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Are Reports of Brown's Demise Exaggerated? Perspectives of a School Desegregation Litigator

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ARE REPORTS OF *BROWN*'S DEMISE EXAGGERATED? PERSPECTIVES OF A SCHOOL DESEGREGATION LITIGATOR

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Hailed as a landmark in the history of America's fight for freedom,[1] the United States Supreme Court decision in *Brown v. Board of Education*[2] helped to usher in an era of civil rights advances that began in the field of education, but whose effects were subsequently felt in the areas of voting rights, housing, employment, and public accommodation. Fifty years later, the legacy of *Brown* has increasingly been called into question by commentators, subjecting both its past significance and future vitality to critical examination.

In considering whether *Brown* is "dead" — and ultimately concluding that it is not — this paper will approach the *Brown* decision and its progeny from a narrow and, perhaps, prosaic point of view. That is, from the perspective of an attorney formerly involved in the day-to-day litigation of school desegregation cases.[3] First, I will analyze the *Brown* decision and the Court's subsequent unwillingness in *Brown II* to put in place remedies that would realize the groundbreaking holding of *Brown I*.[4] Then, I will examine *Brown*'s progeny and the changes that occurred as a result of these decisions. Finally, I will conclude that the *Brown* decision did not fail to meet its goal of true equality, but that society and the courts failed to implement and carry out that goal.

Given that I worked in New York and the overwhelming majority of cases on the Legal Defense Fund docket were in southern states, the perspective I gained in the course of working on school

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1. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, Forward (1987).

2. 347 U.S. 483 (1954) (hereinafter "*Brown I*").

3. This perspective results from fourteen years of involvement with school desegregation cases on behalf of plaintiffs represented by the NAACP Legal Defense and Educational Fund, Inc. in many school districts.

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

desegregation cases is necessarily that of an outsider. Mindful of this geographic reality and aware of the criticism leveled against impact litigation brought by national organizations on behalf of communities in which the organizations are not located,[5] I do not pretend to be the definitive voice of the communities I have represented. The experience of litigating these cases, however, and watching the way the decisions made by the United States Supreme Court played out in individual school districts in Alabama or Georgia, speak to questions about the strengths and weaknesses of *Brown*, its progeny, and ultimately the failure of society to fully realize its goals.

I. THE *BROWN* DECISION AND THE EFFECT OF *BROWN II*

The conclusion that *Brown*'s significance is more than purely historic does not arise from the belief that the case successfully eradicated all of the inferior educational conditions to which children of color have been, and continue to be, subjected. The persistence of marked inequalities in American schools make such a belief impossible. Still, even in the face of the very real disparities — and indeed because of their continued existence — *Brown* maintains its importance into the twenty-first century. In fact, the conditions frequently cited as signs of *Brown*'s failure are testaments to another, more serious and continuing failure: the failure to implement the vision of true equality that the *Brown* decision articulated.

Significantly, the Supreme Court did not base its decision in *Brown* on the differences in resources of the segregated black and white schools then in existence.[6] Although it defies credulity, the

5. *See* Derrick A. Bell, *Serving Two Masters: Integration Ideal and Client Interest in School Desegregation*, 85 YALE L.J. 470 (1976) (suggesting that the institutional interest in promoting integration espoused by organizations such as the Legal Defense Fund potentially compromised the interests of clients in individual cases). Although there may be disagreement about the extent to which a gap existed between the goals of litigators and the interests of clients, it cannot be gainsaid that tensions could and did arise in the course of litigation. Examples of this tension were many and ranged from concerns about the desirability of transportation of students to achieve desegregated schools to the fear of the loss of racial role models to policies of assignment of administrators and faculty to schools that could not be identified as either black nor white but were instead "just schools." *See* Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 12 (1971).

6. *Brown I*, 347 U.S. at 492 (stating that "our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved

lower courts found, and the Supreme Court accepted as fact, that at least with regard to "tangible" factors such as buildings, curricula, and the qualifications and salaries of teachers, the segregated schools had been effectively equalized.[7] Instead, the Court focused on the intangible — the notion that segregation psychologically damaged the children and no amount of equalization could erase the fact that society would not view children of color as integral and equal members of the schools or the greater community: "To segregate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[8]

Therefore, the "problem" with *Brown* was not that it sought to address the wrong set of goals. Rather, the difficulties arose in society's failure to adhere to its vision. This deficiency resulted from a failure of society to address the basic harm set out in *Brown*, resulting in too few children of color being accorded the respect and fairness to which they are entitled.[9] As I will argue, the progress of desegregation and educational equity has been crippled by the failure to adequately address the issue of stigma and a growing indifference by the federal courts to the constitutional harms suffered by students of color. Accordingly, although there have been clear ad-

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in each of these cases. We must look instead to the effect of segregation itself on public education.").

7. *Id.* at 493. *See also* Dana Robinson, *A League of Their Own: Do Women Want Segregated Sports?* 9 J. CONTEMP. LEGAL ISSUES 321, 328-30 (1998) (stating that if the Court had not required schools to be both tangibly and intangibly equal, states could have created segregated environments where the tangible factors were equal but the other intangible factors were not).

8. *Brown I*, 347 U.S. at 495. *See* Robinson, *supra* note 7, at 329-31 (discussing how the Court used the term intangible to encompass the feelings of "wrong and inferiority associated with segregation"); Jaideep Venkatesan, *Fatal in Fact? Federal Courts' Application of Strict Scrutiny to Racial Preferences in Public Education*, 6 TEX. F. ON C.L. & C.R. 173, 200-01 (2001) (discussing the duty of public schools to remove the vestiges of discrimination from the *Brown* era).

9. *See* Sam Dillon & Diana Jean Schemo, *Charter Schools Fall Short in Public School Matchup*, N.Y. TIMES, Nov. 23, 2004, at A21 (comparing charter schools with other public schools and noting that charter schools have consistently performed below public schools and that minorities attend charter schools in higher numbers); Editorial, *Breaking the Hickory Stick*, N.Y. TIMES, May 7, 2001, at A16 (discussing corporal punishment in schools and asserting that minority and disadvantaged children are more likely to receive corporal punishment than other children).

vances in many respects, all too often children of color are denied their rightful place in schools and the community.[10]

Most of the school desegregation cases on the dockets of courts throughout the south are decades old.[11] The age of the cases is undoubtedly a testament, in large part, to the message of equivocation contained in the "all deliberate speed" language of *Brown II*.[12] The Supreme Court's failure to set specific deadlines or to articulate clearly the desegregation standards it expected sent a clear message to school districts and states hostile to the notion of integration that they need not fear immediate and effective requirements that they comply with the Court's earlier order in *Brown I*. Meanwhile, African Americans were left to question the value of the constitutional rights of their children.

These questions turned out to be justified. In virtually all of the school desegregation cases, there was a period of at least a decade when African American parents and children saw little or no change in their schools.[13] Whether because of the outright defiance of school districts and states, the adoption of freedom of choice plans that afforded little real choice because of the hostility of whites and the fear of retaliation by blacks, or the implementation of plans so riddled with exceptions as to be completely ineffective, "all deliberate speed" became tantamount to maintaining the *status quo*.[14]

10. *See* Diana Jean Schemo, *Sidestepping of New School Standards Is Seen*, N.Y. TIMES, Oct. 15, 2002, at A21 (discussing schools' reactions to President George W. Bush's *No Child Left Behind Act*).

11. *See* Tracy Dell'Angela & Tara Deering, *Historic Ruling Just Fight's Opening Bell; School Battles in Rockford and Baton Rouge Show the Difficulty of Ending Racial Injustice,* CHI. TRIB., May 16, 2004, at C1 (discussing how desegregation cases have languished on the docket of federal court judges in Louisiana for years).

12. 349 U.S. at 301. *See, e.g.*, Robert B. McKay, *With All Deliberate Speed: A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956).

13. *See* Pamela S. Karlan & Daryl J. Levison, *Race-Based Remedies: Reshaping Remedial Measures: The Importance of Political Deliberation and Race Conscious Redistricting: Why Voting is Different*, 84 CAL. L. REV 1201, 1230-31 (1996) (discussing the aftermath of the *Brown* decision in segregated school systems).

14. *See id*.

II. *Brown*'s Progeny

A period of significant change began in the late 1960s with the Supreme Court's decision in *Green v. County School Board*[15] and culminated with *Swann v. Charlotte Mecklenburg*[16] in 1971. In *Green*, the Court recognized the various ways that discrimination could manifest in school systems and required district courts to examine a range of factors including, at a minimum, student assignment, facilities, extracurricular activities, transportation, and faculty and staff.[17] Thereafter, *Swann* effectively empowered the lower courts to construct desegregation plans, affording them a wide range of discretion.[18] Armed with these decisions, communities and their advocates engaged in litigation on such issues regarding the location of new schools and the closing of old ones, the redrawing of attendance lines, and participation of African American students in extracurricular activities. Although these efforts did not withstand the continued resistance from intransigent school districts, at least the issues faced consideration among the courts.

Many of the successes achieved during the most effective period of school desegregation in the 1970s and early 1980s addressed the "tangibles" as represented by the factors articulated in *Green*. Although the focus on these concrete examples of inequality were undoubtedly necessary and often effective, whether these methods sufficiently furthered *Brown*'s fundamental goal of eliminating stigma is a question that still remains. The emergence of "second generation" issues such as in-school segregation in the form of tracking and ability grouping, and disparities in the frequency and severity of discipline for students of color demonstrates that the basic goal of *Brown* remains unrealized in many respects.

Further undercutting the realization of the goals set out in *Brown* is the fact that the Supreme Court's commitment to the im-

15. 391 U.S. 430 (1968) (holding that the school board must take "affirmative action" to adopt a plan to desegregate the school system and rejected the school board's "freedom of choice plan" which had resulted in little or no desegregation).

16. 402 U.S. 1 (1971) (holding that a proposed plan that allowed some schools to continue to be all or mostly one race should be closely scrutinized and the school board had the burden to show that racial composition was not the result of discriminatory practices either presently or in the past).

17. *Green*, 391 U.S. at 435-36.

18. *Swann*, 402 U.S. at 28-29.

plementation of the *Brown* decision mandates not only came late, but were relatively short-lived.[19] *Milliken v. Bradley*[20] effectively whittled down the apparent breadth of the ability of the federal courts to order relief in school desegregation cases. In *Milliken*, the Supreme Court curtailed a district court's remedial efforts to desegregate Detroit by including white residents of surrounding school districts, many of whom had fled the Detroit schools, in the desegregation plan.[21] The Supreme Court based the decision on the principal that each of the suburban school districts should have responsibility for the unconstitutional desegregation,[22] which severely limited the ability of district judges to afford meaningful relief to long-suffering plaintiffs in school desegregation cases. The importance of the decision and its effect upon the promise of the *Brown* decisions was not lost on the dissenting judges including Justice Thurgood Marshall. He reflected in his dissent that:

> To suggest, as does the majority, that a Detroit-only plan somehow remedies the effects of *de jure* segregation of the races is, in my view, to make a solemn mockery of *Brown I*'s holding that separate educational facilities are inherently unequal and of *Swann*'s unequivocal mandate that the answer to *de jure* segregation is the greatest possible degree of actual desegregation.[23]

This decision was not the first to restrict the scope of the ability of federal courts to address issues of inequality in schools. The year before *Milliken*, the Supreme Court decided *San Antonio Independent School District v. Rodriguez*.[24] While *Milliken* effectively hamstrung efforts to obtain meaningful relief for findings of unconstitutional discrimination, *Rodriguez* barred a class of underserved children from receiving any judicial relief at all.[25] In *Rodriguez*, minority stu-

19. *See* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails Again*, 81 CAL. L. REV. 1401, 1410 (1993).

20. 418 U.S. 717 (1974).

21. *Id.* at 744-45.

22. *Id.* at 773. This principal effectively ignored the fact that the state of Michigan, which had the ultimate responsibility for what happens in each of the school districts in the state, had permitted the unconstitutional conduct to occur.

23. *Milliken*, 418 U.S. at 808.

24. 411 U.S. 1 (1973).

25. *Id.* at 58-59.

dents and children from low-income Texas school districts challenged the constitutionality of the disparities between those districts and wealthier ones.[26] In rejecting their claims and upholding the financing schemes that created the disparities, the Supreme Court held first that people living in poverty were not a protected class,[27] and second that education was not a fundamental right for purposes of heightened constitutional scrutiny.[28]

In *Rodriguez* and *Milliken*, the Supreme Court's treatment of the educational rights of the poor and their discussion of education in general seemed in many ways fundamentally at odds with the broad, democratic view of education outlined in the *Brown* decision:

> Today, [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[29]

In many respects, therefore, *Rodriguez* and *Milliken* seemed to betray the ideals of true equality established in *Brown*.[30]

As disturbing as both decisions were on their faces, one of the more insidious things that emerged was a transformation of the way that educational equality cases in general, and school desegregation in particular, were viewed by the federal courts. Whereas earlier cases such as *Swann* and *Green* concentrated on the harm done to students of color by unconstitutional discrimination and the need to effectively address that harm, *Milliken* and *Rodriguez* shifted the focus from that harm to the need for local school districts to exercise authority over the schools they operated.

The strong concern about encroaching upon the authority of school boards reemerged again in the 1990s in a trilogy of cases

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26. *Id.* at 5, 19-20.

27. *Id.* at 26.

28. *Id.* at 35-36.

29. *Brown I*, 347 U.S. at 493.

30. *See* Susan H. Bitensky, *"We Had a Dream" in* Brown v. Board of Education, 1996 DET. C. L. REV. 1, 15 (1996) (stating that "It is a composite of factors that have turned *Brown*'s promise more into words of aspiration than commitment. But *Rodriguez*, without fanfare and under cover of *Milliken* . . . has figured into the process").

that contemplated the circumstances under which decades-old desegregation orders could be released from the supervision of federal courts.[31] Each of these decisions pushed the constitutional rights of minority children and their parents further into the foreground.

The first of these cases, *Board of Education of Oklahoma City v. Dowell*,[32] while apparently addressing the need to eliminate vestiges of illegal discrimination, made clear that even if a school system had resegregated its schools so that it closely resembled its state prior to the desegregation order, federal court supervision should not necessarily continue.[33] In recognizing that school districts could be released from the active oversight of federal courts notwithstanding the existence of pervasive segregation within the schools, the Supreme Court made clear that the condition of desegregation was weak and potentially short-lived.[34]

Further eroding the *Brown* mandate, the Supreme Court in *Freeman v. Pitts*[35] refused to hold school districts responsible for school segregation that occurred while a desegregation order was in effect if that segregation was due to "neutral" demographic factors. The Supreme Court further permitted district courts to dismiss cases incrementally so that districts could be declared "unitary" in one or more of the areas of student assignment, facilities, staff, faculty, extracurricular activities or transportation.[36] In many ways, the decision seemed to operate in a theoretical realm largely divorced from reality. Gone from the decision was the recognition of the complex interaction of factors that affect housing patterns and educational systems.[37] Although there can be no real question that

31. *See* Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV 1461, 1465-7 (2003) (discussing *Board of Education of Oklahoma City v. Dowell*, *Freeman v. Pitts*, and *Missouri v. Jenkins* and concluding that "these three cases together give a clear signal to the lower courts: the time has come to end desegregation orders, even when the effect will be resegregation"). *Id.* at 1467.

32. 498 U.S. 237 (1991).

33. *Id.* at 249-50.

34. *See id.* at 249.

35. 503 U.S. 467, 490-91 (1992) (holding that "federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations").

36. *Id.* at 487-89, 494.

37. *Id.* at 492 (identifying four factors that must inform the court when exercising its discretion to order pretrial withdrawal, none of which explicitly acknowledge exter-

schools play an important role in the choice of neighborhood,[38] this central role was effectively ignored in the discussion of supposedly "neutral" patterns of demographic development.[39] Similarly, the piecemeal dismissal process ignored certain realities of the operation of schools. Although courts in desegregation cases had long recognized that the perception of schools as "black" or "white" was shaped by the complex interaction of a variety of factors that can be difficult to tease apart, the Court's sanctioning of "partial unitary status" undercuts the need to examine that complexity.[40] Accordingly, the separation of the *Green* factors permitted by the Supreme Court in *Freeman* ignores the myriad ways that the different aspects of school operations work together to affect the experience of individual students in the system and the way that the schools are regarded by the community as a whole.[41]

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nal demographic factors, and emphasizing evidence of the school system's "good faith commitment" to compliance).

38. *See* Chemerinsky, *supra* note 31, at 1462 (asserting that desegregation and merely adequate school funding "will not occur in most cities as long as parents have the ability to move their children to suburban or private schools, where far more funds are allocated to education than in inner cities"); *see also* Stephen Eisdorfer, *Racial Ceilings and School Choice: Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 943 (1993) (observing that more affluent and educated families do not make school choices on the basis of the distinctive educational characteristics of the various schools, but on other considerations, such as location") (citations omitted); Stephen Sugarman, *The Promise of School Choice for Improving the Education of Low-Income Minority Children*, 19 BERKELEY WOMEN'S L.J. 403 (2004) (noting that middle-class and professional-class families "have long enjoyed school choice," which they exercise by "moving to a different school district, quite often in the suburbs, taking their children to a new home where they think better schooling awaits them") (citations omitted).

39. *See Freeman*, 503 U.S. at 494-95 (attributing population changes to a general pattern of "mobility" that characterizes our society as a whole, and stating that the effect of residential housing choices on the racial composition of schools is "too difficult to address through judicial remedies").

40. *See* Chemerinsky, *supra* note 31. Chemerinsky articulates the problem as follows: "A crucial aspect of [*Brown's*] wisdom was the importance of a unitary system of education. Minority children are far more likely to receive quality education when their schooling is tied to wealthy white children. The failure to create truly unitary systems is the core explanation for the inequalities in American schools today." *Id.* at 1462 (citations omitted).

41. *See id.* at 1467-68 (noting the effects of disparities in school funding on enrollment, availability and number of library resources, teacher experience and quality, technology and computer resources, and parental involvement).

Finally, the Supreme Court decided *Missouri v. Jenkins*,[42] a case that in some ways culminated the trend that narrowed the scope of permissible relief started by *Milliken*. In *Jenkins*, the Supreme Court declared that the district court did not have the authority to order the continued funding and implementation of programs designed to enhance the educational achievement of minority students and found that the original constitutional violation did not justify providing salary enhancements for teachers within Kansas City schools for the purpose of increasing the "desegregative attractiveness" of the schools.[43] Having earlier deprived the students of the possibility of a desegregated education, the Supreme Court then deprived them of educational enhancements that could have benefitted the students or at least provided the possibility of changing the perception of the quality of the Kansas City system.[44]

Although the cases from *Milliken* to *Jenkins* appear to deal with relatively arcane issues such as the proper scope of remedies or the law governing the modification and dismissal of permanent injunctions, the overall message sent to courts, advocates, and communities was clear: although the new round of Supreme Court cases did not call for the wholesale dismissal of desegregation cases, courts and those parts of the public frustrated by the continued presence of these cases were provided a clear blueprint for terminating the decades-old actions.[45] On the other hand, even if they were not aware of the shift in emphasis from the rights of those whose constitutional rights were violated to the rights of the violators to reassert control over the school systems, members of the class of plaintiffs consisting of minority children eligible to attend public schools certainly recognized the growing pressure to close out the cases even if, in the eyes of the minority communities, much work remained to be done.[46]

42. 515 U.S. 70 (1995).

43. *Jenkins*, 515 U.S. at 94, 98-102.

44. *Id.* at 75-76 (noting that the district court adopted the plan because it believed that the investments would be "so attractive" that they would draw non-minority students from nearby private and suburban schools).

45. *See generally* Chemerinsky, *supra* note 31, at 1464-67 (examining the holdings of these cases and concluding that they "give a clear signal to lower courts: the time has come to end desegregation orders, even when the effect will be resegregation").

46. *See* Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 583 (1997) (stating that "In the area of school desegrega-

III. The Failure of Society and the Courts to Realize the Goals Set Forth in *Brown*

Given the initial delay in implementing *Brown*, the relatively short period of the its aggressive enforcement, and the accelerating rate of dismissal of existing cases, the question of the actual impact of these cases on the lives of individuals is an apt one.[47] The arguments that *Brown* did not help or even made things worse are familiar.[48] Significantly, the same arguments occur both in law journals and community meetings: the unequal burdens of transportation under which African American students were bused disproportionately greater distances than were whites;[49] the loss of talented and caring African American teachers and administrators to discriminatory faculty lay-off and reassignment policies; the closing of black schools and the attendant loss of institutional anchors in African American communities; the use of magnet programs which, among other positive effects, might reasonably leave the demeaning feeling that white students would have to be bribed to attend schools with African Americans;[50] and the fact that, fifty years after *Brown*,

tion, where the substantive right is one to class relief, we see perhaps most clearly the political and social forces which operate on what in other contexts may be called only a procedural issue.").

47. *See* Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare* (Jan. 2004), *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php.

48. *See* Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts* 5 (Aug. 2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf (finding that since 1986, black and Latino students have become more racially segregated from whites in their schools).

49. *See* Paul Boudreaux, *Vouchers, Buses, and Flats: The Persistence of Social Segregation*, 49 Vill. L. Rev. 55, 63 (2004) (noting that in some areas, "the combination of busing in the central city and the suburban insulation offered by *Milliken* has exacerbated social segregation and defeated the promise of *Brown*"). *See generally* Kenneth O'Neill Salyer, *Beyond Zelman: Reinventing Neighborhood Schools*, 33 J. L. & Educ. 283 (2004) (questioning whether busing students to achieve integration has been effective).

50. *See* Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 Nat'l Black L.J. 26, 51 (1997-1998) (discussing how magnet school programs may increase, rather than decrease, segregation because minority families may not choose schools that contain predominantly white students because of a fear that their children will not be welcome or able to compete).

too many African American children still do not receive equal educational opportunities.[51]

There is some level of truth to each of these beliefs but, at the same time, they tell only a small part of the story. First, it cannot be gainsaid that the effects of *Brown* go far beyond the effects that were felt in the individual school districts. Indeed, in many instances, defendant school districts or school boards involved in desegregation cases had some number of black administrators including, in some instances, the superintendent of schools. Moreover, boards invariably included some African American members and sometimes were headed by African Americans. Although the presence of African Americans in the board room or at the central department of education certainly did not assure that the defendants would operate in good faith, the very presence of African Americans represented a substantial change from the early days of litigation.

Further proof of the value of the cases can be seen by the data that suggested, to the extent meaningful desegregation was achieved in any American school districts, it was primarily southern school districts that practiced *de jure* segregation and faced desegregation cases.[52] The correlation between the peak era of desegregation in the schools and the period in the 1970s when the courts most vigorously enforced desegregation orders demonstrates the positive results obtained by *Brown*, as do the numerous studies demonstrating positive educational and social outcomes from desegregation.[53]

51. *See* Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Equality* 4, 7 (Jan. 2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf (reporting on a "continuous pattern of deepening segregation for black and Latino students" since the 1980s and that "attempt[s] to resolve the achievement gap by funding equity or classroom size changes" would probably fail if the segregation issue was not addressed).

52. *See* Orfield & Lee, *supra* note 47 (describing the patterns of desegregation that occurred while school districts were under desegregation orders and the subsequent trends toward re-segregation that followed the dismissal of desegregation cases).

53. *See* Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 943-945 n.151-55 (2002) (citing numerous studies concluding that racial diversity in educational settings result in a laundry list of benefits for students of all ages including better teaching and learning, improved civic values, increased employment opportunities, and higher achievement and educational opportunities). *See also* Joanna R. Zahler, *Lessons in Humanity: Diversity as a Compelling*

But perhaps the most dramatic positive result, though less visible in the larger debates, was the effect that the existence of the cases had on the experience of individuals in each of the small communities. Notwithstanding the critical things said about the cases, the fact remains that they often presented the best, and sometimes only, means of addressing the day-to-day concerns of African American students and their parents. In the "second generation" litigation that began in the 1970s and persist to some degree to this day in desegregation litigation, courts have addressed a range of issues that go far beyond the question of seating a black student next to a white student. Issues about the availability of gifted and talented programs,[54] disparities in the imposition of discipline,[55] presence on athletic teams or cheerleading squads,[56] hiring and promoting teachers and administrators of color,[57] assignment to special educa-

State Interest in Public Education, 40 B.C. L. REV 995, 1023 (1999) (citing Jomills Henry Braddock II & James M. McPartland, *Social Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267, 285-86 (1989) (concluding that African Americans, Latinos, and white students who attend desegregated schools were more likely to work in racially-mixed work environments than those who attend segregated schools)); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741 n.50 (1998) (citing numerous studies that concluded African American students attain greater academic success in majority white schools than in predominantly or majority African American schools, and the sooner an African American student is placed in a majority white school or classroom, the higher the student's academic achievement).

54. *See Freeman*, 503 U.S. at 479 (noting that the desegregation plan included the institution of "magnet" school programs for gifted and talented education including performing arts programs, two science programs, and a foreign language program to attract black students and increase the integrated learning experience).

55. *See* Johnson *ex. rel.* Johnson v. Bd. of Educ. of Champaign, 188 F. Supp. 2d 944 (C.D. Ill. 2002). The court entered a consent order resolving school district desegregation, which approved a plan eliminating disciplinary and attendance disparities between races, and encouraged intervention as an alternative to discipline. *Id.* at 965.

56. *See, e.g.*, Manning v. Sch. Bd. of Hillsborough County, 24 F. Supp. 2d 1277 (N.D. Fla. 1998) (litigating that there were not enough black cheerleaders); People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905, 929-30 (N.D. Ill. 1994) (finding that the school district discriminated against minorities with regard to extracurricular activities because the district failed to provide equal access to transportation and the selection process for activities such as the cheerleading squad favored white students).

57. *See* Pasadena City Bd. of Educ. v. Spangler, 417 U.S. 424 (1976) (holding that the school district had to comply with the procedures set forth in the desegregation plan for hiring and promoting teachers and administrators.); Keyes v. School Dist. No. 1, Denver, CO., 413 U.S. 189, 209 (1973) (stating that the school board had the burden of justifying its conduct in a school system with a history of segregation where a disproportionately large number of African American teachers had been discharged.).

tion classes,[58] and indeed even whether black schools would be saved from closing[59] have been litigated successfully in school desegregation cases.

Even with the gains that have been achieved, however, substantial inequalities still exist. Because of this, perhaps the greatest indication of the continuing value of *Brown* to communities of color can be seen in community reactions to the prospect of the dismissal of the cases. Faced with a release from federal court jurisdiction, differences in the community about priorities in education litigation disappear.[60] Although individuals disagree about issues such as the value of integration or the utility of magnet school programs, there is virtual unanimity about whether individual school districts have earned the right to the relative autonomy that accompanies unitary status declarations. In those instances, my experience has been uniform. Communities of color in the overwhelming majority of cases feel that school districts have not truly eliminated the deeply entrenched vestiges of discrimination, even in those cases in which the superficial and mechanistic standards articulated in the later Supreme Court cases have been met.[61] In those instances, the

58. *See* Ho by Ho v. San Francisco Unified School Dist., 147 F.3d 854, 859 (9th Cir. 1998) (holding that desegregation plan had to correct the over-representation of African-American males in special education); Vaughns by Vaughns v. Bd. of Educ. of Prince George's County, 758 F.2d 983, 992-93 (4th Cir. 1985) (holding that it was reversible error to fail to give effect to a presumption that placement disparities in special education were casually related to prior segregation); Yarbrough v. Hulbert-West Memphis School Dist., 380 F.2d 962, 965 (8th Cir. 1967) (holding that the desegregation plan had to include the inauguration of a 'completely integrated' special education program, with one white teacher and one African American teacher in a predominantly white elementary school).

59. *See* Lee v. Autauga County Bd. Of Educ., 59 F. Supp. 2d 1199 (M.D. Ala. 1999); *see also* Stanley v. Darlington County School Dist,. 915 F. Supp. 764 (D. S.C. 1996).

60. *See Dowell*, 498 U.S. at 248 (affirming the district court's ruling to dissolve a desegregation decree despite the reintroduction of a neighborhood school system for grades K-4). The Court held that its decision properly recognized the importance of local school system control and that a federal court's regulatory control of such system could not extend beyond the time required to remedy the effects of past intentional discrimination. *Id. See also Freeman*, 503 U.S. 467 (approving a partial withdrawal of judicial supervision from a Georgia school district despite the filing of a class action law suit by African American students and their parents).

61. *See* Robert L. Hayman Jr. & Nancy Levit, *The Constitutional Ghetto*, 193 WIS. L. REV. 627 (1993) (contending that the decisions in *Dowell* and *Freeman* undermine the contemporary understandings of racism and refuting the suggestion that a historically insignificant passage of time could transform *de jure* segregation into *de facto* segrega-

prospect of the loss of even the possibility of relief in the federal courts is a daunting one.

Ultimately, opponents of the dismissal of school desegregation cases may have apprehended the most important aspect of *Brown* that too often was lost in the struggles about the drawing of attendance zone lines, construction of new schools, or the racial composition of individual schools. Whether fighting for black representation on cheerleading squads or, in the end, opposing the termination of the federal court cases, the people in these communities actually protested the fact that the goal of eliminating the stigma of African American students has not yet been reached and that, fifty years after the *Brown* decision, African American students are still not treated equally with white students. Viewed from this perspective, the failure is not *Brown*'s but is instead ours in that the courts and society as a whole have failed to realize the case's vast promise.

tion). *See also* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521 (2002) (suggesting that if racial equality in America is ever to be achieved affirmative action programs must be utilized to help reduce the black-white test score gap); Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 65 MINN. L. REV. 735 (1985) (declaring that now is not the time to do away with race based initiatives, such as affirmative action, becausee the long-term effects of centuries of discrimination still linger today and "purging the taint of racism requires more than color blindness and race neutrality in a free market").