Table 7).

13. 391 U.S. 430 (1968). The Supreme Court held that the school board had not met the commands of *Brown*. The school board's desegregation plan did not come until almost eleven years after the *Brown* decision. The Court found this delay intolerable considering *Brown's* command for prompt and reasonable desegregation. See generally *id.* at 438.

created by *Brown*, there was no deadline, and there was no sanction; there was really no principle of law. *Brown* basically said integrate when a local federal judge thinks it is appropriate and do so “with all deliberate speed.”¹⁵ In 1968, however, the Supreme Court in *Green* held that schools must absolutely integrate now. Schools must be created that do not have any racial identity.¹⁶ When President Nixon tried to delay integration in 1969, the *Alexander* Court held that integration must occur immediately, even in the middle of a school year.¹⁷ The Court further concluded that the time for “deliberate speed” is over, and that the goal is integration, not letting a few black students transfer into white schools.¹⁸ The goal is to completely uproot the system and create a new system that ends dual schools and creates unitary schools.¹⁹ Further, by 1971, it was clear that urban segregation was not an excuse for school segregation in places that have always had unconstitutional school segregation.²⁰

Integration was not a fragile flower; it was strong, and it lasted for a long time, reaching its high point for black students in 1988.²¹ Then, in 1991, the Supreme Court began to dismantle *Brown* and what it stood for. This is the ultimate tragedy, because as a result of three Supreme Court decisions southern schools are becoming

14. 396 U.S. 19 (1969). The Supreme Court ordered Mississippi schools that failed to comply with *Brown* and fully integrate “with all deliberate speed” to immediately terminate dual school systems based on race and to only operate unitary school systems. The Court held that it was constitutionally impermissible to continue to operate racially segregated schools, even if they were in the process of integrating. See generally *id.* at 20.

15. *Brown*, 349 U.S. at 301.

16. See *Green*, 391 U.S. at 438.

17. See *Alexander*, 396 U.S. at 20.

18. *Id.*

19. *Id.*

20. See generally *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971). This was the first Supreme Court case to approve the desegregation of urban school districts. *Swann*, along with the *Green* decision and the Civil Rights Act, led to urban desegregation orders throughout the South’s large cities. See Orfield & Lee, *supra* note 7.

21. See Orfield & Lee, *supra* note 7, at 17-19 (Table 7); see also Chungmei Lee (2004), *Is Resegregation Real?*, The Civil Rights Project at Harvard University (reaffirming findings of isolation of Latino and black students and addressing criticisms). Even in 1968, when the conservatives took over the federal government and began to remake the Supreme Court, there was not a decline in integration in the South. In fact, there was no decline in integration until after the Reagan Administration. See Orfield & Lee, *supra* note 7, at 17-22 (containing and discussing relevant trends and statistics).

more segregated faster than any part of the country, although the entire country is going backwards in terms of desegregation. According to the Rehnquist Court, the goal of *Brown* is not to actually have integrated schools, but rather to temporarily desegregate them, and then to go back to local control.²² Local officials are free to do as they please, including sending kids back to segregated neighborhood schools that are foreseeably unequal, provided the local officials do not say that the reasons behind their decision are racially motivated.²³ In *Freeman v. Pitt*, the Supreme Court effectively allowed school districts in DeKalb County, Georgia to dismantle part of an order to desegregate, even though the school district never implemented the whole order.²⁴ Any portion of the desegregation order that was implemented, the Court found, could be halted.²⁵ As if these decisions were not extreme enough, in 1995, the Supreme Court, in *Missouri v. Jenkins*, held that educational remedies that are part of a desegregation plan can be discontinued without any finding that they have in fact equalized education.²⁶ The Court further held that on remand the district court should consider the fact that the State's implementation of a court-ordered desegregation plan depends on the funds available to it.²⁷ The dis-

22. *Bd. of Educ. of Oklahoma v. Dowell*, 498 U.S. 237, 247-248 (1991) (holding that school districts which complied with court orders to integrate for a reasonable period of time were released from their obligation to maintain desegregation. Desegregation injunctions were not intended to operate in perpetuity because a federal court's control over a school system existed only long enough to remedy the effects of past discrimination).

23. *See Missouri v. Jenkins*, 515 U.S. 70, 89-90 (1995) (emphasizing that desegregation plans were a matter of local control, and that the courts have a limited role in desegregation).

24. *See Freeman*, 503 U.S. at 471 (relaxing the standard for desegregation, even in places where desegregation had not been fully attained).

25. *Id.*

26. *Jenkins*, 515 U.S. at 89-90 (holding that "improved achievement" on test score was not necessarily required to achieve equal education programs and thus that factor should be eliminated).

27. *Id.*; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that a state has no constitutional duty to ensure that low income school districts and wealthy school districts receive an equal amount of funding. The Court held that "wealth" is not considered a suspect class, and that the Equal Protection Clause does not guarantee equality in education, nor is education a fundamental right).

strict court must take this factor into account when assessing the State's implementation of the court order.²⁸

These cases, taken together, indicate a return to the standard enunciated in *Plessy v. Ferguson*²⁹ more than 100 years ago. Desegregation is temporary; it is a punishment to whites; and it should be abolished, and segregation may be reinstated. Schools do not have to be equalized. This is a tremendous reversal of *Brown*, and it has not really been recognized or considered by the country. People argue that this backwards step toward segregation is a result of demographic changes in the South in 1991. But, the demographics did not change; the Constitution changed. This implicit reversal of *Brown* is the effect of having justices appointed to the Supreme Court by Presidents who were against civil rights enforcement and received few black votes.³⁰

The South has twice as many blacks as the North. Most blacks have always lived in the South, and they have been migrating back to the South for the past twenty-five years since the civil rights revolution. The South is the most important place for African-Americans in this country, and always has been. This is why the subordination of African-Americans was so rigid and the transformation was so profound. However, *Brown*, along with most of the civil rights movement, has never been applied to the North in any serious way.

In the nineteen years following *Brown*, there was no reference to its application to the North until *Keyes v. School District No. 1, Denver, Colorado*.³¹ The *Keyes* Court concluded that segregated schools in city school districts is a national, not a southern, phe-

28. *Jenkins*, 515 U.S. at 88-90.

29. 163 U.S. 537 (1896) (holding that "separate but equal" facilities for whites and blacks is permissible under the Fourteenth Amendment).

30. See Herman Schwartz, *The Warren and Rehnquist Courts and the Struggle for Civil Rights*, available at <http://www.pbs.org/beyondbrown/> (last visited Feb. 3, 2005) (Chief Justice Rehnquist was appointed by President Nixon in 1972, and he made explicit in his dissent in *Keyes v. Sch. Dist. No. 1, Denver, Colorado* that he disagreed with *Green v. County School Board's* desegregation mandate. Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy who were appointed by President Reagan also displayed little sympathy for civil rights enforcement). With the additions of Justices David Souter and Clarence Thomas to the Supreme Court in the early 1990s, the majority of the Court could be classified as conservative. Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens also served as members of the Supreme Court in 1991.

31. 413 U.S. 189 (1973).

nomenon.³² Therefore, the constitutional principles articulated in *Brown* deserved national, rather than regional, application.³³ Any requirement that *Brown* be applied to metropolitan areas in the North³⁴ was profoundly limited, however, the following year in the *Milliken* decision.³⁵ Ironically, the Court waited until most U.S. city schools were already highly re-segregated and then fashioned a remedy that would not work in metropolitan America, particularly in the largest metropolitan areas.³⁶ This is why Michigan is at the top of the list of most segregated states, and Detroit is often the most segregated metropolitan area in terms of education.³⁷ Along with Michigan, for the last thirty years, New York and Illinois have also been at the top of the list of most segregated states.³⁸ This is the result of residential segregation, fragmented school districts and *Milliken*. New York, for example, is the epicenter of segregation. Fifty years after *Brown*, it is the most segregated state in the country for both black and Latino students.³⁹ Of black students in New York, only 14% are in majority white schools, while 61% are in schools that are 90–100% minority.⁴⁰ The average black student is in a school made up of only 18% white students.⁴¹ This is the worst record by any state overall. There is no southern state that even comes close to this level of isolation.

Segregation is a fundamental structure of society, and it is profoundly self-perpetuating, even in the absence of overt discrimination. Segregation stems from a variety of forms, such as unequal resources, information, networks, and opportunities available to

32. *Id.* at 223.

33. *Id.* at 220.

34. The Denver, Colorado school district at issue in *Keyes* was a tri-racial metropolitan area. Arguably, the holding in *Keyes* is applicable to biracial metropolitan areas in the North as well.

35. *Milliken*, 418 U.S. at 757 (finding that the differing racial compositions between schools in Detroit were not a result of official action; therefore, there was no constitutional violation and desegregation plans were not required to be enforced).

36. *See id.* (the Court refused to impose a multi-district remedy for single district de jure segregation. The Court remanded the case to the district court to formulate a decree directed at eliminating the segregation in the city schools only).

37. *See Orfield & Lee, supra* note 7 (Table 11 and accompanying text).

38. *See id.* at 27 (Table 11).

39. *See id.* at 27-28 (Table 11 and 12).

40. *See id.* at 27 (Table 11).

41. *See id.* (Table 11 and the exposure rate).

those in segregated settings. Segregation is our basic policy. Historically, the segregation of blacks, Latinos, and Indians, was imposed by law, discrimination, and violence. Segregation was not, and has never been, chosen. Less than one-tenth of blacks, in most surveys, want to live in all black neighborhoods or go to all black schools.

Segregation is not natural, but it is believed to be natural. Many court decisions ending desegregation plans rely on the notion that you cannot expect the school systems to undertake the impossible task of curing these “natural” causes of segregation. There was this similar belief about racism being natural in *Plessy*.⁴²

There are a number of assumptions in legal commentary, both from a conservative side, and from the critical legal studies side, about school desegregation law after *Brown*. First, there is the assumption that the Court tried really hard to desegregate after *Brown*, but the results were limited and counterproductive. This is just not true. The Court tried hard to implement desegregation for only a few years, and that was mostly aimed at the South. In fact, there were only about four or five years in which all three branches of government worked hard at desegregation. In 1968, Richard Nixon was elected President after a campaign in which he promised to end school desegregation. President Nixon’s four Supreme Court appointments set the stage for the *Milliken* decision that limited the effectiveness of desegregation plans in the mid-1970’s. The rest of the time had been spent focusing overwhelmingly around *Plessy*, or a fraudulent version of *Plessy*.

Serious time has never been spent on urban and metropolitan desegregation. More money was spent trying to equalize segregated schools than to desegregate schools. In fact, there has been no federal money that has gone toward desegregation since Reagan repealed the desegregation assistance law in his first budget. But, money cannot equalize educational opportunity. Peer groups, context, teacher quality connections, networks, and so forth cannot be cured just by the injection of money. If you grow up in a segregated

42. *Plessy*, 163 U.S. at 551-52 (“If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals If one race be inferior to the other socially, the Constitution of the United States cannot put them upon an equal plane.”).

neighborhood and are educated in a segregated school, there is no amount of money that can prepare you to live in an interracial society.

There is an extremely powerful relationship between segregation by race, segregation by poverty, and educational inequality. There are educational benefits that a student receives in diverse schools that a student cannot receive in segregated schools. Consider the relationship between segregation and poverty in 2001. If you look at the schools that are intensely segregated minority schools, nine out of ten have concentrated poverty, compared with intensely segregated white schools where one out of seven live in concentrated poverty, and those that do live mostly in rural America.⁴³ Boston is a good illustration of what our metropolitan areas look like today. The Boston city schools are comprised of only 2% of metropolitan whites, while 44% are black, 23% are Latino, and 14% are Asian.⁴⁴ And, in metropolitan Boston, there is a 97 to 1 probability that a highly racially segregated school will have concentrated poverty.⁴⁵ The suburbs of Boston, however, have white students attending schools that are on average 90% white.⁴⁶ Yet, according to the *Milliken* decision, desegregation of Boston would be limited to the city where there is a huge majority of minorities. The Boston suburbs could be left alone.

At any level of poverty, there is a range in school achievement. This is what the educational debate is about. But, what people do not acknowledge is that if you take the poorest schools and their highest achievers, they are way below the median of the rich schools and their relatively low achievers. There is almost no overlap. There are almost no schools that are extremely poor with a very high range of achievement.⁴⁷

If you look at a high stakes test,⁴⁸ it shows you a similar result. In metropolitan Boston, schools that are 0-10% non-white and 0-

43. Orfield & Lee, *supra* note 7, at 21-22 & Table 10.

44. U.S. Census Data 2000 Summary File (SF-1).

45. Gary Orfield & Chungmei Lee (2005), *Why Segregation Matters: Poverty and Educational Inequality*, The Civil Rights Project at Harvard University.

46. Logan, John, *Segregation in Neighborhoods and Schools: Impacts on Minority Children in the Boston Region* (2003), Albany, NY: The Lewis Mumford Center.

47. Josh Barbanel, *Grading the Schools*, N.Y. TIMES, Jan. 3, 1997, at B5.

48. A "high-stakes" test is one intended to determine which students can be promoted or graduated. Most frequently, these tests are given in Grade 3, 4, 8, or 10.

10% poor, 97% of the kids passed the high stakes test in the 10th grade. If you look at the schools that are 90-100% African-American or Latino and 50-100% poor, only 46% of those students passed the test.⁴⁹

We are not doing anything significant about that issue. The assumption that we can deal with these problems by standards and coercion in our schools is embodied in its most extreme form in the No Child Left Behind Act of 2001. Several recent reports on the No Child Left Behind Act show that the schools that are being most targeted and sanctioned are schools that are virtually all minority and all poor. Nobody is mentioning the fact that they are segregated, and recently, a number of them are being re-segregated because of court orders ending desegregation plans. Yet, these schools are being punished and branded as failures.

On a positive note, in a recent survey of seven school districts around the country to determine the experience of students in well-integrated versus segregated schools, we are finding much of what the Supreme Court found in *Grutter v. Bollinger*.⁵⁰ White students, black students, Latino students, and Asian students all acknowledge that if they are in integrated classrooms they are actually learning about each other in a deeper way. They are learning how to work with each other, they are confident about their ability to live and work in interracial settings, and to work under supervisors of other races as adults. Many things that are extremely important to the future of our democracy are happening in these schools.

Plessy v. Ferguson was the law of the land for two-thirds of a century before *Brown*. There is no evidence of a school system that was separate and equal. No one has nominated a community at any point in time in American history where that condition existed. There are benefits to desegregation, and they benefit all groups of

Sometimes high-stakes tests are used to identify which schools are in need of improvement. See Bob Resnick, *Majority of Districts/Schools Employ "High Stakes" Testing*, available at <http://www.schooldata.com/ssm-resnick-majority.htm> (last visited Jan. 31, 2005).

49. For a more detailed discussion of high-stakes testing, see Gary Orfield & Johanna Wald, *Testing, Testing*, THE NATION, June 5, 2000.

50. 539 U.S. 306, 330-331 (2003) (holding that the Equal Protection Clause does not prohibit the narrowly tailored use of race in admissions decisions because the university has a compelling interest in the benefits obtained from educational diversity). The Court noted that a diverse student body promotes learning and better prepares students for a diverse workplace, society, and as professionals. *Id.*

students. Desegregation changes the lives of students in terms of whether they go to college, whether they succeed in college, what they do in their profession, and so forth.

School desegregation was just one of the many things the civil rights revolution was aimed at achieving, and it will not solve all problems. Students are out of school for five-sixths of their lives, so what happens in the rest of their lives, in employment, housing, and everything else, is vitally important. But, school desegregation does actually work, it is actually durable, and it has been done on a metropolitan scale in southern states with big county school systems including cities and their suburbs. In metropolitan areas that have fully desegregated, there has been less white flight than in places where desegregation occurs only in a central city, and it has lasted for generations. The people in some of those communities want to maintain desegregation, but are being forbidden to by the federal courts under this judicial counter-revolution. This is a disastrous failure of American society at a time when it is going through an incredibly dramatic racial transition. At the time of *Brown*, schools were comprised of about one-eighth minorities. Today, school enrollment is made up of approximately 40% minorities, and by the middle of this century school enrollment will reach about 60% minorities, in both public and private schools.⁵¹ As a nation, in order to make society work, we have to figure out how to deal with this, and how to incorporate, not only African-Americans into white schools, but all students into multiracial schools. The Supreme Court has recognized this about higher education.⁵² Ironically, it is pushing elementary and secondary education in the exact opposite direction.

Desegregation was not pursued by the NAACP or Latino groups with the goal of assimilation. It was pursued to end exclusion and to obtain opportunity. Minority families seeking desegregated schools are looking for better education. They are not looking to sit next to whites; they just know that whites receive better education. It is correct that effective integration in middle-class schools provides substantial benefits for both minority and white

51. See Orfield & Lee, *supra* note 7 at 13-14 (Tables 1 & 2).

52. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003).

students. The Supreme Court has recognized this with respect to colleges.⁵³ *Brown* is not a noble failure that is irrelevant to our future. Society must recognize that *Plessy* and the doctrine of “separate but equal” has never worked, and society, the courts, and the government must work together to end school segregation wherever feasible.

53. See *Grutter*, 539 U.S. 306; see also *Gratz*, 539 U.S. 244.