“Integration, School Finance Reform, and Milliken II Remedies: The Time Has Come for Equal Educational Opportunity”

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Hooks Institute Working Paper #2005-01

INTRODUCTION

> Two groups – one white, the other black – are playing a game of poker. They have been playing the same game for some 300 years, during which time the white group has cheated. . . . The white group now announces that "from this day forward, we will stop cheating." "That's fine," the black group responds, "but what are you going to do about all those poker chips that have stacked up on your side of the table all these years." "We're going to give them to current and future members of our group," the white group replies. "So, whites will continue to benefit from past cheating; that's not fair," the black group insists.[1]

This allegory describes the current race problem in America. Even if all discrimination and prejudice had ceased (which, of course, it has not) the benefits of all those years of discrimination are stacked up on the white side of the table. Until the "chips" are redistributed, there can never be equality. It does not work to start now giving equal numbers of "chips" to both sides, because the whites will always benefit from all the years of "cheating." First we either have to take half of the white "chips" and give them to the blacks, or give the same number of "chips" to the blacks so that both sides have an equal number to begin with. Once the two sides begin with the same number of "chips," the game can proceed fairly.

Throughout the history of the United States, racism and discrimination against minority groups have taken a multitude of forms and have been established in nearly every imaginable area of life, often by law, frequently by institution, and always by the day-to-day practices of white Americans. African Americans continue to face discrimination in every aspect of their lives. During the years since slavery was abolished, any advancement that has been achieved for blacks was earned over the protests and hostility of the white community. In education, too, minority groups have experienced a long history of deprivation of the benefits enjoyed by whites. Offering those groups equality now would be comparable to the poker chip parable. Simple equality does not take into account the myriad deficiencies that have accumulated over

the years and does not make up for the countless problems that could prevent a child from having the opportunity to learn effectively, to achieve academically, and to succeed in life. Equal opportunity, on the other hand, takes all variables into account and balances for any injustices that are standing in the way of one group's ability to learn as effectively and to take equal advantage of the benefits available in society. Once it is recognized that we as a society, through our entrenched racism, have created all of the problems that are the sources of the deficiencies, we can accept our responsibility to do whatever is necessary to rectify the injuries.

BACKGROUND

The treatment of slaves in the Constitution was the "original . . . moral taint that would compel long-term complete political, educational, and human disenfranchisement of an entire people. It is this taint that endures. At its core was slavery in a 'free' country and the moral compromises the Framers made in order to create a Constitution and a United States."[2] These compromises created the foundation for the discrimination and racism that persist today.

"Once slavery was constitutionalized, it then had to be rationalized. . . . [The constitutional support for slavery] reflected the asymmetry between the promises of life, liberty, and happiness for the Framers, but ensured death, slavery, and unhappiness for the enslaved."[3] The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution barely began to scratch the surface in making right the long history of slavery and injustice suffered by African Americans. Following the passage of the Amendments, many years went by before any other progress was made at all. During those long years, African Americans were treated with utter hatred and disrespect. Again, rationalizations about the inferiority of blacks were utilized to

explain away the mistreatment.[4] During the Jim Crow era, those rationalizations were used to justify the deepening culture of white supremacy. The Jim Crow legacy lives on today.

In 1896, the Supreme Court held in Plessy v. Ferguson[5] that the notion of "separate but equal" did not violate the Constitution. Of course, the "separate but equal" language was a myth because the Court made it clear that equality in principle was all that could be expected; in practice, equality was not demanded.[6] Thus the Court guaranteed to generations of African Americans both de jure segregation and inequality. By the time the Court ruled in Plessy, laws dictating separate but equal schools had been prevalent for years. However, the black schools were not only unequal, but underfunded and thus, grossly inadequate. "The impact of the Plessy doctrine on black education is well documented. In 1916, the United States Department of Interior published a comprehensive study of black education in sixteen southern states, the District of Columbia, and Missouri. The report concluded that the Negro schoolhouses are miserable beyond all description".[7]

In the 1930s, the NAACP began challenging the inequality of schools. First they focused on graduate and professional schools, but soon shifted the focus to elementary and secondary schools.[8] The NAACP's first attack was on the pay structure for teachers, fighting for equal compensation for teachers in black schools.[9] Next the goal was equality in facilities, which led naturally to the battle to admit African American children into the superior white schools.

When attention was first paid to the inadequacy of black schools, there was no choice but to focus on desegregation. This was true for two reasons. First, segregated schools placed a "badge of inferiority"[10] on black students, a badge that could not be overcome without eliminating de jure segregation. Second, racism was such a deeply ingrained part of our society

that as long as blacks went to legally segregated schools, it would have been impossible to obtain the funding necessary to provide minority schools with equal educational opportunity.

Finally, therefore, in 1954, the Supreme Court held in Bolling v. Sharpe[11] that segregation unconstitutionally deprives black students of their equal protection rights. "Bolling however has been all but forgotten in the body of law defining unconstitutional discrimination in the realm of public education. In Brown v. Board of Education,[12] decided on the same day as Bolling, the Court also declared segregation unconstitutional, but rested its holding on an entirely different legal theory."[13] In Brown, the Supreme Court held that "separate educational facilities are inherently unequal,"[14] because they foster feelings of inferiority and consequently deprive African American children of equal educational opportunity.[15] The Court thus ruled that the government had a responsibility to provide African Americans the same educational opportunity provided to whites. However, because the Court specified that the cause of the inequality was segregation, for many years the entire focus was on desegregation, and the true mandate of the Brown Court, the mandate for equal educational opportunity, was lost.

Following Brown, communities rebelled against the Supreme Court mandate of desegregation. Although the Brown Court instructed school authorities to act "with all deliberate speed,"[16] in fact, "delay was the rule, and speed the exception."[17] Many systems looked for ways to avoid desegregating. For example, following Davis v. County School Board of Prince Edward County,[18] which was decided as a companion case with Brown, the school board closed public schools which had both white and black students attending, thus essentially shutting down the public school system altogether, and supported newly-created private schools.[19]

When communities did start attempting desegregation, frequently the effort was minimal. For example, many systems began implementing freedom-of-choice plans, whereby parents

could enroll their children in a school other than the assigned school, opening the door for white children to attend black schools and black children to attend white schools. However, in Green v. County School Board of New Kent County,[20] the Supreme Court noted that freedom-of-choice plans require that parents and students take the action necessary to desegregate the schools, a burden which should be the responsibility of the school board.[21] The Court therefore held that the school board bears the burden of constructing and maintaining a plan that can realistically be expected to immediately eradicate the former dual system.[22] With that decision, the Court proclaimed that freedom-of-choice plans were not a sufficient remedy because good faith was not enough; the plans had to work without delay.

The landmark decision in Green opened the door for more radical remedies. In Swann v. Charlotte-Mecklenburg Board of Education,[23] the Supreme Court seized that opportunity. Asserting that "the objective today remains to eliminate from the public schools all vestiges of state-imposed segregation,"[24] the Court first held that racial quotas were a good starting point in creating an effective remedy.[25] Next the Court held that optional majority-to-minority transfers were permissible and that free transportation must be provided.[26] The Court also accepted the use of racially-based altering of attendance zones.[27] Finally, the Court held that busing was an acceptable remedy and ordered its application.[28] In the Swann ruling, the Court made clear that mere desegregation, the opening up of white schools to black students, was not sufficient. Instead, the Court asserted that Brown stood for more, that its mandate was a non-discriminatory, unified, integrated system.

Importantly, the Swann Court held that school systems could be found to be unconstitutional based on the residual effects of past intentional segregation; it was not necessary for plaintiffs to prove that there was currently intentional discrimination.[29]

In Keyes v. School District No. 1, Denver, Colorado,[30] the Supreme Court declared that a finding of intentional segregation in a substantial part of the district can lead to the conclusion that a dual school system exists; it is not necessary to prove that the entire system is racially discriminatory.[31] However, in Milliken v. Bradley,[32] (Milliken I), the Supreme Court changed directions when it stressed the importance of local autonomy in school control.[33] Its previous cases had demanded more centralized control, especially as evidenced in Keyes, where outlying areas of Denver were incorporated into the desegregation plan, even though no specific finding of de jure segregation was made with respect to those areas.[34] The Court there found that because of the reciprocal effects of the recognized dual system in Denver, the surrounding areas necessarily had vestiges of discrimination.[35] In Milliken I, on the other hand, the Court declared that only districts with a specific finding of de jure segregation could be included in desegregation plans.[36]

In Milliken II[37] the Court granted tremendous leeway to courts in crafting remedies for de jure segregation. In so doing, the Court strayed from its narrow focus on desegregation and broadened to include some of the negative effects of segregation. Even though the Court has not, to this day, embraced the fact that the core issue for all Americans is the right to equal educational opportunity, for the first time, in Milliken II, the Court did understand and recognize that desegregation is not the only goal. It realized that eliminating not only segregation, but the negative effects of segregation is of paramount importance. The Court went one step farther than in previous cases. Since Brown, the Court had seemingly forgotten about equal educational opportunity and only worked toward eliminating segregation. In Milliken II, the Court seemed to recognize that a problem with segregation is that it prevents equal educational opportunity, so the results of desegregation must also be remedied.

The Milliken II Court specified three factors that courts should consider. First, "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." [38] Second, the Court held that "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[39] Finally, the Court stated that courts must consider the interest that state or local government has in local autonomy.[40] The Court went on to maintain that once the local authority has failed to carry the burden of its responsibility, not only do the courts have the right to intervene, but they have broad flexibility in designing remedies that are equitable.[41] What this three part examination by the courts suggests is that once it was determined that de jure racism existed and that the local solutions were not satisfactory, courts have the right to order almost any remedy that they deem necessary to right the wrong. In Milliken II, for example, the Court held that in Detroit, pupil assignment would not be a sufficient remedy for the history of segregation inflicted on African Americans.[42] The Court agreed that

> [c]hildren who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream. . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated school system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.[43]

In Washington v. Davis,[44] the Court took a different turn and held that for a law to be found unconstitutional, a "racially disproportionate impact" is not sufficient; it must also reflect a "racially discriminatory purpose."[45] However, In Columbus Board of Education v. Penick[46] the Supreme Court held that the Washington v. Davis requirement of discriminatory purpose could

be met by inferring intent from "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system.'"[47] In Columbus and in Dayton Board of Education v. Brinkman,[48] the Court gave broader discretion to federal courts for finding Constitutional violations.[49]

All these cases show the Court's desire to eliminate de jure segregation from the public schools. However, in spite of these efforts, the schools remain both segregated and unequal.

EDUCATIONAL REFORM

As inequity and segregation continue to plague schools in the United States, our society continues to search for a solution to the problems associated with them. Few could deny that our public education system is in need of reform. There are several different theories on the question of educational reform that are popular today. Each has its own unique following and each has its own problems in implementation. The primary theories are free choice and vouchers, magnet schools, separation, and integration.

A. Free Choice and Vouchers

There are three primary arguments in favor of school choice programs. First, they provide parents with some control over their children's education. Second, they offer students a variety of options so that they can better match their learning styles and maximize their academic capability.[50] Finally, supporters contend that choice programs could be used to create school systems that are more integrated if desegregation goals are incorporated into the program. Because of segregated residential constructs, neighborhood schools continue to be profoundly segregated, especially after the "white-flight" movement into the suburbs. Proponents of choice programs argue that allowing children to choose schools outside of their neighborhood breaks down the segregative barriers created by polarized housing.

One type of school-choice plan is open enrollment, where students may choose to attend any participating public school, including schools outside of their neighborhood. "Because the motivation for such choices may, in some cases, stem from racism, the dangers inherent in this

'simple' approach pose a serious threat to school desegregation and integration."[51] In response the free-choice movement has offered a "controlled choice" option, where transfers are controlled by the effect they will have on desegregation.

There are a variety of problems with free-choice programs. First, the controlled choice programs are open to litigation because white children might be afforded very few opportunities to transfer to the schools of their choice.[52] Additionally, any school choice program that does not offer free transportation limits the accessibility for poorer children.[53] This creates significant problems by exacerbating segregation. Another problem is that suburban schools may elect not to participate, thus perpetuating the isolation of urban minorities.[54] However, since Milliken I,[55] court-ordered desegregation plans generally may not include outlying suburban areas. Proponents of school-choice plans would suggest that voluntary participation by suburban schools might be the only way to incorporate those schools into a desegregation plan.[56]

However, in districts under court-ordered desegregation plans, implementing free-choice programs might be difficult. As previously noted, in Green v. County School Board of New Kent County,[57] the Court maintained that shifting the burden to parents and students to create desegregation was misplaced responsibility.[58]

Opponents would argue that free-choice programs simply "allow parents to flee . . . struggling city school systems,"[59] thus leaving the inner-city schools in the same condition with the same racial isolation for those left behind. And since the suburban schools do not have enough space for all of the inner-city students, some necessarily will be left behind. Furthermore, free-choice programs do not address the issues surrounding equal educational opportunity. Although shifting disadvantaged children to schools with more advantages makes improvements in some areas, it does not remedy the deeper, underlying problems. Thus, minority children would be faced with an inability to compete in classes with their white peers. "It may seem paradoxical that black students, educated in the same classrooms with white students, can be said to receive an unequal education. This presumes, however, that to treat people identically is to treat them 'equally.'"[60]

Voucher programs take free choice to a new realm. Under this theory, parents of elementary and secondary school children would receive a voucher that is the equivalent of a specified amount of money to be used to send their children to the parent's school of choice. The vouchers could be used for any school within the district, regardless of whether the school is a public school, a private school, or a parochial school. Advocates of this theory suggest that voucher programs provide parents with more control over their children's education.[61] Furthermore, proponents argue that voucher programs provide disadvantaged students with the same opportunities that have traditionally been available only to wealthier families.

Opponents contend that voucher programs afford the best students the opportunity to leave the public school system, leaving the most disadvantaged students alone in the public schools.[62] This is because private and parochial schools can set requirements for admission that exclude the most impaired students, leaving them to fend for themselves in the public schools.[63] Moreover, one of the few programs that has been attempted and has been considered somewhat successful, the Cleveland voucher program, provides only ninety percent of tuition to families,[64] thus rendering the program inaccessible to the poorest families.

The principal argument against school voucher programs is that they violate the Establishment Clause of the First Amendment to the United States Constitution. Because religious schools are beneficiaries of some of the funds spent on voucher programs, First Amendment issues arise. In fact, in the Cleveland program, 46 of the 56 schools that participated in the program were religious schools and of the children participating in the program, 96 percent opted for religious schools.[65] Therefore, the primary beneficiaries of voucher funds in Cleveland are religious schools.

In Community for Public Education and Religious Liberty v. Nyquist,[66] the Supreme Court held that government reimbursement of private school tuition was a First Amendment violation because government funds were being used for religious schools.[67] However, the Court has since softened its view on Establishment Clause issues and the current Court will likely find that voucher programs are Constitutional.

However, voucher programs fail to address the fundamental issue of equal educational opportunity. If there were no First Amendment issue and such programs could be maximized, they would still avoid the central problem, in the same way that free-choice programs do. Giving students the chance to go to a choice of schools leaves many of the failings of the system without a remedy. It leaves the responsibility of equalizing educational opportunity in the hands of parents and leaves many children completely without help. Additionally, as parochial schools and public schools are practically the only choices, parents are faced with choosing between supporting religious institutions and leaving their children in failing public schools. Moreover, as the Cleveland program demonstrates, the educational opportunities provided by the religious schools may not improve the lot of students who decide to transfer out of the public schools, since those students may not be able to compete academically with the students who remained in the public schools.[68]

B. Magnet Schools

Magnet schools are another variation on school choice programs. Magnet schools are schools that provide a special focus or curriculum in order to attract students from other districts. Typically, magnet schools began as predominantly-minority schools which added a component that serves as a draw to students from other districts, specifically white students. Although some magnet schools are "full-site magnets," where all students are transfers, most are "partial-site magnets."[69] At these schools, the magnet students follow their own curriculum while the neighborhood students continue to follow the standard program. There are two primary purposes of magnet programs: "(1) to enhance students' academic performance through a distinctive curriculum and (2) to enhance the school's racial and social diversity."[70]

However, magnet schools are only able to enhance the academic performance of the students in the program, not the other students following the regular curriculum. Additionally, although the racial diversity within the school is enhanced, the programs are separated so that the students do not benefit from the diversity.[71] Not only are magnet schools particularly susceptible to segregated classrooms, but tracking, which is a serious problem of discrimination in schools,

is a way of life in magnet schools. Tracking is the very foundation on which the program is based. All students who attend the regular program, generally minority students, are tracked in lower academic tracks than those attending the magnet program, generally white students,[72] thus suggesting "to white and minority students alike that the separation of races is an indication of superior white ability, social importance, or academic potential."[73] What makes this problem particularly insulting is that it is occurring as a result of an effort to remedy segregation. "The insult of being segregated by a desegregation remedy is yet more offensive when one's white peers are enjoying even greater educational opportunities than they would have in the absence of desegregation efforts and federal money to support desegregation-oriented magnet schools."[74] Not only are the neighborhood minority students not receiving any of the benefits that the transfer students are receiving, but they are receiving negative results from being tracked, segregated, and isolated.

C. School Finance Reform

The goal of the school finance reform movement is to redistribute funds in order to equalize resources within a school district or a state. The history of school finance litigation can be divided into three phases.[75] The first phase involved challenges based on the Equal Protection Clause of the federal Constitution.[76] This phase culminated in the case of San Antonio Independent School District v. Rodriguez.[77] There the Court held that education is not a fundamental right[78] and that the disparities caused by using property taxes to fund schools do not amount to an equal protection violation because allowing school finance to be under local control is a rational state purpose.[79]

The second phase of litigation was similar to the first phase in that the challenges were based on equal protection claims. The difference was that these claims were based on state Constitutions instead of the federal Constitution.[80] When Rodriguez effectively shut down federal equal protection challenges, the school finance movement looked to state Constitutions, where they occasionally found equal protection standards that were even more useful than the

federal standard. However, overall these challenges were unsuccessful and, as a result, school finance reformers began to look for a new vehicle for their effort.[81]

During the third phase, school finance claims have continued to be based on state Constitutions, but this time the focus has been on education clauses instead of equal protection.[82] Although the United States Supreme Court found that education is not a fundamental right under the federal Constitution,[83] education is considered a fundamental right under many states' Constitutions. Third-phase challenges typically demonstrate another shift in the way the claim is shaped. Before the third phase, reformers claimed that all schools had a right to equal funding. During this phase, plaintiffs assert that all students are entitled to at least an adequate education.[84] Litigants have been slightly more successful employing this strategy.[85]

Although adequacy would be a vast improvement for many schools, it does not provide equal educational opportunity; nor does it guarantee even equal funding. Instead, adequacy furnishes the bare minimum, only ensuring that schools are capable of providing children with the most basic education and safety. Moreover, because adequacy litigation does not tie poor school districts to wealthier ones in any way, there are no safeguards to ensure that the funding will continue.[86] In school desegregation cases, and even in choice programs and magnet schools, the schools that are affected by the program are populated with both privileged, white children and disadvantaged, minority children. Thus, many of the benefits afforded to the white students will, by necessity, be given to the black students as well. When that connection is removed, the black children do not enjoy any of the advantages that are ensured by their tie to the white children and the funding is always in danger of being taken away because the power of the suburban parents is not behind the effort.[87] Finally, adequacy claims do nothing about inequality because as long as a school is found to be adequate, the disparities among schools are inconsequential.[88]

D. Separation

Malcolm X said in 1964, "So, what the integrationists, in my opinion, are saying when they say that whites and blacks must go to school together, is that the whites are so much

superior that just their presence in a black classroom balances it out. I can't go along with that."[89]

Due to recent trends in desegregation jurisprudence, many of the systems previously under court-ordered plans are being released and the job of school system management is being returned to local authorities.[90] With the release, school boards will have designs, like school choice plans, reopened to them. "The tenor of the times suggests that America's public schools have entered a period where, in the foreseeable future, racial separation will likely become an acceptable result of race-neutral student assignments."[91] Faculty at separate schools, also known as immersion schools, would consider the unique culture of the African American community in organizing the educational design. Proponents of separate schools for blacks maintain that the conflict between African American culture and the dominant white culture is a fundamental problem in the public school system, leading to inadequate performance by African Americans.[92] "Mandatory integration of our educational system simply does not respect the ethnicity of African-American students."[93] Proponents of separation argue that the African-American community provides identity and a system of values to blacks.[94] The existence of a separate African-American ethnicity serves as a justification for separate schools where blacks can be immersed in their own "normative community."

It has been argued that the traditional "assimilationist model of public education" worked for groups who immigrated voluntarily.[95] However, for groups such as Native Americans, some Latino/a groups, and African Americans, separatists assert that the concept of assimilation was the wrong approach. For those "involuntary immigrants," there is not the feeling that the discrimination and prejudice they face on a daily basis is temporary, a feeling generally shared among voluntary immigrants.[96] The lack of trust in whites and all of the institutions of white society make involuntary immigrants less likely to function comfortably or gain acceptance when socialized with the dominant society.

Supporters of immersion schools point out that African Americans are not succeeding at navigating white culture following efforts at assimilation in public schools.[97] Because schools

are primarily segregated anyway, the dominance of white culture and norms that continue to guide educational programs leave blacks feeling incompetent and inferior. If instead, African Americans controlled the culture of the school and portrayed blacks in a positive light by using an Afrocentric curriculum, students could graduate with a feeling of confidence and pride that they would then take with them into the world, thus having a chance at competing favorably. "Resegregated schools present the opportunity for Blacks to provide educational sanctuary for their children where the teachers are interested in the well being of the children, where teachers have high expectations of students and where teachers have racial respect for the students."[98]

Separationists recognize that the Supreme Court's decision in Brown was important because of its role in overruling Plessy v. Ferguson[99] and because of the finding of the court that segregation of the public schools engendered feelings of inferiority in black students.

> In light of their subordinated social status and historical experience of slavery, African-Americans' perception that separation was a badge of inferiority is certainly understandable. . . . But something odd happened as de jure segregation disappeared and de facto segregation took its place. Ironically, a significant portion of the African- American community came to view the liberal notion of integration as undesirable. . . . Between 1954 and 1992, the African-American community developed in such a way that the Court's assimilationist brand of integration came to be perceived as a badge of inferiority by African-Americans, thus bringing it full circle to Plessy.[100]

Immersion schools may not be able to succeed against an equal protection claim, especially in light of the current trend on the Court to approach race issues with "colorblind" methods. Even though continued societal discrimination could provide a compelling state interest, the courts are unlikely to recognize that as a reason to move away from the current colorblind inclination of the Court. However, proponents would argue that "the subordinated position of African-Americans in contemporary society and the fact that those predominantly white schools viewed as 'integrated' in fact embody white norms and have already taken race into account via white race consciousness" should provide sound reasoning for allowing race to be taken into account in establishing immersion schools for blacks.[101]

Separation, like free-choice and voucher programs, resists facing the integral problem. The one way that immersion school programs go farther than the others is that separationism recognizes that desegregation can not solve all the problems. In fact, some of the problems faced by the loss of recognition of an African American culture are improved by creating immersion schools. In discussing the choice between integration and separation, W.E.B. DuBois stated that,

> theoretically, the Negro needs neither separate nor mixed schools. What he needs is Education. What he must remember is that there is no magic either in mixed schools or segregated schools. A mixed school with poor unsympathetic teachers, with hostile public opinion, and no teaching of the truth concerning Black folk is bad. A segregated school with ignorant placeholders, inadequate equipment, and poor salaries is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things are seldom equal, and in that case, Sympathy, Knowledge, and the Truth outweigh all that the mixed school can offer.[102]

Opponents argue that separation can never sufficiently provide blacks with equality in education. Therefore, the further critique of separation is found in section E, Integrationism, which follows.

E. Integrationism

Integrationists assert that a drawback to immersion schools is that African Americans lose the experience of adapting to the culture in which they will ultimately need to live when they get out in the world and begin to compete. Advocates of integration would argue that it is better for African Americans to face the necessary cultural assimilation beginning at a young age than to avoid socializing with different races until it is time to go out into the world and compete in college or the work force. If blacks do not attend schools with whites, they will be ill-equipped to fit in where necessary in order to become happy, productive, and well-adjusted members of society. If minority communities did not foster similar goals to those of whites, immersion schools might be an appropriate answer. But the American dream is still alive in

minority communities, however out of reach it may seem, and in order to have any hope at all of seizing even an infinitesimal piece of it, minorities must prepare themselves to compete in the world of the dominant culture. In other words, even though there is nothing superior about the white culture, in order to hope to share in the financial resources and other benefits associated with white privilege, integrationists argue that minorities will need to learn to fit into white society.

Without integration, white children are also deprived of the opportunity to socialize with blacks. Not only does that leave those students unprepared to work in a multi-cultural world, but they would not be afforded the opportunity of learning to value differences and or begin to interrupt the long-lasting cycle of prejudice.

Although most would agree that schools are still segregated to a large extent, there are many people who continue to support the idea that African Americans benefit from desegregation and that integration should continue to be the primary goal. Many of the supporters of the integration movement in the 1960s and 1970s continue to advocate it today. However, many people who previously supported desegregation began to have a change of heart during the busing era. In fact, many African Americans began to question the value of desegregation. There are many reasons for this disillusionment. For one thing, there is a

> sense that black students are often deeply scarred and humiliated in mixed-race schools. . . . The view [among many black parents is] that mixed-race schools may sound good in theory, but in reality black children meet with harsh discrimination, suffer disproportionate punishment, are banned from leadership roles in clubs and activities, and in general have to live in an atmosphere that fails to respect their culture and history.[103]

On the other hand, studies have shown that integration can improve academic achievement, as well as helping to prepare both white and black students to live and function in a diverse community.[104] In 1966, the Coleman Report[105] "developed a pervasive view that

integration in the classroom, per se, had a beneficial effect on black children, was not harmful educationally or socially for white children, and would help offset years of officially fostered racial isolation and stereotyping."[106] Thus, it would seem that integration brings about positive changes for black students and, at the very least, does not create any harmful effects on white students. Willis Hawley, dean of George Peobody College of Education stated that "based on social science data, . . . desegregation (1) enhances the academic development of minorities; (2) reduces interracial conflict and prejudice; (3) benefits the development of self-esteem, aspiration to achieve, and racial and ethnic identities among minorities; (4) enhances the post-high school opportunities and socio-economic standing of minorities; and (5) increases racial heterogeneity of communities."[107]

The debate between separationists and integrationists focuses to a large extent on the African-American culture and the importance of allowing black children to be immersed in that culture as part of their education or assimilating into the culture of the dominant white society. However, it is very difficult to define the ethnicity of either blacks or whites and to organize an educational plan around either one. The problem with the culture-based approach to integration is that it suggests that African-American culture is inferior to that of whites. The problem with a culture-based approach to separation is that it suggests that blacks can compete in a world dominated by white culture without having been exposed to it as a student. The bigger problem, however, is that the focus on culture, while an important question to consider, is misplaced until African Americans are afforded some semblance of equal educational opportunity, or, at the very least, until there is some real attempt to create equality in education.

Although integration is of the utmost importance, it does not accomplish enough. It is important to remember that the original goal decreed in Brown was equal educational

opportunity. In order to accomplish that, desegregation of the schools was absolutely necessary. But integration cannot be the final goal; more is required to fulfill the mandate of Brown. "The root of the problem was not de jure segregation or its twin de facto segregation. It was, instead, white supremacy . . . created from and solidified in our constitutional consciousness by the Faustian bargain the Framers made with the South to protect slavery. It is this white supremacy and its effects that must be destroyed root and branch" until the entire culture of racism and discrimination is defeated.[108]

PROPOSED SOLUTIONS

From the time the Brown Court declared de jure segregation to be unconstitutional until recent years, school reform centered around a belief that the discrepancy in performance between black children and white children was due simply to segregation. However, that focus misses the point behind the Brown holding. The real holding in Brown was that African Americans are entitled to the same educational opportunity afforded whites. The belief in Brown was that what was standing in the way of that opportunity was segregation. Of course the Court was right that as long as de jure segregation existed, equal educational opportunity was not attainable. However, segregation is not the only barrier. Recall that the problem began, not with Plessy, but with slavery and the bargain made with the south about the inclusion of slavery in the Constitution. Physical segregation is only one of the obstacles. Because of this, the other approaches to school reform have arisen in an effort to combat the barriers. However, as each theory is put into practice, the specific hurdles to success are discovered. The problem is that no one solution can begin to break down the barriers.

The Connecticut Supreme Court recognized that when it decided Sheff v. O'Neill.[109] Sheff represents what has been seen as the beginning of a fourth phase of school finance litigation.[110] In Sheff, the court recognized that equalization of school finance was not enough.

In fact, in Hartford, where Sheff originated, the schools were already receiving more money than the state average. Instead, the court found that the disparity was not just in the funding that different schools received, but that educational disparity followed racial and socioeconomic lines.[111] But the segregation in Connecticut schools was not held to be the product of a de jure effort to maintain separate schools. The Sheff court declared that the Connecticut Constitution guarantees students equal educational opportunity and that segregation, whether de jure or de facto, deprives them of that opportunity.[112] Thus, the court held that de facto segregation must be remedied.[113]

As in Brown, the Sheff court acknowledged that segregation and racial isolation were barriers to equal educational opportunity. But Sheff went farther.

> By focusing its analysis on the nature of de facto segregation, Sheff suggested that the educational disadvantages minority students face are systemic. While de jure segregation inflicts harm on minority students on an individual level by stigmatizing them and creating in them a sense of inferiority, the harm of de facto segregation operates on a broader basis. Rather than being limited to "the narrow objective of compensating the victims of past de jure segregation," the desegregation remedy contemplated in Sheff presses for the elimination of systemic racial disadvantage in public education. . . . The notion of systemic educational disadvantage supported by Sheff does not reject the "stigma" theory relied upon in Brown but suggests that the stigmatization of minority children may also operate on a groupwide basis.[114]

The court maintained that both finance and integration would be needed to overcome the systemic obstacles facing minority students. Where others might perceive the two as conflicting goals, the Sheff court believed that the two theories could work together to create equal educational opportunity, and that neither one alone could accomplish that.[115]

Although the court relied, not only on the Education Clause of the Connecticut Constitution, but also the unique Segregation Clause, it could have relied solely on the Education Clause, thus rendering the decision useful in other states. The court could have done this by defining equal educational opportunity, guaranteed in the state Constitution, as including the right to attend integrated schools, regardless of the cause of the segregation.[116]

An important point to consider from the Sheff decision is that school finance without desegregation efforts is a return to the Plessy v. Fergusson doctrine of separate but equal. Desegregation without school finance equalization returns to the pre-Milliken II busing era. Only by combining the two efforts can any real progress be made.

In acknowledging that more than one approach will be necessary to equalize educational opportunity, the various obstacles must be recognized so that remedies can be fashioned. In order to overcome those obstacles, at least three solutions out – integration efforts, school finance reform measures, and Milliken II-type remedial programs – must be carried simultaneously in order for real progress to occur.

The first obstacle to overcome is racial and socioeconomic segregation. One cause of the current segregated state of inner-city schools is the Supreme Court's decision in Milliken I, where the Court declared that interdistrict desegregation could only be employed if it could be proven that there was interdistrict, de jure segregation.[117] This made incorporating suburban school districts into desegregation plans all but impossible. "As Professor Jeffries has explained, busing within the cities displaced white students from their neighborhood schools and thus gave middle-class whites a reason to leave; refusal to include the suburbs in busing plans, in turn, protected white suburbs and thus gave middle-class whites a place to go."[118] This "white flight" exacerbated the urban racial isolation. When the concentrated residential segregation of inner cities is considered, Milliken I amounted to a death knell for any profound success desegregation efforts might have had. Besides fostering segregated schools, the racial isolation of inner cities localizes poverty, creating socioeconomic isolation, as well.

This isolation, in conjunction with lower expectations of teachers and administrators, peer influence (both conscious efforts to conform to the culture and the absence of the motivation that can come from enthusiastic peers), and general racism among those in contact with students creates nearly insuperable hurdles. However, research is now showing that these hurdles can begin to be overcome with integration. There is evidence that children who attend integrated schools are more likely to attend and graduate college, to earn higher incomes, and to

live and work in integrated communities, thus breaking the cycle of segregation and poverty.[119] In addition to the benefits derived from racial integration, "there is a good deal of evidence to suggest that integrating students from different socioeconomic backgrounds leads to significant educational benefits for poorer students."[120] In fact, it has been shown that "racial integration is most effective when it also results in socioeconomic integration."[121]

One of the most important benefits of integration plans is that they connect white and black students in such a way that when whites seek and receive resources or benefits, the blacks who attend their schools will automatically benefit. In order to accomplish this goal, integration approaches must bring together students from urban schools and students from suburban schools. Choice models attempt to do that, but fail because suburban schools do not always choose to participate, those that do only have limited space, and inner-city schools remain racially and socio-economically isolated. Instead, two approaches that might work both involve the redrawing of district lines. One option is to draw district lines in a "pie-like system of districts, with wedges emanating from the cities and extending to the suburbs."[122] The other possibility is to create districts that incorporate an entire metropolitan area into a single district, thus tying the fate of all the students together.

Another obstacle that must be overcome is that the actual facilities or materials in black schools are not equal to those of white schools due to poorer funding. When the basic physical needs of minority students are not met, the students certainly do not have equal opportunity or a chance of competing.

> If students *W* and *B* are of equal "intelligence" and social background, but student *W* is provided with two books and student *B* with only one, student *B* clearly has been given less opportunity to learn than has student *W*. When both students finish their course of study, student *B* will have learned less than student *W*; if each is tested on the information contained in the two books, student *W* will perform in a superior fashion.[123]

School finance litigation seeks to redress this problem. However, equal funding is not a satisfactory remedy since inner-city schools require additional funding because of the greater

needs and the higher costs.[124] On the other hand, school finance challenges that are seeking adequacy instead of equality lose the important benefit of tying wealthy students to poor students in much the same way that integration ties white students to minority students.[125] However, if school finance reform is used in conjunction with other remedies, it can be an effective tool. This is especially true if finance reform strives for a combination of adequacy and equalization and is coordinated with integration efforts that succeed in connecting the fate of poor, minority students with that of wealthy, white students.

However, it is important not to stop the evaluative process there because equality barely scratches the surface in equalizing educational opportunity. Simple equality does not consider the countless problems that could prevent a child from having the opportunity to learn effectively, to achieve academically, and to succeed in life. Equal opportunity, on the other hand, takes into account all variables that are standing in the way of one group's ability to learn as effectively as others. We as a society must recognize that we have created the problems that are the basis of the deficiencies. At that point, we will begin to accept our responsibility to do whatever is necessary to remedy the harms.

Besides physical segregation and unequal funding, African Americans have been severely burdened by academic isolation. "Educational segregation . . . acted as an efficient means to intellectually colonize Blacks and to ensure their intellectual inferiority by under-educating them and under-funding their education. . . . The educational segregation that guaranteed the inferiority of Blacks did not end with Brown v. Board of Education and its progeny."[126] Even in schools that were successfully desegregated, blacks have frequently been tracked into the lowest academic tier, ensuring that black students would continue to be intellectually segregated when actual physical segregation is not possible.[127] Additionally, African Americans are more likely to be labeled mentally retarded or learning disabled,[128] more likely to be placed in vocational or special education schools,[129] less likely to be labeled gifted and talented,[130] and less likely to be placed in advanced placement classes.[131] "This intellectual segregation has long-term and short-term effects. It determines the type of education a child

receives while she is in school, and the types of opportunities she can pursue once she completes the public school program."[132]

In addition to intellectual segregation, African Americans are given a substandard education in every way. Traditionally, urban public schools nationwide have failed to provide an adequate education in basic skills to huge numbers of students.[133] Although some improvements were made, by and large inner-city schools are still inadequately funded and the quality of the education offered is not only inferior to that provided by white schools, but is so substandard that black students cannot hope to compete in any domain. Blacks continue to graduate without the most basic skills in reading, math, and other fundamental subjects.[134] The dropout rate among African Americans is higher than among whites, and blacks are less likely to attend college than whites.[135] Neither African Americans nor whites are taught black history or are furnished any understanding of black culture. This deprives African Americans of the confidence and pride that can only be achieved in feeling a tie to the history and traditions of your own people, and leaves white students without the understanding needed to break down barriers and begin to accept African Americans as equals.

Inner-city black children are faced with a myriad of other problems that must be addressed in order to guarantee equality in educational opportunity. Substandard housing, violence, and isolation make both ability and motivation difficult to muster. Income levels among blacks are significantly lower than among whites, and unemployment rates are significantly higher.[136] Furthermore, the problems go even deeper. For example, while the parents of white children were often afforded a satisfactory education, many of the parents of African Americans were educated in systems that were even worse than those their children are facing today. "Nationwide studies of children aged 9, 13, and 17 have consistently demonstrated that, on the average, children's achievement in reading and math is directly proportional to their parents' level of education."[137] Educated parents provide their children with a variety of benefits that are not available to children of uneducated parents. These include assistance in understanding, intellectual exchanges of ideas, exposure to a more extensive vocabulary, a

family emphasis on education, and the ability to recognize deficiencies in the education that the students are receiving, in addition to having a better chance of receiving responsive feedback when complaints are mounted.

> As compared to children of the same age from middle-class families, many of the urban children have not been exposed to the benefits that flow from such things as adequate housing, proper food, adequate parental supervision and preschool experiences leading to learning readiness. . . . Many poverty-related conditions . . . impede the progress of pupils in large city schools. . . . Lack of proper food, clothing, medical care, as well as proper recreation interfere with educational progress. Overcrowded and noisy living quarters interfere with a child's study. . . . These conditions . . . produce a cluster of adverse effects upon children's work in school, that include distraction from school work, undone homework . . . and lack of motivation to attend school and to achieve.[138]

Despite these barriers that African Americans encounter, education remains of the utmost importance in achieving any success in this society. In the agricultural society that existed prior to the industrial revolution, education was not a fundamental necessity. However, with the advent of much more complex jobs, it became far more crucial to have a basic education in order to compete.[139] Half of the chronically unemployed,[140] sixty to eighty percent of prisoners,[141] and one third of welfare recipients are functionally illiterate.[142] In spite of the importance of an education, inner-city children continue to receive an inadequate education that does not prepare them to compete in the world at large.

"In Milliken II, the Court noted that the consequences of 'previous unlawful educational isolation . . . linger and can be dealt with only by independent measures.' The Court thus reaffirmed [that] . . .[f]air process is not enough; untainted democratic decisionmaking is inadequate. The Constitution requires equal educational opportunity."[143] However, it is difficult to determine what is meant by equal educational opportunity.

"In defining the parameters of equal educational opportunity, opportunity and performance collapse into the same concept. Thus, if blacks perform worse on tests because they have not learned the required curriculum as effectively as have whites, the government arguably has not provided equal educational opportunity."[144] Once it is accepted that African Americans

do not have innate weaknesses, performance is a reasonable gauge of how successfully the government is meeting its obligation of providing equal educational opportunity to all students.

> Integration alone could cure the performance gap between blacks and whites only if segregation were the sole cause of unequal educational performance. . . . As long as disadvantaged minority students perform at a lower average level of achievement than do whites, the government has failed to fulfill its affirmative remedial obligation. A successful remedy, therefore, must focus on performance. It must address those components of a curriculum that can compensate for the effects of cultural isolation and provide minority students with the skills necessary to compete in the American meritocracy. Integration may be relevant, but only to a limited extent. Far more significant is the substance and method of educational instruction. Since the deprivation is substantive, so much [sic] be the remedy.[145]

Therefore, it might be said that all students are entitled to equal results in the educational process. "[A] right to equality of result with respect to public school education, . . .is arguably a prerequisite to equality of opportunity with respect to higher education and to scarce employment positions."[146] Due to the increasing importance of education in each individual's ability to compete, those results are of the utmost importance.

The trend of the Supreme Court, however, has been to move away from a race-conscious goal of equal educational opportunity and instead to focus on a race-neutral, colorblind approach. In order to find a violation, the government must have taken direct action to cause the problem and it must have done so with the specific intent to discriminate. However, under the colorblind strategy, the requirement is that the government must refuse to consider race at all.[147] "The state action requirement forgives the government of responsibility for racial inequality in the 'private' sphere, while the discriminatory purpose requirement accomplishes much the same thing by forgiving the government of responsibility for race-neutral action that has a disproportionate impact on racial minorities. . . ."[148]

The gains made by blacks during the Civil Rights movement have convinced many whites to believe that racism and discrimination no longer exist in this society.[149] In fact, there

are some who believe that African Americans now actually have an advantage over whites.[150] These beliefs support the trend of the Court to ignore society's responsibility and the obligation of equal opportunity. Such beliefs, however, deny the realities of the continued plight of minorities in our society. In Washington v. Davis,[151] the Court held that there is no constitutional violation unless it is proven that there is a discriminatory purpose. Thus, when the government pays no attention to race, it is "immunized from responsibility for persisting racial inequality, including whatever amount of racial inequality may be attributable to past (unadjudicated) discrimination by the state."[152] Consequently, "white insistence on non-race consciousness amounts to white denial of racial guilt. If Euro-Americans do not acknowledge race, then they cannot be guilty of racial subordination."[153]

However, when a school system continues to fail to effectively educate minority students, while effectively educating white students, it violates the Equal Protection Clause.[154] In fact, it could be argued that discriminatory purpose could be found in most, if not all of the deficiencies faced by African Americans. For example, the problems delineated above that result from students having uneducated parents are all the result of the intentionally discriminatory educational practices that created the need for court-ordered desegregation. Similarly, many issues surrounding housing can be traced to racist practices with purposeful discrimination. Once it is recognized that we as a society through our entrenched racism have created all of the problems on which the deficiencies are built, we can then accept our responsibility to do whatever is necessary to redress the damage. Remedial action cannot be race-neutral because it is in response to a system that is not race-neutral. It is impossible to have equality before instituting justice. Otherwise, under a race-neutral system of unjust equality, the alienation

among races is exacerbated instead of healed, and the white culture will always remain dominant.

Instead, it is the responsibility of society to institute race-conscious policies. "The government must make victims whole 'but for' the effects of its past transgressions."[155] It is important to draw a distinction "between the right to equal treatment and the right to be treated as an equal."[156] Being treated as an equal means being treated with respect and being allowed to compete on an even playing field. Equal treatment, on the other hand, can be devastating to someone who has been given an unfair disadvantage throughout history. That is why the focus in school reform must shift from equity, where the goal is to begin to spend an equal amount of money on all schools (which is still not done), and from adequacy, where the goal is to provide a minimum standard of education to all children, to a combination of the two, where equal educational opportunity is provided to all students, even if some schools require more funding to make that possible than do other schools.[157]

Recall that in Milliken II the Court declared that remedial measures should be used to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,"[158] and that if local authority fails in that responsibility, courts must intervene by designing whatever equitable remedies are needed. It is nearly impossible to imagine what position African Americans would be in now absent the long history of purposeful discrimination, but it is not unreasonable to expect that remedies should be designed to equalize performance to a level comparable to that of white students.

In contract cases, "compensatory justice requires that the wrongdoer transfer to the victim an amount that is equivalent both to the loss suffered by the victim and to the ill-gotten benefit obtained by the wrongdoer. By a single stroke, therefore, the compensation erases both the ill-

gotten benefit and the undeserved loss."[159] Similarly, African Americans are entitled to more than equality in education. Not only should they receive remedies that make up for their losses (by way of equal funding, facilities, teachers, etc.), but the balance is not complete until the ill-gotten benefits to whites are accounted for, as well. Therefore, remedial measures that address the host of deficiencies are necessary in order to bring the educational standard for blacks to the level that whites have always enjoyed. Once that is complete, equality will be sufficient.

Opponents would argue that this plan requires too much centralization. However, local control has failed the challenge of educating inner-city African Americans. Furthermore, "[i]f the national Government had the power to put down Slave Insurrections, hunt fugitive slaves over state lines, and protect slavery in the states while slavery existed, it has the right to assist in the education and improvement" of their descendants.[160]

Affirmative action programs in higher education and employment, while important, are not enough. They are needed because we continue to allow minority children to receive a substandard elementary and secondary education. Once the necessary remedial actions are taken in public schools, there will cease to be a need for affirmative action programs.

The final step, then, is to create remedial measures to make up for the countless barriers that minority students must overcome before they can begin to experience equal opportunity in schools. One component of the remedial programs would necessarily be to begin to hold teachers and principals accountable for the education and performance of black children.[161] Otherwise, society is blaming African-American children for the failure of the educational system.[162] To that end, teachers and administrators must be given additional training to learn how to satisfy the new requirements. Beyond that, there are a tremendous variety of possible remedies available to schools. Smaller classes with a better teacher-student ratio, more contact

with parents in order to afford parents more control over their children's education, mentoring and tutoring programs, individualized teaching, and student committees to get children actively involved in improving their own education would all be positive actions that schools could take.[163] Additionally, improved libraries, music and arts programs, multicultural studies, and specialized programs tailored to students' interests would provide a more well-rounded education.[164] Besides adequately educating all children to at least a minimum level, schools should be expected to help each child as nearly as possible reach his or her capacity and become competitive and productive members of society.[165] To that end, schools should teach students a basic knowledge of government (so that they will be prepared to make informed choices and participate in the political process), career planning (including assessments, job skills training, and general preparation, such as application and interview skills), ethics, and recreational pursuits.[166]

> The ultimate concern in defining the constitutional right against discrimination in education should be to eliminate the caste-like quality of race in America. The Constitution establishes the framework for a just social structure. All groups should have the same opportunity to participate in American society, and to compete for its many benefits and rewards. *Brown* was a signal that the Constitution no longer would tolerate a dual society. In predicating its holding on the principle that unequal educational opportunity constituted the proscribed inequality, the *Brown* Court envisioned ideals that reach farther than integration just in the nation's classrooms. The spirit of *Brown* compels the integration of the economic structure of American society. The educational system should fully equip minorities to compete - - blacks must benefit from education equally with whites - - so that they will no longer be disproportionately denied the benefits of living in American society. . . . As the root of achievement, education serves as the means by which a person acquires the skills rewarded in society.[167]

In order to accomplish the goal that all people be equally able to access the benefits of society, integration of the schools, school finance reform, and remedial measures must be established in the schools. These measures will finally begin to provide African Americans with the equal educational opportunity to which they are entitled, to redistribute the poker chips, so

that everyone is on an even playing field. Once that has been achieved, African Americans will be able to compete as equals with whites in higher education and the job market. Then, the ultimate goal of a just social structure where all human beings can compete equally and live together with respect may begin to be possible. In fact, the colorblind strategy of the Court might then be a legitimate approach.

[1] Gary Chartier, *Civil Rights and Economic Democracy*, 40 Washburn L.J. 267 (2001), quoting Roy L. Brooks, et al., Civil Rights Litigation: Cases and Materials 3 (2d. ed. 2000).

[2]Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 How. L.J. 133, 140 (1999).

[3]*Id.* at 150-51.

[4]*See id.* at 164-65.

[5]163 U.S. 537 (1896)

[6]*See id.* at 544

[7]Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 Minn. L. Rev. 735, 751-52 (1985).

[8]Smith, *supra* note 2, at 178.

[9]*See id.*

[10]Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[11]347 U.S. 497 (1954).

[12]Brown I, 347 U.S. 483 (1954).

[13]David Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U.L. Rev. 1, 8 (1983).

[14]Brown I, 347 U.S. at 495.

[15]*See* Chang, *supra* note 13, at 8.

[16]Brown v. Board of Education (Brown II), 349 U.S. 294**,** 301 (1955).

[17]Heaney, *supra* note 7, at 765.

[18]347 U.S. 483 (1954).

[19]See Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 221 (1964).

[20]391 U.S. 430 (1968).

[21]See id. at 441.

[22]See id. at 441-42.

[23]402 U.S. 1 (1971).

[24]Id. at 15.

[25]See id. at 25.

[26]See id. at 26-27.

[27]See id. at 28.

[28]See id. at 30.

[29]Chang, *supra* note 13, at 14.

[30]413 U.S. 189 (1973). Keyes was significant because it was the first Supreme Court decision in which a non-Southern state was declared to be a dual system and desegregation was ordered.

[31]See id. at 201.

[32]418 U.S. 717 (1974). Milliken was significant in two primary ways. First, it was the first northern system that the Court declared to have a history of de jure segregation. Second, the Court made clear that de facto segregation was not to be dealt with by the courts. Courts could only order remedies for de jure segregation. This was reaffirmed in Pasadena City Board of Education v. Spangler, 427 U.S. 424. There the Court overturned a lower court decision that ordered annual modification to ensure that there was never a school with a majority minority student body. The Court stated unequivocally that once a school system has successfully established a race-neutral system, so that segregation is the result of de facto segregation with no current unconstitutional action by the school board, courts may no longer interfere.

[33]See id. at 742.

[34]See Keyes, 413 U.S. at 201-02.

[35]See id.

[36]See Milliken I, 418 U.S. at 744-45.

[37]Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977).

[38]Id. at 280.

[39]Id. (quoting Milliken I, 418 U.S. at 746). Italics in Court's opinion.

[40]See id. at 280-81.

[41]See id. at 281.

[42]See id. at 287.

[43]Id. at 287-88.

[44]426 U.S. 229 (1976).

[45]Id. at 239.

[46]443 U.S. 449 (1979).

[47]Id. at 465 (quoting the district court at 429 F.Supp. 229, 255 (1976)).

[48]443 U.S. 526 (1979).

[49]Heaney, supra note 7, at 775.

[50]Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 Neb. L. Rev. 255, 257 (1995).

[51]*Id.*

[52]*See id.* at 261-64.

[53]*See id.* at 273.

[54]*See id.* at 274.

[55]Milliken I, 418 U.S. 717 (1974).

[56]*See* Smith, *supra* note 50, at 292.

[57]391 U.S. 430 (1968).

[58]See id. at 441.

[59] Mary Jane Lee, *How Sheff Revives Brown: Reconsidering Desegregation's Role in Creating Equal Educational Opportunity*, 74 N.Y.U.L. Rev. 485, 524 (1999).

[60]Chang, *supra* note 13, at 58 note 133.

[61]See Scott A. Fenton, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 Cap. U. L. Rev. 645, 647 (1997).

[62]*See id.* at 645.

[63] *See id.* at 671.

[64]Matthew D. Fridy, *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 Cumb. L. Rev. 709, 714 (2000/2001).

[65]*See id.* at 756.

[66]413 U.S. 756 (1973).

[67]See id. at 779.

[68] Evaluation of the Cleveland Scholarship Program, 1998-2000 Summary Report, Indiana Center for Evaluation, September, 2001. The report shows that, while those participating in the program started out ahead of the other students in every area, after two years in the program, the public school students were outscoring the voucher students in reading achievement, language achievement, mathematics achievement, and total achievement. By the end of the third year, the voucher students were ahead in language achievement, although still not as far ahead as they had started out.

[69] Kimberly C. West, *A Desegregation Tool that Backfired: Magnet Schools and Classroom Segregation*. 103 Yale L.J. 2567, 2569 (1994).

[70] *Id*. at 2568-69.

[71] *See id.* at 2570.

[72] *See id.* at 2573-74

[73] *Id.* at 2578.

[74] *Id.* at 2579.

[75] Kevin Randall McMillan, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 Ohio St. L.J. 1867, 1869 (1998).

[76] James E. Ryan, *Schools, Race, and Money*, 109 Yale L.J. 249, 266 (1999).

[77] 411 U.S. 1 (1973).

[78] Id. at 30.

[79] Id. at 55.

[80] *See* McMillan, *supra* note 75, at 1872-73.

[81] *See Id.*

[82] *See* Ryan, *supra* note 76, at 268.

[83] San Antonio Independent School District v. Rodriguez, 411 U.S. at 30.

[84] *See* McMillan, *supra* note 75, at 1875.

[85] *See* Ryan, *supra* note 76, at 269.

[86] *See id.* at 271.

[87] *See id.*

[88] *See* McMillan, *supra* note 75, at 1886.

[89]Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African Americans Again*, 81 Calif. L. Rev. 1401, 1406 (1993) (quoting Malcolm X, By Any Means Necessary: Speeches, Interviews, and a Letter, 16-17 (1970)).

[90]Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 Iowa L. Rev. 813, 817(1993).

[91]*See id.* at 817-18.

[92]*See id.* at 819.

[93]Johnson, *supra* note 89, at 1418.

[94] *See id.* at 1404.

[95]*See* Brown, *supra* note 90, at 839.

[96]*Id.* at 841.

[97]*See id.* at 847.

[98]Smith, *supra* note 2, at 239 note 182 (1999).

[99]163 U.S. 537 (1896).

[100]Johnson, *supra* note 89, at 1427.

[101]*Id.* at 1461.

[102]Smith, *supra* note 2, at 186-87 (quoting W.E.B. DuBois, *Does the Negro Need Separate Schools?* 4 J. Negro Educ. 328-35 (1935)).

[103] Robert Anthony Watts, *Shattered Dreams and Nagging Doubts: The Declining Support Among Black Parents for School Desegregation*, 42 Emory L.J. 891, 892 (1993).

[104] *See* James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U.L. Rev. 529, 556 (1999).

[105]J. Coleman, E. Campbell, L. Hobson, J McPartand, A. Mood, F. Weinfeld, and R. York, Equality of Educational Opportunity (1966).

[106]Neal Devins, *School Desegregation Law in the 1980's [sic]: The Courts' Abandonment of Brown v. Board of Education*, 26 Wm and Mary L. Rev. 7, 16 (1984) (quoting Blumstein, Legal Issues in the Desegregation of Postsecondary Education 4 (June 1981)).

[107]*Quoted in* Devins *supra* note 106, at 38.

[108]Smith, *supra* note 2, at 238-29.

[109] 678 A.2d 1267 (Conn. 1996).

[110] *See* McMillan, *supra* note 75, at 1896.

[111] See Sheff, 678 A.2d at 1271.

[112] *See* Lee, *supra* note 59, at 486.

[113] Ryan, *supra* note 104 at 530.

[114] Lee, *supra* note 59, at 510-511.

[115] *See id.* at 527-28.

[116] *See* Ryan, *supra* note 104, at 549.

[117] See Milliken I, 418 U.S. at 717.

[118] Ryan, supra note 76, at 282, citing John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 318 (1994).

[119] *See* Ryan, *supra* note 76, at 302-03.

[120] *Id.* at 297.

[121] *Id.* at 300.

[122] Ryan, *supra* note 104, at 570.

[123]Chang, *supra* note 13, at 29.

[124] *See* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 Mich. L. Rev. 432, 435 (1999).

[125] *See* Ryan, *supra* note 76, at 271.

[126]Smith, *supra* note 2, at 168.

[127]*See id.* at 189.

[128]*See id.* at 190.

[129]*See id.* at 198.

[130]*See id.*

[131]*See id.* at 200.

[132]*Id.* at 203.

[133]*See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 779 (1985).

[134]*See* Smith, *supra* note 2, at 204.

[135] *See* Johnson, *supra* note 89, at 1412.

[136] *See id.*

[137]Ratner, *supra* note 133, at 864 note 44.

[138]*Id.* note 52 (quoting Board of Education v. Nyquist, 408 N.Y.2d 606, 630 (Sup. Ct. 1978)).

[139]*See id.* at 783.

[140] *See id.* at 864 note 15 (citing Omang, *The Secret Handicap: Millions of American Adults Can't Read*, Wash. Post, Nov. 25, 1982, at A1, col. 4).

[141] *See id.* note 18

[142]*See id.* note 20.

[143]Chang *supra* note 13, at 28.

[144]*Id.* at 31.

[145]*Id.* at 39-41.

[146]Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 Ohio St. L.J. 845, 885 (1985).

[147]*See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L. Rev. 857, 896 (1999).

[148]*Id.*

[149] *See* Johnson *supra* note 89, at 1410.

[150] *See id.*

[151]426 U.S. 229 (1976).

[152] Levinson, *supra* note 147, at 897.

[153] Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. Rev. 73, 151 (1998).

[154]Ratner, *supra* note 133, at 830.

[155]Chang, *supra* note 13, at 58 note 151.

[156]Rosenfeld, *supra* note 146, at 854 (citing R. Dworkin, Taking Rights Seriously, 277 (1977).

[157]*See* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 Ga. L. Rev. 543, 545 (1998).

[158]Milliken II, 433 U.S. at 280 (quoting Milliken I, 418 U.S. at 746)

[159]Rosenfeld, *supra* note 146, at 863.

[160]Smith, *supra* note 2, at 174.

[161] *See id.* at 233.

[162] *See id.*

[163] *See* Devins, *supra* note 106, at 29. *See also* Heaney, *supra* note 7, at 781.

[164] *See* Heaney, *supra* note 7, at 781-82.

[165] *See* Ratner, *supra* note 133, at 819.

[166] *See id.* at 864, note 161 (citing Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979)).

[167]Chang, *supra* note 13, at 32-34.