TWO SHADES OF BROWN: THE FAILURE OF DESEGREGATION IN AMERICA; WHY IT IS IRREMEDIABLE (AND A MODEST PROPOSAL)

*James M. McGoldrick, Jr.**

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INTRODUCTION

Brown I[1] revealed the clear evils of state imposed segregation, but *Brown II*[2] expressed that the remedy for those evils is opaque.[3] This article will argue that since *Brown I* in 1954, the Supreme Court's decisions made the current segregated state of our public schools almost inevitable.[4] First, neither the gradualism approach ordered by *Brown II*,[5] nor the later immediacy requirement of *Green*,[6] had much chance for success, though both were likely the product of the political realities of the time. Second, defining the constitutional violation as strictly de jure segregation was a defensible interpretation of the state action requirement of the Fourteenth Amendment, but the distinction between de jure and de facto segregation hamstrung legitimate judicial efforts. Third, appropriate remedies for de jure segregation were so circumscribed that no effective remedy was possible. Fourth, once the illegal de jure segregation was remedied to the degree practicable, as the Court's amorphous standard called for, the inevitable resulting segregation, in the Court's own alchemy, became de facto segregation. Fifth, the failure to require equal funding for education made de facto racial segregation de facto substandard schools. Sixth, the Court imposed a strict scrutiny test for the use of race to remedy de facto segregation, making any remedy unlikely, even in those few jurisdictions willing to undertake the task of dismantling de facto segregated schools. Seventh, there is no likely judicial remedy for desegregating American schools, and only the political decision to make education equal and adequate across all economic and racial substructures can make a difference. For that political approach, I propose a federal spending program for the modest purpose of encouraging integration innovation, what I call Learning Equality for All Persons (LEAP), a federal spending program designed to encourage all states and interested private parties to gradually increase integration and hopefully equality in education and outcome.

* Professor of Law, Pepperdine University School of Law

1 *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954) ("*Brown I*").

2 *Brown et al. v. Board of Education of Topeka et al.*, 349 U.S. 294 (1955) ("*Brown II*").

3 Professor McUsic said it better and more simply: "As an articulation of principle, *Brown* has succeeded. As a tool of integration, it has failed." Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004).

4 GARY ORFIELD ET. AL., CIVIL RIGHTS PROJECT, BROWN at 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 19 (rev. ed. May 15, 2014), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-anddiversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brownat60-051814.pdf.

5 *Brown II*, 349 U.S. at 298.

6 *Green v. County School Bd. Of New Kent County, Va.*, 391 U.S. 430, 439 (1968).

I. THE DIFFERENT SHADINGS OF BROWN I AND BROWN II

Between *Brown I*, where the Court found segregated schools violated black school students' equal protection rights, and *Brown II*, where the Court worked out the remedies for those violations, there is wider range than the various browns in any painter's pallet.[7]

Brown I is the color of dark anguish with the force of black thunderclouds of principles combined with the white purity of righteous indignation. In *Brown I*, the Court described education as, "perhaps the most important function of state and local governments," necessary for "the performance of our most basic public responsibilities," "the very foundation of good citizenship," "a principal instrument in awakening the child to cultural values," preparatory for "later professional training," crucial to adjusting "normally to his environment," and necessary for any child to "succeed in life."[8] *Brown I* found that modern physiological knowledge amply supported that segregation "with the sanction of law," had "a detrimental effect upon the [black] children," "denot[ed] the inferiority" of that race, retarded "the educational and mental development" of such children, and deprived "them of some of the benefits they would receive in a racial[ly] integrated school system."[9] This led to its conclusion: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms,"[10] later summarized in its most famous phrase, "Separate educational facilities are inherently unequal."

Brown II is the beige of compromise, the washed-out appearance of old khakis, the absence of vibrancy of any hew, the Oscar dress that made no list. In *Brown II*, the Court reiterated the basic holding of *Brown I* stating "the fundamental principle that racial discrimination in public education is unconstitutional" but then quickly vacillated.[11] The Court recognized the "different local conditions," the "variety of local problems," and "the complexities arising from the transition."[12] It accepted at face value the false claims of attorneys representing various states that "substantial steps to eliminate racial discrimination" had been taken as to some public schools, and that "substantial progress" in

7 Even the weather reflected the purity of *Brown I*, the sun shining bright and clear over the Supreme Court, while in *Brown II*, rainy clouds covered the Nation's capital. *Compare* "Weather History for KDCA – May, 1954," WWW.WUNDERGROUND.COM, https://www.wunderground.com/history/airport/KDCA/1954/5/17/DailyHistory.html?req_city=Washington&req_state=DC&req_statename=District+of+Columbia&reqdb.zip=20001&reqdb.magic=1&reqdb.wmo=99999.

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

9 *Id*. at 494.

10 *Id*. at 493.

11 *Brown II*, 349 U.S. at 298.

12 *Id*.

complying with *Brown I* had been made by some of the defendants.[13] Other defendants were said to be "awaiting" further instructions by the Court in *Brown II*.[14] The Court made it all seem so hopeful with defendants' actions ranging from making substantial progress to awaiting further instructions.[15] It recognized "varied local school problems," the need for local school authorities "to engage in elucidating, assessing, and solving these problems," and the need for the trial courts to engage in "judicial appraisal" of "good faith implementation of the governing constitutional principles"— the same trial courts that, with one exception had found no initial constitutional violations requiring desegregation. [16]

From *Brown I*'s condemning the impositions of racial inferiority as to "perhaps the most important function of state and local governments,"[17] *Brown II* morphed into concerns for "elucidating" local problems and "appraising" good faith compliance.[18] It is not clear whether this evolution is the color of rose tinted glasses or the camouflage design of intentional delusion. As history would show, the Court's cautious optimism in *Brown II* was almost wholly unjustified, but at the time it seemed to shape the Court's soft approach. The Court said the trial courts would "be guided by equitable principles," which were "characterized by a practical flexibility," with the nuance of "adjusting and reconciling public and private needs."[19] The Court recognized that eliminating "a variety of obstacles," "as soon as practicable on a nondiscriminatory basis," was the goal, but that the courts could "properly take into account the public interest," that such actions be in "a systematic and effective manner."[20] Of course, it said, simple disagreement with the Court's order was not enough, and "a prompt and reasonable start toward full compliance" was required.[21] Still, additional

13 *Id*. at 299.

14 *Id*.

15 *Brown II* considered the "complexities arising from the transition to a system of public education freed of racial discrimination" and claimed that in some communities such as D.C., Kansas, and Delaware, "substantial steps" were taken to eliminate discrimination, while South Carolina and Virginia were said to be "awaiting the decision of this Court concerning relief." *Id*.

16 Of the original defendants—Kansas, Delaware, Virginia, South Carolina, and Washington D.C.—only Delaware and Virginia were found by the district court to have violated the Constitution, but even there only the *Plessy v. Ferguson* constitutional rule of separate but equal, and only the Delaware court ordered desegregation as a remedy. The Virginia district court said, "On the issue of actual inequality our decree will declare its existence in respect to buildings, facilities, curricula and buses." *Davis v. Cty. Sch. Bd. of Prince Edward Cty., Va*., 103 F. Supp. 337, 340 (E.D. Va. 1952). Only the Delaware Supreme Court found that desegregation was the appropriate remedy and even that was very limited, "We think that the injunction of the court below, in effect commanding the defendants to admit the plaintiffs to the Claymont school, was rightly awarded." *Gebhart v. Belton*, 33 Del. Ch. 144, 167, 91 A.2d 137, 149 (1952).

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

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

19 *Id*. at 300.

20 *Id*.

21 *Id*.

time might be necessary to achieve good faith compliance "at the earliest practicable date."[22] The Court listed the factors that might raise problems with compliance: "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas," and "revision of local laws and regulations."[23] Then, in the less than ringing condemnation that defined the first opinion, the Court said non-discriminatory remedies were to be taken "with all deliberate speed."[24]

Today, over 60 years later,[25] racially segregated public schools are still the norm, especially in our urban centers.[26] More white students will attend school with black students than in 1954, but in many areas of the country, black students will attend schools that are 90% or higher minority and increasing every year.[27] The distressing thing, in terms of integrated schools in both the South and elsewhere, is that the high point for racial desegregation was in 1988 with schools becoming dramatically more and more segregated since.[28]

The principal change since 1954 is that there is likely now no constitutional judicial remedy for school segregation, except for the few school districts still under supervision for de jure segregation.[29]

22 *Id*.

23 *Id*. at 300-301.

24 *Brown II*, 349 U.S. at 301.

25 I hope that bemoaning the failure of *Brown* at other than a decade's interval is not considered inappropriate.

26 GARY ORFIELD ET. AL., CIVIL RIGHTS PROJECT, BROWN at 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 19 (rev. ed. May 15, 2014), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-anddiversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brownat60-051814.pdf (According to the UCLA Civil Rights Project, in large urban centers such as Chicago and New York, there are few White students.).

27 *See id*., at 10. (Southern desegregation went from 0% in 1954 to a high of 43.5% in 1988 to 23.11 in 2011.); Jeff Larson, Mikole Hannah-Jones, and Mike Tigas, *Segregation Now: The Desegregation of U.S. Schools, School Segregation After Brown*, PROJECTS.PROPUBLICA.ORG (May 1, 2014), *available at* http://projects.propublica.org/segregation-now/ (In 2014, ProPublica reported the number of Blacks in schools with 90% minority enrollment went from 2.3 million students in 1993 to 2.9 million in 2011.) (Regarding Central High School in Tuscaloosa, Alabama, the article concluded: "In Tuscaloosa today, nearly one in three Black students attends a school that looks as if *Brown v. Board of Education* never happened.") (Generally, the article claimed, "Black children across the South now attend majority-Black schools at levels not seen in four decades.") (More specifically, in 1972, one fourth of Black students attended 90% minority schools, while in 2011 over half did.); NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, U.S. DEPARTMENT OF EDUCATION 1 (2015), *available at* https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf ("On average, White students attended schools that were 9 percent Black while Black students attended schools that were 48 percent Black . . . .").

28 GARY ORFIELD ET. AL., *supra* note 4, at 18 (In most regions of the country, the low point for extreme segregation was 1988.).

29 It is hard to know how many ongoing desegregation cases there are. Jeff Larson, Mikole Hannah-Jones, and Mike Tigas, *supra* note 28, lists as of June 1, 2010, some 340 schools and school districts with open segregation cases, including for Washington, DC. The article indicates that it

Historically, Southern segregation, along with much Northern and Western segregation, was de jure, the product of intentional governmental acts. Modernly, it is generally accepted that most, if not all, segregation in public schools is de facto in nature, the result of private decisions not the product of intentional state acts. Only de jure segregation violates Fourteenth Amendment rights and is subject to federal constitutional remedies.[30] De facto segregation, however regrettable, is not a constitutional violation and federal courts have no authority to remedy it. For those local governments with the political will to deal with de facto segregated schools, the Supreme Court imposed insurmountable barriers, applying strict scrutiny to any explicit use of race in working out remedies for de facto segregation.[31] Of the school districts previously found guilty of de jure segregation, most have made good faith efforts to remedy the constitutional violation and are in the process of being freed from federal court supervision. It is only a short matter of time before no school district, however egregiously segregated based upon race, has any duty to remedy racially segregated schools.

II. THE FAILURE OF *BROWN II*'S GRADUALISM

In *Brown I*, the Court concluded that "separate but equal" public schools violated the equal protection rights[32] and it reserved the question of remedy for the next term in *Brown II*. It framed the remedial issue as being (a) whether African American children should "forthwith be admitted to schools of their choice" within the normal school district, or (b) whether "an effective gradual adjustment" was the better approach. If a gradual adjustment was the better remedy, the Court asked for argument as to whether the courts of first instance or some other source such a special master would be best position to work out "the specific terms of more detailed decrees."[33]

In *Brown II*, the Court opted for a gradual adjustment with local

was corrected as of June 1, 2016. The U.S. Department of Justice's webpage, March 1, 2018 lists around 50 race-based ongoing segregation cases, a number identified as long-standing. https://www.justice.gov/crt/case-summaries. A press release of the Justice Department from Feb 6, 2013 read, "The racial desegregation of schools is a top priority of the Civil Rights Division. The United States is involved in nearly 200 racial desegregation cases in school districts around the country." A press release from the Justice Department, dated March 13, 2017, concludes with the following statement "Promoting school desegregation and enforcing Title IV of the Civil Rights Act of 1964 is a top priority of the Justice Department's Civil Rights Division." The number of pending cases was noticeably missing.

30 *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Once the racial imbalance due to the de jure violation has been remedied, the school district is under no obligation to remedy an imbalance that is caused by demographic factors.").

31 Parents Involved in *Cmty. Schs. v. Seattle Sch. Dist. No. 1 et al.*, 551 U.S. 701 (2007).

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

33 *Id.* at 496, n. 13.

school authorities having the primary responsibility to work out the various problems, but with federal district trial courts determining whether the local school board solutions constituted "good faith implementation of the governing constitutional principles."[34] As for how gradual, the Court was generous in its accommodation of local conditions. It required only that local school boards acting in good faith "make a prompt and reasonable start toward full compliance," "at the earliest practicable date," and "with all deliberate speed."[35] It allowed for the elimination of local obstacles to desegregation "in a systematic and effective manner," but cautioned that disagreement with *Brown I*'s core holdings would not justify any delay.[36] Of course, disagreement with *Brown I*'s core holdings is exactly what led to delay.

The decision to go with the "all deliberate speed" approach was to prove a fateful decision, inviting delay after delay and undermining the force of the seminal decision of *Brown I* itself. Given our racial history, it is hard to believe that the Court underestimated the degree to which the implementation of *Brown I* would be resisted, but it appears the Court did so. In *Brown II*, the Court expressed the belief that substantial steps were taken across the country to eliminate segregated schools and that three of the defendant school districts—Washington DC, Delaware, and Kansas—had made "substantial progress."[37] As for the other two defendant school districts—South Carolina and Virginia—nothing had been done because, as the Court kindly characterized it, those school districts were "awaiting the decision of this Court concerning relief."[38] Of course, neither of these things was true.

Less than two months later, the Court might have had its first clue as to how difficult it would be to implement the enigmatic imprecision of *Brown II*'s gradual adjustment remedy. The three–judge federal panel in the case out of South Carolina quickly jumped to the task of working out the *Brown II* remedies. Its gradual adjustment remedy was simple enough: freedom of choice.[39] It concluded: "If the schools which [South Carolina] maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches."[40] It noted that the federal government had not taken over local schools, something much feared, that forced mixing of races was not required, and that under freedom of choice no one was deprived of the right to choose

34 *Brown II* at 299.
35 *Id*. at 300-301.
36 *Id*. at 300.
37 *Id*. at 299.
38 *Id*.
39 *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).
40 *Id*. at 777.

their own school.[41] Once the state got out of the business of discriminating based upon race, private individuals could make whatever decision they wanted to. Perhaps, it should come as no surprise that the same lower federal court that had found that the segregated public schools of South Carolina did not violate any constitutional rights should also take a laissez faire view of the remedies under *Brown II*.

There is perhaps more than just a surface appeal to freedom of choice. That it was the first go to remedy in the racist south makes it automatically questionable. Its main appeal is that it takes the government out of the role of instituting and supervising specific desegregation rules; its main weakness is that it does not address any of the evils resulting from decades of mandated segregation. Those evils included such obvious things as housing segregation and the lack of equality in the formerly black schools. No white student was going to voluntarily go a substandard formerly black school, and only the bravest or most hopeful of black students were going to leave the sanctity of their black school for the hostile environs of the still overwhelmingly white schools.[42]

> The three–judge panel in Kansas, the case that gave *Brown* its name, took a neighborhood school approach.[43] It accepted the Topeka Board of Education's proposed remedy whereby "except in exceptional circumstances, school children irrespective of race or color shall be required to attend the school in the district in which they reside and that color or race is no element of exceptional circumstances warranting a deviation from this basic principle."[44] The federal court was aware that this remedy was not in full compliance with *Brown II*, but felt that it was consistent with the gradualism that *Brown II* allowed.[45] The court specifically cast disfavor on a provision that allowed parents of kids beginning kindergarten to choose a school in their district or in any other district, but it allowed the proposed plan to go forward as a temporary good faith solution while a more permanent plan in more complete compliance was being developed.[46] The court also accepted that one of the district's schools could continue to be all black since there were no white children in that

41 *Id*.

42 *Green v. Board of Education of New Kent County*, 391 U.S. 430 (1968). *See n*ote 84 (Freedom of choice's main advantage as a remedy is that it took the courts out of attempting to micromanage the various aspects of desegregation and left it to the personal choice of parents and their children. Though hopelessly inadequate as an initial remedy, it is possible that freedom of choice over a period of more than 60 years might have worked just as well in achieving desegregated schools as the thousands of federal court decisions attempting to do that, some continuing to this day).

43 *Brown v. Bd. of Educ. of Topeka, Kan.*, 139 F. Supp. 468 (D. Kan. 1955) (finding that Kansas's proposed desegregation plan was a good faith effort to fulfill *Brown II*).

44 *Id*. at 469.

45 *Id*. at 470.

46 *Id*. at 469-70.

> district.[47] It said that desegregation did not mean, "intermingling of the races in all school districts" and that there was no constitutional violation in compelling kids "to attend the school in the district in which they live."[48]

Like freedom of choice, a neighborhood school solution has some appeal, and may even have the Supreme Court's imprimatur. Neighborhood schools were meant to represent the ideal American school system, drawing the community together in proverbial redbrick centers of education, security, and family. But as a remedy, freedom of choice does not address the fact that segregated schools often contributed to segregated housing, that the other side of the railroad tracks continued to lead to segregated neighborhoods, and thus segregated schools. The remedy also did not address the problem that districts can easily be redrawn to contribute to racial isolation.[49] To some degree, the Supreme Court's current approach is very much in tune with a neighborhood approach. Its decisions discouraged inter-district remedies, no matter how impossible a remedy was otherwise.[50]

The Virginia federal three–judge panel decided on procedural grounds that it no longer had authority to hear the remedy portion of the case. [51] At the time, three–judge panels were only required when there were constitutional challenges, and *Brown I*, the appellate court reasoned, had resolved the constitutional challenge.[52] After *Brown I* and II, only the remedy was at issue. Two of the judges removed themselves and left the case in the hands of the district court judge who first heard the case

47 *Id*. at 470.

48 *Id*. *See Millikan v. Bradley*, 418 U.S. 717 (1974) (holding it is inappropriate to institute a multi-district remedy for segregation in a single district when there has been no finding that the other districts were drawn for segregative purposes) (And in winding down decade long remedies for desegregation, the Court has called for respect for "local control," which sounds a hopeful sigh for the simple days of neighborhoods schools). *See Freeman v. Pitts*, 503 U.S. 467, 506 (1992).

49 *Wright v. Council of Emporia*, 407 U.S. 451 (1972) (The Supreme Court refused to allow a White section of the district to leave when the district was already under an order to desegregate. In that instance, the school district had a positive duty to desegregate, and the change in the district would be contrary to that duty. In cases not involving an existing order to desegregate, there is no reason why school district lines could not be redrawn for neutral reasons even if the redrawing contributed to de facto segregation). *See id*. at 470 (The Court in Emporia emphasized that once even a school district under a federal court desegregation order had achieved unitary status, the district lines could be redrawn as long as not for purposes of racial animus). Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (November, 2016) ("School districts in the South no longer face the exacting desegregation scrutiny they once did, either because they were released from federal court desegregation orders or because enforcement of ongoing desegregation orders is deferential to defendant school districts. Consequently, school districts in the South are able to use state and local government laws to restructure their school districts in ways that threaten to further exacerbate the resegregation of schools in the South").

50 *See* note 48.

51 *Nat'l Ass'n for Advancement of Colored People v. Patty*, 159 F. Supp. 503, 521 (E.D. Va. 1958) (holding the court should withhold action pending the Supreme Court of Appeals of Virginia's construction of the state statutes).

52 *Id*. at 528.

involving the Prince Edward County, Virginia school district. This procedural detour was a fairly obvious ploy to avoid implementing the *Brown II* decision. And the remedies came to a screeching halt. In 1956, Virginia, pursuant to a state policy accurately called "massive resistance," eliminated all funding for integrated schools but provided tuition funding for all students to attend private schools.[53] There were virtually no private schools for blacks. In 1959, Prince Edward County went one step further and provided no funding for any public schools.[54] In Prince Edward County, white children went to private academies, but for the most part there were no schools in the county for blacks.[55] Public education for black children effectively ended in that county for five years from 1959 to 1964.[56] Some black students were educated elsewhere, but most were denied any education at all.[57] Finally, in 1964, the U.S. Supreme Court ordered state and county supervisors to reopen the public schools in Prince Edwards County.[58]

The remedial efforts in Delaware were not much better. Delaware, though geographically a border state, had segregated schools mandated by law.[59] The Delaware state court was the only lower court of the four *Brown* cases to order its public schools integrated, albeit for violations of *Plessy v. Ferguson*'s "separate but equal" requirement.[60] The facts introduced during the state court trial phase indicated that the black

53 Carl Tobias, *Public School Desegregation in Virginia During the Post*-Brown *Decade*, 37 Wm. & Mary L. Rev. 1261, 1270 (1996).

54 *See Civil Rights Movement in Virginia: The Closing of Prince Edward County's Schools*, VIRGINIA MUSEUM OF HISTORY AND CULTURE, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/closing-prince (last visited August 14, 2017) (Prince Edward County closed its entire public school system on May 1, 1959 rather than following the order to integrate the schools).

55 *See id*.

56 *Id*. ("In 1963-64, the Prince Edward Free School picked up some of the slack. But some pupils missed part of all of their education for five years.").

57 *Id*.

58 *Griffin v. County School Board*, 377 U.S. 218, 222-23 (1964). (A brief account of the sordid story of this delay, maybe the worst in the country, is given by the Supreme Court in this opinion).

59 "Delaware, along with five other states and the District of Columbia, is a Border State—a slave state that remained within the Union during the Civil War. It was also one of 17 states where segregation was law prior to *Brown v. Board of Education* (1954)." https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/courts-the-legislature-and-delawares-resegregation/niemeyer-delaware-segregation-2015.pdf.

60 *Gebhart v. Belton*, 33 Del.Ch. 144, 165 (1952) (Holding that "the constitutional guarantee of equal protection of the laws does not prevent the establishment by the state of separate schools for Whites and Negroes, provided that the facilities afforded by the state to the one class are substantially equal to those afforded to the other (often referred to as the 'separate-but-equal' doctrine)."(citing *Davis v. County School Board of Prince Edward County*, Virginia, 103 F.Supp. 337(E.D. Va. 1952) (Upholding the validity of the constitutional and statutory enactments of the state, which required the segregation, but found that everything furnished to the Black children was inferior to those furnished the White children and ordered the defendants to remedy the defects but not to integrate the schools as a remedy).

schools did not come close to the equality requirements of *Plessy*.[61] Between *Brown I* and *Brown II*, the state school board "formulated a policy looking toward the gradual desegregation of the public schools," but there was no actual substantial compliance.[62] In 1960, in the face of the demands of the federal district court, the state school board proposed compliance over a twelve-year period. The district court rejected this long transition and in 1960 ordered that full integration occur in 1961.[63] Nonetheless, in 1974, the district court found the public schools of Wilmington, Delaware to be largely segregated. [64] Despite trying to give the appearance of steps in compliance, elementary school racial segregation in Wilmington were little changed between 1956 and 1973, and only in some schools a few percentage points less at most.

Only Washington D.C. attempted anything near full compliance with *Brown II* and even this turned out to be a pyrrhic victory. Its initial success was called "a miracle of social adjustment."[65] The school districts were divided into two fairly broad geographic areas, and all students, without regard to race, went to schools in their geographic area. This led to more integration than strictly a neighborhood school policy, but because of housing segregation did not lead to fully integrated schools.[66] Also, in each district, students were divided into one of four curriculum tracks—from remedial to college prep—and given the underachievement of the students coming from the under funded black schools, the tracks themselves worked a racial segregation within each school. Finally, desegregation seemed to hasten white flight to white suburban schools to nearby Maryland and Virginia. In 1954, Washington D.C. schools were already 60% black, but, with desegregation, by 1967, 90% of the students in Washington D.C. schools were black.[67]

Whether the gradualism of *Brown II* was the correct or incorrect approach, in practical terms it may have been the only realistic approach. The new Chief Justice Earl Warren may have used the power of the consummate politician he had as the governor of California to convince

61 Gebhart, 33 Del.Ch. 165. ("These inequalities are not incidental or unimportant differences, and it is our clear duty to say that they constitute unlawful discrimination on account of race or color").

62 *Evans v. Buchanan*, 379 F. Supp. 1218, 1220 (D. Del. 1974).

63 *See Evans v. Ennis*, 281 F.2d 385 (3d Cir. 1960).

64 *Evans v. Buchanan*, 379 F. Supp. 1218, 1221 (D. Del. 1974).

65 *See* Carl Hansen, *Miracle of Social Adjustment—Desegregation in the Washington, D.C. Schools*, Freedom Pamphlet Series.

66 This is a common problem. *See generally* John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 682 (2001) ("Housing and school segregation are inextricably linked; the largest central city schools serve an increasingly non-White and poor population, reflecting the housing segregation in these cities.").

67 "The city of Washington, which is the District of Columbia, presently has a population over 60% Negro and a public school population over 90% Negro*." Hobson v. Hansen*, 269 F. Supp. 401, 406 (D. D.C. 1967).

his new brethren that a unanimous opinion striking down the "separate but equal" doctrine of *Plessy* was necessary, but all of his political powers may not have convinced the Court to go along with the requirement of greater urgency in achieving immediate desegregation.[68] Certainly, Chief Justice Warren could not have believed that the Court would have the support of President Eisenhower in implementing any more of an aggressive desegregation order.[69] The Court may even have believed that the force of its opinion on the law might have been enough to move desegregation forward. If the recalcitrant of the trial courts to move meaningful segregation forward was not enough, the stories coming out of the South the following year surely disabused the Court of the accuracy of any such notion. In 1955, fourteen-year-old Emmett Till, an African-American boy visiting from Chicago, was murdered in Mississippi when he was abducted from his bed for having allegedly whistling at a white woman. Two local white men were tried based on eyewitness testimony, but were acquitted by a jury of twelve white men. They later admitted their guilt to a national magazine.[70] This is often referred to as the beginning of the Civil Rights movement, but it was a moment of horror reflecting the times.

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68 Ian Millhiser tells the familiar story in *Brown v. Board of Education Came Very Close To Being A Dark Day In American History* about all the chess pieces that had to fall just right to make *Brown I* a unanimous decision, the most important of which was Chief Justice Vinson's untimely death that led to Warren's appointment. As Millhiser tells the story, Warren turned the *Brown I* decision from a possible four to four tie to unanimity. Ian Millhiser, *Brown v. Board of Education Came Very Close to Being a Dark Day in American History*, THINK PROGRESS (May 15, 2015), https://thinkprogress.org/brown-v-board-of-education-came-very-close-to-being-a-dark-day-in-american-history-dd231ad0f2f2/.

69 In response to a question about *Brown*, President Eisenhower responded that he was in favor of "honest, decent government." DAVID A. NICHOLS, A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION, 67 (2007). Nichols concludes, "This did not seem like a ringing endorsement of the Supreme Court's decision." Id. But to be fair, when Justice Jackson who heard *Brown I* died, President Eisenhower disappointed Southerners and appointed Justice John Harlin II, a New Yorker, to the Supreme Court in time to hear *Brown II*. Justice Harlin's grandfather had written the dissenting opinion in *Plessy v. Ferguson*. *Id* at pages 69-70. Although Eisenhower was pleased with the Court's gradualism of *Brown II* as opposed to an immediate remedy, he did bemoan the enforcement duties it imposed on the executive branch. *Id* at page 74.

70 Subsequent to the acquittal, the two White suspects sold their confession of the murder for $4,000 to Look Magazine. Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2102 (2005). *See also* Sheila Weller, *The Missing Woman, How Author Timothy Tyson found the Woman at the Center of the Emmett Till Case*, VANITY FAIR (Jan. 26, 2017) (referencing Timothy Tyson, *The Blood of Emmett Till*, SIMON AND SCHUSTER (2017)).

The "watered-down Civil Rights Act of 1957" contained a jury trial amendment in order to appease Southerners. Alongside the horrific stories like Emmett Till, Southern juries never convicted any official for refusing Black citizens the right to vote. Brody Shields, *The Civil Rights Presidents: FDR to Nixon*, 13 (2015) available at http://digitalcommons.mtech.edu/cgi/viewcontent.cgi?article=1001&context=urp_aug_2015.

Green v. County School Bd., 391 U.S. 430, 437–38, (1968). This has no footnote number referring to any above the line text

III. GREEN IS THE NEW BROWN

The Supreme Court abandoned its gradualism approach in 1968 in *Green v. Board of Education of New Kent County*.[71] The district had only two schools, both combined elementary and high schools, one all white and one all black. In 1965, after years of delay and obstruction, but under the pressure of new federal laws and court suits,[72] the county adopted a freedom of choice plan leading to no white kids opting to attend the formerly black school and only 115 of 750 black kids choosing to attend the formerly all-white school. Under the freedom of choice plan, 85% of all black kids went to the exclusively black school.[73] The Supreme Court rejected the partial remedy of the freedom of choice plan. It declared, "The time for mere 'deliberate speed' has run out."[74] It ordered the New Kent County, Virginia school board "to come forward with a plan that promises realistically to work, and promises realistically to work now."[75] It called for the elimination of the evils of segregated schools "root and branch."[76]

In ordering desegregation now, the Court's abandonment of gradualism for immediacy could not have had more favorable facts. New Kent County, with a population of 4,500, was evenly divided between blacks and whites. It had only two schools, one for whites and one for blacks, which despite no significant residential segregation with substantial busing remained completely segregated until 1965.[77] The remedy was simple: both of its two schools would admit those students who resided within their geographic district.[78] Since there was no

71 *Green's* significance was noted in an exchange between Chief Justice Earl Warren, who had written the majority opinion in *Brown*, and William Brennan, author of the *Green* decision. In a note to Brennan, Warren wrote, "When this opinion is handed down, the traffic light will have changed from *Brown* to *Green*." *See, e.g.*, MARK TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991, 69, OXFORD UNIVERSITY PRESS (1967).

72 "[R]espondent School Board, in order to remain eligible for federal financial aid, adopted a 'freedom-of-choice' plan for desegregating the schools," summarized the Court. *Id*. at 433.

73 "In short, approximately eighty-five percent of the Black students were still attending what was the old Black school at the time of the Supreme Court's ruling," found Judge Robert R. Merhige, Jr in a moving personal reflection on those turbulent times. Robert R. Merhige, *Reflections on* Brown v. Board of Education *and the Civil Rights Movement in Virginia: The Promise of Equality: Reflections on the Post*-Brown *Era in Virginia*, 39 U. RICH. L. REV. 11, 15 (2004).

74 *Griffin v. Sch Board.*, 377 U.S. 218, 234 (1964).

75 *Id*. at 439.

76 *Id*. at 438.

77 "Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." *Id*. at 435.

78 "There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side." *Id*. at 432.

residential segregation, an immediate plan just that simple would lead to both schools being desegregated and would eliminate the busing that had been necessary to maintain a segregated system. The ease of an immediate remedy in *Green* masked the complexity to come in attempting immediate remedies in far more difficult factual settings such as in Boston, Detroit, and Los Angeles.[79]

The immediacy of *Green*'s order was almost certainly a product of the Court's frustration at the lack of enforcement of desegregation, but it may also have been a calculation based upon the change in the political landscape. Eisenhower's ambivalence towards civil rights had been replaced by Johnson's aggressiveness, marked by the seminal Civil Rights Act of 1964 and the Voting Rights Act of 1965, both allowing for the immense power to the federal government to enforce basic civil rights.[80] *Green*'s immediacy may have been as much a product of the new aggressiveness of the political branches to enforce civil rights, as *Brown II* was a product the lack of such a commitment by the political branches. Whether the Court was intentionally considering the political realities or not, *Brown II* and *Green* did parallel the political realities of the time.

Brown II's gradualism approach to remedy unconstitutional segregation was a failure,[81] but there is little reason to believe that *Green*'s demand of immediate remedies worked any better. The result of *Brown II* was almost no increased integration of public schools, but the result of *Green* was some quick immediate relief, followed by white flight or other changes in racial demographics, making any ultimate remedy impossible.[82] It is conceivable that the *Brown II* gradualism approach

79 "Bringing *Green*'s doctrinal revolution to large metropolitan areas, particularly the governmentally fragmented North, vastly increased the factual, legal, and political complexity of the Court's work. Large metropolitan areas had growing racial ghettos, surrounded by a growing halo of unstably racially integrated areas, which were themselves in turn surrounded by a growing ring of exclusively White residential neighborhoods." Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 376(2015).

80 "[T]he Act forbade the use of federal funds for any discriminatory program, authorized the Office of Education (now the Department of Education) to assist with school desegregation, gave extra clout to the Commission on Civil Rights and prohibited the unequal application of voting requirements." For famed civil rights leader Martin Luther King Jr., it "was nothing less than a 'second emancipation.'" *Civil Rights Act of 1964*, HISTORY.COM, https://www.history.com/topics/Black-history/civil-rights-act/print.

81 Although admiring the activism unleashed by *Brown I* and *II*, Professor Tushnet is one of many that has concluded, "Yet, paradoxically, from the point of view of those seeking substantial integration of the public schools, *Brown* was a failure. The Supreme Court endorsed a formula of gradual desegregation that provided the opportunity for massive resistance in the Deep South and for token desegregation elsewhere." *See* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1867–68 (1991).

82 In DeKalb County, Georgia, the subject of a desegregation order discussed in *Freeman v Pitts*, the Supreme Court seemed to acknowledge this: "The school system that the District Court ordered desegregated in 1969 had 5.6% Black students; by 1986 the percentage of Black students was 47%." *Freeman*. 503 U.S. at 475. Close to 2/3's of this demographic change was the result of more Blacks moving in from neighboring Atlanta and a little more than 1/3 to Whites leaving. *Id.*

may have eventually led to integrated schools, but that would be impossible to know. The district court's rejected freedom of choice gradualism plan in *Green* resulted in some blacks transferred to white schools and no Whites transferred to Black schools.[83] This is very close to what exists today with some blacks attending mostly white schools and, in many instances, virtually no whites attending predominately Black schools.[84]

It is tempting to think that the Court should have just ordered immediate desegregation in *Brown I* and skipped the *Brown II* remedy phase altogether, a "rip the band aid off" kind of approach. Such an approach could hardly have been worse than over a decade of delay and dithering. But the result might very well have been the collapse of public schools as occurred in Virginia. Likely, neither a *Brown II* gradualism approach nor a *Green* immediacy approach had much of a chance for success given the other decisions made by the Court.

IV. THE DE JURE/DE FACTO DICHOTOMY

The Court made any remedy for segregation more difficult by distinguishing between de jure segregation, segregation intentionally caused by the government, and de facto segregation, segregation caused by a variety of private decisions.[85] As the battle for desegregation remedies moved from the South to the North and the West, the distinction between de jure and de facto segregation led to diverting of judicial attention from working out meaningful remedies for school segregation to full blown trials on the cause of the segregated schools.[86] For example, in a lawsuit challenging the cause of the segregated schools in Denver, not counting preliminary injunction issues, the trail lasted fourteen days and "produced over 2,000 pages of testimony and several hundred exhibits."[87] In Detroit, determining the cause of segregation took over eight weeks of trial time.[88]

Requiring plaintiffs to prove de jure segregation was likely

83 "In three years of operation not a single White child has chosen to attend [the formerly Black school] and . . . 85% of the Negro children in the system still attend the [formerly all Black school]. In other words, the school system remains a dual system." *Green*, 391 U.S. at 441.

85 See Justice Powell's opinion in *Keyes*, "The Court has chosen, rather, to adhere to the de facto/de jure distinction under circumstances, and upon a rationale, which can only lead to increased and inconclusive litigation, and—especially regrettable—to deferment of a nationally consistent judicial position on this subject." *Keyes v. School District No. 1*, 413 U.S. 189, 252 (1973) (Powell, J. concurring and dissenting).

86 *See, e.g.*, *Keyes v. School Dist.*, 313 F. Supp. 61, 63 (D. Colo. 1970).

87 *Id*. at 63.

88 "The trial of the issue of segregation in the Detroit school system began on April 6, 1971, and continued through July 22, 1971, consuming some 41 trial days." *Milliken*, 418 U.S. at 724.

unavoidable, but it did divert judicial resources from the remedies for segregated schools.[89] The distinction between de jure and de facto segregation is now, if not always, well settled, and however dubious it seems to be, it is pointless to question it.[90] In other settings, the Court has also held that neutral laws with racially discriminatory impact are constitutional unless the discrimination was the result of proven intentional state acts.[91] Though not a necessary one, and likely not a helpful one, the distinction makes sense at least on one level: It was the states' misconduct in *Brown I* that led to the constitutional decision. It is unlikely that the Court in *Brown I* would have found any constitutional violation if schools in the South, as in many North and West areas, were segregated as the result of voluntary choices of its residents.[92]

89 In one of starker illustrations of the difference between de jure and de facto segregation, after what was described as a "long trial," the lower court concluded that the almost total segregation of the largely Black and Hispanic Andrew Jackson High School located in Queens about one mile from Nassau County was not a product of deliberate actions. In 1957, 82% of the students had been White. At the time of the action in 1976, only one White student (described as "other") attended the 2,532-person school. In nearby high schools in Nassau County, over 92% were White. In Queens as a whole, 55% were White. In non-public schools, there were no precise numbers for racial breakdowns, but a Catholic diocese report indicated that 89% were White. The court found, "Demographic change has been the dominant factor in the history of Jackson." And concluded, "There is no evidence that the Board has sought to segregate minorities in identifiably minority schools or has taken any action for the purpose of segregating minority students." Supporting the courts conclusion were birth statistics strongly indicating that the segregation was the product of de facto decisions. *Parent Ass'n of Andrew Jackson Sch. v. Ambach*, 451 F. Supp. 1056, 1057, 1077 (E.D. N.Y. 1978) aff'd in part, rev'd in part sub nom. *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705 (2d Cir. 1979).

90 The California Supreme Court in *Crawford v. Board of Education*, 17 Cal. 3d 280 (1976), convincingly argued that the distinction between de jure and de facto segregation was not required by state action concepts and in any given case it was almost impossible to determine whether at some level all segregation was the product of state acts. And when all was said and done, the harm to children was the same: "Although the educational experts may disagree on many aspects of the desegregation controversy, there is virtually no dispute that the practical effect of segregated schooling on minority children does not depend upon whether a court finds the segregation de jure or de facto in nature; the isolating and debilitating effects do not vary with the source of the segregation" *Id*. at 301. In an article criticizing the *Dowell* and *Freeman* cases discussed at Note 161 , the title captures the results of the de jure de facto distinction in a way that one cannot miss the resignation of Robert L. Hayman, & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 652-653 (1993) ("It is, perhaps, too late in the day to challenge the doctrinal manifestation of the public/private dichotomy.").

91 *See Washington v. Davis*, 426 U.S. 229 (1976); *see also Freeman*, 503 U.S. at 495 (1992) (finding that when segregation is a product of private decisions and not state action, there are no constitutional consequences). These cases illustrate the consistency in Supreme Court decisions "that maintain when facially neutral laws have discriminatory impact, proof of discriminatory purpose is necessary to show an equal protection violation." George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 625, 667 (2015).

92 Justice Powell, concurring and dissenting in *Keyes*, called for eliminating the de jure de facto distinction. He argued that both northern and southern schools are equally segregated with similar harm to minority students, and the same remedies should apply to both whatever the cause of the segregation. He believed that that if the same remedies for segregated schools applied in other parts of the country as in the South that political pressures would require that remedies be more moderate.

The 14th Amendment's state action concept supports this distinction, which provides that no state may deny due process or equal protection rights.[93] Private decisions to live in a racially segregated community are hard to view as state actions. Had the Court wanted to include de facto segregation, it could have found sufficient state action in just running the schools.[94] The Court found state action in a similar fashion with regard to racial discrimination by private lawyers in exercising peremptory challenges in selecting jurors.[95] But there was little incentive for the Court early on to take such an expansive view of state action as to de facto segregation.

The distinction between de jure and de facto discrimination was

He also asserted as a practical matter that if the courts were prescient enough that they would find that almost all de facto segregation was the product of some form of de jure actions: "Indeed, if one goes back far enough, it is probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at some time been supported or maintained by government action." *Keyes*, *supra* note 12, at 228Perhaps, he had in mind the 1971 findings of the District Court in *Milliken v. Bradley* that 'Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.' *Milliken*, 418 U.S.at 724. Many have made the point that Justice Powell's motive for eliminating the de jure de facto distinction was his protest against the more extreme remedies for segregation, such as busing. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS, 940-41, New York: Aspen Publishers, 5th ed., 2006. (assessing the discussion in *Keyes* between Justice Powell and Brennan regarding the de jure/de facto distinction); *see also* Michelle Adams, *Integration Reclaimed: A Review of Gary Peller's Critical Race Consciousness*, 46 CONN. L. REV. 725, 762 (2013).

93 U.S. Const. amend. XIV, § 1.

94 Justice Douglas argued in dissent in *Keyes v. Denver* that the state action concept would not necessarily compel a distinction between de jure and de facto segregation: "I agree with my Brother POWELL that there is, for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between de facto and de jure segregation. The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budgets it prepares are state action for Fourteenth Amendment purposes." [214—215] This first quotation is unidentifiable. It points to no source and does not come from the *Milliken* case as with the second quote. I also checked the *Brown* cases but did not find it in them either.[214—215] Justice Douglas expands this view in dissent in *Milliken v. Bradley*, "Each school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students. The creation of the school districts in Metropolitan Detroit either maintained existing segregation or caused additional segregation. Restrictive covenants maintained by state action or inaction build Black ghettos. It is state action when public funds are dispensed by housing agencies to build racial ghettos. Where a community is racially mixed and school authorities segregate schools, or assign Black teachers to Black schools or close schools in fringe areas and build new schools in Black areas and in more distant White areas, the State creates and nurtures a segregated school system, just as surely as did those States involved in *Brown v. Board of Education*, 347 U.S. 483, when they maintained dual school systems." *Milliken*, 418 U.S. at 761.

95 In *Batson v. Kentucky*, the Court found that the state's use of peremptory challenges to exclude jurors based upon race was state action in violation of the equal protection clause. 476 U.S. 79, 137 (1986). This holding was extended to gender discrimination in *JEB v. Alabama*. 511 U.S. 127 (1994). The Court found that the racial or gender discrimination by private attorneys in a civil suit involving only private parties also violated equal protection rights based upon the fact that the state ran the court systems and was responsible for its misuse. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

made most explicitly in 1971 in *Swann v. Charlotte-Mecklenburg*.[96] The Court summarized *Brown I*'s holding: "Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws."[97] *Swann* was actually saying something more, that only state imposed segregation violated the constitution; de facto segregation did not.[98] The Court emphasized the point, saying that "desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance,"[99] an obvious reference to de facto segregation.

De jure segregation as a constitutional violation was not a new concept.[100] *Brown I*, of course, involved "state-imposed segregation," as did *Swann*.[101] But the emphasis that de facto segregation was not subject to constitutional remedies was new.[102] In *Brown I*, the Court had not been so precise, ambiguously stating: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[103] The Court then concluded equal protection rights were violated "by reason of the segregation complained of." [104]

Swan's emphasis on de jure segregation as the constitutional violation, as opposed to de facto segregation, changed the dynamics of achieving any remedy. *Brown* involved de jure segregation, but nothing about *Brown I* or *Brown II* specifically limited the concern for segregated schools to de jure segregation and not de facto segregation. *Swann* claimed otherwise:

96 *See Swann v. Charlotte-Mecklenburg Bd. of Ed*., 402 U.S. 1 (1971) (holding the district courts possessed broad remedial powers to remedy past wrongs with desegregation mandate violations from schools found guilty of state-imposed segregation).

97 *Id*. at 11.

98 *Id*.

99 *Id*. at 17.

100 *Green* summarized *Brown* as involving racially separate schools "under compulsion of state laws." 88 S.Ct. 1693

101 *See Brown I*, 347 U.S. at 494.

102 The issue had been much debated in political forums, and Congress addressed it in a new federal law creating new federal remedies for discrimination in education, but which specifically rejected any federal right of action to remedy de facto segregation. The Court in *Swann* explained, "The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." *Swann*, 402 U.S. at 17-18.

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

104 *Id*. at 12. In *Bolling v. Sharpe*, the Washington D.C. companion case to *Brown I*, there was also no explicit mention of de jure vs de facto segregation. *See generally* 347 U.S. 497 (1957). Nonetheless, Judge Wright in *Hobson v. Hansen* found Washington DC in non-compliance with *Brown II* stating "the Supreme Court held that the equal protection clause's proscription against de jure school segregation— segregation directly intended or mandated by law or otherwise issuing from an official racial classification." 269 F. Supp. 401, 492 (D.D.C 1967). The city of Washington, which is the District of Columbia, presently has a population over 60% Negro and a public-school population over 90% Negro. *Hobson v. Hansen*, 269 F. Supp. 401, 406 (D.D.C. 1967).

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' [105]

Swann took an expansive view of the nature of the remedies, requiring that all vestiges of state-imposed segregation be eliminated,[106] but it took a narrow view of the constitutional violation, limiting it to state imposed or de jure segregation. De facto segregation was ruled out. The Court emphasized that, absent legislation creating new rights, only constitutional violations were subject to federal remedies: "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation."[107]

The constitutional violation in *Keyes v. Denver*, like in *Swann*, was based upon de jure segregation, but a more difficult to prove form of intentional discrimination.[108] In *Swann*, as in all of the southern states, state law required racially segregated schools on the face of the law.[109] In *Keyes*, Colorado and Denver, as with school districts in other northern and western states, seemed to make most of its decisions on racially neutral grounds and only by looking beneath the surface that intentional racial discrimination was found. For example, the selecting of a site for a new elementary school seemed like a typical race neutral decision on the surface, but a look beneath showed the new school would be almost 90% black, a likely intended result.[110] In *Keyes*, the petitioners conceded that

105 Emphasis is that of the Court.

106 The Court did attempt to impose a reasonableness-balancing test on the use of busing as a remedy, perhaps the most controversial of desegregation remedies. *Swann*, 402 U.S. at 31-32.

107 *Swann*, 402 U.S. at 31. "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to White students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Id*. at 16.

108 *Keyes v. School District No. 1*, 413 U.S. 189 (1973) (holding schools act unconstitutionally when the board acts intentionally to segregate in the public-school system and shifted the burden of proving other segregated schools in that system were not because of intentional acts).

109 *See Swann*, 402 U.S. at 17.

110 In *Keyes*, a key fact was the building of a new elementary school in the middle of a minority area to avoid any integration. *See* 413 U.S. at 192-93. As the court held, "When Barrett opened in 1960, its student body was 89.6 percent Negro." *Keyes v. School Dist. No. One, Denver Colo.*, 313 F. Supp. 61, 64 n.2 (D. Colo. 1970) *supplemented* 313 F. Supp. 90 (D. Colo. 1970), and *aff'd in*

they had to prove not only the fact of segregation but also that it was "brought about or maintained by intentional state action."[111] The Court reframed this concession, requiring the petitioners to prove "segregative intent."[112] Segregation was easy to prove in *Keyes*, with most of Denver's schools being racially segregated, the core city schools largely black and Hispanic, and with other parts of the city largely Anglo.[113] Although anything but easy to prove, segregative intent was found.[114] The trial in Keyes lasted fourteen days and involved over 2000 pages of testimony, and hundreds of exhibits.[115] As Justice Powell argued as in Keyes, the first major Supreme Court case outside of the South was an opportunity for the Court to abandon the de jure de facto distinction in favor of a national approach which does not require proof of the cause of the segregation.[116]

The Supreme Court has not spelled out how segregative intent is proven. *Keyes* called segregative intent that segregation created and maintained by the school board.[117] In *Keyes*, the Supreme Court's key findings were that black and Hispanic students should be treated the same for purposes of determining segregative intent, that the proof of segregative intent as to a little more than 1/3 of the district with a substantial minority race population created a presumption of such intent

part, rev'd in part sub nom. Keyes v. Sch. Dist. No. 1, Denver, Colo., 445 F.2d 990 (10th Cir. 1971), *judgment modified and remanded*, 413 U.S. 189 (1973).

111 *Keyes*, 413 U.S. at 198. In the case, the Court said that the petitioners "apparently concede" that in a case where statutes did not mandate segregated schools that "plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Id*.

112 *Id*. at 207.

113 "The segregated character of the core city schools could not be and is not denied. Petitioners' proof showed that at the time of trial 22 of the schools in the core city area were less than 30% in Anglo enrollment and 11 of the schools were less than 10% Anglo.15 Petitioners also introduced substantial evidence demonstrating the existence of a disproportionate racial and ethnic composition of faculty and staff at these schools." *Id*. at 206.

114 *Id*. at 265.

115 *Keyes v. School Dist. No. One, Denver Colo*., 313 F. Supp. at 63.

116 At the very least, he argued, the fact of segregation should have placed the burden on the school board of proving the absence of state action: "Rather than continue to prop up a distinction no longer grounded in principle, and contributing to the consequences indicated above, we should acknowledge that whenever public-school segregation exists to a substantial degree there is prima facie evidence of a constitutional violation by the responsible school board." *Keyes*, 413 U.S. at 235.

117 The trial court in *Keyes* had adopted a four—part test. It held that in order to prove de jure segregation it was essential to prove that "(1) the state or school board took "some action with a purpose to segregate; (2) the action in fact created or substantially aggravated it; (3) segregation currently still existed either because of state remedies or natural circumstances; and (4) most importantly that the de jure acts had to be the cause of the current segregation." 313 F. Supp. at 73, *citing* Hobson v. Hansen, 269 F.Supp. 401, 502 (D.D.C.1967), *aff'd*. *sub nom*., *Smuck v. Hobson*, 372, 408 F.2d 175 (1969). The Court of Appeals in *Keyes* framed it more directly, "And we can perceive no rational explanation why state-imposed segregation of the sort condemned in *Brown* should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers." 445 F.2d 990, 999.

as to the whole school district, and that segregation in students and staff was strong proof of segregative intent.[118] The key distinction between de jure and de facto segregation[119] was the purpose to segregate, which could be proved either by overt acts as in *Brown* or covert acts as in *Keyes*, the latter requiring circumstantial evidence.[120] The intent to segregate did not need to be the only factor, only one of several.[121]

Without much guidance from the Supreme Court as to how to prove segregative intent the lower courts have had to wrestle with the issue. [122]In *Milliken v. Bradley*, the lower court found that optional attendance

118 See *Keyes v. Sch. Dist. No. 1, Denver, Colo*., 413 U.S. 189, 189, 204, 209 (1973).

119 The district court rejected the argument that de facto segregation was enough. It did however find that the lack of equal facilities in schools subject to de facto segregation violated *Plessy v. Ferguson*. "Today, a school board is not constitutionally required to integrate schools which have become segregated because of the effect of racial housing patterns on the neighborhood school system. However, if the school board chooses not to take positive steps to alleviate de facto segregation, it must at a minimum insure that its schools offer an equal educational opportunity." *Keyes v. Denver*, 313 F.Supp. 61, 83., D. Colorado (1970). The *Keyes* district court was much influence by Judge J Skelly Wright's opinion involving the difficulties of working out a remedy for the Washington D.C. public schools, "To invoke a separate-but-equal principle is bound to stir memories of the bygone days of *Plessy v. Ferguson*. To the extent that *Plessy*'s separate-but-equal doctrine was merely a condition the Supreme Court attached to the states' power deliberately to segregate school children by race, its relevance of course does not survive *Brown*. Nevertheless, to the extent the *Plessy* rule . . . is a reminder of the responsibility entrusted to the court's for insuring that disadvantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule the court here recognizes. *Hobson v. Hansen*, 269 F.Supp. 401, 496-497 (1967). The *Plessy* logic of the *Keyes* trial court was rejected by the Court of Appeals. It is nonetheless interesting to note that the odious *Plessy* decision would yield a more meaningful remedy to de facto segregation than *Brown II*. To the horror of my Black classmates, I suggested to the legendary Professor Phillip Kurland in his constitutional law course that in the then 1968 Chicago school system *Plessy* would be a better remedy than *Brown II*. I was met with his customary disdain and never had the temerity to raise my hand again.

120 The Court described this circumstantial approach in *Keyes*, "This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." *Keyes*, 413 U.S. 201.

121 *See Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 265-266 (1977) (The Court, though it found no segregative intent in a zoning decision that had a disproportionate racial impact, said that it was enough that "there is a proof that a discriminatory purpose has been a motivating factor in the decision . . . .")

122 The lower court in *Nat'l Ass'n for Advancement of Colored People v. Lansing Bd. of Ed*., 559 F.2d 1042 (6th Cir. 1977) illustrated the approach to segregative intent. There the court found the almost complete racial segregation of Lansing, Michigan's west side was the result of segregative intent, which it defined as school board polices "the natural, probable and foreseeable result of which was to contain minority students in racially identifiable schools." *Id*. at 1046. Like in *Keyes*, it listed the variety of state acts supporting the finding of segregative intent "from the gerrymandering of attendance zone boundaries, the granting of special transfers from minority to majority schools, the use of mobile units under circumstances which enhance the racial identifiability of schools, the one-way busing of minority students, the discriminatory assignment of minority faculty and administrators, the relative inferiority of facilities at minority schools, the rescission of the cluster-school desegregation plan, and the choice of location of [a new school] coupled with the decision to operate it as a neighborhood school so that it is certain to open as a

zones in the city of Detroit had the "natural, probable, foreseeable and actual effect" of allowing white students "to escape" black schools.[123] Similarly, the trial court found that school board knew that school attendance zones drawn along north-south boundary lines would lead to more segregation than if drawn in an east-west direction.[124] The trail court found that "the natural and actual effect of these acts was the creation and perpetuation of school segregation within Detroit."[125] The trial court did not say that either decision was made for the very purpose of creating or maintaining a segregated system. Of a more obvious nature, the school board also admitted to busing black students around White schools to other Black schools.

Two Supreme Court cases, *Washington v. Davis* and *Village of Arlington Heights*, neither involving racial segregation, are as helpful as any of the racial segregation cases in explaining the Court's approach to neutral acts with disproportionate racial impact.[126] In *Washington v. Davis*, black Washington DC police officers challenged the constitutionality of a qualifying test given to applicants for DC police officers.[127] The test was develop as a verbal test for federal jobs generally, not as related to the skills necessary to be a police officer. Some 57% of black applicants failed the test as compared with a failure rate of 13% for white applicants.[128] Washington made it clear that disproportional impact was not enough to make out a violation of the equal protection component of the due process clause:[129] "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."[130] Proof of racially discriminatory intent or purpose was necessary to prove a violation of the Equal Protection Clause. Referencing the school desegregation cases, the Court said that they proved that "the insidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose" and that the fact of predominately black and white schools did

segregated facility." *Id*. at 1056. It concluded that a neighborhood school policy was adhered to when it advanced segregation and departed from when it prevented meaningful integration. *Id*. The approach of the Court in Village of Arlington Heights as to how to prove per se discrimination would be useful in proving intentional discrimination in the face of neutral laws.

123 *Bradley v. Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971) *aff'd*, 484 F.2d 215 (6th Cir. 1973) *rev'd*, 418 U.S. 717 (1974).

124 *Id*. at 588.

125 *Id*.

126 *See Washington v. Davis*, 426 U.S. 229 (1976); *see also, Village of Arlington Heights*, 429 U.S. 252 (1977).

127 *Washington*, 426 U.S. at 235.

128 *Davis v. Washington*, 512 F. 2d 956, 958 (D.C. Cir. 1975).

129 *Washington*, 426 U.S. at 242; *see also Bolling v. Sharpe*, 347 U.S. 497 (discussing that the equal protection clause by itself only applies to the states, but the 5th Amendment due process clause, which applies to federal laws and acts, includes an equal protection component).

130 *Washington*, 426 U.S. at 242.

not in and of itself violate the equal protection clause.[131] De jure segregation, the Court said, was "a current condition of segregation resulting from intentional state action."[132]

The difference between de jure and de facto segregation was the "purpose or intent to segregate."[133] Wrongful intent did not have to be expressed on the face of the statute but could "be inferred from the totality of relevant facts," including any disproportionate impact.[134] In some instances the disproportionate impact could not be explained on any other grounds other than intentional racial discrimination.[135] Nonetheless, a neutral law on its face with a valid purpose, such as the qualifying test at issue in *Washington v. Davis*, would not be treated as a racial classification simply because of its disproportionate racial impact. Unlike racial classifications, which had to be narrowly tailored to advance some compelling state interest, neutral laws with a disproportionate racial impact had only to rationally relate to some legitimate governmental interest.[136]

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court was more explicit about how circumstantial and direct evidence could be used to prove discriminatory intent.[137] In the case, there was a challenge to the refusal to rezone property to build low-income housing because of the disproportionate racial impact of that refusal. The Court said that it was not necessary to prove that the refusal rested solely on racially discriminatory grounds, but that it was enough that racial discrimination was a dominant or primary purpose.[138] The disproportionate impact of the official action, whether it "bears more heavily on one race than another," could be an important starting point. In all other cases the trial court would look to other evidence, such as the decision's historical background, particularly if there is a pattern of official actions taken for racially discriminatory purposes, the specific sequence of events leading up the challenged decision, departures from the normal procedural sequence, and significant substantive departures.[139] Even direct evidence of legislative or administrative motives were all relevant factors in proving intentional

131 *Id*. at 240.

132 *Id*. (quoting *Keyes v. Denver*, 413 U.S. 189, 205 (1973).

133 *Id*.

134 *Id*. at 241-242.

135 E.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (where Chinese were excluded from operating brick laundries); *see also Akins v. Texas*, 325 U.S. 398, 404 (1945); *see also* Smith v. Texas, 311 U.S. 128 (1940); *see also* Pierre v. Louisiana, 306 U.S. 354 (1939); *see also* Neal v. Delaware, 103 U.S. 370 (1977) (illustrating a number of cases where Blacks were systematically excluded from juries).

136 *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

137 *Village of Arlington Heights*, 429 U.S. at 265-66.

138 *Id*. at 264.

139 *Id*. at 266-267.

racial discrimination.[140]

The distinction between de jure and de facto segregation was perhaps inevitable, but de facto segregation still results considerable harm. The stigma of state mandated segregation would seem to almost certainly impact the sense of well-being of minority students, perhaps even to the degree claimed by the plaintiffs in *Brown I*, where psychological tests indicated heartbreakingly low self-esteem in the black students of segregated schools.[141] But even without that stigma, numerous studies support the proposition that segregated schools, whatever the cause, hurt minority students, and that integrated schools do little if any harm to white students.[142] It is difficult to know why segregated schools hurt minority students. Perhaps, it is just one of the obvious manifestations of racism, that minority neighborhoods have poorer services in virtually every aspect of life, from police protection, to fire safety, to garbage pickup, to public schools.[143] There is no reason why all black schools could not excel, and some do, but the numbers show this is not the norm. The distinction between de jure and de facto segregation made mandatory integration, one of the more obvious solutions for eliminating the under-performance in minority schools, unavailable.[144]

140 The Court acknowledged that direct evidence of legislative motive was "elusive," and "frequently multipurposed," citing *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971). It generally referenced the seminal article on legislative motive by Professor Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP.CT.REV. 95, 116-118.

141 *Brown* 347 U.S., at 494 (quoting *McLaurin v. Oklahoma State Regents*, 339 U.S. 637), ("Segregation of White and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.").

142 *E.g.*, Mary Jane Lee, *How Sheff Revives Brown: Reconsidering Desegregation's Role in Creating Equal Educational Opportunity*, 74 N.Y.U. L. REV. 485, 528 (1999).

143 *See Pinpointing Racial Discrimination by Government Officials*, by Justin Wolfers, N.Y. TIMES (Oct. 6, 2017) (discussing an academic study showing that even inquiries from persons with Black sounding names were less likely to receive a response from local government officials); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (where the Court found Congress had the enumerated power to eliminate a voting restrictions on Puerto Ricans in New York as a means to prevent discrimination in public services, "[m]ore specifically, [the federal law] may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement).

144 Other solutions, including massive infusions of resources to eliminate the inherent inequality of schools in poor, disproportionately minority neighborhoods, must be a higher priority than it now is. Professor McCusic, although not specifically calling for massive infusions of additional resources, identifies the problem of poverty and lack of equality in education: "Children, however, can suffer a lack of educational opportunity in a single race school if it is a single race poor school—not because of race but because of poverty." Molly S. McCusic *The Future of Brown v. Board of*

V. THE DE JURE REQUIREMENT AND ITS IMPACT ON REMEDIES

Milliken v. Bradley[145] extended the sweep of the *Swann* and *Keyes*' holding that segregative intent had to be proven in every case, that only de jure segregation violated the constitution. *Milliken* held, perhaps even more importantly, that the de jure requirement limited the scope of the remedies.[146] In a second *Milliken* case, finding Michigan liable for part of the financial cost of compliance remedies in Detroit, the Court summarized the de jure remedy: "[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . ." [147] Even if the plaintiff proved segregative intent and thus a constitutional violation, remedies were limited to correcting the constitutional violation, not to remedying the racial segregation.[148] In *Milliken I*, the Court found that Detroit had intentionally segregated its school system but concluded that a remedy, which included the mostly white suburban school districts, was invalid because there was no proof that the suburban school districts were drawn for the purpose of creating segregated schools.[149] Any remedy was limited to the Detroit school

Education: Economic Integration of Schools, 117 HARV. L. REV. 1359-1360 (2004).

145 *Milliken v. Bradley*, 418 U.S. 717 (1974) [hereinafter *Milliken I*]. *Pasadena v. Spangler*, 427 U.S. 424 (1976) also limited the remedies to de jure segregation. In *Spangler*, the court had found de jure segregation and ordered desegregation remedies that had some initial success. After a period, the schools became segregated again. The federal court had maintained jurisdiction and ordered additional remedies. The Supreme Court found that the additional remedies were invalid because it had not been proven that the new segregation was the result of de jure segregation as opposed to de facto segregation. In *Missouri v. Jenkins*, 515 U.S. 70 (1995), the district court attempted an end run around *Milliken*. In the Kansas City school districts, de jure segregation did not include the inter-district schools and since 69% of the Kansas City school population was Black, no remedies just involving the Kansas City schools were possible. The district court sought to create in Kansas City schools the equal of or better than "surrounding suburban school districts" in order to entice more White students to voluntarily transfer. The Supreme Court found the remedy in violation of *Milliken*, "[b]ut this *inter* district goal is beyond the scope of the *intra*-district violation identified by the District Court. In effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the inter-district transfer of students." *Jenkins*, at 92. *See* Jared A. Levy, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575, 610 (1998), for a criticism of Justice Thomas' use of the de jure distinction as to the remedies in *Missouri v. Jenkins*: "The real danger of Thomas's approach is that by using his narrow standard of intentional segregation, not only he, but other Court members and government leaders, will close their eyes to the depressing educational experiences of Black children trapped in inner-city schools and will ignore the harms that befall these children."

146 *Milliken I*, 418 U.S. at 757.

147 *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) [hereinafter *Milliken II*].

148 *See id.*

149 *Id.* at 74. ("Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief, but the notion that school district lines may be casually ignored or

system itself, which effectively made any remedy impossible.[150] First, there were not enough white students in Detroit public schools to make for any significant desegregation.[151] White flight to suburban schools had already depleted Detroit schools of most of its white students.[152] Second, a remedy limited to just Detroit schools only aggravated the already rampant white flight to the suburban school districts.[153] And third the busing necessary for whatever desegregation was possible was made much more arduous because of the distances involved, distances far greater than busing between Detroit and the suburban schools.[154]

Justice Douglas argued in the dissent that the result of the holding was worse than *Plessy*'s approval of separate but equal schools.[155] Here, not only were the black inner city schools separate from the white suburban schools, because of *San Antonio v. Rodriquez*,[156] there was no requirement of equal funding.[157] *Rodriquez* had found that unequal funding for poorer and richer school districts could be justified by only

treated as a mere administrative convenience is contrary to the history of public education in our country."). In distinguishing *Milliken*, the 6th Circuit allowed an inter-district remedy, including the Louisville, Kentucky city district within its own Jefferson County. In *Milliken*, the remedy, it said involved 53 districts and three counties. It concluded, "[w]e are not confronted here with the problem in *Milliken* in which the remedy approved by the Court of Appeals was broader than the constitutional violation. Rather, the situation presented is that of two districts in the same county of the state being equally guilty in failing to eliminate all vestiges of segregation . . . " *Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky*, 510 F. 2d 1358, 1361 (6th Cir. 1975).

150 *Milliken I*, 418 U.S. at 764 (White, J., dissenting) ("The core of my disagreement is that deliberate acts of segregation and their consequences will go without remedy, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State."). "The year after the *Milliken* decision, however, the trend toward more racially integrated public schools in the United States stopped," claimed Professor Myron Orfield in *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. Rev. 364, 368, February 2015. Summarizing, he said, "[h]ad *Milliken* been decided differently, the nation would undoubtedly be less segregated and socioeconomically unequal." *Id*. at 372.

151 *Milliken I*, 418 U.S. at 747-48.

152 *Id*. at 781.

153 *See generally Id*.

154 *Id*. at 791.

155 "Today's decision, given Rodriguez, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the Black schools are not only 'separate' but 'inferior.'" *Milliken* at 761. (Douglas, J., dissenting.)

156 *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

157 *Milliken I*, at 760-761 (Douglas, J., dissenting) (citations omitted) ("When we rule against the metropolitan area remedy we take a step that will likely put the problems of the Blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*. The reason is simple. The inner core of Detroit is now rather solidly Black; and the Blacks, we know, in many instances are likely to be poorer, just as were the Chicanos in *San Antonio School District v. Rodriguez*. By that decision the poorer school districts must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.").

some rational basis.[158] Higher scrutiny was not required.

VI. *OKLAHOMA CITY V. DOWELL*: HOW DE JURE SEGREGATION BECAME DE FACTO SEGREGATION

The Oklahoma City school district was sued in 1961 and found to have intentionally segregated both its schools and its housing.[159] After various unsuccessful remedies and much litigation, a 1972 plan[160] that involved among other things busing lower elementary grades to formerly white schools and higher elementary grades to formerly black schools led the school district in 1977 to petition the district court to close the case. The district court held that there had been "substantial compliance with the constitutional requirements" and that the school board would continue "to follow the constitutional desegregation requirements."[161] The Court concluded, "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court . . . ."[162]

In 1984, after release from the district court's order, the school board began a neighborhood assignment plan that led to almost half of its sixty-four elementary schools being either 90% black or 90% white.[163] After reversal and remand by the Tenth Circuit, the district court again upheld its finding that the school board had eliminated the segregation caused by its illegal acts, that "the Board had done nothing for 25 years to promote residential segregation, and that the school district had bused students for more than a decade in good-faith compliance with the court's orders."[164] The district court found the "present residential segregation

158 *Rodriguez*, 411 U.S at 9.

159 *Dowell v. Sch. Bd. of Oklahoma City Pub*. Sch., 219 F. Supp. 427 (W.D. Okla. 1963). The Dowell lawsuit continued on for 30 years until reaching the United States Supreme Court in 1991 with Board of Education of Oklahoma City Public School, Independent School District Number 89, *Oklahoma Cty*., *Okl*. *v*. *Dowell*, 498 U.S. 237 (1991) where Black students' parents filed a motion to reopen the desegregation cases.

160 *See Dowell v. Bd. of Ed. of Oklahoma City Pub. Sch*., 338 F. Supp. 1256 (W.D. Okla.), *aff'd,* 465 F.2d 1012 (10th Cir. 1972).

161 *Dowell by Dowell v. Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Dist. No. 89*, 795 F.2d 1516, 1519 (10th Cir. 1986).

162 *Dowell v. School Board of Oklahoma City Public Schools*, 219 F.Supp. 427 (WD Okla. 1985). Under remand by the 10th Circuit, the District Court reaffirmed its conclusions again in June, 1987 in an eight-day evidentiary hearing in which it received, in the Tenth circuit's words, "a golconda of testimony and exhibits." *Dowell v. Board of Educ*., 890 F.2d 1483, 1487 (10th Cir.1989).

163 "Under the SRP [Student Reassignment Plan], 11 of 64 elementary schools would be greater than 90% Black, 22 would be greater than 90% White plus other minorities, and 31 would be racially mixed." *Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okl. v. Dowell* [hereinafter *Dowell*], 498 U.S. 237, 242 (1991).

164 *Id*. at 243.

was the result of private decision-making and economics, and that it was too attenuated to be a vestige of former school segregation" and "that the neighborhood assignment plan was not designed with discriminatory intent."[165] The appeals court reversed, but the Supreme Court upheld the district court's holding.

The Supreme Court held that if the school board had in good faith eliminated to the extent practicable the vestiges of past discrimination, de jure segregation was remedied and federal court jurisdiction ended.[166] Although the Oklahoma City schools had to a significant degree become again racially segregated by the time the case got to the Supreme Court, the Court seemed to accept that the renewed segregation was the product of private, not state choices, and thus not subject to a heightened scrutiny.[167] The Court remanded[168] the case back to the District Court to determine "whether the vestiges of past discrimination had been eliminated to the extent practicable."[169] As Justice Souter pointed out for the four dissenting justices, Oklahoma had operated de jure segregated schools for sixty-five years, including eighteen years after *Brown I*, and then after only thirteen years of compliance, much of it after lengthy litigation, it was allowed to adopt a school assignment plan leading to substantial re-segregation.[170] Souter concluded that a desegregation order should not "be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist" especially when, as the Court of Appeals had held, "there remain feasible methods of eliminating such conditions."[171]

165 *Id*.

166 *Id*. at 249-50.

167 The Court referenced *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), two cases involving racially neutral laws with disproportionate racial impact, both getting a rational basis level of review. *Dowell, supra* note 163 at 250-51.

168 The District Court on remand from the Supreme Court concluded in a comprehensive review of thirty years of litigation that Oklahoma was operating a legal unitary system and thus its decision to move away from the "negative effects of busing" to "neighborhood school program" was consistent with the equal protection clause, that is, the rational basis requirement. It concluded: "While the history of discrimination in Oklahoma City cannot be ignored, it 'cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'" Dowell v. Okla. City, 778 F.Supp. 1144, 1195-1196, (1991), *citing City of Mobile v. Bolden*, 446 U.S. 55, 74, 100 S.Ct. 1490, 1503, 64 L.Ed.2d 47 (1980) (plurality opinion).

169 *Dowell, supra* note 163 at 249-50. The Court said that in determining whether de jure segregation had been "eliminated as far as practicable," the District Court should look not just at student numbers but "to every facet of school operations," emphasizing that current policies with regard to "faculty, staff, transportation, extra-curricular activities, and facilities" are "among the most important indicia of a segregated system." *Id*. at 250. Though Oklahoma City's student assignments had led to considerable segregation, the District Court had found that the "School Board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and nondiscriminatory." Dowell v. Okla. City, 778 F.Supp. at 1153.

170 *Dowell, supra* note 163 at 251.

171 *Id*. at 253.

In *Freeman v. Pitts*,[172] the Supreme Court expanded *Dowell* to allow district courts in school segregation cases to incrementally remove those portions of a school district that had implemented appropriate remedies while maintaining jurisdiction over the remainder.[173] *Freeman* accepted that the district court had to remedy the de jure segregation, but it had to do so with respect for local control. The Supreme Court first introduced the concept of localism in *Dayton School Board v. Brinkman*.[174] There, the Court said that the interest in local control of public schools could be overcome only by proof of a constitutional violation, that is, de jure segregation. The *Freeman* Court, in accepting partial compliance with a desegregation order as justifying partial release from the district court's supervision, said, "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."[175] It was only in *Freeman* that localism became a competing goal. Localism in *Freeman* evolved into something different than it had meant in both *Dayton* and *Millikan*. In those two cases, the Court had found that a remedy to local decisions was not allowed absent de jure segregation. In *Freeman*, there was de jure segregation, but at some point in time any remedy had to at least consider localism as an additional factor. It is hard to know what to make of this concern for local control. Perhaps, the point was only that at some point in time, after fifty years of litigation, the remedies had to end out of respect for local control by local school officials who had played no role in the initial violations appearing to act in good faith. It would be hard to argue against that point.[176]

VII. *SAN ANTONIO V. RODRIQUEZ*: THE DEMISE OF EQUAL FUNDING

In *Rodriguez*,[177] Mexican American parents living in the Edgewood school district of San Antonio, consisting of twenty-five poor inner city schools, challenged the unequal funding in seven school districts,

172 *Freeman v. Pitts*, 503 U.S. 467, 491 (1992).

173 *Id*. at 492. "[The court held] that, in the course of supervising desegregation plans district court has 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. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree." Similarly, "[a] court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power." *Id*. at 491-92.

174 *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979).

175 *Freeman*, 503 U.S at 490.

176 From specific statutes of limitation to the vagaries of the law of laches, the harm done by untimely actions are well known in the law. Remedies that extend decades after the harm and that flow to children and even grandchildren of the victims of the harm are hard to defend.

177 *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 193 (1973).

specifically within San Antonio but also school districts throughout Texas. [178] The main comparison was the funding for Edgewood, the poorest school district in San Antonio, versus the funding for Alamo Heights, the richest school district, consisting of five schools in a well to do residential area.[179] From a combination of state funds and funds from local property taxes,[180] Edgewood received $231 per pupil, and Alamo Heights $543 per pupil.[181] Adding in federal funds, Edgewood received $356 per pupil and Alamo Heights $594 per pupil.[182] The federal district court found that the law classified by wealth and that it involved the fundamental right to education, both requiring that the law be subject to a strict scrutiny analysis.[183] The Supreme Court rejected strict scrutiny for both.[184] Without addressing whether wealth was a suspect classification, it found that the use of local property taxes was not wealth based since some poor people lived in urban areas with high property valuations.[185] It also did not address whether education was a fundamental right, finding only that education above a minimal level, certainly including that in Edgewood, was not a fundamental right.[186] The

178 The problem was hardly unique to Texas. Although Justice Stewart believed the classifications were constitutional, he wrote in the opening sentence of his concurring opinion, "The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust." *Rodriguez*, 411 U.S at 59 (Stewart, J., concurring) *citing* a New York Times' front page article from March 11, 1973.

179 Richest and poorest are rough judgments based upon real property value, income level, and per student amount available per student. There was also a racial component. In Edgewood, 90% of the students were Mexican American and 6% were Black. In Alamo Heights, 81% of the students were Anglo. *Id*. at 12-13.

180 The 10 richest districts raised an average of $610 per pupil, whereas the four poorest districts raised only an average of $63 per pupil. *Id*. at 74-75. (Justice Marshall's dissenting opinion.) The actual property tax rate for the Edgewood was 20% higher than for Alamo Heights. Despite the higher tax rate for the local property tax, Edgewood generated $26 per student and Alamo Heights $333 per student. *Rodriguez*, 411 U.S. 13.

181 *Id*. at 14.

182 Justice White in dissent summarized the mix of federal, state, and local contributions, "In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per pupil." *Id*. at 63 (White, J. dissenting).

183 This discrepancy was found to be in violation of both the U.S. constitution and the Texas constitution.

184 *See Rodriguez*, 411 U.S at 29.

185 Referencing a Connecticut study of unequal school funding which had found "not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts," the Court said that it was not known if a similar pattern would apply in Texas, but "there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impunity—are concentrated in the poorest districts." *Id* at 23. The Court's approach was supported by a Yale Law Review article questioning the underlying economic arguments for the claim of unequal funding of education. *See* Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 YALE L. J. 1303, 1328—1329 (1972).

186 **"**For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms." *Rodriguez*, 411 U.S. at 25.

Court concluded that local funding and control was a valid rational basis for the discrepancy in funding.[187] It called upon scholars, legislators, and the democratic process to influence more appropriate funding decisions.[188]

The states are almost evenly split as to the requirement of equal funding.[189] The Court's approach in *San Antonio* was directly contrary to that previously taken by the California Supreme Court in *Serrano v. Priest*,[190] the most influential state court case calling for equal funding. The California Supreme Court, applying strict scrutiny,[191] had found that funding public schools "with its substantial dependence on local property taxes and resultant wide disparities in school revenue" "invidiously

187 "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. [Cite omitted.] We hold that the Texas plan abundantly satisfies this standard." *Id*. at 55. Three of the four dissenting justices also applied the rational basis test, but found it wanting. Only Justice Marshall in a lengthy primer on school funding called for a stricter test: "The invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting inter-district discrimination in the educational opportunity afforded to the schoolchildren of Texas." *Id*. at 124 (Marshall, J., joined by Douglass, J. dissenting).

188 "We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." *Id*. at 58-59. Compare James 2:15: "Suppose a brother or a sister is without clothes and daily food. If one of you says to them, 'Go in peace; keep warm and well fed,' but does nothing about their physical needs, what good is it?"

189 The conclusion in a 2001 article was that the public school funding systems of eighteen states including, Alaska, Colorado, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin, were upheld and the funding of 17 states, Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, North Dakota, New Hampshire, New Jersey, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming have been upheld. John Dayton, *Serrano and its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447, 448 (2001).

190 *Serrano v. Priest*, 5 Cal.3d 584 (1971) (Serrano I). A 1995 Duke Law Journal article concludes, "Although state courts can give broader protection to individual rights than the Constitution provides, courts have infrequently done so in school funding cases. Of twenty-three state equal protection clause challenges, only six have prevailed." Erin Kelly, *All Students Are Not Created Equal: the inequitable combination of Property-Tax-Base School Finance Systems and Local Control*, 45 DUKE L. J. 397 (1995). The six prevailing states on state equal protection grounds were Arkansas, California, Connecticut, Tennessee, West Virginia, and Wyoming. Equal funding has also been required on state constitutional grounds other than state equal protection clauses. *See e.g*. Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989), where the Kentucky Supreme Court based its decision on a state constitutional mandate to "provide an efficient system of common schools throughout the state."

191 *Serrano I* required strict scrutiny as both a requirement of the federal constitution. After *Rodriquez, Serrano v. Priest*, 18 Cal. 3rd 728 (1976) (*Serrano II*), the California Supreme Court reaffirmed its commitment to the strict scrutiny level of review but based upon only the state constitution.

discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors" and that since "education in our public schools is a fundamental interest" it could not be conditioned based upon wealth.[192] This approach was followed by the federal district court in Minnesota, agreeing with Serrano that the equal protection clause required equal funding of state schools, unrelated to the "taxable wealth of the school district or their parents." The court adopted what the *Serrano* decision had called the principle of "fiscal integrity," that only the wealth of the state as a whole, not that of a particular district, was the controlling factor.[193] The New Jersey trial court reached a similar conclusion, finding a violation of the equal protection clause of both the state and U.S. Constitutions. It viewed education as a fundamental right and wealth classifications as being disfavored. It said that no compelling state interest justified the unequal funding, and perhaps in anticipation of *San Antonio*'s ruling concluded alternatively, "[i]t is doubtful that this system even meets the less stringent 'rational basis' test normally applied to the regulation of state fiscal or economic matters."[194] The Michigan Supreme Court reached essentially the same conclusion.[195]

While *San Antonio*'s acceptance of extreme levels of unequal funding in the guise of promoting local control and interest seems shocking in the extreme, it is not without some foundation. The level of equal funding in jurisdictions, such as that required in *Serrano*, tended to be towards equality at the bottom of the scale as opposed to equality at the top of the scale.[196] The lack of local control may have led to a lack of interest in supporting local schools, but the lower level of support for schools may have been the result of other factors. In California, for example, Proposition 13, which placed constitutional limits on increasing

192 *Serrano*, 5 Cal. at 589.

193 *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 872 (D. Minn.1971).

194 *Robinson v. Cahill*, 287 A.2d 187, 275. (N.J. Super. Ct. 1972). (After the *San Antonio* decision, the New Jersey Supreme Court affirmed on different grounds, that unequal funding violated the state constitution); *Robinson v. Cahill*, 303 A.2d 273 (1973).

195 *Milliken v. Green*, 203 N.W. 2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973) (While the stricter 'compelling state interest' test must be applied because of the existence of a 'fundamental interest and a suspect classification', the state public school financing system also fails to pass the test of 'rationality').

196 As one article concluded, "[E]fforts to restore California's once vaunted system to its previous stature have largely failed." On overall expenditures, California was 35th, almost $4,000 per student less than other high-income states like New York and New Jersey; on per capita wealth, it ranked 40th; and on class size, 48th, five more students per class than the national average. *See* Christopher L. Lockard, *In The Wake Of Williams V. State: The Past, Present, And Future Of Education Finance Litigation In California*, 57 HASTINGS L.J. 385 (2005).); An alternative approach to education equality, given that equality may be at the bottom of the scale, is to protect the right to an adequate education, that is, requiring the state to spend whatever is necessary to meet its obligation to provide a meaningful education. *See* Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C.L.REV 399 (2000).

local property taxes, the primary means of funding schools, was passed in 1978, just seven years after *Serrano*.[197] It is easy to believe that a state contemporaneous cap on property taxes might very well have contributed to a reduction of expenditures for public schools. [198]

Funding equality all by itself is a slippery devil. Despite pockets of extreme inequality like that in the *San Antonio* case, some have claimed that there is overall equal funding.[199] Even if low-income areas were given equal funding for public schools as the high-income areas, it would be unlikely this funding would translate to equal educational opportunities.[200] A low-income area would more than likely have to spend a disproportionate amount of its budget on such matters as security, vandalism, and compensatory remedial programs, so as to end up with fewer dollars for core teaching than schools in high-income areas.[201] Additionally, high-income areas would have a greater advantage in securing private donations to public schools from parental and corporate

197 Proposition 13 was only two years after a second Serrano decision, implementing the first Serrano decision on state grounds only. *Serrano v. Priest*, 557 P.2d 929, 952 (Cal. 1976).

198 A 1995 article claimed: "In fact, the state's assumption of responsibility for assuring uniform levels of education spending, together with the constraints imposed on public spending by the "taxpayer revolts" of the late 1970s and the subsequent weakening of the California economy, has resulted in a dramatic erosion in the adequacy of the financial support for public education in California. Once among the highest spending and highest achieving states, California now finds itself near the bottom on many measures." *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 185-94 (1995).

199 "Despite glaring economic inequalities between a few rich suburbs and nearby central cities, the average Black child and the average White child now live in school districts that spend almost exactly the same amount per pupil."
Dominic Brewer, *The Black-White Test Score Gap. Edited by Christopher Jencks and Meredith Phillips. Brookings Institution Press, 1998. 523 P.*, 4 GEO. PUB. POL'Y REV. 187 (1999).

200 According to a student note, this was certainly the case in California where a lawsuit claimed that despite *Serrano* students in poorer areas were "being deprived of basic educational opportunities available to more privileged children" because their schools lacked "the bare essentials required of a free and common school education." The complaint laid out what was called "a bleak and appalling picture of their schools, alleging that they lacked sufficient classrooms, desks, qualified teachers, books, healthy and safe facilities and even functioning bathrooms, and that some schools were infested with rats and cockroaches." *See* Christopher R. Lockard, Note, *In The Wake Of Williams V. State: The Past, Present, And Future Of Education Finance Litigation In California*, 57 HASTINGS L.J. 385 (2005).

201 *McUsic*, *supra* note 3 *at* 1351-52 (2004). ("Districts with a high percentage of poor children often must spend far more money on special needs such as bilingual or special education than other school districts. School districts in high-poverty areas incur higher costs than their wealthier neighbors in other areas as well. School districts serving large percentages of poor students typically find it more difficult to staff their schools with qualified teachers, which requires them to provide greater economic incentives than wealthier districts. Urban school districts also need to compensate for the high mobility of students, and for students suffering from untreated serious health problems, hunger, family disruption, and violence. These districts often have higher security costs. Their buildings are usually much older than those in more recently developed suburban areas, and often in need of expensive repairs. The schools are overcrowded. Paying for all of these costs, which affluent districts do not share, and then—on top of that—funding a straightforward academic program that compares well with the programs of affluent schools can be prohibitively expensive.").

sources.

Still, even if equality of funding is hardly the panacea that one might hope,[202] it surely has to be a better option than the shocking discrepancy found in *San Antonio*. Political forces can band together to require that the state spend more overall on its schools.[203] With unequal funding decided based upon local wealth, no amount of political pressure is going to increase the money available for public schools in the poorest districts. It is hard to calculate the harm to the educational system from the unequal division of wealth in America, much of it along racial lines,[204] but it is impossible not to believe that the wealth divide contributes to the unequal outcome in our schools.[205]

VIII. *PARENTS INVOLVED V. SEATTLE SCHOOL DISTRICT*: A FINAL DASHED HOPE FOR INTEGRATION REMEDIES

In *Parents Involved*,[206] a plurality of the Supreme Court made it harder for even political entities with the will to address de facto segregation to do so. The plurality applied strict scrutiny to race based remedies for de facto segregation, finding that the race based remedies

202 "Finally, even when funding for poor school districts has increased, it has not been effective in providing students with an equal education. It has been difficult to find the link between more money and a better education. Input-output studies have often failed to find a correlation between money spent and various measures of academic success, such as test scores. In school district after school district, large funding increases have proved inadequate to overcome the educational disadvantages faced by poor, underachieving students." Professor McUsic believes that it is the social mixing of low income with higher income students that makes a difference beyond the additional funds. *See McUsic*, *supra* note 3 at 1353 (2004)

203 Lockard, *supra* note 200 (citing *A Primer on Proposition 98*, EDSOURCEONLINE, http://www.edsource.org/pubedfctprop98.cfm (last visited Feb. 22, 2005) (This was done in California with Proposition 98, an initiative requiring that 40% of the state budget be spent on public education: "The initiative guaranteed a minimum amount of money for elementary and secondary schools, based on a complex calculation that could only be overridden by a two-thirds vote of the legislature.").

204 A 2017 article in Slate.com claimed that the median White household held 86 times more wealth than its Black counterpart 68 more wealth than Latino households and concluded, "This isn't a wealth gap—it is a wealth chasm." *See* Jamelle Bouie, *The Wealth Gap Between Whites and Blacks Is Widening*, SLATE.COM (Sept. 17, 2017)**,** http://www.slate.com/articles/news_and_politics/politics/2017/09/the_wealth_gap_between_Whites_and_Blacks_is_widening.html **(**citing an August 8, 2017 meta-analysis by the Institute for Policy Research, Northwestern University).

205 Professor McUsic argues that wealth integration more than race is the key predictor of success: "As a result, the purpose of this remedy is not to achieve numerical integration comparable to the metropolitan area as a whole, but to alleviate the overwhelming concentration of poor students in one school district. In particular, an economic integration remedy would focus on the elimination of high-poverty school districts, those with over fifty-percent low-income children. If the social science research is correct, the economic integration remedy would do more to improve academic achievement of currently failing students than any feasible funding increase or purely racial desegregation." *See McUsic*, *supra* note 3 at 1360 (2004).

206 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

were not narrowly tailored even assuming some compelling state interest, making it nearly impossible to specifically use race to prevent or correct de facto segregation.[207] The plurality struck down school desegregation remedies in Seattle, Washington and Jefferson County, Kentucky. Seattle considered race in attempting to achieve racial diversity at each of its ten public high schools, none of which had been found to be guilty of de jure segregation. Jefferson County, including Louisville, considered race to maintain a balance in all of its non-magnet public elementary schools, schools recently released from court-imposed remedies for de jure segregation.

While other school districts were resisting de jure desegregation, Seattle was actively trying to remedy de facto segregation.[208] In 1966, 61% of all African-Americans went to one Seattle high school.[209] Eight of the other ten high schools were more than 95% white.[210] In 1963,

207 *Id*. at 782 (Kennedy, J., concurring) (Justice Kennedy, in his concurring opinion to the 5-4 decision, joined the opinion as to the need for strict scrutiny. He did not agree with the majority as to its limited definition as to what might be a compelling state interest)); Allen Rostro, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NORTHWESTERN UNI. L. REV. COLLOQUY, 3 (2012), www.law.northwestern.edu/lawreview/colloquy/2012/11/LRColl2012n11Rostron.pdf (As stated in a Northwestern Law School colloquy essay, "Justice Kennedy emerged as the lone occupant of a middle ground; he provided the fifth vote for striking down the particular school district policies but declined to rule out the possibility that a school district could craft a race-conscious assignment policy that would remain safely within constitutional boundaries."); *Parents Involved in Cmty. Sch*., 551 U.S. at 748 (Thomas, J., concurring) (Justice Thomas in his concurring opinion framed the issue more stridently: "Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in [*Brown I*]. This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race."."); *Id*. at 824 (Breyer, J., dissenting) (Justice Breyer, for the four dissenting judges, argued that consideration of race as a remedy for segregation was as appropriate in cases involving de facto as de jure segregation..); *Id*. at 837 (Breyer, J., dissenting) (He argued for a softer version of strict scrutiny, "I believe that the law requires application here of a standard of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described."); *Id*. at 837 (Breyer, J., dissenting) (He also expressed the belief that Justice Kennedy would support this softer test.).

208 *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d 1224 (2001) (As the trial court said, "Since the 1960's, while courts around the country were ordering intransigent school districts to desegregate, Seattle's school board was voluntarily exploring measures that were designed to provide all of the district's students with access to diverse and equal educational opportunities."); Segregation in Seattle schools was the result of housing segregation. As described in *Parents Involved*, the majority of Whites live in the more affluent areas north of downtown and the majority of non Whites—including 84% of Blacks, 74 % of Asians, 65% of Latinos, and 51% of Native Americans—live south of downtown. *See Parents Involved in Cmty Sch*., 137 F. Supp. at 724.

209 *Parents Involved in Cmty Sch*., 137 F. Supp. at 809("Similarly, of the 1,461 Black students enrolled in the 12 senior high schools in Seattle, 1,151 (or 78.8%) attended 3 senior high schools, and 900 (61.6%) attended a single school . . . "); *see also* Douglas Judge, *Housing, Race, and Schooling in Seattle: Context for the Supreme Court Decision*, J. EDUC. CONTROVERSY, 5 (2007), http://cedar.wwu.edu/cgi/viewcontent.cgi?article=1036&context=jec (discussing the vast amount of segregation in schools in Seattle during times of supposed desegregation).

210 *Id*.

Seattle adopted a voluntary transfer plan whereby any student could transfer to another school if it would advance racial balance at the receiving school.[211] While a number of different desegregation remedies had been voluntarily pursued by Seattle,[212] the one challenged was adopted for the 1998-1999 school year to maintain racial balance in its ten high schools. The problem of any remedy was compounded by the fact that though Seattle had a 70% white population, its public schools were only 40% white. The plan allowed incoming ninth-graders to choose from among any of the district's ten high schools, ranking however many schools they wished in order of preference.[213] Five high schools were over-subscribed. The district employed a series of "tiebreakers" to determine who would fill the open slots at the oversubscribed schools.[214] The first tiebreaker was based upon having a sibling at the school, but the second tiebreaker depended on the racial composition of the particular school and the race of the individual student.[215]

Unlike Seattle, Jefferson County, Kentucky was found in 1973 to have operated illegally segregated schools, but in 2000 was found to have remedied this de jure segregation, thereafter operating as unitary schools.[216] In 2001, it adopted the voluntary student assignment plan at issue in this case.[217] The plan required all non-magnet schools to maintain a black student enrollment between 15% and 50%.[218] Approximately 34% of the district's 97,000 students were black; most of the remaining 66% were white.[219]

Since both Seattle and Jefferson County specifically used race as part of the remedy, the Court applied strict scrutiny, requiring that the use of race in the assignment plans be narrowly tailored to achieve a compelling state interest.[220] Quoting its most recent affirmative action

211 *Parents Involved in Cmty*. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005).

212 *Id*. (A state initiative intended to limit busing as a remedy for de facto segregation was found to be unconstitutional in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982). The Court concluded that despite the fact that the law did not mention race or integration, "there is little doubt that the initiative was effectively drawn for racial purposes.").

213 *Parents Involved in Cmty*. *Sch*., 426 F.3d at 1169.

214 *Id*. at 1169-70.

215 *Id*. at 1170.

216 *Parents Involved in Cmty*. *Sch*., 551 U.S. at 715-16.

217 *Id*. at 716.

218 *Id*.

219 *Id*.

220 *Parents Involved in Cmty*. *Sch*., 551 U.S. at 748 (Thomas, J., concurring) (Justice Thomas in his concurring opinion framed the issue more stridently: "Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in [*Brown I*]. This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.").

case, the Court said that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[221] A plurality of the Court in *Parents Involved* said that in prior cases involving schools, only "remedying the effects of past intentional discrimination"[222] and "the interest in diversity in higher education" were considered to be compelling state interests.[223] Only the fifth member of the majority, Justice Kennedy, seemed to think that remedying de facto segregation was a compelling state interest.[224] Seattle contended that using race helped to reduce racial concentration in schools caused by racially concentrated housing patterns that prevented non-white students from having access to the most desirable schools.[225] Jefferson County framed its interest more simply, to educate its students "in a racially integrated environment."[226]

While the school districts asserted the educational and social benefits flowing from racially integrated schools, *Parents Involved* and various *amici* disputed whether racial integration had any significant impact on test scores or other objective factors or indeed achieved any more subjective social advantage.[227] The Court said that it did not have to decide if the claimed state interest in remedying de facto segregation was a compelling state interest, since "the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity."[228]

221 *Id*. at 721 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

222 *Parents Involved in Cmty. Sch.*, 551 U.S. at 721.

223 *Id*. at 722.

224 *Id*. at 783-84. Justice Kennedy, in his concurring opinion to the 5-4 decision, joined the opinion as to the need for strict scrutiny. He did not agree with the majority as to its limited definition as to what might be a compelling state interest. *Id*. at 782 (Kennedy, J. concurring).

225 *Id*. at 726.

226 *Id* at 725.

227 *Id* at 726. Though the advantages of desegregation remedies are much debated, ProPublica claims that "during the 1970s and '80s, the achievement gap between Black and White 13-year-olds was cut roughly in half nationwide," that "the overwhelming body of research shows that once Black children were given access to advanced courses, well-trained teachers, and all the other resources that tend to follow White, middle-income children, they began to catch up." Referencing a study by Professor Rucker Johnson, University of California at Berkeley, published by the National Bureau of Economic Research, it said that Professor Johnson had concluded that "desegregation's impact on racial equality to be deep, wide, and long-lasting" and that "Black Americans who attended schools integrated by court order were more likely to graduate, go on to college, and earn a degree than Black Americans who attended segregated schools," earn more money, be healthier, and spend less time in jail." Further, White students did just as well in integrated as in segregated schools, plus they were more likely to live in racially diverse communities and to send their children to integrated schools. ProPublica, Segregation Now, April 16, 2014.

228 *Parents Involved*, 426 F.3d at 726. The racial mix in Seattle was far more complicated than that in Jefferson County. Seattle classified students as White or non-White, which obscured the complexity that close to a third of its students were Asian, where as in Jefferson County the mix was roughly two-thirds White and one-third Black. Much of the Court's concern in *Parent's Involved* as to Seattle was the illogical treatment of Asian students in terms of achieving diversity.

The desegregation plans, it said, were "directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate," not "to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[229] Just the very framing of what the Court required makes it clear that few if any attempts to remedy de facto segregation by political means when race is considered will ever pass the compelling state interest test.[230] At most, school districts can attempt to maintain racial balance, as did Seattle and Jefferson County. A school district would find it exceedingly difficult to prove that such balance actually advanced the educational benefits hoped for and long claimed for integrated schools.[231]

IX. WHY IS THERE NO HOPE OF ANY REMEDY?

We have long since left behind the intentional segregation issues that first confronted the Supreme Court.[232] The *Brown II* gradual elimination of the evils of de jure segregation gave way to the immediacy of *Green*'s root and branch approach with only precarious long-term differences. While not all of the gains of *Green* have been lost, there is still room for despair that these remaining gains may well be lost in the near future.

One of the problems with either a gradualism or immediate approach is that the remedies span over decades, requiring constant adjustments, and endless court hearings. Of the forty-nine U.S. Department of Justice's ongoing race-based segregation cases, nineteen are identified as long-standing, most dating back to the time of *Green* in the late 1960's.[233]

Asian students were obviously not White, but out-performed White students and had little in common with the educational disadvantages of the other minority students with which they were linked.

229 *Id* at 726.

230 *See generally Id*.

231 "The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the White/nonWhite or Black/"other" balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district." *Id*. at 727.

232 Professor McUsic puts it simply, "At a minimum, we live in a country where no state statutes or constitution 'require the segregation of Negroes and Whites in public schools'" *McUsic*, *supra* note 3 at 1334-1335. And we must not forget that not only our public schools but our public transportation, golf courses, and swimming pools were all segregated based upon race in our Southern states. All that, in terms of the force of law, is a thing of the past. See, e.g., *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955), a per curiam order by the Supreme Court of the United States affirming an order by the United States Court of Appeals for the Fourth Circuit that enjoined racial segregation in public beaches and bathhouses and *Holmes v. Atlanta*, 350 U.S. 879 (1955), a per curiam order by the Supreme Court of the United States that summarily reversed an order by the Georgia Court of Appeals that permitted the city of Atlanta to allocate a municipal golf course to different races on different days.

233 *See* note 29.

Without even counting the enormous legal bills to the private parties and local school districts, demographic changes, of which white flight is only the most obvious, made the school districts still subject to federal oversight in current times far different than that of fifty to sixty years before. Even if the daily news stories of white police officers killing black motorists make us doubt that we have achieved in the post-Obama era a period of racial equanimity, it cannot be doubted that we are not the racist society that led to the de jure segregation challenged back in the 1950's and 1960's. To continue to focus on de jure as the constitutional violation freezes us in a time that no longer exists. Our concern should be unequal schools and the degree to which race is relevant in identifying unequal schools, race must be relevant to the remedy.[234] But the Court has made the use of race to remedy de facto segregation subject to the highest scrutiny.

It is easy to hope that at some point, remedies for underperforming schools should be devoid of race, but it is hard to believe that point has occurred. In 2003, in approving race-based affirmative action as a remedy for underrepresentation of black students in higher education, Justice O'Connor in her majority opinion suggested hopefully that in 25 years, race based preferences would no longer be necessary.[235] She noted at the time that it had been twenty-five years since the Court last addressed race-based affirmative action in *Bakke v. University of California*.[236] Justice O'Connor's reference to twenty-five years seems to be more the coincidence of symmetry than a prescient prediction. Little or no progress has been made in producing equal outcome for black students in our public schools, negating the need for making affirmative action no longer necessary, and twenty-five years is close to three-fifths come and gone.

As long as same race minority schools continue to produce under-performing students, race-based preferences in higher education continues to be the inadequate solution for the failure of our racially segregated elementary and high schools, where Black students come out

234 A recent Stanford study of achievement in public schools led one scholar to conclude that "racial segregation is inextricably linked to unequal allocation of resources among schools; and that policies that don't address this will fail to remedy racial inequality." Jonathan Rabinovitz, *Local education inequities across U.S. revealed in new Stanford data set*, Stanford News, April 29, 2016 (summarizing the findings of Professor Sean Reardon, a professor of poverty and inequality at Stanford University).

235 Justice O'Connor commented, "It has been 25 years since Justice Powell [in *Bakke*] first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased . . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

236 *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). Justice O'Connor said, "We last addressed the use of race in public higher education over 25 years ago." *Grutter*, 539 U.S. at 322.

having little chance of competing on an even playing ground with white students. That is the ugly conclusion from the annual summaries of the performance of White students versus Black students. Black students year after year under-perform White student on standardized tests.[237] Yet, we as a society seem to look away, hoping that next year the results may be different. Too often the reality of the numbers is found deep in the text of news articles.[238] How this cannot be a scandal of the highest proportions is hard to understand. If we reject the inherent racist explanation for this under performance, as all but the most base in our society must, then our schools are failing our black students.[239] Surely, some remedy is possible, if not integrated schools, then equal schools as measured by outcome are required.[240] We as a civilized society cannot continue to abandon our black kids year after year. Only equality in results from our lower schools will make affirmative action in higher education an unnecessary anachronism of our public educational system.[241] Only in equality in

237 "African Americans currently score lower than European Americans on vocabulary, reading, and mathematics tests, as well as on tests that claim to measure scholastic aptitude and intelligence." *The Black-White Test Score Gap*, *supra* note 201. "Average test scores of Black students are, on average, roughly two grade levels lower than those of White students in the same district." *Local Education Inequities Across U.S. Revealed in New Stanford Data Set*, STANFORD NEWS (April 29, 2016).

238 *See* Scott Jaschik**,** *SAT Scores Drop; Declines take averages down to lowest point in years*, Inside Higher Ed, (September 3, 2015). Deep in the article a chart revealed that the average White SAT score on all of the parts was 1576 and the average Black score was 1277, far bigger news, I would assert, than the decline in overall scores. *But see* Sharon Noguchi, *California's school test scores reveal vast racial achievement gap*, San Jose Mercury News (Sept. 9, 2015), updated August 12, 2016. The article summarized California test scores as showing that 61% of White students (71% of Asians) and only 28 percent of Blacks met state English standards and 49% of Whites versus 16% of Blacks met the math standard.

239 It would be unfair to put this blame entirely on our schools since racial differences appear even before kindergarten begins, but schools can still be the leveler that addresses this difference. "This [testing] gap appears before children enter kindergarten . . . and it persists into adulthood." *The Black-White Test Score Gap*, Note 201.

240 There are many theories for this difference. A Brookings.edu article referenced a study which "compared a group of exceptionally effective elementary schools with a group of low-achieving schools with similar demographic characteristics in New York City" and found that "roughly 90 percent of the variance in student reading and mathematics scores at grades 3, 6, and 8 was a function of differences in teacher qualifications." Unequal Opportunity: Race and Education by Linda Darling-Hammond, March 1, 1998. Brookings.edu. A U.S. News on line article proposed a number of theories, including living environment, "Part of the difference in educational outcomes likely stems from the different environments Black and White children live in during their school years. Black children are far more likely to live in households that are low-income, extremely poor, food-insecure, or receiving long-term welfare support. Black children are less likely than White or Hispanic children to live in households where at least one parent has secure employment, and Black children have the greatest rate of any race for families with children living in homeless shelters. Nearly 25 percent of Black parents report their children live in unsafe neighborhoods, compared with 7 percent of White parents." U.S. Education: Still Separate and Unequal by Lindsey Cook, USNEWS.COM (Jan. 28, 2015).

241 "Eliminating racial differences in test performance would also allow colleges, professional schools, and employers to phase out the racial preferences that have caused so much political trouble over the past generation." *Id*.

results do we have the hope of equality of life in modern America.[242]

X. A LEGISLATIVE REMEDY AS MODEST AS IT IS IMPROBABLE

It is intentional that I frame my modest proposal for a remedy parenthetically. I offer it without any more hope of success than the remedies that have failed since *Brown II* and by putting it in parenthesis, I attempt to use punctuation to apologize for how inadequate it is. My ideal solution would be a simple one: Every state, federal, and local tax dollar, not irrevocably committed to another essential service, should be spent on addressing the lack of achievement in American public education as to all students. But my actual proposal is far more modest.[243] The federal government needs to use its vast spending power to entice states, local school boards, and private entities to use the creative genius of this country to achieve integrated schools, not of force but of choice, a choice encouraged by the federal purse. I call my program LEAP, Learning Equality for All Persons,[244] a leap perhaps of only hope and faith, but a leap worth taking. Only when Black students[245] walk out their

242 "But if racial equality is America's goal, reducing the Black-White test score gap would probably do more to promote this goal than any other strategy that commands broad political support." *Id*.

243 In this I follow Julius Chambers admonition in his influential article without claiming his wisdom:

In assessing "how much" is enough, we might well be wise to follow the suggestion of Professor Charles Black: "It is often helpful to step back and think small, and to ask not, 'What is the whole extent of what we are bound to do?' but rather, 'What is the clearest thing we ought to do first?"' Though there is a danger of setting goals too low, thereby facilitating state evasion of more strenuous responsibility, a disadvantaged child's inability to read, write and calculate demands immediate attention. As a society, we must commit ourselves to investing in the future of those most disadvantaged.

Adequate Education for All: A Right, an Achievable Goal, Julius Chambers, 22 HARV. C.R.-C.L. L.REV. 55 (1987). Citing Professor Charles Black, *Further Reflection on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1114 (1986).

244 I freely borrow the idea and the cheesy anagram from the current federal law that requires that all states receiving applicable federal funds related to the education of disabled students must have a policy that assures every disabled student "the right to a free appropriate public education" or FAPE. FAPE is the shorthand anagram used by Chief Justice Roberts in a 2017 case interpreting the meaning of a "free appropriate public education" for disabled children, *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017). The Court in *Bd. of Educ.of the Hendrick Hudson Central Hudson School District v. Rowley*, 102 S.Ct. 3034 (1982), said that the law was passed out of the perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" The FAPE requirement was intended to provide every disabled student with "a basic floor of opportunity" consistent with equal protection, but no particular substantive educational standard was imposed upon any state. For disabled students, the remedy varies from student to student and success may be measured in the smallest of increments.

245 Ideally, any remedy for Black students would also include a remedy for Hispanic students and any other underperforming racial class. Professor McUsic avoids this problem of racial classifications by emphasizing the economic gap between schools. *See McUsic, supra* note 3 at 1360.

elementary and high school doors with the same level of achievement in English, math, and science as White students, can the American dream of equality finally become a reality. There is strong evidence to support that black students do better in integrated schools.[246] Though the evidence is far from conclusive, integrated schools likely give the best hope for that equality. Integrated schools should be much desired for educational reasons alone, if not for intangible societal purposes.[247] It is unlikely that the federal courts are ever going to achieve the remedy of even desegregation of illegally segregated schools, let alone integration of the vast majority of public schools, so many of which are segregated based upon de facto reasons beyond court power. Even political forces are limited in addressing de facto segregation, hamstrung in the use of racial classifications to remedy such segregation. Our schools have failed our black students, and only a legislative remedy offers hope.

Tying to federal spending power the right of every black student to a LEAP would provide an incentive to every state to do the right thing. Such a law would allow each state to control its own destiny. To be eligible for the federal funds, a state or local school board would have to propose a plan to increase racial integration in its public elementary and high schools. Full integration would not be required, just progress and the more progress the greater the financial rewards. It would be integration for the sake of integration. There is no other purpose. The hope of equality of education and a dramatic improvement in any black/white learning outcomes are far from modest, but initially those are only hopes.[248]

246 As Professor Erika Wilson nicely summarized, "For minority students, the benefits of attending desegregated schools include a decrease in Black-White achievement gap scores; access to higher quality teachers and curriculum; and increased . . . college quality and adult earnings, reduced . . . probability of incarceration, and improved adult health status." Extensive cites excluded. *See* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 154–155 (2016). Or as Professor McUsic puts it, "Segregated schools, even with equal funding, can never be equal. Integration, albeit integration by economic class, is the most effective, least expensive way to provide a quality education to all children."McUsic, 1335. Professor McUsic calls for integration based upon economic class, not race, which she says is the key reason for the underperformance of Black and Hispanic students. There are some that claim that only an integrated system can guarantee equality, "Even a separate but perfectly equal education system, which will not unfold, is not as sure a route to equality and racial accord as integration. The racially segregated schools of the future will inevitably be unequal. The input equalization sought through finance litigation and the output equalization sought through the standards-based accountability movement will prove as illusory as *Plessey*'s guarantee of equality." Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 2007.

247 Psychologist Beverly Daniel Tatum, president emerita of Spelman College, in an editorial in the Los Angeles Times bemoaned the failure of desegregation in American schools for many of the reasons mentioned in this article and concluded that perhaps only racial diversity in colleges may lead to the kind of interracial relationships that break down the segregation in housing and interactions that makes segregation almost inevitable. *Diverse but Segregated, Some 60 years after* Brown v. Board of Education, *U.S. is going backward*. LOS ANGELES TIMES, September 12, 2017.

248 If not integrated schools, then equal funding would be the next best solution. Almost half the states have some sort of equality of funding requirement. See Note 191. Though equality of funding

Perhaps, we might even eventually hope that our black and white students achieve the outcome of even our highest achieving group of students.[249]

As part of a LEAP program, any solution would call for the mobilization of private as well as public remedies. Both private and public agencies could apply for federal funds to address the goal of racially integrated schools. This was the approach taken in the Adolescent Family Life Act passed by Congress in 1981 to address the "severe adverse health, social, and economic consequences" that often follows pregnancy and childbirth among unmarried adolescents. The act called for "a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives."[250] A LEAP program would similarly call for the full resources of public and private entities to achieve the goal of racial integration with the hope of equality of opportunity and outcome.

A LEAP program, if effective, would lead to equality of education and, hopefully, the same level of achievement as majority students. Even if integrated schools were not successful in eliminating the equality of outcome, they would likely narrow the gap, allowing schools to then focus on what other remedies are needed to eliminate that gap.

Parents Involved's strict scrutiny requirement for race-based remedies to de facto segregation presents at least a possible obstacle to even this modest proposal. The use of funds as a remedy for even de facto segregation would not necessarily require the racial classifications needing strict scrutiny in Public Involved. Some state remedies to de facto segregation would not involve any racial classifications. The same neutral decisions that created segregated schools, some intentional while others only negligently, could be used to integrate schools. For example, new

seems to make real common sense and to be fundamentally fair, it is hard to know if such equality has actually led to better schools overall or indeed better schools for Black students.

249 Our Asian students, for example, achieve a level of success that our White students can only envy. As one study for the Proceedings of the National Sciences of the United States observed, "Asian Americans have higher grades and standardized test scores, are more likely to finish high school and attend college, and are more likely to attend the most elite colleges relative to Whites . . . . See Amy Hsina and Yu Xie, *Explaining Asian Americans' Academic Advantage over Whites*, PNAS.ORG (April 8, 2014), http://www.pnas.org/content/111/23/8416.

250 "The Adolescent Family Life Act (AFLA or Act), Pub.L. 97–35, 95 Stat. 578, 42 U.S.C. § 300z *et seq*., (1982 ed. and Supp. IV), was passed by Congress in 1981 in response to the 'severe adverse health, social, and economic consequences' that often follow pregnancy and childbirth among unmarried adolescents . . . . [T]he AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and pregnancy.*'" Bowen v. Kendrick, 487 U.S. 589, 593*. *Bowen* upheld the law against an Establishment Clause challenge, "We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id., 609*.

schools could be built on the border between racially segregated neighborhoods, drawing naturally students from both sides. Voluntary busing could be provided to make it easier for students of any race to attend a school that presented better opportunities. Some communities might choose to create elite academies in math or science or dramatic arts enticing students of all colors. Private entities might or might not be subject to constitutional restraints, depending on whether the federal funding would be viewed as state action. Even if a particular funded program by either public or private sources were subject to the strict scrutiny test of Public Involved, spending differences might well satisfy the narrowly tailored requirement part of that test, more so than discrimination as to admission. Those are problems that would have to be addressed at a later time, but they hardly seem insurmountable.

In our history, after the Emancipation Proclamation, the Thirteenth Amendment,[251] and the end of the Civil War, the Freedman wanted during the aborted Reconstruction period that they could vote and that their kids would be educated.[252] With the passage of the Voting Rights Act of 1965, the hundred-year-old dream of equality in voting has come closer to reality. Sadly, the ancestors of those Freedmen still await the dream of equality in education. The Courts have reached the end of their attempt to address it using the Constitution. Now, it is time for Congress, the states, and private parties to step up, even if in only the most modest of ways.

251 For reasons that are hard to fathom, neither the 13th Amendment's end of slavery, the 14th Amendment's guarantee of privileges and immunities, due process rights, and equal protection, nor the 15th guarantee of the right to vote free of racial classifications ever translated into full protection of either suffrage or educational rights.

252 *See generally*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877. Foner's heartbreaking stories of America's failure to protect the Freedman, or even free Blacks before the war, resound with disappointment after disappointment, sometimes even by those with the best of intentions. In one story, an agent of the Freedman's Bureau, the agency charged with helping the newly freed slaves, told a little Black girl walking to school with her school books that she should be in the field picking cotton. As heartbreaking as that story is, it is repeated every year when Black kids graduate from our schools without achieving what they have the ability to achieve. Until the promise of equality of education is met, Blacks will never be free of the oppression of dashed dreams and lost opportunities.