# ARTICLES

# Separate But Equal: The Low Road Reconsidered

*By* DONALD E. LIVELY*

## Introduction

The Supreme Court declared in *Brown v. Board of Education*[1] that "[s]eparate educational facilities are inherently unequal."[2] In so doing, it determined that equal protection could not be fully secured even by efforts calculated to eliminate tangible educational disparities.[3] The Court concluded instead that it "must look to the effect of segregation itself on public education."[4] Upon doing so, it determined that racial segregation

* Associate Professor, College of Law, University of Toledo. A.B., University of California, Berkeley; M.S., Northwestern University; J.D., University of California, Los Angeles. Professor Phillip Closius provided valuable comments upon an early draft. Research assistance by Orene Bryant and Simi Fasehun was performed in an especially able and discerning fashion.

1. 347 U.S. 483 (1954).

2. *Id.* at 495. The "separate but equal" doctrine was adopted by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). The Court concluded that a state law, requiring railroads to provide "equal but separate accommodations for the white, and colored races" did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 540. Adaptation of the doctrine to other contexts was presaged generally by the spirit of the Court's decision and its specific observation that "[t]he distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court." *Id.* at 545. The doctrine was not abandoned until 1954. *See Brown*, 347 U.S. at 495.

3. The Court acknowledged "findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Brown*, 347 U.S. at 492. Still, actual equalization, even of tangible factors, never was realized under the separate but equal doctrine. As the segregation principle became increasingly subject to constitutional attack, its defenders attempted to perpetuate it by making incrementally stronger efforts to minimize the tangible disparities. However, per capita spending for white students remained much higher than for black students. South Carolina in 1915, for instance, spent almost 10 times more money per white student than per black student. *See* A. LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 20 (1964). By 1954, southern states were averaging expenditures of $165 per white student and $115 per black student. *Id.*

4. *Brown*, 347 U.S. at 492.

had a detrimental effect upon the victims of discrimination,[5] thus denying them equal educational opportunities and equal protection of the law.[6]

For nearly two decades following the *Brown* decision, the Court's adherence to the desegregation precept was unbending.[7] In the early 1970's, as the focus spread from the South to the North and West, the Court began to formulate major limiting principles that narrowed the desegregation mandate's reach.[8] During the 1980's, the consequences of those decisions have become increasingly visible. In major population centers, education is substantially separate,[9] unequal, and often immune to desegregation. Moreover, many schools, once desegregated, have been constitutionally freed to resegregate.[10]

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5. *Id.* at 494. The Court noted that segregation had a detrimental effect which was *heightened* when it had "the sanction of the law." *Id.* Implicit, at least, would seem to be the notion that racial segregation of school children, regardless of cause, had adverse consequences upon educational opportunity. *Id.*

6. The Court identified "education [as] the most important function of state and local governments." *Id.* at 493. It pointed out that education

> is required in the performance of our most basic public responsibilities . . . the very foundation of good citizenship . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training . . . in helping him to adjust normally to his environment . . . [and in affording a reasonable chance] to succeed in life. . . .

*Id.* Thus, it concluded that public education "is a right which must be made available to all on equal terms." *Id.* In subsequent decisions, however, the Court retreated from any notion of education being a fundamental right. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973).

7. The Court's paramount purpose at the time was to fashion remedies that would eliminate racially identifiable schools. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); Green v. County School Bd., 391 U.S. 430, 435 (1968).

8. Those principles conditioned the duty to desegregate upon the cause of racial separation, narrowed the basis for and the availability of remedies in metropolitan areas, and made the duty to desegregate a transient one. *See infra* notes 100-144 and accompanying text.

9. The public school systems of such cities as Baltimore and Washington, D.C., for instance, are more than 90% black. *See* Riddick v. School Bd. of City of Norfolk, 784 F.2d 521, 528 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). Separateness is especially conspicuous in cities where the student population is predominantly black. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 271 n.3 (1977) (Detroit's public school population was 71.5% black, 26.4% white, and 2.1% other ethnic groups). Contributing to the condition is the Court's deference to school district lines and consequent reluctance to impose metropolitan remedies. *See infra* notes 121-130.

10. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 32. Modern segregation in metropolitan areas has proved especially impervious to the desegregation mandate. *See* Milliken v. Bradley, 418 U.S. at 782, 804-08 (Marshall, J., dissenting). Characteristic of such separation are substantial disparities in funding and educational progress. For example, average pupil expenditures approximate $3,000 in Ohio's three largest cities—Cleveland, Columbus, and Cincinnati—and over $4,000 in nearby predominantly white suburbs. *See* STATE OF OHIO, DEPARTMENT OF EDUCATION, COSTS PER PUPIL, Table 1 at 5, 7-8, and Table 2 at 28, 30-31 (1984-85). Con-

Given the principles which have narrowed the desegregation mandate's ambit,[11] coupled with the white flight phenomenon[12] particularly characteristic of major population centers, it is evident that racially separate schooling is a reality that will endure into the foreseeable future. To the extent its linkage to official action is declared too remote, segregation is constitutionally acceptable.[13] Consonant with such cause-oriented analysis, resegregation is permissible even where desegregation had been decreed.[14]

The promise of meaningful equality associated with the desegregation mandate appears incomplete to the extent much segregation, because of its characterization, is constitutionally immune. As it has become apparent that comprehensive and enduring integration has been placed beyond the ken of constitutional proscription, in major population centers or where a reversion to past patterns occurs, the theme of eliminating dual school systems has assumed a hollow tone.[15] Unless fortified or augmented by pragmatic responses to modern realities, the net accomplishment of the desegregation principle may prove minimal.[16]

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cern that center city schools are breeding grounds for an urban underclass is reinforced by education achievement scores in reading, science, and mathematics that, on a scale of 100, range from about 10 to 15 points below the national mean—which is approximately 60—compared with suburban scores which range from about 10 to 15 points above the mean. *See* U.S. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, NATIONAL ASSESSMENT OF EDUCATION PROGRESS, Tables 17-19 (1985) (for ages 9, 13, and 17, by subject and by selected characteristics).

11. *See infra* notes 100-144 and accompanying text.

12. White flight denotes the resettlement process by "wealthier whites [who] successfully immunize themselves from desegregation remedies that less wealthy groups have been unable to avoid." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1042 (1978). Its destabilizing effect upon desegregation efforts is typified by demographics presented in a case which the Supreme Court declined to hear. In 1970, the population of Norfolk, Virginia, was 70% white and 28% black. Student enrollment in public schools was 57% white and 43% black. Riddick v. School Bd. of City of Norfolk, 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). Desegregation was ordered in 1971. *Id.* By 1980, the overall city population had declined more than 11%. and school enrollment had dropped by 37%. *Id.* The racial composition of the city had shifted to 61% white and 35% black, and in the schools to 42.6% white and 57.4% black—almost the exact reverse of a decade earlier.

13. *See infra* notes 100-120 and accompanying text.

14. *See infra* notes 121-141 and accompanying text.

15. The Court's original expectation was that the desegregation process would make it no longer "possible to identify a 'white' school or a 'Negro' school." *Swann*, 402 U.S. at 18. *See* Green v. County School Bd., 391 U.S. at 435. Modern realities, shaped by limiting principles that have restricted the desegregation mandate's reach and by the consequences of white flight, have contributed to the perpetuation of those distinctions.

16. Despite recognizing education as an important individual and social interest, the Court has refused to consider it a fundamental right and thus has not employed heightened scrutiny to review funding disparities. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 35-37 (1973). Consequently, substantial equality of education is not guaranteed. *Id.* at 36-37. Because racial segregation which is not officially mandated or the product of official

During the 1970's it became evident that not all forms of school segregation violated the Fourteenth Amendment.[17] It is now questionable whether the gains made even where desegregation occurred will endure or prove ephemeral.[18] The Court's drift from forceful administration of the desegregation mandate has been especially unpropitious because the Court, in embracing and later modifying the desegregation precept, adopted no auxiliary equal protection principles.[19] The insistence and resolve, which once were the dominant aspects of the Court's posture, were essential for communicating its expectations to recalcitrant state and local officials.[20] That firmness has receded, however, as primary responsibility for desegregation effectuation and integration maintenance has been transferred to state and local officials.

Invalidation of the separate but equal doctrine was accompanied by the observation that "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy [v. Ferguson]* was written."[21] Since public schooling in the nineteenth century was a limited and underdeveloped reality, history affords few insights into the precise meaning of equal protection in the area of education.[22] Given the evolution and consequences of constitutional

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intent does not evoke close judicial scrutiny, subsequent resegregation does not engender an insistence upon equalization which at least was an option, even if underutilized, prior to the *Brown* decision.

17. Segregation that was not found to be proximately linked to official action, for instance, is excluded from the desegregation mandate. *See infra* notes 100-144 and accompanying text. Included in the constitutional exemption is segregation resulting from population shifts, even if resettlement is prompted by a desegregation order.

18. Once desegregation occurs and a school system becomes unitary, no duty exists to prevent resegregation from occurring unless it is the product of discriminatory action. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976); *Swann*, 402 U.S. at 31-32. Freedom from the duty to desegregate has been granted in several major population centers. *See infra* notes 134-144 and accompanying text; *see, e.g.*, Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986); Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985); Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1434 (5th Cir. 1983); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983); United States v. Hendry School Dist., 504 F.2d 550, 554 (5th Cir. 1974).

19. The notion that "[s]eparate educational facilities are inherently unequal" essentially displaced principles, that purportedly required an equalization focus, in favor of a desegregation remedy that was expected to promote equal educational opportunities. *See Brown*, 347 U.S. at 494-95.

20. Because of widespread resistance and delay by state and local officials, accompanied by freedom of choice plans and other methodologies not really designed to effectuate the desegregation mandate, the Court insisted not only upon functional desegregation plans but upon plans that would work immediately. *See, e.g.*, Green v. County School Bd., 391 U.S. at 435; Griffin v. Prince Edward County Bd. of Educ., 377 U.S. 218, 234 (1964).

21. *Brown*, 347 U.S. at 492.

22. At the time the Fourteenth Amendment was drafted, and later when *Plessy v. Ferguson* was authored, public education was in its embryonic state and neither widely developed

analysis since *Brown*, however, it would be tempting to "turn back the clock" to 1954.[23] In enunciating the desegregation principle, the Court presumed that the elimination of segregated educational facilities would help engender equality in both a legal and practical sense.[24] It probably did not contemplate that more than a generation later, "separate but equal" actually might be traded for separate, period.

The central problem which the *Brown* Court set out to resolve was the effective denial of equal educational opportunity tied to the systematic subordination of a racial group.[25] Official racial separation, accompanied by unequal and inadequate resources, successfully perpetuated that condition. The desegregation formula, therefore, was a logical doctrinal substitute for a principle that, papered by equal protection mouthings, facilitated oppression. Having abandoned a doctrine which conditioned an overt equality component, however, the Court's dedication to the desegregation mandate and the principle's capacity for flexible application became critical. As segregation persisted or resurfaced in new forms, and the precept was not recalibrated to address new realities, insistence upon elimination of all racially identifiable schools[26] developed into an increasingly qualified mandate. The rigid application of the desegregation principle, evinced by a disinclination to use it to address modern realities, has contributed to or at least betrayed a concession to segregation's durability, entrenchment, and expanding legal acceptability.[27] Because the Court's commitment to desegregation has proved to be neither sweeping nor enduring, too much may have been lost in the 1954 doctrinal transaction.

Although generally dismissed as a morally bankrupt footnote in

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nor available. *See Brown*, 347 U.S. at 490; L. TRIBE, GOD SAVE THIS HONORABLE COURT 46 (1986) [hereinafter TRIBE, HONORABLE COURT].

23. The temptation might arise in response to the limiting principles that substantially narrowed the reach of the Court's mandate in *Brown*. *See infra* notes 100-144 and accompanying text.

24. Finding "that in the field of public education the doctrine of 'separate but equal' has no place," the Court observed that segregation "has a detrimental effect upon the colored children" that denies them equality in educational opportunity and under the law. *Brown*, 347 U.S. at 493.

25. The Court accordingly was guided by concern that the denial of an equal educational opportunity pursuant to racial considerations ensures that the adversely affected group will have a lesser chance of succeeding in life. *Id. See also* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487-88 (1976).

26. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 18; Green v. County School Bd., 391 U.S. at 435.

27. The Court has been perceived by some as softening its position on desegregation, beginning in the early 1970's, consonant with the public's mood. *See* Milliken v. Bradley, 418 U.S. at 814-15 (Marshall, J., dissenting); B. SCHWARTZ, *Swann's* WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 186-89 (1986).

legal history,[28] *Plessy v. Ferguson* affords a departure point for addressing some of the consequences of segregation that otherwise are constitutionally unreachable. The separate but equal doctrine failed constitutionally because it disguised a commitment to separate, rather than equal.[29] In a society apparently destined to remain largely segregated, however, a reconstituted separate but equal concept at least might afford an analytical predicate for offsetting the disparities that remain untouched so long as separate conditions persist.

Instead of concluding that certain differences in education are immeasurable, as the Court did in rejecting the separate but equal doctrine,[30] the existence of disparities in both tangible and intangible factors alone is a compelling reason for attempting to equalize them. If strictly measured and assessed, the cost of offsetting disparities conceivably might prove prohibitive.[31] To the extent such analysis helped make the perpetuation of segregation impractical, equal protection interests ultimately might profit.[32] At a minimum, secondary principles focusing upon the effect of segregation would afford a constitutional safety net to ensure that equality principles were not displaced entirely.

Because separate no longer must be equal, and modern, constitutionally resistant strains of segregation continue to evolve, the uncondi-

28. The observation, that the separate but equal doctrine would "in time prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case," proved to be an "accurate prophe[sy]." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 629 (1983) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The separate but equal doctrine has been criticized for having created "a shallow illusion of equality." L. TRIBE, *supra* note 12, at 1019-20.

29. Shortly after embracing the doctrine, for instance, the Court upheld a school district's decision, based upon economic reasons, to provide a high school education for whites but not for blacks. *See* Cumming v. Board of Educ., 175 U.S. 528 (1899); *see infra* notes 48-59 and accompanying text. Later, in another context, when some efforts were made to provide comparable facilities, the Court concluded that such intangibles as faculty, reputation, position and influence of alumni, and connections and opportunity could not be equalized. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950).

30. Even before rejecting the separate but equal doctrine altogether, the Court diverged from it to the extent important differences could be identified "which are incapable of objective measurement." Sweatt v. Painter, 339 U.S. at 634. *See* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 641 (1950).

31. Part of the original strategy behind litigation designed to have official segregation eventually declared unconstitutional, was the insistence upon equalization to the point costs would become demonstrably excessive and the separatist system would thus collapse under its own weight. *See* K. RIPPLE, CONSTITUTIONAL LITIGATION 123-25 (1984). However, in at least one instance, defendants demonstrated a resolve to equalize at any cost rather than dismantle a segregated system. *See id.* at 128.

32. A recent court order, to the effect that Kansas City and the state of Missouri must spend $196 million to improve the quality of largely segregated urban schools, has evoked official outcries that compliance would devastate Missouri's budget and would be unaffordable. *See It's Full Steam Ahead for Magnet Schools,* Kansas City Times, Nov. 13, 1986, at A1, A10.

tional trade-in of equalization merits rethinking. Part I of this Article reviews the origins and failure of the separate but equal doctrine. Part II demonstrates how abandonment of the separate but equal doctrine prefaced further displacement of equality principles. It also discusses *Brown* and its progeny, focusing on the dilution of the desegregation mandate. Part III suggests a modern *equal where separate* principle which, even if not a permanent solution, may be responsive to the consequnces of persisting and recurring school segregation especially in major population centers.

## I. The Separate But Equal Doctrine: An Emphasis Upon Separatism

The separate but equal doctrine, conceived in *Plessy v. Ferguson*,[33] was calibrated to perpetuate separateness rather than to eliminate inequality.[34] The principle, even when first propounded, was not universally subscribed to because the doctrinal terms were merely a transparent disguise for unconstitutional ways and means.[35] Justice Harlan's dissent in *Plessy* noted that the formula essentially acted as a mechanism for protecting a dominant class[36] and sanctioned a classification scheme that stigmatized blacks and fostered stereotypes.[37] Still, the majority observed that the Fourteenth Amendment, even though designed to ensure absolute legal equality, "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."[38] Thus, the Court promoted the illusion that

33. 163 U.S. 537 (1896).

34. The "apparent symmetry in treatment created only a shallow illusion of equality [which eventually] prompted the Court in *Brown v. Board of Education* to overturn legally-compelled segregation in public schools." L. TRIBE, *supra* note 12, at 1019. As discussed in Part II (*infra* notes 73-144 and accompanying text), the Court's promise in 1954 propounded another illusion begetting further disappointment, to the extent neither desegregation nor equalization has been realized.

35. *See Plessy*, 163 U.S. at 557-64 (Harlan, J., dissenting).

36. He noted that contrary to the purpose of the Equal Protection Clause, "it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights . . . upon the basis of race." *Id.* at 560. Justice Harlan envisioned that judicial endorsement of the separate but equal doctrine "will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by state law to defeat equal protection guarantees." *Id.*

37. *Id.* at 562.

38. 163 U.S. at 544. Examples that the Court offered to demonstrate the settled "nature of things" proved anything but firmly cast. It noted that the most common instance of legal segregation "is connected with the establishment of separate schools for white and colored children." *Id.* The Court also observed that "the constitutionality of [such classification] does

official racial separation did not connote inferiority[39] and that it fell within the ambit of a state's police power.[40]

The formal segregation endorsed by the Court was subject to the minimally limiting principle that any exercise of state police power which classified on the basis of race had to be reasonable.[41] Although reasonableness theoretically would have been exceeded if separatism was calculated to oppress a particular ethnic group, the possibility of invalidation on such grounds was minimal.[42] Unlike modern equal protection analysis,[43] the standard for reviewing official racial classifications was a deferential rather than a heightened one.[44] Consequently, a classification scheme, whether motivated by genuine—albeit unenlightened— attempts

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not seem to have been questioned." *Id.* at 551. A mere three years later, and during the next half century, such questions were raised. *See infra* notes 48-72 and accompanying text.

Although official classification pursuant to the "nature of things" now supposedly is disreputable, such differentiations have crept back into the legislative process and have survived judicial scrutiny. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974), in which the Court concluded that exclusion of pregnancy from disability insurance coverage was not a gender-based classification, because no risks existed from which men or women as a group were excluded. *Id.* at 496-97. The Court's determination evoked criticism to the effect that the plan afforded dissimilar treatment based upon "physical characteristics inextricably linked to one sex" and that the classification should not be blithely regarded as "in the nature of things." *Id.* at 501 (Brennan, J., dissenting).

39. The Court concluded that any such implication was "not by reason or anything found in the act, but solely because the colored race cho[se] to put that construction upon it." *Plessy*, 163 U.S. at 551.

40. *Id.* at 544.

41. *Id.* at 550. The Court implied, therefore, that separation on the basis of hair color, alienage or nationality, or laws assigning sidewalks on the basis of race or requiring white person's houses to be painted white and "colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color," would be unreasonable. *Id.* at 549-50.

42. *See id.* The Court stated it would tolerate only "such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." *Id.* at 550. Its citation to Yick Wo v. Hopkins, 118 U.S. 356 (1886), which involved a municipal regulation selectively applied to Chinese laundries, suggested that the Court might respond to instances of discrimination uncamouflaged by trappings of social custom and tradition. *See Plessy*, 163 U.S. at 550.

43. Racial classifications now are regarded as suspect and consequently unlikely to be based upon a valid purpose. Thus, they are subjected to strict judicial scrutiny and justified only by compelling state interests. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944). Such review has been described as "strict in theory and fatal in fact." Gunther, *Foreward In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

44. The standard for assessing the constitutionality of a racial classification scheme was mere reasonableness. *See Plessy*, 163 U.S. at 550. By regarding custom, tradition, preservation of public peace, comfort, and order as proper bases for official classifications, the Court afforded legislatures ample room to perpetuate a separatist society. *Id.*

to promote public well-being,[45] or by oppressive and supremacist instincts,[46] would rarely fail to pass constitutional muster.

Not surprisingly, therefore, the separate but equal doctrine in practice accentuated separation.[47] Any expectation that constitutional commitment to equality would be comparable to that for separateness was dispelled shortly after the Court embraced the separate but equal concept.

An early test of the principle, in *Cumming v. Board of Education*,[48] proved it to be so flimsy that even egregiously unequal education was countenanced. In *Cumming*, the Court permitted a school board to deny a high school education to blacks even though it provided one to whites.[49] By making the equality component virtually inoperative, the Court essentially signaled that the availability of public education at the time could be racially determined without constitutional offense.[50]

Consistent with the spirit of the separate but equal doctrine, an opportunity for a meaningful education, much less an equal one, was a

45. *See id.* The *Plessy* Court, in recognizing a state's interest in "preservation of the public peace and good order," *id.*, was unpersuaded by Justice Harlan's argument that "[t]he sure guarantee of the peace and security of each race is the clear, distinct unconditional recognition . . . of every right that inheres in civil freedom, and of the equality before the law of all citizens . . . without regard to race." *Id.* at 560 (Harlan, J., dissenting).

46. Antimiscegenation laws that were enacted and left undisturbed until the late 1960's, for instance, were intended "to maintain white supremacy." Loving v. Virginia, 388 U.S. 1, 11 (1967).

47. Not until 1938 did the Court actually find inequality in a state policy of educational segregation. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Even so, it was not until the disparity, created by the absence of any state law school for blacks, was so egregious that it was virtually impossible to ignore. "[A]t the university level no provision for Negro education was a rule rather than an exception." Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 319 (1952). Still, two Justices would have reached a different result because the state had acted "upon the view that the best interest of her people demands separation of whites and negroes in schools," *Gaines*, 305 U.S. at 353 (McReynolds, J., joined by Butler, J., dissenting), and because public education "maintained by state taxation is a matter belonging to the respective states." *Id.* (quoting Cumming v. Board of Educ., 175 U.S. 528, 545 (1899)). Before abandoning the separate but equal principle, the Court never insisted upon equalization of schools below the post-graduate level. *See Brown*, 347 U.S. at 493.

48. 175 U.S. 528 (1899).

49. *Id.* at 542. The county had abolished a black high school, for claimed economic reasons, but continued to maintain a high school for white girls and helped fund a sectarian high school for white boys.

50. Justice Harlan, who had dissented so vigorously in *Plessy v. Ferguson*, found in *Cumming* "that it was within the discretion of the Board to establish high schools." *Id.* Thus, the Court's response to black taxpayers who filed the suit was that allocation of tax monies is not governed by the Constitution and, in any event, "it is impracticable to distribute taxes equally." *Id.* Absent any constitutional control upon expenditures, it is difficult to envision how the second half of the separate but equal doctrine could have been enforced.

mere pretense.[51] Almost immediately, the sheerness of the separate but equal doctrine's disguise became manifest. Contrary to the Court's earlier observations that inferiority was mistakenly inferred by the primary victims of segregation, and not implied by the classification,[52] its endorsement of schemes which separated and set rights and benefits according to race proved just the opposite.

Several decades passed before the Court, in *Missouri ex rel. Gaines v. Canada*,[53] afforded more serious attention to the "equality" guarantee of the separate but equal doctrine. It did so, however, only in response to challenges directed increasingly toward the validity of the doctrine itself.[54] The Court in *Gaines* considered whether a state, by providing a law school for whites but not for blacks, denied equal protection.[55] Although the state offered to pay out-of-state tuition for the protesting student's legal education, the Court found the state had defaulted upon its constitutional obligation to maintain "the equality of legal right to the enjoyment of the privilege which the State has set up."[56] Having considered whether the state had provided legal privileges to whites which it denied to blacks, the Court concluded that the state had done precisely that and thus had denied equal protection on the basis of race.[57] Unlike its analysis in *Cumming*, the *Gaines* Court recognized that tying the availability of education to race fostered not only separation but "unconstitutional discrimination."[58] Absent other opportunities for in-state

51. The *Cumming* Court employed a balancing of harm analysis especially geared toward the separate but equal doctrine. Thus, it concluded that because primary education would have been denied to 300 black children if the Board "maintained a separate school for the sixty children who wished to have a high school education[,] . . . its decision was in the interest of the greater number of colored children." *Id.* at 544. Rather than grant relief that would equalize, the Court concluded that denying a high school education to whites would take away their educational opportunities without providing any such opportunity to blacks. *Id.* Justice Harlan thus took an active hand in facilitating a system that promoted racial inequality in a particularly profound way.

52. *See Plessy*, 163 U.S. at 551. The result of this analysis demonstrated the accuracy of Justice Harlan's forecast that a racial classification scheme would be used to mete out and regulate rights and benefits. *Id.* at 560 (Harlan, J., dissenting).

53. 305 U.S. 337 (1938).

54. Until 1938, litigants had not contested the validity of the separate but equal doctrine but asserted that equal facilities were unavailable. *See* Gong Lum v. Rice, 275 U.S. 78, 80 (1927); *Cumming*, 175 U.S. at 530-31.

55. *Gaines*, 305 U.S. at 345.

56. *Id.* at 349-50. The Court observed that the failure to afford a legal education within the state, because of race, constituted "discrimination, [which] if not relieved . . . would [be] a denial of equal protection." *Id.* at 345.

57. *Id.* at 349-50. The Court observed that the obligation "cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do." *Id.* at 350.

58. *Id.*

legal training, the "petitioner was entitled to be admitted to the law school of the State University."[59] By accentuating the equality factor for the first time, the Court unveiled an equal protection enforcement mechanism which was to be abandoned when the Court embraced the concept of desegregation.

The equality focus evolved further before the separate but equal doctrine was displaced, but it never was employed outside the context of graduate education,[60] nor was the equality requirement necessarily enforced in a meaningful way.[61] However, in *Sweatt v. Painter*,[62] the Court served notice that it no longer would be satisfied with token equalization. Unlike the facts pertinent to previous decisions,[63] a state "law school for Negroes" had been created.[64] Still, the Court found the school unequal for constitutional purposes and directed the white law school to admit the plaintiff.[65] The order reflected the Court's most penetrating effort, as of that time, to identify factors in the educational process which had to be equalized. Noting that the white school had a stronger faculty, broader range of courses, better library, larger student body, and more extensive student activities, the Court determined that the black school was inferior.[66] Its analysis, however, did not stop with an assessment of physical or readily palpable differences. Rather, it identified intangible qualities, such as faculty reputation, alumni position and influence, institutional traditions and prestige, and linkage to professional opportunities, as relevant factors in the equality calculus that were "incapable of

59. *Id.* at 352.

60. The four cases in which the Court focused upon equalization were McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) (graduate school); Sweatt v. Painter, 339 U.S. 629 (1950) (law school); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (law school); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (law school).

61. For instance, the Court, in a per curiam opinion, ordered a state to provide a legal education at an in-state law school for blacks or at the state university "as soon as it does for applicants of any other group." Sipuel v. Board of Regents, 332 U.S. 631, 633 (1948). When the state merely roped off a portion of its capitol building and termed it a black law school, the Court, despite arguments of patent inequality, denied further relief. *See* Fisher v. Hurst, 333 U.S. 147 (1948).

62. 339 U.S. 629 (1950).

63. Central to the Court's previous decisions was the absence of any state supported school for blacks. *See* Sipuel v. Board of Regents, 332 U.S. at 633; *Gaines*, 305 U.S. at 349-52.

64. 339 U.S. at 633. The trial court, recognizing that conditioning the opportunity for a legal education upon race was incompatible with equal protection, had stayed proceedings "to allow the State to supply substantially equal facilities." *Id.* It later determined that the newly created institution afforded "privileges, advantages, and opportunities for the study of law substantially equivalent to those afforded by the State for white students." *Id.*

65. *Id.* at 635-36.

66. *Id.* at 632-34.

objective measurement."[67]

The implication, that certain factors pertinent to assessing equality defied measurement,[68] suggested that the separate but equal doctrine might be living on borrowed time. Leading further toward its demise was the Court's decision in *McLaurin v. Oklahoma State Regents for Higher Education*.[69] In *McLaurin*, the Court held that racially determined seating arrangements in a university classroom, cafeteria, and library directly impaired the "pursuit of effective graduate instruction."[70] In both *Sweatt* and *McLaurin*, the principle of segregation was displaced pursuant to an emerging perception that certain disparities could not be bridged and that separate could never be equal. Although the Court found it unnecessary at the time to reconsider the separate but equal doctrine,[71] the focus upon intangible differences and resultant remedies prefaced its inevitable displacement.[72]

## II. Separate is Inherently Unequal: The Reconstitutionalizing of Segregation

The Supreme Court's conclusion, in 1954, that separate inherently constituted unequal, was accompanied by the sense that immediate change could not be imposed by judicial fiat.[73] A cautious sense of its enforcement capability notwithstanding, it is doubtful whether the Court fully appreciated how deeply separatist instincts were engrained in society and the consequent lengths to which persons would go in resisting

67. *Id.* at 634.

68. *Id.*

69. 339 U.S. 637 (1950).

70. *Id.* at 641. The Court found that by impairing the "ability to study, to engage in discussion, and exchange views with other students, and in general, to learn [the] profession" the students were denied equal protection. *Id.*

71. The doctrine actually was challenged in *Sweatt v. Painter*. *See* K. RIPPLE, *supra* note 31, at 128-29. Noting that constitutional decisions "will be drawn as narrowly as possible," the *Sweatt* Court remarked that "much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition." 339 U.S. at 631.

72. *Sweatt*, 339 U.S. at 636. Eventually, the Court concluded that those intangible "considerations apply with added force to children in grade and high schools." *Brown*, 347 U.S. at 494.

73. The Court undoubtedly anticipated a response which has been characterized as "electric and widely divergent." A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 180 (1958). To diffuse public hostility that a wholesale rejection of the separate but equal doctrine may have been expected to precipitate, the Court limited its holding to the effect "that in the field of public education the doctrine of 'separate but equal' has no place." *Brown*, 347 U.S. at 495. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 574-76 (1986). Consistent with the realization that desegregation would not occur overnight, the Court originally required it "with all deliberate speed" and turned to the lower courts for implementation. *Brown*, 349 U.S. at 301.

racial mixing. Nor could it have contemplated the opportunities that would become increasingly available to avoid segregation.

When announced, the desegregation principle engendered immediate and widespread resistence, delay, evasion, and actual mutiny by lower federal courts.[74] Although the Court for nearly two decades after *Brown* insisted upon the dismantling of dual school systems, its new analytical mode was a prelude for incomplete and fleeting results.[75] Separate education, especially outside the South, was not overtly enforced by the State and was attributed to other factors including housing and employment patterns.[76] Even if the *Brown* Court might have pondered the desirability of expanding its mandate to respond to those influences, it is doubtful that it could have forecast the social dynamics that would evolve independently and help defeat any far-reaching desegregation. Increasing personal mobility, tied to a growing national economy, eroded traditional rootedness in a community or neighborhood. The simultaneous growth of suburbs defined urban areas in broader metropolitan terms and provided a sanctuary for those wanting to escape racial mixing or its perceived consequences. Especially to the extent old neighborhoods were left behind for new ones, desegregation became a task that could not be accomplished within the relatively simple framework of a single district. The march to the suburbs, accompanied by the creation of districts that were new and without a history of discrimination, ushered in new realities that the Court later would address.[77] The legacy of that eventual confrontation is a series of limiting principles that leaves the desegregation mandate facially intact but countenances much existing or recurrent segregation[78] and leaves much of the *Brown* Court's equal protection hopes unfulfilled.

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74. *See infra* note 92 and accompanying text.

75. The duty to desegregate became more narrowly drawn and transient pursuant to limiting principles, discussed *infra* notes 100-144, which have enabled the North and West in particular to avoid the mandate. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 218-19 & nn. 3-4 (1973) (Powell, J., concurring and dissenting) (desegregation "in many nonsouthern cities with large minority populations" has not been realized "primarily because of the *de facto/de jure* distinction").

76. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480-81 (1979) (Powell, J., dissenting).

77. *See infra* notes 100-144 and accompanying text.

78. Once a school system achieves unitary status, a court may not order further relief in response to subsequent changes in neighborhood ethnicity, so-called immutable geographic factors, or demographic shifts for which the system is not held accountable. *See* Riddick v. School Bd. of City of Norfolk, 784 F.2d at 536-37 (citing Davis v. East Baton Rouge School Bd., 721 F.2d 1425, 1435 (5th Cir. 1983)); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983); *see also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976).

Under *Plessy*, the equality factor was, for the most part, dormant. But because it constituted half of the doctrine, at least externally, the Court if it was so inclined could choose to emphasize it.[79] By contrast, under *Brown* and its progeny, the equality factor may be dormant because it has ceased to exist in an overt form.[80]

In reassessing the separate but equal doctrine, the Court was not obligated to discard it entirely.[81] The opportunity existed, for instance, to use it as a saber rather than as a shield.[82] Consistent with *Sweatt v. Painter*, desegregation might have been conditioned upon a failure to demonstrate that comprehensive and substantial equality existed.[83] Building upon previous determinations that certain disparities defied measurement or were irreducible, however, the Court moved a step further and asserted categorically that segregation and equality were mutually exclusive.[84] Relying upon observations by social scientists,[85] it noted

79. *See infra* notes 134-144 and accompanying text.

80. Education, moreover, is not a fundamental right, so equality of educational opportunity is not constitutionally guaranteed. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 36-37 (1973). Absent disparities that are the product of intentional racial discrimination, differences in educational quality will not trigger heightened scrutiny. *Id.* at 28.

81. The Court claimed that, in earlier cases, it had found such obvious inequality resulting from actual denial of educational opportunities that it had not been "necessary to re-examine the doctrine." *Brown*, 347 U.S. at 492.

82. The litigation strategy which eventually defeated the separate but equal doctrine was calculated to seek "absolute and complete equalization of curricula, faculty, and physical equipment in white and black schools." Marshall, *supra* note 47, at 318. It succeeded in demonstrating the sterility and futility of the separate but equal concept. *See* K. RIPPLE, *supra* note 31, at 122-34. Despite insisting upon desegregation, the Court could have continued to insist upon "absolute equalization," especially where segregation has proved to be constitutionally resistant.

83. *See supra* notes 62-67 and accompanying text. The Court, by ordering the admission of blacks into white law schools, had constructed a possible framework for desegregation. *See* Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). The state, in *Sweatt v. Painter*, actually was disposed to make "every effort to show that if [the black law school] was not equal [at least] insofar as physical facilities were concerned, it would be made equal in short order." Marshall, *supra* note 47, at 319. Especially if expanded so that it focused also upon intangibles, the separate but equal doctrine would afford a broad cutting edge for equality interests rather than a mere shield for the established order. Furthermore, evidence existed at the time the Court rejected the separate but equal doctrine that some effort was being made to equalize the quality of physical facilities, faculty, and course offerings.

84. *Brown*, 347 U.S. at 495.

85. The Court cited to several prominent psychologists and sociologists to support its conclusion that segregation was detrimental in an educational setting. *See id.* at 494 n.11. In several of the cases joined and reversed by the Court, social scientists had testified regarding the harmful effects of segregation upon students. *See* K. RIPPLE, *supra* note 31, at 132-33. On appeal, a statement by 32 sociologists, anthropologists, psychologists, and psychiatrists, emphasizing those harms, was submitted. *See The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427 (1953). Reliance on such data has engendered criticism similar to that which followed the use of medical and other

that separation of children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[86] Based upon those findings, the Court concluded that the separate but equal doctrine crossed the Equal Protection Clause of the Fourteenth Amendment.[87]

The Court in *Brown* embraced a principle designed to promote equalization of educational opportunities indirectly.[88] By failing to retain principles that overtly promoted parity,[89] no secondary or fall back principles remained to protect or promote equal protection values in the event the desegregation mandate faded or became overwhelmed by new realities. The Court, in ordering desegregation, assigned primary responsibility for implementation "with all deliberate speed"[90] to local officials and courts.[91] School districts—with the complicity of lower federal courts—seized the mandate as an opportunity to resist desegregation and adopted plans that were subterfuges,[92] and engaged in delaying

studies in delineating the liberty to choose an abortion. In both contexts, critics have asserted findings are changeable and "have an uncertain expectancy of life." *See* Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150, 157-59, 167 (1955) (desegregation); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting ) (the trimester analysis that delineates abortion and fetal rights is on a collision course with itself as medical advances push reasons for regulating maternal health forward toward childbirth, and fetal viability backward toward the point of conception).

86. *Brown*, 347 U.S. at 494.

87. *Id.* at 495. The Court noted that "in the field of public education the doctrine of 'separate but equal' has no place." *Id.*

88. Desegregation by itself does not equalize but was conceived as a methodology that would create equal educational opportunities. *See id.* at 494-95.

89. Although used primarily to maintain segregation, the separate but equal doctrine's equality component enabled the Court to insist upon parity if it so chose. *See supra* notes 53-70 and *infra* notes 154-156.

90. *Brown*, 349 U.S. at 294, 301.

91. *Id.* at 299.

92. Such purported desegregation plans actually were designed to perpetuate segregation. Arkansas, for instance, enacted a law intended to free students from compulsory attendance at biracial schools. The statute was engendered by a state constitutional amendment requiring the legislature to approve "in every Constitutional manner the Un-constitutional desegregation decisions . . . of the United States Supreme Court," and led to desegregation at federal bayonet point. ARK. CONST. amend. 44 (cited in Cooper v. Aaron, 358 U.S. 1, 8-9 (1958)). Other sham desegregation plans invalidated by the Court included freedom of choice and transfer plans that permitted students to move from schools where they were part of a minority to schools where they would be part of a majority. *See* Green v. County School Bd., 391 U.S. 430, 439-42 (1968); Goss v. Board of Educ., 373 U.S. 683, 685-87 (1963). Even after a detailed statement of impermissible procedures and delineation of a federal court's power to alter attendance zones for remedial purposes, many school systems continued to gerrymander district lines in an effort to avoid the full impact of the desegregation mandate. *See* L. TRIBE, *supra* note 12, at 1036 (discussing the aftermath of Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

tactics.[93] States enacted legislation designed to thwart the order[94] and deterred efforts to have it enforced.[95] Protracted litigation eventually tested the Court's patience and caused it to insist on desegregation plans that "promise[d] realistically to work *now*."[96] Even then, deliberate stalling and evasion succeeded in delaying or frustrating desegregation and the equalizing effect it was expected to have.[97]

Recalcitrant state and local officials and rebellious judges most frequently are identified as scapegoats for the disappointing results of the Court's desegregation mandate.[98] However, the Court's subsequent responses to the persistent challenges regarding what conditions required desegregation, what remedies were permissible, and whether the duty to desegregate was a lasting one have guided the desegregation mandate's devolution. By fashioning major limiting principles,[99] the Court accommodated both old and new strains of segregation.

### A. Principles Limiting the Reach of Desegregation: Intent

The first limiting principle propounded by the Court conditioned the duty to desegregate upon the existence of officially induced segrega-

93. Such tactics were facilitated by the complicity of lower federal courts. The Court, for instance, had to review a judicially created principle that desegregation actions could not be entertained by a federal court until administrative remedies were exhausted. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963). Federal district courts thus were in the vanguard of obstructionism. By encouraging plans designed not to work, they furthered official stalling and bad faith. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966). It was "not surprising," given such local judicial cheerleading, that many school officials did not face up to their responsibilities. *Id.*

94. *See supra* note 92.

95. One such deterrent was a law intended to disbar civil rights attorneys. Such legislation was struck down in NAACP v. Button, 371 U.S. 415, 444 (1963).

96. Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis in original).

97. Ten years after the desegregation order, only 2.14% of black students in 11 southern states attended schools in which they were not a racial majority. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 124 (1974). Such results were the product of slow, token, or no response by officials responsible for implementing the desegregation mandate. *See, e.g.*, Goss v. Board of Educ., 373 U.S. 683 (1963) (student transfer plan perpetuated rather than helped dismantle segregation); Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964); Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448 (1962).

98. *See, e.g.*, Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 245 (1968); Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963).

99. Those limiting principles include the de jure/de facto distinction, restrictions upon interdistrict remedies, and the transitory nature of the duty to desegregate. *See infra* notes 100-144.

tion.[100] Equal protection objectives thus were subjected to a major contingency.[101] To the extent segregation could be attributed to factors other than what the Court would consider purposeful state action, no duty to desegregate would exist.[102] It thus became evident that desegregation would be a selective rather than comprehensive concept, pertinent only when a formal system of segregation had existed or a palpable discriminatory intent could be identified.[103]

By not acknowledging a linkage between government action and segregated housing patterns, the Court overlooked or heavily discounted the enduring effects of officially enforced racially restrictive covenants and formal state policies.[104] It also evinced insensitivity to other realities that precluded mixed neighborhoods.[105] Formulation of the de jure/de

100. In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), the Court stated that "the differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208 (emphasis in original). *See also* Washington v. Davis, 426 U.S. 229, 238-41 (1976). The Court in *Keyes* drew a line between so-called de jure segregation, which was the product of official action, and de facto segregation, which supposedly reflected a racial imbalance untied to official action. 413 U.S. at 205-14. As a cut-off point for official responsibility, however, the line may be illusory. Segregated housing, for instance, may be the product of official enforcement of restrictive covenants or other policies. *See id.* at 216 (Douglas, J., concurring). The Federal Housing Administration adopted lending policies to protect residential loans from "adverse influences" that included "racially inharmonious groups." P. JACOBS, PRELUDE TO RIOT: A VIEW OF URBAN AMERICA FROM THE BOTTOM 139-41 (1967). State action also may contribute to racial neighborhoods by virtue of decisions concerning the construction and closing of schools, employment of faculty and staff, assignment of students, and distribution of urban development funds. *Keyes*, 413 U.S. at 216 (Douglas, J., dissenting). The formulation of policies which foster separate neighborhoods implicate the state as much as overt separatist policies. *Id.* Rather than exploring those linkages to state action in depth, the Court opted for bright but not necessarily sensitively drawn lines between permissible and impermissible segregation. The real dividing line would appear to be between overt and subtle forms of state action that promote segregation. *Id.*

101. Thus, "a finding of intentionally segregative action establishes . . . a prima facie case of unlawful segregative design on the part of school authorities." *Keyes*, 413 U.S. at 208.

102. *Id.* at 215-16 (Douglas, J., concurring). Although officially mandated school segregation was most visible in the South, segregation in education was pervasive elsewhere. When the de jure/de facto distinction had been drawn in the early 1970's, segregation was common in nonsouthern cities. *See* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SCHOOL ENROLLMENT SURVEY (1971), *reported in* 118 CONG. REC. 563-66 (1972).

103. It has been noted that whatever progress has been made in dismantling officially segregated systems, "[n]o comparable progress has been made in many non-southern cities . . . primarily because of the *de jure-de facto* distinction nurtured by the Courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South." *Keyes*, 413 U.S. at 218-19 (Powell, J., concurring and dissenting). Because educational opportunity was an original concern motivating desegregation, and cause does not alter the effect of segregation upon that opportunity, Justice Powell would have abolished the de jure/de facto distinction. *Id.* at 218-19, 229-30, 253.

104. *See supra* note 100.

105. Effective deterrents to neighborhood diversity have included, with official complicity, actual and threatened violence and property destruction. *See, e.g.*, W. TUTTLE, JR., RACE

facto distinction constituted a watershed in the Court's responsiveness and adaptability to the problem of segregation. Contrary to the *Brown* Court's willingness to acknowledge and reject a failed doctrine, investment in the de jure/de facto distinction announced or at least prefaced a reluctance to adjust equal protection doctrine to new realities tied to the social dynamics of the post-*Brown* era. Comprehensive realization of equal educational opportunity and elimination of racially identifiable schools thus were placed beyond the ken of the desegregation mandate. Given enhanced personal mobility and suburban development, which the *Brown* Court could not fully envision but which were manifest when the de jure/de facto distinction was drawn, the intent-based limiting principle became a basis for making much racially separate and unequal education constitutionally acceptable.

The duty to desegregate, as limited by the de jure requirement, created a substantial burden upon plaintiffs attempting to show that an obligation to desegregate existed.[106] Proof that a school system was officially segregated easily could be demonstrated.[107] Discriminatory intent when not facial, however, is elusive.[108] Proof of intent thus became much more difficult when segregation resulted from more subtle government action,

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RIOT: CHICAGO IN THE RED SUMMER OF 1919, at 157-83 (1970); S. DRAKE & H. CLAYTON, BLACK METROPOLIS 174-80 (1945).

106. *See* Palmer v. Thompson, 403 U.S. 217, 219-22 (1971); *Keyes*, 413 U.S. at 224 (Powell, J., concurring and dissenting).

107. Discriminatory purpose was self-evident in laws that required segregation, but government action neutral on its face requires a more searching inquiry. *See, e.g.*, Personnel Admin'r v. Feeney, 442 U.S. 256, 272-74 (1979). The Court has observed that there are cases in which "the legitimate noninvidious purposes of a law cannot be missed." *Id.* at 275. However, because "reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable." *Id.* at 283 (Marshall, J., dissenting). The question of proof thus became one of considering degree, history, inevitability, foreseeability of and alternatives to disproportionate impact, and other factors pertinent toward establishing discriminatory intent. *Id.* Such analysis by its nature, however, necessarily requires a significant amount of guesswork. Deduction of segregative intent thus has been characterized as a "tortuous effort." *Keyes*, 413 U.S. at 224 (Powell, J., concurring and dissenting). The description is particularly apt, given the Court's pronouncement that it is "extremely difficult . . . to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." Palmer v. Thompson, 403 U.S. at 224 (citing United States v. O'Brien, 391 U.S. 367, 383 (1968)).

108. The task of proving intent is difficult because even the most routine decisions affect segregation. Decisions which may have to be probed include:

> [A]ction or nonaction with respect to school building construction and location; the timing of building new schools and their size; the closing and consolidation of schools; the drawing or gerrymandering of student attendance zones; the extent to which a neighborhood policy is enforced; the recruitment, promotion and assignment of faculty and supervisory personnel; policies with respect to transfers from one school to another; whether, and to what extent, special schools will be provided, where they will be located, and who will qualify to attend them; the determination of curriculum, including whether there will be "tracks" that lead primarily to college or

particularly in the form of decisions concerning school sitings and closings,[109] attendance zones, and faculty hiring and assignment.[110]

The de jure principle, which emerged as a major liability limiting concept is akin to the concept of proximate cause. Like that notion, it is vulnerable to subjective policy determinations that influence the drawing of legal dividing lines.[111] In either instance, a cut-off point is established so that liability for consequences of a wrongful act does not extend indefinitely.[112] Thus, the de jure/de facto distinction reflects a sense that even if all segregation is ultimately traceable to official action, legal responsibility necessary to trigger remedial action attenuates as the connection to overt state action grows more distant.[113]

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to vocational training, and the routing of students into these tracks; and even decisions as to social, recreational, and athletic policies.

*Keyes*, 413 U.S. at 234-35 (Powell, J., concurring and dissenting). Further complicating the inquiry is the problem of varying and mixed motive. *See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 284- 85 (1972). Consequently, in those parts of the country which did not have laws requiring dual schools, segregation was more difficult to prove. Generally, those areas also have a higher incidence of segregation. *See* U.S. COMMISSION ON CIVIL RIGHTS, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT 18-27 (1979).

109. The Court has recognized that the location of schools is highly determinative of residential development in metropolitan areas and has a particularly profound effect upon the composition of inner city neighborhoods. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971). The common practice of closing schools in racially changing areas, and building new ones in distant white suburbs and in the central cities, effectively has fostered metropolitan segregation. *See id.* Despite surface appearances that may allow the result to be dismissed as the product of residential housing patterns, such policies "when combined with 'neighborhood zoning' further lock the school system into the mold of separation of the races." *Id.*

110. Overlooked in the search for distinctions may be the reality that the "familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities." *Keyes*, 413 U.S. at 222-23 (Powell, J., concurring and dissenting) (emphasis in original).

111. The concept of foreseeability, for instance, is pertinent for determining both discriminatory intent and proximate cause. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979) (discriminatory intent); Pope v. Rollins, 703 F.2d 197, 202 n.4 (5th Cir. 1983) (negligence). A determination of whether liability should be cut off for an individual's action which may be linked to remote harm, or government action which may contribute inexorably to segregation, nonetheless is likely to engender controversy rather than consensus. *See supra* notes 107-110 and accompanying text.

112. Identifying the cut-off point, however, is a treacherous process that lends itself to subjectivity, arbitrariness, and procrustean solutions.

113. The abatement of official responsibility nonetheless is troublesome, especially if it is assumed that no school district exists "with any significant minority school population, in which the school authorities—in one way or the other—have not contributed in some measure to the degree of segregation which still prevails." *Keyes*, 413 U.S. at 252-53 (Powell, J., concurring and dissenting).

Such line drawing is as perilous in constitutional law as it is in tort law, because the search for cut-off points is vulnerable to subjectivity, arbitrariness, guessing, and whim.[114] The delineation process creates both controversy and division and, as evidenced by the bridling of the desegregation principle, invites criticism by discounting official actions and policies that foster a racially segregated society generally and schools especially.[115] Furthermore, the marking of constitutional perimeters pursuant to an intent-based analysis diminishes the underlying harms resulting from separation.[116]

School district boundaries that yield racially distinct systems whether proximately or more remotely caused by official action, may be regarded as systemic dividing lines and a negative reminder by society of one's place.[117] When a "child perceives his separation as discriminatory and invidious, he is not . . . going to make fine distinctions about the source of a particular separation."[118] The conclusion that a child's constitutional rights are not implicated, because he was "born into a *de-facto* society," thus seems facile and capricious.[119] To the extent racial separation suggests a systematic pattern, breeds a sense of inferiority, and impairs educational development and opportunity, causation based distinctions seem tied more to lines of convenience than of principle.[120]

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114. Notions of proximate cause have given rise to a field of law which may be unsurpassed for engendering disagreement and fostering confusion. PROSSER & KEETON, THE LAW OF TORTS 263 (West 1984). Because the consequences of an act may "go forward to eternity" and liability otherwise would be infinite, boundaries are set upon legal responsibility pursuant to "some social idea of justice or policy." *Id.* at 264. Because perceptions of justice and policy preferences vary among individuals and according to context, the setting of liability limiting concepts is especially difficult to accomplish in an invariably principled fashion.

115. If the decisions of a southern school board concerning school location and school sizes can be said to have contributed to racial segregation among residential areas, then with far greater force it can be argued that official state action in northern and western cities has produced residential segregation. Until 1948, racially restrictive covenants in deeds were regularly enforced by state courts; governmental action has often located public housing in such a way as to intensify residential segregation; and, in a variety of ways, the federal government's programs of subsidy and loan guarantees have explicitly encouraged racial segregation in private housing.

Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383, 388-89. *See supra* note 100.

116. *See infra* notes 118, 120 and accompanying text.

117. *See* Milliken v. Bradley, 418 U.S. at 804 (Marshall, J., dissenting).

118. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 119 (1970).

119. Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 148 (5th Cir. 1972) (en banc) (quoting United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 397 (5th Cir. 1967) (Gewin, J., dissenting)).

120. Justice Powell observed that cause based limiting principles served no purpose other than to "perpetuat[e] a legalism rooted in history rather than present reality." *Keyes*, 413 U.S. at 219 (Powell, J., concurring and dissenting).

## B. Principles Limiting the Reach of Desegregation: The Sanctity of School District Lines

A second major limiting principle further bounds the duty to desegregate, even in the event of official and purposeful discriminatory action, by purportedly conditioning the reach of any remedy upon the scope of the constitutional violation. The qualifier has had particularly profound consequences in major urban centers. In *Milliken v. Bradley*,[121] for example, a city school board purposely had created and maintained a segregated system, and a district court had found that the state had contributed significantly to that effort.[122] The Court, however, disagreed with the trial court's findings of purposeful state action.[123] Having found the relationship between cause and effect unconvincing, the Court rejected an interdistrict remedy.[124] By sanctifying school district lines and thus insulating suburban districts from the consequences of official discriminatory practices, the Court essentially freed many of the nation's metropolitan areas from the desegregation mandate.[125]

Having set out to cure inequality by eliminating segregation, but then narrowing the duty to desegregate by requiring a linkage to official intent, the Court drew an even tighter equal protection circle.[126] Lower courts, which for almost two decades had been rebuked for not going far

121. 418 U.S. 717, 725-27 (1974).

122. The district court found that the city school board had created and maintained optional attendance zones, bused students to distant schools for purposes of perpetuating segregation, and chosen building sites that would ensure one-race schools. *Id.* at 725-26. It was determined that the state had promoted segregation by nullifying a voluntary desegregation plan, exercising responsibility over construction plans, supporting and approving a transportation scheme that fostered segregation and that was unequally funded, and sanctioning attendance plans that perpetuated segregation. *Id.* at 734-35 n.16; *id.* at 770-71 (White, J., dissenting).

123. The Court defined the pertinent "constitutional right . . . [as one] to attend a unitary school system . . . . Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students in the [city] to attend schools in [the suburbs], they were under no constitutional duty to make provisions for Negro students to do so." 418 U.S. at 746-47. The dissenters in *Milliken* noted that both "[t]he District Court and the Court of Appeals found that over a long period of years those in charge of the Michigan public schools engaged in various practices calculated to effect the segregation of the Detroit school system." *Id.* at 762 (White, J., dissenting).

124. *See* 418 U.S. at 748.

125. Having "created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together," the geographically narrowed remedy "allow[ed] the State to profit from its own" wrong. *Id.* at 763 (White, J., dissenting).

126. Justice Marshall, commenting on the limiting principle advanced in *Milliken*, noted that "the Court's answer is to provide no remedy at all . . . [thus] guaranteeing that Negro children . . . will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past." *Id.* at 782 (Marshall, J., dissenting).

enough in effectuating desegregation,[127] suddenly were admonished for going too far.[128] The Court's longstanding insistence that a desegregation remedy must be effective,[129] was revised and made dependent upon context. The *Milliken* decision officially exempted from the desegregation mandate many major population centers segregated along urban and suburban lines. Without auxiliary equal protection principles to put forth where the desegregation precept would not reach, the Court incongruously began to emerge as a doctrinal source for separate and inherently unequal education.[130]

The *Milliken* decision is consonant with the long-standing principle that parents have a constitutionally based liberty interest in making decisions regarding the education of their children.[131] Like any other protected liberty, however, it is not absolute. A singular concern for liberty, as demonstrated by the separate but equal concept, actually may be a "thin disguise" for competing constitutional concerns that merit at least as much safeguarding.[132] The *Brown* Court, in abandoning the separate but equal doctrine, concluded that equal protection interests demanded some incursion upon otherwise unfettered liberty. Its radical shift in equal protection focus represented a commitment to doctrinal change necessary to effectuate meaningful equalization of educational opportunity.

By finding suburban districts unlinked to past discrimination, which perhaps too conveniently can be concluded to the extent they often are too new to have any history,[133] the Court may insist that it remains true to the *Brown* Court's focus upon dismantling officially segregated schools. What it has propounded, however, is a principle that, despite pertinence in the context of 1954, has not been allowed to grow and thus has diminished relevance for modern realities. To the extent the *Brown*

127. The Court consistently had reminded lower courts of their duty to impose and enforce desegregation plans. *See Swann*, 402 U.S. at 25; Davis v. School Comm'r, 402 U.S. 33, 37 (1971); Green v. County School Bd., 391 U.S. 430, 439 (1968).

128. By limiting the scope of a desegregation remedy despite findings of state action, the Court forced a retreat from a comprehensive plan to a less effective city only plan. *See Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

129. Prompt and effective remedies had been insisted upon, for instance, in Green v. County School Board, 391 U.S. at 435, and Griffin v. Prince Edward County Board of Education, 377 U.S. 218, 234 (1964).

130. *See Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

131. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1928); Meyer v. Nebraska, 264 U.S. 390, 400-01 (1923). Even proponents of the desegregation formula acknowledged that it abridged "something that can be called a 'freedom of the white.' " Black, *The Lawfulness of the Desegregation Decisions*, 69 YALE L.J. 421, 429 (1960).

132. *See* Plessy v. Ferguson, 163 U.S. at 562 (Harlan, J., dissenting).

133. *But see infra* note 139.

Court evinced a commitment to tailoring and tuning constitutional doctrine so that equal protection objectives might be meaningfully effectuated, the modern Court has abandoned that guiding spirit.

### C. Principles Limiting the Reach of Desegregation: Constitutional Resegregation

The third limiting principle emerged when the Court determined that the duty to desegregate was a passing one.[134] Consistent with the de jure/de facto distinction, the elimination of segregation resulting from official action discharges the obligation to desegregate.[135] Once a system becomes unitary, school officials need not make adjustments to changing residential or attendance patterns even if they result in resegregation.[136]

Population redistribution after a desegregation order, however, does not necessarily break the link between official action and segregation and often is accelerated by it.[137] Even if resegregation may be a veiled result of state action, desegregation will not be required absent some action which the Court finds purposely discriminatory.[138] Modern segregation may be a step removed from patent discriminatory action, but it is difficult to ignore the existence of a real connection.[139] Insofar as resegregation follows desegregation efforts, but the linkage to official action is cut, the promise of "a school system in which all vestiges of enforced racial segregation have been eliminated"[140] is fashioned into a short-term guarantee. To the extent the Court has removed resegregation from a chain of events commenced by discriminatory practices and policies,[141] it in effect has expanded the concept of de facto segregation and further expanded the category of constitutionally permissible segregation.

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134. "[H]aving once implemented a racially neutral attendance pattern in order to remedy . . . perceived constitutional violations . . . ," no further duty to desegregate existed despite demographic changes in the community. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976). *See also Swann*, 402 U.S. at 32.

135. Absent "a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention . . . should not be necessary." *Swann*, 402 U.S. at 32.

136. No such obligation exists provided resegregation is not a product of official tampering designed to effectuate that result. *Id.*

137. *See supra* note 100.

138. Thus, the Court observed that the "quite normal pattern of human migration resulted in . . . shifts in the racial makeup of some . . . schools." Pasadena City Bd. of Educ. v. Spangler, 427 U.S. at 436.

139. To the extent a state has "created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together, [it] is responsible for the fact that many whites will react to the dismantling of that segregated system by attempting to flee to the suburbs." *Milliken*, 418 U.S. at 806 (Marshall, J., dissenting).

140. *Keyes*, 413 U.S. at 210-11.

141. Wright v. Council of the City of Emporia, 407 U.S. 451, 463 (1972).

Implicit in the Court's abandonment of the separate but equal doctrine was the promise that it would pursue equal protection goals with more powerful constitutional medicine.[142] It is disquieting to realize, therefore, that the desegregation principle has acquired a self-destruct mechanism that is triggered regardless of any lasting or identifiable accomplishment. Given the various limiting principles adopted since *Brown*, the Court's determination to charge school officials with the foreseeable effect of policies that contribute to segregation is brushed by some ironic shadings.[143] Distinctions among patterns of segregation have resulted in substantial constraints upon a difficult constitutional task.[144] For those excluded from the ambit of modern equal protection thinking, enduring or recurring segregation and inequality may be its paramount legacy.

## III. A Modern Separate But Equal Doctrine: Equal Where Separate

The paramount albeit unstated purpose of the separate but equal doctrine, when first framed and employed, was to protect "a dominant race—a superior class of citizens."[145] A cursory examination of the doctrine's early application reveals that it served purposes of separatism and supremacism rather than fourteenth amendment principles of equality.[146]

142. The "realization that apparent symmetry in treatment created only a shallow illusion of equality prompted the Court in *Brown*" to embrace an equal protection principle that for almost 20 years insistently demanded change. L. TRIBE, *supra* note 12, at 1019.

143. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979). If held to the same standard, discriminatory intent might be imputed to the Court in connection with analysis that accommodates existing or new forms of segregation.

144. "Desegregation is not and was never expected to be an easy task." *Milliken*, 418 U.S. at 814 (Marshall, J., dissenting).

145. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). Justice Harlan noted that "[e]very one knows [it] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Id.* at 557. He nonetheless subscribed to the notion that the "white race [was and would] . . . continue to be for all time . . . the dominant race in this country . . . in prestige, in acheivement, in wealth, and in power." *Id.* at 559. Justice Harlan, however, asserted that the Constitution was "color-blind," countenancing no official dominant caste. *Id.* Because the separate but equal doctrine officially operated to connote inferiority and degrade, *id.* at 560, he perceived that the equality component would "not mislead any one, nor atone for the wrong this day done." *Id.* at 562. Like motives to perpetuate a dominant class were evinced by antimiscegenation statutes designed "to preserve . . . racial integrity" and "prevent the 'corruption of blood', 'a mongrel breed of citizens,' and the 'obliteration of racial pride,' obviously an endorsement of white supremacy." Loving v. Virginia, 388 U.S 1, 7 (1967). Such legislation eventually was found to "violate[ ] the central meaning of the Equal Protection Clause." *Id.* at 12.

146. Once the surface of the doctrine was scratched, it was apparent that the principle was used to enforce systematically preferential treatment for whites. Thus, a school district could

Justice Harlan's forecast, that *Plessy v. Ferguson* would "in time prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*,"[147] thus proved accurate.[148] Given the disparity between original rhetoric and modern results, investment in a formula that has diminishing efficacy is open to similar ridicule. To the extent the desegregation formula may yield "the same separate and inherently unequal education in the future as . . . ha[s] been unconstitutionally afforded in the past,"[149] the principle, despite a nobler birth than its doctrinal predecessor, is vulnerable to charges of hypocrisy.

The notion that "separate" is inherently "unequal" may be wrapped in prettier constitutional packaging than its doctrinal antecedent,[150] but the limiting principles that have rigidified the purview of the desegregation mandate facilitate only limited and evanescent results.[151] The philosophy that engendered the separate but equal doctrine generally evokes a sense of revulsion preempting any notion that the principle might have redeeming value.[152] The thinking originally associated with the desegregation principle is much more appealing and at least facially does not evoke repugnance. Still, a doctrine must be assessed not by how nicely it expresses equal protection sentiments but by how well it actually guarantees equal protection. Given the devolution of the desegregation principle, what appeared to be an attractive and enlightened analytical

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provide schooling to whites while denying it to blacks. *See supra* notes 48-51 and accompanying text.

147. In Dred Scott v. Sanford, 60 U.S. (18 How.) 393, 406 (1857), the Court concluded that blacks were not citizens and thus not entitled to constitutional protection. The decision resulted in the destruction of the Court's political base and undercut its moral authority to such a degree that recovery was a prolonged process.

148. Modern legal literature that discusses the two decisions generally identifies them as among the Court's most infamous. *See, e.g.*, TRIBE, HONORABLE COURT, *supra* note 22, at 75, 98.

149. *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

150. The Court, in *Brown*, wrote in compassionate and sensitive terms, as it noted that education was essential to development and chances of "succeed[ing] in life" and segregation "may affect [children's] hearts and minds in a way that may never be undone." 347 U.S. at 493-94. By contrast, in *Plessy*, the Court evinced a more merciless tone when it ridiculed the notion "that . . . enforced separation . . . stamps the colored race with a badge of inferiority," curtly dismissing such notions as a "fallacy." 163 U.S. at 551.

151. More forceful application or expansion of the desegregation mandate, by contrast, may have been self-defeating to the extent it merely accelerated resettlement along racial lines. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. at 485 (Powell, J., dissenting).

152. The principle, when discussed, tends to elicit such terms as "notorious" and "demeaning." *See* TRIBE, HONORABLE COURT, *supra* note 22, at 75; L. TRIBE, *supra* note 12, at 1020. Although those descriptions accurately depict its general application and underlying philosophy, such characterizations need not deter a fresh assessment of whether the principle may have some relevance to and utility for modern times.

framework now appears merely to have exchanged "separate but equal" for separate period.

Although the desegregation principle may be tarnished, given actual results, the objectives it was designed to pursue remain worthwhile. Desegregation promised equal educational opportunity and thus equal protection, but realization of that goal on a comprehensive scale is neither imminent nor likely in the foreseeable future. Consistent with the spirit of *Brown* and a pragmatic appreciation of its limiting principles, and in the interest of affording a better if not equal start in life and minimizing the sentencing of successive generations to positions in an underclass, other avenues for enhancing educational opportunity merit examination or reassessment.[153]

If detached from its repugnant philosophical moorings, a modified separate but equal concept might afford a departure point for such analysis. Properly constructed, it might address untouched or otherwise resistant forms of segregation and provide some degree of relief in the form of a better education for those whose constitutional interests otherwise are sacrificed.[154]

Even if an enlightened "equal where separate" doctrine might respond to modern separatism, its embrace would not be risk free. To the extent desegregation might be identified as the only acceptable formula for fulfilling equal protection promises, consideration of other alternatives may be perceived as a weakening of equal protection resolve. Still, the danger of not exploring other methodologies, when comprehensive and enduring integration is not a foreseeable reality, may be more profound. The pursuit of desegregation typically necessitates sacrificing the interests of those in whose name equal educational opportunities are sought, in hopes of securing long-term gains for many in the future.[155] Continuing generational sacrifices are more difficult to justify, however, to the extent the strategy is singularly adhered to despite emphatically

153. *See, e.g.*, Abramowitz & Jackson, *Desegregation: Where Do We Go From Here?*, 19 How. L.J. 92, 98-114 (1975); Mays, *Comment: Atlanta—Living with* Brown *Twenty Years Later*, 3 Black L.J. 184, 190-92 (1974).

154. Justice Marshall, who contributed largely to masterminding the Court's embrace of the desegregation principle, has observed that subsequent limiting principles may be "a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice that is the product of neutral principles of law." *Milliken*, 418 U.S. at 814 (Marshall, J., dissenting). If so, the case for augmentative policies is that much stronger.

155. Because of the time consumed by desegregation litigation, it is not unusual that named plaintiffs and the school generation they represent never receive the constitutional benefits to which they are entitled. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 862 (5th Cir. 1966); Abramowitz & Jackson, *supra* note 153, at 92-93.

negative responses by the Court that likely will persist into the foreseeable future. Deferral of equal protection satisfaction in anticipation of more forceful use of desegregation principles, which increasingly have been narrowed, runs a particularly grave risk of actually abetting those forces which promote racial subordination.

Inquiry into the cause of modern racial separation for purposes of drawing constitutional lines and determining constitutional responsibilities may be subject to valid criticism,[156] but such a response for now is more academic than pragmatic. More pertinent in a practical sense, given modern realities, is how to serve equal protection interests when segregation has become constitutionalized, and how to retain equal protection gains where dual systems that have been dismantled recur with the Fourteenth Amendment's blessing. The Court's willingness to countenance and perpetuate conditions which impair educational opportunities, undermine self-worth, and reduce opportunities for movement into the social mainstream, contrasts profoundly with the spirit characterizing the Court's original embrace of the desegregation principle.[157] Not only has segregation generally proved to be intractable, it even may be reintroduced, if properly clothed, where it once had to be eradicated.

Generational sacrifice could be rationalized to the extent anticipated effectuation of long term equal protection goals made consequent short term losses acceptable. Difficult as it now may be to defer desegregation goals and ponder alternatives more responsive to modern realities, the abiding interest in promoting equal protection concerns and protecting against erosion of gains secured by the desegregation process may compel such a choice. Resegregation, unless recognized by the Court as the product of further discriminatory action, is constitutionally untouchable. If backsliding is to be deterred, therefore, it apparently must be done by identifying oppressive societal forces untouched by the desegregation mandate and by formulating policies that acknowledge majoritarian realities but nonetheless creatively promote equal protection objectives.

### A. The Untouched Forces of Oppression

Even when the desegregation mandate is applied, forces that promote racial subordination may not be touched or altered.[158] Although

156. It is unlikely, in any event, that any school district with a significant minority population has not in some way contributed to existing racial segregation. *See Keyes*, 413 U.S. at 252-53 (Powell, J., concurring and dissenting).

157. It was precisely such concerns that originally motivated the Court to insist upon desegregation. *See Brown*, 347 U.S. at 494.

158. More frequent disciplinary action against black students, for instance, has been attributed to "white institutional racism." Hawkins v. Coleman, 376 F. Supp. 1330, 1338 (N.D. Tex.

the substitution of equalization principles alone might make it too easy for society to return to separatist patterns, equal protection interests are served best when the Court remains responsive to oppressive influences that, whether proximate or remote, betray racist instincts.

Although secondary strategies may not be targeted directly at eliminating racial separation, they would respond to forces which, by perpetuating unequal and inadequate schools or reflecting racist sentiments, help foster racial subordination. Resorting to such methodologies reflects, even if reluctantly, a pragmatic sense that "[w]e live in a world in which human conduct, often self-seeking and sometimes sordid, as well as the realities of nature, limits our options."[159]

Even though the duty to desegregate has been substantially qualified, the problem of disparate educational opportunity which the Court set out to address has not subsided. Despite the risk that consideration of desegregation alternatives may send an undesired message to segregation's victims and sympathizers,[160] the interests of educational equity and perhaps desegregation itself are endangered more by inattention or avoidance. Inferior schools can be upgraded by investing additional resources into them. So long as certain schools remain isolated or grossly underdeveloped and afford limited or no passage into the social mainstream, thus contributing to the creation and perpetuation of an underclass, the notion of equal educational opportunity is flagrantly illusory.

A response premised upon financial aid may invite criticism that money is the trite rejoinder society affords when it either does not know what else to do or does not care enough to formulate and implement thoughtful policy. Immediate upgrading of educational facilities and programs at least could offer gains which normally may be expected from an enhanced investment of resources, and thus minimize the possibility that the learning environment itself would facilitate segregation by contributing to white flight.[161] To the extent improvements were made that would be necessary to promote effective desegregation anyway, the equal

1974). Such disparities suggest that, even in a desegregated setting, "a pervasive intolerance [has been evinced] by school officials for all students who are different in any number of ways." Bell, *supra* note 25, at 488 n.52 (quoting CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 12 (1975)).

159. Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 718 (2d Cir. 1979).

160. *See* Bell, *supra* note 25, at 489.

161. *See* Abramowitz & Jackson, *supra* note 153, at 110. The Court itself has recognized that the quality of school facilities significantly influences residential patterns. *See Swann*, 402 U.S. at 20. Even if desegregation was ordered in an urban setting, for example, resources would have to be invested to make improvements necessary for the plan to succeed. Thus, to the extent some schools may be inferior to the point that prescribed attendance would consti-

protection interests of one generation would not be entirely deferred and the equal protection prospects of future generations might be enhanced.

### B. Pragmatic Responses to Modern Realities

Federal policies, during the 1960's, were crafted to facilitate constitutional challenges of, and to create financial disincentives for state-enforced dual school systems.[162] Such measures, originally calibrated to promote equal protection goals, have diminishing relevance in the urban context where predominantly one-race schools are largely unreached by constitutional principles of desegregation. Because much modern segregation is constitutionally tolerable, equal protection values must draw more heavily upon state and local initiatives and programs to attain or perpetuate racial balance.

Voluntary or partial busing plans, for instance, may have potential for curbing desegregation-related declines in white enrollment.[163] Policies that purportedly attempt to stem white flight, by curbing busing or reverting to a partial system of neighborhood schools, such as those which the Court recently let stand in *Riddick v. School Board of the City of Norfolk*,[164] are vulnerable to criticism that they bend to racist sentiments.[165] Given the modern reach of the desegregation mandate, such majoritarian sensitive policies may represent one of the few options for providing to the largest possible number of students in an urban setting some semblance of a desegregated education.[166] One-way busing from cities to suburbs invites criticism that it siphons off the urban schools' most talented students and constitutes policy dictated by racist attitudes. Still, such programs may afford better education to participants and reflect a pragmatic sense that parents who fled to the suburbs in search of

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tute a sanction on students reassigned from better schools, meaningful improvement may be a necessary "prelude to a program of integration." *Keyes*, 313 F. Supp. 61, 85 (D. Colo. 1970).

162. Pursuant to the Civil Rights Act of 1964, which barred federal assistance for any program administered in a racially discriminatory fashion, the Department of Health, Education and Welfare conditioned aid to school districts upon compliance with desegregation orders or submission of a desegregation plan consistent with HEW guidelines. The Act also authorized the Attorney General to file school desegregation lawsuits on behalf of plaintiffs unable to bring their own. *See* E. BARRETT, JR. & W. COHEN, CONSTITUTIONAL LAW (6th ed. 1980).

163. *See* Marek, *Education by Decree*, 17 NEW PERSPECTIVES 36, 38 (Summer 1985).

164. 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

165. Although white flight cannot justify failure to dismantle a dual school system, it has been factored into voluntary plans designed to maintain or improve racial balance. *See Riddick*, 784 F.2d at 528-29 (citing Higgins v. Board of Educ. of City of Grand Rapids, 508 F.2d 779 (6th Cir. 1974)).

166. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d at 719.

educational quality will not be part of plans that require sending their children back to city schools.

If surveys are accurate in finding most parents of public school children voluntarily would enroll them in distant schools with special educational advantages,[167] the magnet school concept may serve as an increasingly helpful tool for promoting equal protection interests. Strong investment in magnet schools actually may be attractive to school officials and both parents and students.[168] For instance, court-ordered transformation of all Kansas City secondary and middle schools, and half of the city's elementary schools, into magnet schools with varying curricular focuses, is calculated to encourage selection of schools on the basis of interest rather than residence.[169] Aside from any effect upon students, the emphasis upon curricular offering rather than geography might have particular utility for diverting faculty and resources from normal tracts dictated by constituency and thus at least indirectly by race.[170] The magnet concept may be one of the few means available, given the existence of the de facto principle and seeming inviolability of district lines, for promoting racially mixed and substantially equal schools.[171] Even the neighborhood school concept, which so often was trumpeted by opponents of desegregation, may be useful in areas of a city where patterns are reasonably integrated.[172]

Because resegregation is constitutionally permissible unless found to be the product of intentional official action, consolidation and preservation of equal protection gains demand at least the attention and creativity necessary to effectuate desegregation. Experiments with integration maintenance suggest, for instance, the utility of incentive programs calculated to influence home buying decisions that would facilitate racial balance.[173] The practice of steering, which traditionally has reflected dis-

167. A poll in Boston—where court-ordered desegregation triggered violence, friction, obstruction, and a mass exodus of white students—demonstrated a willingness to accept a non-neighborhood school, provided it offered advantages such as magnet programs, special curricula, or smaller classes. *See* Marek, *supra* note 163, at 41.

168. *See It's Full Steam Ahead for Magnet Schools*, Kansas City Times, Nov. 13, 1986, at A1.

169. *See id.* The magnet school order requires each school to offer a unique academic, arts-related, vocational, or pre-professional theme. *See id.* at A11.

170. *See* K. Helmore & K. Laing, *Exiles Among Us, Poor & Black in America, Inadequate Education is Still Part of the Poverty Problem*, Christ. Sci. Mon., Nov. 20, 1986, at 30, col. 1.

171. *See* Farley, *Residential Segregation and Its Implications for School Integration*, 39 LAW & CONTEMP. PROBS. 164, 192 (1975).

172. Such a scheme, on an experimental basis, has been combined with a program of voluntary transfers to effectuate further desegregation. *See* Marek, *supra* note 163, at 41.

173. The State of Ohio in 1985, for instance, set aside part of a mortgage revenue bond issue for black first-time home buyers settling areas with less than a 10% black population, and

criminatory motives, actually may be useful when it comprises affirmative marketing plans and cooperative efforts by realtors, bankers, and local officials to create or perpetuate racially balanced living patterns.[174] Such strategies may be augmented by other incentives that, for instance, might include college tuition credits tied proportionately to the number of years spent in an integrated school.[175]

Integration maintenance, for now, seems to depend largely upon the willingness of state and local government to institutionalize affirmative race-conscious policies.[176] Even where such solicitude exists, difficult choices are inevitable. Past experience teaches that methodology logically calculated to desegregate actually may facilitate the recurrence of segregation.[177] Mandatory crosstown busing, for instance, may spur migration to suburbs and foster a racially identifiable school system. Thus, given the modern desegregation principle which is limited in scope and duration, even traditional desegregation remedies must be scrutinized carefully to determine whether they actually promote the opposite of their intended results.[178]

Where segregation endures and is constitutionally acceptable, resulting harms and inequities may not be offset entirely by secondary remedies. Still, inequities may be ameliorated so that expectations associated with an education might be realized more fully. Although "the mixed school is the broader, more natural basis for the education of all youth"[179] and may represent the equal protection ideal, it remains a constitutional mirage for those who are untouched by the desegregation mandate and attend schools as separate and unequal as those of their ancestors. Upgraded facilities, enriched programs, and a generally en-

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for white first-time purchasers moving into neighborhoods with less than a 60% white population. *America Moved to the Suburbs, and So Did the Integration Battle*, The Washington Post, Nat'l Weekly Ed., July 14, 1986, at 34, col. 1-2.

174. Programs emerging from such cooperative policymaking have created "financial incentives, including interest rate buy-downs, monthly mortgage supplements and down-payment loans to home buyers who move into areas where their race is 'under-represented.'" *Id.*

175. *See* Coleman, *New Incentives for Desegregation*, 7 HUM. RTS. 10, 49 (No. 3, 1978).

176. Some communities actually have initiated marketing campaigns to attract and perpetuate population diversity. *America Moved to the Suburbs*, *supra* note 173.

177. *See supra* note 12 and accompanying text.

178. It must be considered whether desegregation preservation plans, which have disquieting segregative effects, may be a pretext for racial discrimination. *See Riddick*, 784 F.2d at 541-43. The possibility of such a pretext would seem to be enhanced, for instance, to the extent busing and pupil transfer plans were dropped purportedly to deter white flight which actually had abated for a period of years. *Id.* at 541.

179. DuBois, *Does the Negro Need Separate Schools?* 4 J. NEGRO EDUC. 328, 335 (1935). Although a desegregated school has been described as the ideal, "[o]ther things being equal," it was noted that "things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer." *Id.*

hanced educational environment would represent an affirmative response to the forces of systematic racial subordination. Assertion of those policies as a companion to desegregation might help ensure that the failures of the equal protection principle would not be paid for entirely by those whose rights and opportunities it was intended to secure.

## Conclusion

Central to the desegregation principle is the notion that children have the right "to an equal start in life and to an equal opportunity to reach their full potential as citizens."[180] What began as a commitment to eliminate all racially identifiable schools, so that it no longer would be "possible to identify a 'white school' or a 'Negro school' "[181] has devolved into a reluctance to address segregation in certain settings, a willingness to countenance its recurrence after a desegregation interval, and a transfer of responsibility from the judiciary to state and local officials. Because the primary methodology for enforcing the guarantee has been restricted, it is essential to identify alternatives that promote the basic purposes of the equal protection mandate—to eliminate a system that fosters racial subordination and provide "the best possible educational opportunity for all children."[182]

The desegregation concept, as it has developed, leaves unaltered the reality that "the great mass of urban black children [are] locked in all-black schools, many of which are as separate and unequal today as they were in 1954."[183] Resegregation, moreover, may make desegregation an essentially futile exercise and constitutionally permissible segregation an expanding concept.[184] Given the durability of one-race schools in most urban centers, and their existence beyond the ken of the equal protection guarantee, the modern desegregation principle seems a more symbolic than substantive force.

Stretched to its full capacity, an equal where separate doctrine might mitigate harms not addressed by the desegregation mandate. Pending meaningful desegregation, however, an equalization principle responsive to modern separatist realities at least could respond to conse-

180. *Brown*, 347 U.S. at 495.

181. *Swann*, 402 U.S. at 18. *See* Green v. County School Bd., 391 U.S. at 435.

182. *Keyes*, 413 U.S. at 253 (Powell, J., concurring and dissenting).

183. Bell, *supra* note 25, at 515-16.

184. Desegregation in cities such as Boston, Detroit, Dayton, and San Francisco was followed by drops in white enrollment ranging from approximately 15 to 22% during the implementation years alone. *See* Marek, *supra* note 163, at 39. A large exodus of white students, especially in cities with a substantial black population, makes racial balance mathematically impossible.

quences probably not contemplated when the separate but equal doctrine was abandoned and desegregation embraced. If so, a modern equal where separate analysis actually might help effectuate what the old separate but equal doctrine worked to prevent and the desegregation principle has left untouched.