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OUR BUILDING BLOCKS OF EDUCATION DO NOT STACK UP

Amy Keseday[1]

I. INTRODUCTION

The *Brown v. Board of Education*[2] decision and the No Child Left Behind Act (NCLB)[3] sit as pillars in our society of education as it stands under the law today. On their faces, both call for equal education.[4] A deeper analysis reveals, however, that the two differ greatly in their approach.[5] And yet, both

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[1] The author received her Juris Doctor in May 2008 from Rutgers University School of Law in Camden, New Jersey.

[2] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

[3] No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* [hereinafter NCLB].

[4] Dan J. Nichols, *Brown v. Board of Education and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L.J. 151, 151 (2005) ("A quick glance at the rhetoric of both *Brown* and NCLB suggests they are philosophical siblings.").

[5] *Id.* at 151-52.

> Upon closer examination, however, it is apparent that two distinctly different ideologies motivated the *Brown* decision and NCLB. For *Brown*, a separate education could never be equal, and affirmative racial integration was necessary to provide every child with a quality education. Conversely, under NCLB the ideologies of high-stakes accountability and a market-driven approach ensure that a separate education can be equal, and that every child will have a quality education.

appear to have had the same result to date, namely, an inability to cure the problem of unequal education amongst students of different races in our country.[6]

Brown and NCLB vary most significantly in their focus: *Brown* takes a macro approach while NCLB takes a micro approach.[7] *Brown* attempts to reach its goals through desegregation, focusing on the practices of school districts, while NCLB shifts the focus to individual schools, its teachers, students and their performance with respect to set standards.[8] As a result of these different approaches, the two supposed building blocks of our educational policy stand at odds with one another.

One calls for desegregation because equal education cannot be achieved unless both blacks and whites are attending the same schools; both need to have the same access to the same

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Id.

[6] *See* Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, RETHINKING SCHOOLS ONLINE, Fall 2001, http://www.rethinkingschools.org/archive/16_01/Seg161.shtml (last visited Feb. 6, 2008).

[7] *See* Nichols, *supra* note 4, at 174 ("To modern conservatives, a private marketplace remedy is appropriate to fix the problems created by personal, not public, choice."). *See also id.* at 174 n.185 ("That certain schools are overwhelmingly black in a district that is now more than two-thirds black is hardly a sure sign of intentional state action." (citing Missouri v. Jenkins 515 U.S. 70, 116 (1995) (Thomas, J., concurring))); *id.* at 174 ("Justice Thomas stressed that the continuing racial isolation of schools after de jure segregation has ended may well reflect voluntary housing choices or other private decisions.").

[8] *See* Nichols, *supra* note 4, at 172 (citing GARY ORFIELD & CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY 205 (1991)).

> Noticeably absent is any mention of racial integration among and between school districts. This absence is not accidental. The operative focus of NCLB's accountability measures is making sure that every student has an opportunity to "bloom where planted." The conservative movement since Brown has been openly antagonistic to affirmative state-sponsored racial integration.

Id.

resources.[9] The other calls for accountability of the individual.[10] NCLB recognizes that all schools are not equal, but believes if standards are set, teachers and students can and will rise to the occasion and perform.

Brown and NCLB do share many similarities as well. However, their shared goal, equal education for all, is overcome by their competing approaches. The case law created before and after *Brown* has hindered the breathing room of NCLB,[11] and the ideals of NCLB stand in direct opposition to the policies behind *Brown*;[12] the two cannot work together.

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[9] *Brown I*, *supra* note 2.

[10] U.S. Dept. of Educ., *Accountability*, http://www.ed.gov/nclb/

accountability/index.html (last visited Feb. 6, 2008).

[11] *See* Briggs v. Elliot, 103 F. Supp. 920 (D. S.C. 1952). *See also* Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430 (1968) (holding freedom of choice plans in violation of *Brown* if they perpetuate dual school systems); Milliken v. Bradley, 418 U.S. 717 (1974) (holding interdistrict remedy unlawful unless there is proof of an interdistrict violation).

[12] NCLB, 20 U.S.C. § 6301 (West 2002).

> [The purpose of the Act] can be accomplished by ...holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education.

Id.

The Act makes no mention of desegregating schools, or even that segregation of the races and monies is the reason behind the unbalanced achievement of America's students. NCLB hopes that standards will bridge the gap in achievement, while *Brown* merely asked that all students receive the same opportunities. *See* Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1462 (2003).

> Desegregation and adequate, let alone equal, funding for schools will not occur in most cities as long as parents have the ability to move their children to suburban or private schools, where far more funds are allocated to education than in inner cities. A crucial aspect of Brown's wisdom was the importance of a unitary system of education. Minority children are far

II. BROWN V. BOARD OF EDUCATION

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone...We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[13]

A. THE CONSTRUCTION OF BROWN

1. "Equal" How

The United States of America first began entertaining solutions to the race question in 1863.[14] The Emancipation Proclamation freed all slaves. Two years later, the federal government enacted the Thirteenth Amendment[15] and officially put an end to slavery.[16] All the while, the country was engaged in the American Civil War which began in 1861 and ended in 1865.[17] Leading up to and during the War, the issue of slavery acted as a wedge between the North and South.[18]

> more likely to receive quality education when their schooling is tied to wealthy white children. The failure to create truly unitary systems is the core explanation for the inequalities in American schools today.

Id.

[13] *Brown I*, 347 U.S. at 494-495.

[14] ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY 40 (1986).

[15] U.S. CONST. amend. XIII, § 1 (stating that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction").

[16] SALOMONE, *supra* note 14.

[17] CivilWar.com, Timeline, http://www.civilwar.com/content/section/

Once the War ended, the question of "what next?" loomed. The Confederate states that seceded needed to return to the Union and blacks were to become part of the society of free men. However, the unification of blacks into free society was met with resistance.[19] Southern state governments implemented Jim Crow laws which prohibited blacks from using the same public accommodations as whites.[20] Just five years after the end of the Reconstruction era, the Supreme Court gave the judicial nod of

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16/42/ (last visited Feb. 6, 2008)

[18] The American Civil War Homepage, The Succession Crisis and Before, Causes of the Civil War: Post-War Commentary, http://members.aol.com/jfepperson/postwar.html (last visited Feb. 8, 2008).

> We have much to say in vindication of our conduct, but this we must leave to history. The bloody conflict between brothers, is closed, and we "come to bury Caesar, not to praise him." The South had $2,000,000,000 invested in Slaves. It was very natural, that they should desire to protect, and not lose this amount of property. Their action in this effort, resulted in War. There was no desire to dissolve the Union, but to protect this property. The issue was made and it is decided.

Id.

[19] ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES ix (1957).

> Ten percent of the American people are Negroes. And, solely because they are Negroes, they were subjected to the special laws of twenty-one states and the District of Columbia requiring them to be "segregated." These laws provided, among other things, that Negroes could live only in specified areas, that Negroes could sit only in the backs of buses, that Negroes were forbidden to share with whites the same public parks, playgrounds and beaches – and that Negroes had to be educated in separate, all-Negro schools. These laws, many of them nearly a century old, represented a way of life to the forty million Americans below the Mason-Dixon Line.

Id.

[20] JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY xvi (2001).

approval to the South's discrimination in the *Civil Rights Cases*.[21]

Louisiana, like most states in the South at the time, passed its own discriminatory laws, one of which eventually gave rise to the landmark Supreme Court decision of *Plessy v. Ferguson*.[22] The Jim Crow Car Act of 1890 required separate accommodations for blacks and whites on railroads, including, but not limited to, separate railway cars.[23] Two years after the law was instituted, Homer Plessy challenged the law.[24] Plessy's actions ultimately led to the Supreme Court's announcement of

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[21] Civil Rights Cases, 109 U.S. 3 (1883) (coming before the United States Supreme Court as a set of five similar cases grouped together under one issue, the Court held that Congress, because of the enforcement provisions of the Fourteenth Amendment, did not have the constitutional authority to outlaw racial discrimination by private individuals and organizations).

[22] 163 U.S. 537 (1896).

[23] *Id.* at 540. The Court noted that the first section expressly provides:

> that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations...No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to...

Id.

[24] *Plessy*, 163 U.S. at 541. Plessy was seven-eighths white and one-eighth black.

> [T]he mixture of colored blood was not discernible in him; and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected . . . .

Id. at 541-42.

the separate but equal doctrine.[25] Plessy argued, albeit unsuccessfully, that being forced to ride in a separate railroad car stamped him with a "badge of inferiority." The Court did acknowledge the Fourteenth Amendment,[26] but said it was designed to create equality under the law, not to abolish separate schools for children of different ages, sexes, and colors.[27]

After *Plessy*, the key question became, whether public facilities and services were equal for all citizens, even though separated by race.[28] As long as the answer was yes, there was no constitutional violation.[29] And thus, the Court's intent of equal but separate accommodations leading to a unification of whites and blacks throughout the nation proved unfulfilled. "At the

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[25] *Id.* at 543 ("A statute which implies merely a legal distinction between the white and colored races ... has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.").

[26] U.S. Const. amend. XIV, § 1 ("No State shall...deny to any person within its jurisdiction the equal protection of the laws.").

[27] *Plessy*, 163 U.S. at 544.

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

Id.

[28] *Id.* at 550.

> [T]he case reduces itself to a question whether the statute of Louisiana is a reasonable regulation, and with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is a liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to...their comfort, and the preservation of the public peace and good order.

Id.

[29] DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 18 (1995).

time of the *Plessy* decision, not only southern and border states, but a total of 30 states in the Union, including most of the West as well as Indiana, Kansas, and New York, had separate but equal public school statutes."[30]

2. The Stage Readies for Change

The separate but equal doctrine of *Plessy* stood at the forefront of educational policy for over fifty years.[31] During that time, the National Association for the Advancement of Colored People (NAACP) was formed.[32] The main focus of the NAACP was to successfully challenge school segregation.[33] In the years leading up to 1950, the challenge took shape and progress was made.[34]

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[30] SALOMONE, *supra* note 14, at 41 (citing HENRY J. ABRAHAM, FREEDOM AND THE COURT 362 (3rd ed. 1977)).

[31] *Id.*

[32] *Id.* ("Originating in the early 1900s, the NAACP had grown to over 400 local organizations … by 1921. Committed to a strategy of litigation, it had hired its first lawyer in 1915. In the late 1930s, the NAACP Legal Defense and Education Fund (LDF) was created . . . .").

[33] *Id.*

> [The NAACP hired] their first lawyer in 1915. In the late 1930s, the NAACP Legal Defense and Education Fund (LDF) was created and served as the major source of funds for school desegregation litigation. During those years, the NAACP had formulated a strategy to legally challenge segregation. That strategy rested on two major points. First, sue for equal schools on the theory that the cost of maintaining a dual system would prove so prohibitive as to speed the abdition of a segregated system. Second, pursue desegregation on the university level where it was likely the meet the least resistance. Then proceed incrementally to the elementary and secondary level where choice of school is closely tied to choice of residence.

Id. *See also* RICHARD KLUGER, SIMPLE JUSTICE 136-37 (1976); Jeanne Hahn, *The NAACP Legal Defense and Education Fund: Its Judicial Strategy and Tactics, in* AMERICAN GOVERNMENT AND POLITICS (1973).

[34] SALOMONE, *supra* note 14, at 41 ("Between 1938 and 1950, the NAACP gradually whittled away at the separate but equal doctrine by challenging it before the Supreme Court in progressively more problematic cases."). *See*

> In two unanimous decisions handed down on the same day, the Court signaled to the South that separate but equal was gasping its last breath. In *Sweatt v. Painter*[35] and *McLaurin v. Oklahoma State Regents for Higher Education*[36] the Court struck down both interschool (*Sweatt*) and intraschool (*McLaurin*) separation of the races based not only on tangible inequalities but intangible as well.[37]

Both *Sweatt* and *McLaurin* ask: "to what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?"[38]

In *Sweatt*, the Court declared that denying admission of a black student to a white law school violated the equal protection provision, the black student could not achieve an equal education without the opportunity to commingle with and experience the same education as his peers.[39] The Court also

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Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349-50 (1938) (stating that "the white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege…"); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948).

[35] 339 U.S. 629 (1949). Herman Sweatt applied to the University of Texas Law School. State law refused admission of blacks to white universities. When Sweatt sought court intervention, the law school attempted to provide a separate but equal facility. *Id.*

[36] 339 U.S. 637 (1949). McLaurin applied to the University of Oklahoma. He was initially rejected admission. He successfully sued to gain admission based on the U.S. District Court for the Western District for Oklahoma's finding that not allowing McLaurin admission was a violation of his constitutional rights. He was then admitted, but provided with separate facilities such as his own row in classrooms and table in the lunchroom. McLaurin again brought suit. *Id.*

[37] SALOMONE, *supra* note 14, at 41.

[38] *Sweatt*, 339 U.S. at 631.

[39] *Id.* at 634.

> The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups

found that differences in tangible resources would make the black law school inferior to the University of Texas Law School for whites.[40]

In *McLaurin*, the Court found that separating a black graduate student from white peers in classrooms and other facilities would cause his training and development to suffer.[41] The Court considered the possibility that even with equal facilities, McLaurin would "still be set apart by his fellow students."[42] Regardless, the Court stated "there is a vast difference – a Constitutional difference – between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar."[43] While the Court did not denounce the separate but equal doctrine, the Court's "willingness to consider the sociological and psychological consequences of segregated educational facilities inexorably paved the way for the school desegregation cases to follow."[44]

> which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.

Id.

[40] *Id.*

[41] *McLaurin*, 339 U.S. at 641.

[42] *Id.*

[43] *Id.*

[44] SALOMONE, *supra* note 14, at 42. *See also,* BLAUSTEIN & FERGUSON *supra* note 19, at 111.

> Despite the far-reaching import of the McLaurin decision and the law school cases, the Court purported not to disturb the separate but equal doctrine. "Broader issues have been urged for our consideration," said Chief Justice Vinson in *Sweatt v. Painter*, "but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court."

Id.

3. "Equal" is Discriminatory

The Court could no longer avoid the question of the effect of segregation itself on public education.[45] *Brown*, a consolidation of cases from Kansas,[46] South Carolina,[47] Virginia,[48] and Delaware,[49] asks, "Does segregation of children in public schools

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[45] *Brown I*, 347 U.S. 483.

[46] *Brown v. Bd. of Educ*., 98 F.Supp. 797 (D. Kan. 1951). The plaintiffs here were of elementary school age. They brought their initial action in United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permitted, but did not require, cities of more than 15,000 residents to maintain separate school facilities for black and white students. A three-judge District Court found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers.

[47] Briggs v. Elliott, 103 F.Supp. 920 (D.S.C. 1952). Plaintiffs were of elementary and high school age. They brought their initial action in District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which required the segregation of blacks and whites in public schools. A three-judge District Court found that the Negro schools were inferior to the white schools and ordered the defendant to immediately begin working toward equalization of the facilities. Despite the favorable ruling, the Court denied the plaintiffs admission to the white schools during the equalization process. The Supreme Court later vacated the judgment and remanded the case to obtain the court's views on a report filed by the defendants concerning the progress made in the equalization program. The District Court found substantial equality had been achieved.

[48] Davis v. County Sch. Bd., 103 F.Supp. 337 (E.D. Va. 1952). The plaintiffs were of high school age. They brought the initial action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which required the segregation of blacks and whites in public schools. A three-judge District Court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants equalize the schools. However, during the equalization, the plaintiffs were not permitted to attend the white schools.

[49] Belton v. Gebhart, 87 A. 2d 862 (Del Ch. 1952), *aff'd* 91 A. 2d 137 (Del. 1952). The plaintiffs were of elementary and high school age. They brought this initial action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which required the segregation of blacks and whites in public schools. The Chancellor found for the plaintiffs and ordered their admission to schools previously attended only by white children. The Supreme Court of Delaware affirmed the decision, but did leave the door open to a possible reversion; if the schools equalized, the decree could be modified.

solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[50]

The plaintiffs in each case had claimed that "segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they [the plaintiffs] are deprived of the equal protection of the laws."[51] In response, the Court unanimously overruled *Plessy*[52] and the separate but equal doctrine.[53] In one ruling, the Court deemed all state imposed segregation of public schools in violation of the Equal Protection Clause of the Fourteenth Amendment.[54]

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[50] *Brown I*, 347 U.S. at 493.

[51] *Id.* at 488.

[52] *Plessy*, 163 U.S. 537.

[53] *Brown I*, 347 U.S. at 494-95.

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

[54] SALOMONE, *supra* note 14, at 43 ("Legal scholars have since pondered over the precise meaning of *Brown's* mandate. Was the decision about education or race? The Court's reliance on social science data as evidence of the harmful psychological effects of segregated schools on black children would seem to limit the holding to education."). *But see* New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (invalidating segregation in parks); Gayle v. Browder, 352 U.S. 903 (1956) (invalidating segregation in intrastate commerce); Boynton v. Virginia, 364 U.S. 454 (1960) (invalidating segregation in interstate commerce); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (invalidating segregation at public golf courses); Turner v. Memphis, 369 U.S. 762 (1962) (invalidating segregation in airports). None of the above cases mentioned psychological effects. *See* SALOMONE, *supra* note 14, at 44 ("Perhaps then Brown's central statement was not about education at all but about intentional racial segregation, or, as suggested by William Taylor, about the right to be free from legislation implying inferiority.").

B. JUDICIAL UNDERSTANDING OF BROWN

> In a series of major school desegregation decisions during the 1970's, the Supreme Court grappled with a host of complex legal issues involving the definition of desegregation, the nature of remedies, the obligations of school districts, and the remedial powers of the lower courts. These battles and disputes were not over the basic principles of *Brown* but over how school segregation should be remedied.[55]

1. Remedies

The Court in *Brown I* declared racial discrimination in public education unconstitutional. Moreover, the Court rejected "[a]ny language in *Plessy v. Ferguson* contrary to . . . [its] finding."[56] The Court failed to define the remedies it called for; instead the Court requested reargument on Questions [four][57] and [five][58] from its original case.[59] After a year of reargument, *Brown II*[60] went before the Court.[61]

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[55] ARMOR, *supra* note 29, at 17.

[56] *Brown I*, 347 U.S. at 494-95.

[57] *Id.* at 495, n 13.

> 4. Assuming it is decided that segregation in public school violates the Fourteenth Amendment (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

Id.

[58] *Id.*

> 5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b), (a) should this Court formulate detailed decrees in these cases; (b) if so, what specific issues should the decrees reach; (c) should this Court appoint a special master to hear evidence with a view to

Ultimately, the Court deferred to the lower courts of first impression.[62] Instead of providing a roadmap of remedies to be immediately instituted nationwide, "the Court left the task to the lower courts to direct and oversee the dismantling of segregated school systems but not at once, or even within any specified time, but merely, 'with all deliberate speed.'"[63] Lower courts were ordered to have defendants make a "prompt and reasonable start toward . . . compliance," with the noted understanding of the Court that local administrative difficulties might cause delays.[64] No definition of "governing constitutional principles" was provided; the Court left the door to interpretation open.[65] Additionally, a true time element was not

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> recommending specific terms for such decrees; (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Id.

[59] *Id.* at 495.

[60] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[61] *Id.* at 298.

> While the Court in *Brown I* sensed the moral readiness of the country to do something about racial inequality, it was also acutely aware of both the political realities of that day and of its own perceived limitations. And so the Justices refrained from an immediate implementation decree and ordered re-argument in all five cases the following year [Brown II].

SALOMONE, *supra* note 14, at 44.

[62] *Brown II*, 349 U.S. at 299 (stating, "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.")

[63] SALOMONE, *supra* note 14, at 44-45.

[64] *Brown II*, 349 U.S. at 300.

[65] SALOMONE, *supra* note 14, at 44-45.

set for compliance;[66] the Court used language like "deliberate speed" and "reasonable."[67]

This nonspecific ruling on remedies left the local courts to their own desires. As such, the local court of first impression in *Briggs v. Elliott*,[68] interpreted *Brown II* as simply forbidding the state from enforcing separation and requiring only that children be allowed to attend any school they wished.[69] *Brown*

> Was the . . . decision in *Brown* based on a *nondiscrimination* or an *integration* model? If the former, then the right involved is that of attending a public school free of official discrimination and the violation is the official classification by race. Segregated schools are perceived as the effect of such violations, not as the violation per se. If the latter, then the right defined is one of attending integrated schools and the duty imposed on school systems is an affirmative one.

Id.

[66] *Id.*

[67] *Brown II*, 349 U.S. at 300-01. For criticism of this language *see* Owen Fiss, *The Supreme Court 1978 Term, Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979) (arguing, "[n]o one had a road map at the outset. No one had a clear vision of all that would be involved . . . the second [*Brown II*] decision was far from such a vision: it was but a recognition of the magnitude of the task and an attempt to buy time."). *See also* ARMOR, *supra* note 28, at 23 (citing Frank T. Read, *Judicial Evolution of the Law of School Integration since Brown v. Board of Education,* 39 LAW & CONTEMP. PROBS. 7 (1975)) ("[*Brown II*] was surprisingly short and remarkably free of detail, a circumstance seen by some legal scholars as contributing to the delay, confusion, and controversy over remedy that characterized the next fifteen years.").

[68] 132 F. Supp. 776 (E.D.S.C. 1955).

[69] *Id.* at 777. In its analysis, the court noted:

> [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided . . . . It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided...is that a state may not deny to any person on account of race the right to attend any school that it maintains . . . if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend

I, in the opinion of the court, only restricted "the use of governmental power to enforce segregation".[70] The Court understood "[t]he Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."[71] Consequently, *Briggs* thought it permissible to allow students to choose which school to attend.[72]

2. A Bit of Guidance

In reality, the years following *Brown* were met with inaction, and in the cases of action, the action was inadequate.[73] It was not until 1968 in the case of *Green v. County School Board of New Kent County*[74] that the Court addressed another freedom-of-choice plan.[75] The racially integrated town involved had only

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> different schools . . . . The Constitution, in other words, does not require integration. It merely forbids discrimination.

Id.

[70] *Id.*

[71] *Id.*

[72] ARMOR, *supra* note 29, at 25 (arguing in reality, this plan did nothing to end segregation because though a few brave black students opted to attend white schools, no white students decided to attend the black schools).

[73] SALOMONE, *supra* note 14, at 45-46.

> During the first decade following *Brown*, states and local school systems engaged in numerous legal maneuvers and subterfuges to thwart the progress of school desegregation in the South. By 1957, at least 136 new laws and state constitutional amendments had been enacted to delay or prevent the process. By 1964, that number would increase to 200.

Id.

[74] 391 U.S. 430 (1968).

[75] *Id.* at 431-32 (citing *Brown II*, 349 U.S. at 300-01).

> The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his

two schools, one for blacks and one for whites.[76] At the time court papers were filed, "[fifteen] percent of black students had chosen [to attend] the white school,[77] but no whites had chosen the black school."[78] Also at the time the suit began, the School Board believed it was statutorily protected and allowed to institute legally the freedom-of-choice plan.[79] The School Board was wrong; the School Board was found in direct violation of *Brown I* and *II*.[80] The Court disagreed with the School Board's

> own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis . . . ."

Id.

[76] *Id.* at 432.

[77] PATTERSON, *supra* note 20, at 145 ("115 black high school students, of 736 in the district, went to the 'white' high school . . . .").

[78] ARMOR, *supra* note 29, at 28. Similar views are shared by others too. *See e.g.*, J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 109-10 (1979) ("In theory, each child's school choice was free; in practice, it was often anything but . . . . [Blacks] were advised that white schools 'regrettably' were 'overcrowded' . . . . [O]r that school buses [did not pass] through [their] parts of town."). *See also*, SALOMONE, *supra* note 14, at 46 ("But there existed even more serious inhibitors to true 'freedom of choice'. As documented in a Civil Rights Commission study cited by the Court, economic dependency, fear of physical retaliation, and actual incidences of violence prevented blacks from seeking to attend white schools.").

[79] *Green*, 391 U.S. at 433 (citing the Pupil Placement Act, Va. Code § 22-232.1 *et. seq.* (1964) (repealed 1966) ("Under the Act children were each year automatically reassigned to the school previously attended unless upon their application to the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board.")).

[80] *Id.* at 435. After reviewing the facts, the Court summarized:

> The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. 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,

argument that freedom-of-choice plans are admissible unless the Fourteenth Amendment is read as requiring compulsory integration.[81] The Court, in light of *Brown II*, saw the plan in violation of their past declarations.[82]

The Court found, "[t]his deliberate perpetuation of the unconstitutional dual system . . . [is] no longer tolerable . . . a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable."[83] Thus, *Green* held that segregated systems must be dismantled "root and branch,"[84] so that desegregation is achieved among several factors affecting educational quality, including student body composition, facilities, staff, faculty, extracurricular activities, and transportation.[85]

From *Green* forward, ending separate school assignment policies was no longer sufficient.[86] Plans were judged on their effectiveness in accomplishing integration.[87] "It has been argued that *Green* marks a turning point from the constitutional duty to desegregate to a duty to take affirmative steps toward integration."[88] And potentially most importantly, "[i]t gave

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> extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part "Negro."

Id. *See also id.* at 438 (striking freedom-of-choice plans that placed the burden of integration on black students down).

[81] *Id.* at 437.

[82] *Id.*

[83] *Id.* at 438.

[84] *Id.*

[85] ARMOR, *supra* note 29, at 29.

[86] SALOMONE, *supra* note 14, at 47.

[87] *Id.*

[88] *Id.* *See* PATTERSON, *supra* note 20, at 146 ("As his friend Justice Brennan prepared to read the decision on May 27 – fourteen years after *Brown* – Warren passed him a note: 'When this opinion is handed down, the traffic light will have changed from *Brown* to *Green*. Amen!'").

specificity to the vague and ineffective phrase, 'all deliberate speed.'"[89]

Unfortunately, the Court in *Green* defined neither a unitary system nor the steps necessary to achieve it.[90] What is more, the *Green* decision was limited to "ending *de jure* racial segregation and therefore it mattered only in the South and many border regions."[91]

3. Too Much Guidance

The Court stirred the pot in the opposite direction of *Brown II* in 1971.[92] The specificity with which the Court called for desegregation created its own controversy.[93] The Charlotte-Mecklenburg school system had initiated a neighborhood school policy in 1965 and the Fourth Circuit upheld the constitutionality of the system.[94] However, the reality was that the schools in Charlotte-Mecklenburg were still segregated.[95]

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[89] PATTERSON, *supra* note 20, at 146.

[90] *Id.*

[91] *Id.*

[92] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). This case dates back to 1964 when Darius Swann and his family returned to Charlotte from service in India to find that their child had to attend an all-black school. Learning of this, the family brought suit against the local school system. *Id.*

[93] *Id.* at 6 ("These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once."). *See also id.* at 14 ("The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts.").

[94] SALOMONE, *supra* note 13, at 47-8.

[95] *Id. See also Swann*, 402 U.S. at 20-21.

> In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion

After an examination of the facts, the Court asserted, "The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city."[96] With this said and known, what was to be done?[97]

> farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principals of ["]neighborhood zoning.["] Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with ["]neighborhood zoning,["] further lock the school system into the mold of separation of the races.

Id. While, at this point in the opinion the Court is not claiming this is exactly what happened in the Charlotte-Mecklenburg school system, the Court is pointing to factors, patterns and actions that can point to segregation. More importantly, such findings must be taken into account by the courts when fashioning a remedy for the particular school system. *Id.*

[96] *Id.* at 25.

> [T]he court also found that residential patterns in the city and county resulted in part from federal, state, and local government action . . . [not] school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education.

Id. at 7.

[97] The Court noted the central issue that it must confront,

> is that of student assignment, and there are essentially four problem areas: (1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system; (2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation; (3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and (4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

Id. at 22. The Court further recognized there is no hard and fast rule that can resolve the matter.

In the case of the Charlotte-Mecklenburg school system, the district court had ordered a massive cross-county busing plan to attain racial balance.[98] Under the plan, "students would be picked up at the schools near their homes and transported by bus to the schools they were to attend."[99] The Court believed

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> No per se rule can adequately embrace all of the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.

Id. at 26.

[98] *Id.* at 30. In its analysis, the Court validated the awkward and inefficient plans implemented to resolve the issue of segregation.

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

Id. at 28. Further, the Court justified its authority to implement the new plan.

> The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Id. at 30.

[99] *Id.* (realizing this busing plan was a dramatic improvement from the old plan instituted in the district – "each day 26,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour." By picking students up at the school nearest their home and transporting them to their assigned school, the district court found the trip would not require more than 35 minutes).

"the remedial techniques used in the District Court's order were within that court's power to provide equitable relief."[100] Busing was now an acceptable means of desegregation and steps were made toward compliance with *Brown*![101]

4. Desegregation Litigation Enters New Arenas

"The principal question after *Swann* was how to identify a constitutional violation in the context of a northern school district. The answer came in *Keyes v. School District No. 1, Denver, Colorado*[102]."[103] The segregation of the Denver schools was not the result of state statutory or constitutional law, but was the result of direct manipulative techniques utilized by the

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[100] *Id.* After naming the cross-county busing plan reasonable for the Charlotte-Mecklenburg system, the Court did note that valid objections to busing plans could be raised; the Court cited time and distance as valid bases for argument, and also the health and safety of children, or infringement on the learning process. *Id.* at 30-31. Ultimately, the Court created the tailoring principal – the remedy must fit the violation. SALOMONE *supra* note 14, at 48-49. Many have criticized the Court for this proclamation. "Despite its stated rule, the Court did not even attempt to tailor the remedial order to the correction of that portion of the discrimination . . . ." *Id.* at 48. Owen Fiss has argued for the total rejection of the Swann tailoring principal criticizing it as being too formalistic. "[B]y suggesting that the violation will be the exclusive source of the remedy, the tailoring principal obscures both the need for choice of remedy and the criteria for choice . . .the courts should have available a choice among a host of remedies." *Id.* at 49.

[101] *See* PATTERSON, *supra* note 20, at 158 ("District court judges, while not required to call for year-by-year readjustment of school boundaries, were permitted to do so, and often did in order to seek racial balance . . . leading to mandatory busing plans to promote school desegregation in more than 100 southern school districts.").

[102] 413 U.S. 189 (1973).

[103] SALOMONE, *supra* note 14, at 49. *See also* PATTERSON, *supra* note 20, at 157 (stating "[*Swann*], moreover, applied only to school systems that segregated *de jure*. *Swann*, therefore, did not affect the North, even though many public authorities there continued to pursue housing and school districting policies that separated blacks and whites."). *But see* PATTERSON, *supra* note 20, at 160 (noting that "[i]n October 1972, the Court heard another controversial school case that had the potential of giving still more rigor to *Brown* . . . . [T]his one concerned Denver, the first non-southern city to have its school policies challenged . . . .").

Denver school board.[104] "With the rise of rights consciousness in the 1960s . . . local black leaders became more insistent than ever in demanding better school facilities."[105] Black leaders argued that the school board's actions equated to "intentional segregation . . . [which] so affected pupil placement in the other schools that it made the entire district a dual system. *De facto* segregation, in short, rested on a bed of public policy in the city: it was a thinly disguised form of *de jure* segregation."[106] A lower court judge agreed with this argument; the case was eventually appealed to the Supreme Court, where that Court too was ultimately persuaded.[107]

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[104] SALOMONE, *supra* note 14, at 49. *See also Keyes*, 413 U.S. at 191.

> [The Denver school] system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. Rather, the gravamen of this action, brought in June 1969 . . . is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.

Id.

[105] PATTERSON, *supra* note 20, at 160. "Some of the largely black schools in Denver, located in heavily black neighborhoods, featured crowded, trailer-like portable classrooms . . . . Nearly 40 percent of black children . . . attended identifiably black schools." *Id.*

[106] *Id.*

[107] *Id.* at 160. The Court's response here was similar to its response to schools in the South.

> In June 1973, nineteen years after Brown, all but Rehnquist, who dissented, supported the complainants. The burden of proof, the Court said, lay with the Denver school board to show that its actions had not been intentional. If it could not do so, it was constitutionally obligated to desegregate the entire system. The Court all but ordered Denver officials to institute citywide busing.

Id. at 160-61.

When faced with *Keyes*, the Supreme Court held "in the context of school desegregation cases and in the absence of a history of officially mandated segregation, a necessary element of an equal protection claim was purpose or intent to segregate."[108] In such cases, the school district involved assumes the burden of proving that it operated without "segregative intent" on a system-wide basis.[109]

Unfortunately, while the *Keyes* decision was the first time a school desegregation case had affected a city outside the South, the decision left room for criticism. *Keyes* has been criticized

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[108] SALOMONE, *supra* note 14, at 49 (citing *Keyes*, 413 U.S. at 208.).

> [W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.

Keyes, 413 U.S. at 208.

[109] *Id.* The Court further explains its reasoning.

> Indeed, to say that a system has a "history of segregation" is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

Id. at 210.

because of continuation of the *de jure/de facto* distinction.[110] Justice Powell, who wrote a separate opinion in *Keyes*, wanted the same remedies to apply to the North and the South.[111] "For him, the uniformity would rest in an '*effects*' and not on '*intent*' standard to better insure the elimination of even subtle racial discrimination in the decisions of school board officials."[112] For others, the continued labeling of *de facto* versus *de jure* segregation meant a chance to escape the burden of desegregating.[113]

The reality was some of the criticism was directly on point. "Integrationists in other cities thus faced the daunting task of exhuming old school board decisions to build cases proving that school segregation had been intentional."[114] Nonetheless, "as Justice Powell said, 'The focus of the school desegregation problem has now shifted from the South to the country as a whole . . . . We must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.'"[115]

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[110] SALOMONE, *supra* note 14, at 50. *See also* PATTERSON, *supra* note 20, at 160. "Denver did not practice *de jure* segregation, southern-style, of its schools." *Id.*

[111] SALOMONE, *supra* note 14, at 50.

[112] *Id.* (citing *Keyes*, 413 U.S. at 233.) "A test based on purpose or intent would not only render equal protection claims difficult to prove, but would lead to 'fortuitous, unpredictable and even capricious' results. In the same breath, Justice Powell was criticizing busing as a desegregation remedy." SALOMONE, *supra* note 14, at 50.

[113] The Court made sure to establish a distinction between the two forms of segregation.

> Moreover, Brennan, who wrote the *Keyes* decision, was careful to say that the existence of *de facto* school segregation was insufficient grounds for judicial intervention. If a school board could show that it did not *intend* to segregate – that is, if the segregation had stemmed from other sources, such as segregated housing arising from uncoordinated private decisions – the board need not take steps to establish greater racial balance.

PATTERSON, *supra* note 20, at 161.

[114] *Id.*

[115] *Id.* at 162.

If Justice Powell's statements were accurate, what went wrong in *Milliken*?[116] The Court reversed an appellate decision affirming[117] that an adequate system of desegregated schools could not be established within the Detroit school district's geographic limits and thus a multidistrict plan was needed.[118] In striking down the court's remedy, the Supreme Court opined:

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[116] Milliken v. Bradley, 418 U.S. 717 (1974). *See* SALOMONE, *supra* note 14, at 51 ("Here the NAACP was to suffer its fist major defeat following a continuous stream of court victories."). *See also* PATTERSON, *supra* note 20, at 178.

> This decision had been keenly awaited, for it involved a critical undecided issue concerning the very meaning of "desegregation". Did it mean, as Judge Parker's "Briggs Dictum" had said in 1955, only that states and municipalities must not deliberately segregate students by race, or did it mean, as *Green* and *Swann* had argued, that *results* of school actions – appropriate racial balance – were what really mattered?

Id.

[117] *See* ARMOR, *supra* note 29, at 39.

> Because Detroit was a majority-black (64 percent) school district at the time of trial, and projected demographic trends indicated that it would become increasingly black in the near future, the district court concluded that an effective remedy could not be attained within the confines of the Detroit system. In arriving at this conclusion, the court relied upon expert testimony that a desegregation plan involving only the city of Detroit would cause substantial white flight and would have the effect of accelerating the transition of Detroit to a predominately black school district. The district court had also found that the State of Michigan had contributed to Detroit school segregation in some of its policies, including failure to subsidize transportation of Detroit students, approval of the locations of new schools, and legislation aimed at barring some voluntary programs for improving the integration of Detroit schools.

Id. *See also id.* at 39-40. The District Court ordered a massive metropolitan remedy whereby Detroit would be consolidated with 53 independent suburban districts and students would be bused between the city and the suburbs to attain racial balance. *Id.*

[118] *Milliken*, 418 U.S. at 757. *See also* SALOMONE, *supra* note 14, at 51-52.

> Chief Justice Burger, writing for a 5-4 majority, held that, "with no showing of significant violation by the 54 outlying school

> The controlling principle...is that the scope of the remedy is determined by the nature and extent of the constitutional violation . . . it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts...have been a substantial cause of interdistrict segregation.[119]

The decision of Milliken, while widely criticized,[120] has not been overturned.[121]

> districts and no evidence of any interdistrict violation or effect" an interdistrict remedy was not permissible. Gone was *Green*'s focus on the effectiveness of desegregation plans. Instead, the Court reiterated the legalistic doctrine of *Swann* that "the nature of the violation determines the scope of the remedy". . . . Driving the Court's bottom line was a "deeply rooted" tradition of local control over education and its importance in maintaining community concern and quality education.

Id.

[119] *Milliken*, 418 U.S. at 744-745 (citation omitted) (striking down the multidistrict plan in Detroit, the Court was sure to establish when metropolitan multidistrict desegregation may be permissible, that is, (1) where intentional segregation in one district leads to a "significant segregative effect in another district," or (2) where state officials have contributed to the separation of the races by drawing or redrawing school district lines or by the purposeful racially discriminatory use of state housing or zoning laws).

[120] *See, e.g.*, Richard Thompson Ford, *Brown at Fifty: Brown's Ghost*, 117 HARV. L. REV. 1305, 1317-18 (2004).

> Milliken reinforced the presumption that integration is an unwelcome punishment to be inflicted on school districts that are guilty of past sins, rather than a constructive social policy designed to correct a widespread social evil that harms students of all races . . . . After all, if integration is so great, why is it a punishment imposed on guilty school districts? If it is so beneficial, why are the wealthy and powerful exempt from its mandate?

Id. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 793 (2005).

III. NO CHILD LEFT BEHIND

A. THE CONSTRUCTION OF A LEGISLATIVE ACT

"No Child Left Behind (NCLB) is designed to change the culture of America's schools by closing the achievement gap, offering more flexibility, giving parents more options, and teaching students based on what works."[122] According to the express language of the Act itself, "the purpose of this *subchapter* is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[123] "NCLB is the latest federal presentation of modern conservatives' vision of educational reform."[124]

B. A LOOK INTO A PART OF THE ACT

"Parents of students in Title I schools identified for school improvement, corrective action, or restructuring will have the

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> However badly reasoned, Milliken seems firmly embedded in the law. Moreover, the prospects for meaningful progress in breaking down patterns for residential segregation, undergirded as they are in many places by exclusionary zoning, are long-range at best. This means that, if extending the gains of school desegregation to many who are now locked in racially isolated, high-poverty schools is regarded as an important societal goal, we must find ways to decouple school access from neighborhoods and local political control.

Id. Chemerinksy, *supra* note 11, at 1470 ("Milliken effectively encouraged white flight to the suburbs.").

[121] SALOMONE, *supra* note 14, at 53. "The Court has either remanded, affirmed without opinion, or refused to review lower court decrees upholding interdistrict remedies in Louisville, Kentucky; Wilmington, Delaware; Indianapolis, Indiana; Allegheny County, Pennsylvania; and Benton Harbor, Michigan." *Id.* (footnotes omitted).

[122] U.S. Dept. of Educ., *Stronger Accountability: Accountability,* http://www.ed.gov/nclb/accountability/index.html (last visited Feb. 20, 2008).

[123] NCLB, 20 U.S.C. § 6301 *et seq.*

[124] Nichols, *supra* note 4, at 171.

option to transfer to another public school in the district not in school improvement."[125]

1. What "Choice"

Choice in education is not a new idea;[126] NCLB is just the latest attempt to give children and parents choice in education.[127] Under the Act, the choice of a student is limited to another school in the district, provided the other school is not also deemed a failing school.[128] The ability of a student to attend a school in another district is just a possibility.[129] If, by chance,

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[125] U.S. Dept. of Educ., *Overview Introduction Executive Summary of No Child Left Behind*, http://www.ed.gov/nclb/overview/intro/execsumm.pdf. (last visited Feb. 20, 2008).

[126] *See* Briggs v. Elliot, 132 F.Supp. 776 (D.S.C. 1955). *See also* Green v. County Sch. Bd., 391 U.S. 430 (1968).

[127] AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 62 (1993). *See also* U.S. Dept. of Educ., *Choices for Parents*, http://www.ed.gov/nclb/choice/index.html (last visited Feb. 20, 2008) ("[S]chool choice is part of the strategy to give every child an excellent education.").

[128] U.S. Dept. of Educ., *Choice and Supplemental Educational Services Frequently Asked Questions: When are Children Eligible for School Choice?*, http://www.ed.gov/parents/schools/choice/choice.html (last visited Feb. 20, 2008).

> Children are eligible for school choice when the Title I school they attend has not made adequate yearly progress in improving student achievement – as defined by the state – for two consecutive years or longer and is therefore identified as needing improvement, corrective action or restructuring. Any child attending such a school must be offered the option of transferring to a public school in the district – including a public charter school – not identified for school improvement, unless such an option is prohibited by state law. No Child Left Behind requires that priority in providing school choice is available to students enrolled in schools that have been identified as needing improvement under the ESEA as the statute existed prior to the enactment of No Child Left Behind.

Id.

[129] U.S. Dept. of Educ., *Choice and Supplemental Educational Services Frequently Asked Questions: Do Public School Options Include Only Schools in*

the possibility turns to a reality, transportation for the student is not a guarantee.[130]

2. Choice is not Legitimate

NCLB itself defeats its own school choice provision.[131] A major focus of NCLB is accountability.[132] As Nichols has pointed out:

> Although choice is a critical ideological component of NCLB; it does not allow interdistrict competition. Thus, if an entire school district is failing, the "failing" label is given to all schools in the district regardless of individual school performance. Hence, a student stuck in a poor school district has no real market choice. In addition, a school district is not motivated, under

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the Same District?, http://www.ed.gov/parents/schools/choice/choice.html (last visited Feb. 20, 2008).

> There may be situations where children in Title I schools have school options outside their own district. For instance, a school district may choose to enter into a cooperative agreement with another district that would allow their students to transfer into the other district's schools. In fact, the law requires that a district try 'to the extent practicable' to establish such an agreement in the event that all of its school have been identified as needing improvement, corrective action or restructuring.

Id.

[130] U.S. Dept. of Educ., *Choice and Supplemental Educational Services Frequently Asked Questions: Is Transportation Available for Children who Exercise their Right to Attend Another School?*, http://www.ed.gov/parents/schools/choice/choice.html (last visited Feb. 20, 2008) ("Subject to a funding cap established in the statute, districts must provide transportation for all students who exercise their school choice option under Title I. They must give priority to the lowest-achieving children from low-income families.").

[131] Nichols, *supra* note 4, at 177.

[132] U.S. Dept. of Educ., *Stronger Accountability: Accountability*, http://www.ed.gov/nclb/accountability/index.html (last visited Feb. 20, 2008).

> NCLB, by interdistrict competition; only individual schools participate in the intradistrict market.[133]

Once a school is labeled as failing, a parent's choice to remove his or her student from the school kicks in;[134] simultaneously, the chances of improving the school drops.[135] Students do not want to attend, teachers do not want to work at, and local governments do not want to fund failing schools. While it is still early, it appears the effects of school choice do not point in the direction of a legitimate, realistic choice for students and their parents.[136]

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[133] Nichols, *supra* note 4, at 177.

[134] U.S. Dept. of Educ., *Choice and Supplemental Educational Services Frequently Asked Questions: When are Children Eligible for School Choice?*, http://www.ed.gov/parents/schools/choice/choice.html (last visited Feb. 20, 2008).

[135] Nichols, *supra* note 4, at 176-77

> [L]abeling an entire school as failing is counterproductive to the process of improving it. According to [Scott Cameron, an Associate Dean at J. Reuben Clark Law School at Brigham Young University], one of the key components of educational quality is a student's perception of herself, her teachers, and her school. Indeed, arguably, the Brown court arguably rested its "separate is inherently unequal" doctrine on the damaging sense of inferiority that segregation instilled in black children. So, once a school has been labeled failing, the children of that school belong to a failure. Leaving the school may not be a real option for many of the children, so they are stuck in an inferior school. Further, such labeling depresses the job quality of teachers and administrators at those schools.

Id.

[136] Liu & Taylor, *supra* note 120, at 823 n.23 ("In May 2004, the Citizens' Commission on Civil Rights published a report on implementation of the No Child Left Behind Act transfer provision."). *See* CYNTHIA G. BROWN, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT (Dianne M. Piché & William L. Taylor eds., 2004), *available at* http://www.cccr.org/ChoosingBetterSchools.pdf. Statistics from ten states and sixty-eight districts show that almost 70,000 students exercised choice in the 2003-2004 school year. *Id.* at 6. In some places, participation in the program was limited by the failure of districts to disseminate information to parents, by lack of capacity to receive transferring students, and by other factors not related to parental or student interest. *Id.* at 66-67. *See also* JIMMY KIM & GAIL L. SUNDERMAN, DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW-

C. PRACTICAL EFFECTS OF NCLB

In theory, NCLB is the second, yet successful, coming of *Brown*. With the implementation of NCLB, academic achievement gaps are to dwindle.[137] And yet, amazingly, NCLB is vastly different from *Brown*.[138] "NCLB certainly does not embrace an integration or assimilation approach to racial disparity."[139] Rather, NCLB focuses on the accountability of schools and teachers so that students can thrive in their present environment.[140]

1. Remedies Equally Lacking

Still, even after our educational platform has shifted from *Brown* and desegregation, to NCLB and accountability, our educational system remains separate and unequal.[141] A recent study by Harvard Professor Gary Orfield, declares there is

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PERFORMING SCHOOLS? (2004) (finding that the NCLB transfer provision is not widely used, does not provide low-income students with better schooling opportunities, and is unworkable in urban districts with many low-performing schools); Liu & Taylor, *supra* note 120, at 800-01.

> The reality, however, is that many city schools with predominantly minority and low-income students are located in city school districts with predominantly minority and low-income students. The educational challenges faced by a low-performing urban school often pervade many if not most schools within the district. Accordingly, there are few meaningful options for public school choice within district boundaries in inner-city school systems.

Id.

[137] U.S. Dept. of Educ., *Stronger Accountability: Accountability*, http://www.ed.gov/nclb/accountability/index.html (last visited Feb. 20, 2008).

[138] Nichols, *supra* note 4.

[139] See NCLB, 20 U.S.C. § 6301. The remedies listed in the Act deal solely with improving the quality of schools, not moving students from poor schools.

[140] U.S. Dept. of Educ., *Teacher Quality: Frequently Asked Questions*, http://www.ed.gov/nclb/methods/teachers/teachers-faq.html (last visited Feb. 24, 2008).

[141] *See* Orfield, *supra* note 6, at 1.

reason to believe the problem is only going to get worse.[142] The telling statistics reveal harsh realities like the percentage of African-American students attending majority white schools has continuously dropped since the 1980's. At the time of Brown, 1954, only 0.001% of African-American students in the South attended majority white schools.[143] Ten years later, the number had increased to 2.3%.[144] By 1988, the number had leaped all the way to 43.5%.[145] Unfortunately, since that time the numbers, as quickly as they rose, are now falling. Throughout the 1990's, the numbers dropped from 36.6% in 1994, to 34.7% in 1996, to 32.7% in 1998.[146]

The numbers speak for themselves; but what is behind the numbers? According to Gary Orfield's research[147] and Erwin Chemerinsky's analysis[148] of the data, "Supreme Court decisions ending successful desegregation orders are causing substantial increases in segregation."[149]

> In several cases, the Supreme Court concluded that school systems achieved "unitary" status, and therefore that federal court desegregation efforts should end. The result was that remedies, which were in place and working, ceased and resegregation resulted. Many lower courts followed the lead of the Supreme Court and ended desegregation orders. The result has been a predictable increase in segregation as documented by Orfield.[150]

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[142] *Id.*

[143] *Id.* at 31.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 1.

[148] Chemerinsky, *supra* note 12.

[149] *Id.* at 1464.

[150] *Id.* at 1464-65 (citing Bd. of Educ. v. Dowell, 498 U.S. 237 (1991) and Freeman v. Pitts, 503 U.S. 467 (1992)).

An echoing of Orfield and Chemerinsky's views can be found in a recent article in the National Law Journal. The article describes the end of desegregation orders throughout the country and quotes Orfield, "We're going back to a kind of *Plessy* separate-but-equal world. I blame the courts because the courts are responsible for the resegregation of the South."[151]

2. Inappropriate Instructions

Unlike *Brown*, NCLB suffers from an additional obstacle: two of its key players, teachers and school administrators are not on board. Teachers do not like teaching to the tests, which are the only way of determining whether schools are "closing the achievement gap" or "failing" under the provisions of the Act.[152] In addition to the internal upheaval, there is also public outcry against NCLB.[153] Expounding on the views of our teachers, the National Council of Churches declare, "[A]s people of faith, we do not view our children as products to be tested and managed, but instead as unique human beings to be nurtured and educated."[154]

IV. CONCLUSION

It is clear both *Brown* and NCLB have their faults; *Brown* more than NCLB makes one wonder, with all its faults for all these years, how is it still considered a landmark case in our country's jurisprudence, and why is it widely celebrated?[155] NCLB has not been around nearly as long as *Brown*, and yet its results appear to be no better;[156] why have we not learned from our mistakes?

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[151] Tresa Baldas, *Saying Goodbye to Desegregation Plans*, 6/16/03 NLJ 4 (col. 1).

[152] *A Test of Faith*, NEA TODAY, September 2006, at 15.

[153] *Talk Back*, NEA TODAY , September 2006, at 9 (quoting Barbara Kerr).

[154] *A Test of Faith*, *supra* note 152.

[155] Ford, *supra* note 120, at 1333.

[156] *See* Orfield, *supra* note 6; Chemerinsky, *supra* note 12. *See also Notepad: NCLB: A Failure?*, NEA TODAY, September 2006, at 13.

The fact that neither *Brown* nor NCLB seem to working as American educational leaders would like, is not surprising. *Brown* and NCLB are a direct contradiction of one another.[157] *Brown* calls for desegregation and NCLB for segregation, if that means standards will be met by schools, teachers and students. If every time a school "fails" students have the choice to leave, the potential for white flight and further segregation of the races is increased.[158] Under *Brown*, such a chain of events would not be allowed. And thus, rather than standing together, our pillars of education are each fighting for the same position.

Regardless, as scholar, Richard Thompson Ford argues, "*Brown* stands as an ideal, and like most ideals, its merit is not that it is readily achieved, but that it is worth struggling for. *Brown* symbolizes not what we have accomplished, but what we, at our best, continue to strive for."[159] And I argue NCLB can fill that same role in society. NCLB is up for reauthorization by

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[157] *See* Liu & Taylor, *supra* note 120, at 796.

> At the macro level, the gap between white and black students in reading as measured by the widely respected National Assessment of Educational Progress was reduced roughly by half in the 1970's and 1980's. The greatest gains were recorded by black elementary students in the Southeast in the 1970's, the period when school desegregation was occurring all across the region for the first time.

Id. (citations omitted).

[158] Chemerinsky, *supra* note 12, at 1468.

> By the 1970's, a crucial problem emerged as white flight to suburban areas increased. The flight was due, in part, to avoid school desegregation and, in part, as a result of a larger demographic phenomenon. The emerging problems further endangered successful desegregation. In virtually every urban area, the inner-city population became increasingly composed of racial minorities. By contrast, the surrounding suburbs were almost exclusively white and the minimal minority population residing in the suburbs is generally concentrated in towns that are almost exclusively black. School district lines parallel town borders, meaning that racial separation of cities and suburbs results in segregated school systems.

Id. Said trends will never change without direct desegregation plans.

[159] Ford, *supra* note 120, at 1333.

Congress in 2007.[160] At present "nearly seventy percent of NEA members surveyed disapprove of NCLB, and fifty-seven percent want to see major changes in the law."[161] The time is ripe to institute the proper changes in NCLB;[162] a way of reconciling the two must be found, and can be, if we capitalize on this opportunity. As it stands now, our great intention of equal education is impossible because our building blocks of education, *Brown* and NCLB, do not stack up.

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[160] *No More Excuses*, NEA TODAY, September 2006, at 18-19.

[161] *Id.*

[162] The National Education Association has provided some guidance on how to achieve change:

> To help make this happen, delegates left the RA (NEA Representative Assembly) with palm-sized cards to share with colleagues, listing five things every member can do to help fix NCLB. They include e-mailing your member of Congress, making a contribution to the NEA Fund for Children and Public Education, posting personal stories at www.nea.org/esea, writing letters to the editor, and getting the word out to other NEA members.

Id.