

ARTICLES

THE CONSTITUTIONAL GHETTO

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The Authors humbly dedicate this effort to the memory and enduring legacy of Justice Thurgood Marshall.

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Prologue: A Brief *Apologia*

Writing some eighty years ago—four score and two, to be precise—Dr. Du Bois confessed his puzzlement at the “Souls of White Folk”: not “the souls of them that are white,” he cautioned, “but souls of them that have become painfully conscious of their whiteness.” He marveled at this “singular obsession” with color, at “the way it is developing the Souls of White Folk.” “[A]nd I wonder,” he wrote, “what the end will be.”¹

As the fires raged in Los Angeles last spring—and across the nation, in one form or another—we too marveled at the Souls of White Folks, and we too wondered what the end will be. And our minds, in part reflecting our conditioning and in part defying it, returned with some regularity to a much less controversial event.

Less than one month before the conflagration, the United States Supreme Court completed another chapter in the story of desegregation, perhaps the final chapter to what now looks to be a century-long cycle.

1. W.E.B. DU BOIS, *The Souls of White Folk*, in W.E.B. DU BOIS: A READER 298 (Meyer Weinberg ed., 1970). The work first appeared in August 1910. *Id.*

And as we read and reread the Court's opinion—while homes burned, while people died, while the fabric of the national community was exposed for the frayed and tattered patchwork it has so long been—the relentless sensation was of an eerie disconnectedness. The worlds that conceived these two events seemed so distant, so alien to one another; yet something told us that could not be. Were the events—the worlds—really so unrelated?

The legal mind has a way of resolving such dissonance, and we took comfort in the shelter of words like “attenuated,” “inapposite,” and even “irrelevant.” But the comfort was shallow and fleeting, and the sense persisted that the relationship was real, the divorce an artifact. Back and forth we went, questioning at one moment our legal acumen, at another, our sanity. And we realized what the Souls of White Folk had become—what the meaning of whiteness had, in the end, come to be.

Being white means, for the most part, not much knowing the ghetto. It means having the power to reduce some realities to abstractions; to reduce some lives to statistics; to reduce some communities to worlds that are pervasively “different” and that intrude on “our” world only to the extent that they are at times geographically, or politically, proximate to our destinations. It means having the power to isolate and ignore. But that is not much of a revelation; that is what ghettos are all about.

Being white also means, for the most part, having the opportunity to know the ghetto. It means having access to the tools of understanding, and access to the lives and the worlds made so “different” from “our” own. It means having the power to interact and sharing the ability, through comprehension and compassion, to transform. But that is not much of a revelation; that is what humanity is all about.

There are contradictions in being white, as a group and as individuals. It was, after all, mostly white jurors who would not see four white policemen in Los Angeles beating a black man senseless; but it is equally true that most white people saw that injustice just as clear as day. And in the bitter aftermath of that absurd verdict, it was mostly white authorities who were demanding respect for law and order; but it is equally true that most white people knew very well that it was precisely the law and the order that were the problem.

Being white, we are the problem; being white, we are also part of its solution.

Being white has been a long-standing paradox. Being white, we enslaved the African people, we denied them citizenship, we made them separate and unequal. But being white, we abolished slavery, we recognized the citizenship of the slaves and their descendants, and we guaranteed to all citizens the equal protection of the law.

Being white, we segregated our schools; being white, we desegregated them. Being white, we resisted integration and re-

segregated our schools; being white . . . well, it is time again to decide what we will do.

Being white means we do not have the right even to speak of the ghetto; being white means that writing about the ghetto is both our privilege and our obligation.

Being white, we created ghettos.

And so being white means confronting the choice. To see or not to see. To know or not to know. To care or not to care. To try . . . or not. Being white means that if we close our eyes tight enough, cover our ears completely, shut and seal our minds and hearts, then maybe, just maybe, the cries will fade away, will recede from our consciousness, will cease to echo so painfully in our memories, will cease to reverberate in our troubled souls.

"No justice, no peace."²

Being white, we still hear.

And that is the dilemma in being white.

Or perhaps it is the dilemma in being human.

All this I see and hear up in my tower above the thunder of the seven seas. From my narrowed windows I stare into the night that looms beneath the cloud-swept stars. Eastward and westward storms are brewing—great, ugly whirlwinds of hatred and blood and cruelty. I will not believe them inevitable. I will not believe that all the shameful drama of the past must be done again today before the sunlight sweeps the silver seas.

- W.E.B. Du Bois³

INTRODUCTION

Legal scholars have no agreed set of criteria to meaningfully assess whether a case has been poorly adjudicated. Retrospectively, one can estimate the number of times the decision is overruled, a means of assessment that is helpful only in the panoramic sweep of history. Prospectively, one can first critique the internal logic of the decision and probe for syllogistic flaws, or test whether the decision comports with the criteria of rationality.

2. The chant of many participants in the uprisings following the Rodney King verdict. *Verdicts Spark Protests, Violence Across California*, L.A. TIMES, May 1, 1992, at A3.

3. DUBOIS, *supra* note 1, at 304.

In addition, decisions may be evaluated according to internal doctrinal norms, either of grand theory or prevailing positive mandates. For constitutional cases, these may address both structural constitutional concerns (separation of powers, federalism) and somewhat broader questions of jurisprudence situated in constitutional context (their position, for example, relative to the standard dichotomies of efficiency and fairness, rules and standards, text and context, and so forth). Constitutional decisions may also be evaluated according to more specific doctrinal norms, and examined for their consistency with prevailing doctrine and for impacts on doctrinal developments.

There is room too for critique from outside the insular realm of the law. One may examine the positive empirical premises of a decision, both in terms of their broad epistemological foundations and their specific claims to truth. One may also evaluate the authenticity of a decision: whether the assumed or depicted landscape of a decision affords an authentic account of the historical, cultural, and political contexts. Finally, there is room for normative critique: What are the ideals envisioned in the opinion, expressly or impliedly, and is it a metaphysic worthy of embrace?

The goal of this Article is to assess the most recent Supreme Court desegregation decisions, utilizing all of these criteria. It is our view that *Board of Education v. Dowell* and *Freeman v. Pitts* are, by almost every measure, seriously flawed decisions. The opinions of the Court⁴ rest on epistemic premises—reductionist views of race and racism, and an absurdly formalistic conception of equality—that are by turns either anachronistic, cramped and inauthentic, or demonstrably wrong. Worse, they promote a vision of American society—fragmented, hierarchical, and shamelessly individualistic—that is fundamentally inconsistent both with the egalitarian norms embodied in the Fourteenth Amendment and with the moral mandate that the Court once assumed on behalf of all

4. *Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 111 S. Ct. 630 (1991); *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). Justice Marshall, joined by Justices Blackmun and Stevens, dissented in *Dowell*; that dissent, predictably, manifests a continuing dedication to the promise of *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954), and is not a subject of our critique. *Freeman v. Pitts*, meanwhile, prompted separate concurring opinions from Justice Souter and from Justice Blackmun—the latter joined by Justices Stevens and O'Connor—that also reflect a more authentic understanding of the nature of American racial segregation than is manifest in the opinion for the Court and that are somewhat more sensitive to the mandates of *Brown*. These too are generally outside the scope of our critique. This work, then, focuses principally on Chief Justice Rehnquist's rather terse opinion for the Court in *Dowell*; on Justice Kennedy's somewhat muddled opinion in *Freeman*; and, finally, on Justice Scalia's concurring opinion in *Freeman*, a manifestation of a world-view that is, in a non-normative sense, utterly fantastic.

Americans. And if our own jurisprudential leanings do not permit us to declare that these decisions are in error,⁵ they do not preclude us from insisting that *Freeman* and *Dowell* are, in human terms, utterly tragic.

Part I of this Article briefly traces the road to *Freeman* and *Dowell*. It contends that the path from *Plessy v. Ferguson*⁶ has now become a circular one, that *Freeman* and *Dowell* represent what may be the final stage of a devolution to *Plessy*'s cramped and formalistic notions of equality. Specifically, it notes that *Freeman* and *Dowell* manifest an apparent acceptance of *Plessy*'s belief in natural race and racism; a concomitant acceptance of the view that racial subordination is a constitutionally insignificant phenomenon; and a revival of *Plessy*'s insistence that the Constitution, and the construing Court, can be only helpless observers in the struggle for racial equality. Finally, Part I concludes with a specific doctrinal critique of *Freeman* and *Dowell*'s position on the *de jure/de facto* dichotomy, on the requirements of "intent" and "causation," and on the role of the federal judiciary in the constitutional scheme.

Part II of this Article begins the examination of the central epistemological premise of *Freeman* and *Dowell*: that racial separation reflects private choice. Part II contends that the belief in natural individual racism is embarrassed both by the historical record and by contemporary social science. It notes that the color line in America did not simply evolve, but rather was drawn—and has been maintained—to serve determinate economic needs. It further notes that the line is perpetuated today without recourse to explicit racist ideology: that "race-neutrality" and individualism peacefully co-exist with racial subordination. But it also notes that the ideology of modern racism can be countered, that even subtle racism is nullified, if not unlearned, when it is confronted by salient egalitarian norms. Part II of this Article concludes by observing that *Freeman* and *Dowell* ignore these truths: that in suggesting that the racial segregation documented in these cases is "private," the opinions are both ahistorical and illusory, and negate the Court's own role in the construction, or destruction, of the color line.

5. See, e.g., Robert L. Hayman, Jr., *Re-Cognizing Inequality: Rebellion, Redemption, and the Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. C.R.-C.L. L. REV. 9 (1991) [hereinafter Hayman, *Re-Cognizing Inequality*]; Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U. L. REV. 494 (1991) (book review); Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990) [hereinafter Hayman, *Presumption of Justice*]; Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263 (1989).

6. 163 U.S. 537 (1896).

Part III of this Article completes the examination of *Freeman* and *Dowell*'s paeans to private choice. It contends that the opinions do not offer an authentic account of the meaning of "race" in America. Part III challenges the view that the meanings of "race" are principally biological, and that the differences in racial achievement reflect innate differences in merit. On the contrary, "race," Part III contends, is a pervasive economic, cultural and political truth: It is, in America, a way of life. Moreover, the contingent meanings of "race" have been preserved simultaneously through control over the discourse—through the reification of such terms as "race," "difference," and the various proxies for "merit"—and through hegemony over experiential opportunities. Segregation, Part III notes, has long been a vital part of this control.

Part III examines the more specific truths of the meaning of "race" in the schools. It contends that racial disparities in academic achievement are manifestations of economic, cultural, and political hegemony; the promise of *Brown*, it notes, was to end this dominance. Part III reviews the substantial evidence supporting the proposition that *Brown*'s project is realizable: that when the desegregation effort is genuine—and at times even when it is not—the gap between black and white achievement narrows, and so too does the gap between race-related behavior and egalitarian norms. Part III concludes by noting that *Freeman* and *Dowell*'s efforts to sanctify private choice are fundamentally at odds with *Brown*'s project: that the opinions reify and marginalize "race"; that they ignore the integral role of the schools in promoting or inhibiting racial justice; that they ignore the practical and policy objectives of the desegregation effort; and finally, that they divorce *Brown*'s project from its moral foundations.

In the end, what *Freeman* and *Dowell* achieve may be nothing less than the virtual death of desegregation. The project is torn from its constitutional moorings; stripped of its history; isolated from its cultural contexts; and divorced, finally, from its moral underpinnings. What is left is an empty shell: a jurisprudence that is isolated, marginalized, and vacant. Consigned, perhaps, to irrelevance, the law of desegregation survives, for now, in a constitutional ghetto: an insular doctrinal realm where comprehension is impoverished and compassion subordinated. It is a place where human initiative seems futile, a place fast running out of hope.

I. THE ROAD TO *FREEMAN* AND *DOWELL*A. *The Path of Desegregation: A Doctrinal Review*

The path of desegregation law from 1954 to 1989 has been chronicled extensively elsewhere.⁷ The following brief capsulization of doctrine is offered primarily to present three themes which have evolved, or devolved, in desegregation law and which are now reflected in mature form in *Dowell* and *Freeman*.

First, *Plessy* originated, and *Dowell* and *Freeman* embrace, a concept of natural racism, the idea that racism inheres in the human condition. Racism, this view holds, is innate and inevitable; as a consequence, it must be tolerated—by the federal courts among others—as an unfortunate fact of human existence. The Constitution and the construing Court are powerless to alter the course of natural racial instincts; separation may not be equal, but it is entirely natural.

Second, *Dowell* and *Freeman* complete another cycle begun in *Plessy*: the discrediting of racism as a barrier to genuine constitutional equality. In several ways, segregation itself becomes an ironic metaphor for this aspect of the Court's doctrinal approach: the law of desegregation regresses to an insular body of rules, separated from the remainder of equal protection doctrine; it regresses to an approach to causation that treats segregation in education as a phenomenon unconnected to other social causes; and it devolves into a category of issues, and of people, isolated from the constitutional norm of equality.

Third, the formation of desegregation doctrine involves a methodology of betrayal, of promises at once made and broken, of interpretive possibilities discarded and paths not taken. From its inception, desegregation law manifested a notable lack of doctrinal candor. As the body of law developed, the test prescribed for determining liability immediately undercut the reach of the remedy. And now, *Dowell* and *Freeman* attempt to convey the notion that the promise of *Brown* has been met to the fullest possible extent; that those who placed their faith in *Brown* were doomed to disappointment by the

7. PAUL R. DIMON, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985); GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980* (1983); Wiley A. Branton, *The History and Future of School Desegregation, Remarks Prepared for Delivery Before the Eighth Circuit Judicial Conference* (July 25, 1985), in 109 F.R.D. 241 (1986); Drew S. Days III, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737 (1986); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990).

unrealizable vision which inhered in *Brown's* quixotic project; and that the failures which maintain us as two people, separate and unequal, are the failures not of the state, not of the courts, but of the American people themselves, who suffer, after all, only what they choose.

1. BEFORE *BROWN*: GOVERNMENT-SPONSORED SUBORDINATION

In *Plessy v. Ferguson*, the Supreme Court upheld a statute requiring racially segregated railway cars and ruled that these separate but equal accommodations—equal, that is, by tautology and nothing more—did not offend the Constitution. Racial prejudice was viewed as a behavior unalterable by legislation or decree; laws would be “powerless to eradicate . . . instincts.”⁸ The Court drew a sharp distinction between political and social equality, and relegated the success of social equality projects to “the result of natural affinities . . . and a voluntary consent of individuals.”⁹ Thus, the *Plessy* Court viewed racism as a “natural” state of affairs and commented that segregation reflected “established usages, customs and traditions of the people.”¹⁰ The Court concluded that “in the nature of things [the Equal Protection Clause] could not have been intended to abolish distinctions based upon color.”¹¹ For the *Plessy* majority,¹² the differences between blacks and whites were inherent.¹³ And even if the accompanying “instincts” were not biological but sociological in origin, societal preferences embodied as majoritarian choices became the constitutional mandate.

2. THE PROMISE OF *BROWN V. BOARD OF EDUCATION*

*Brown v. Board of Education*¹⁴ was a marvelous statement of constitutional promise. *Brown* condemned segregation in education because it created a stigma of inferiority in black schoolchildren;¹⁵ a unanimous Court insisted that separation of the races “generates a feeling

8. *Plessy*, 163 U.S. at 551.

9. *Id.* The Court held that there is no constitutional relief “[i]f one race be inferior to the other socially.” *Id.* at 551-52.

10. *Id.* at 550.

11. *Id.* at 544.

12. *Plessy* drew only a single—albeit powerful—dissent. *Id.* at 552, 560-61 (Harlan, J., dissenting). For a discussion of both the epistemological and metaphysical premises of this dissent, see Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 34-35 44-45.

13. And the taint of being black was strong. *Plessy* was seven-eighths Caucasian and one-eighth African-American. *Plessy*, 163 U.S. at 541.

14. 347 U.S. 483 (1954).

15. *Id.* at 494.

of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹⁶

Brown was more than a command to dismantle segregated schools; it was a call to uproot deeply entrenched racism. On the doctrinal level, *Brown* chose not to extend the equalization effort of previous cases: It represented a marked departure from prior patterns of assessing the equivalence of black and white institutions.¹⁷ *Brown* was also extraordinary as a matter of phenomenology: Its intended symbolic effect was remarkable.¹⁸ *Brown's* overruling of *Plessy* specifically articulated a reversal of the assumptions that supported *Plessy's* social inferiority thesis.¹⁹ *Brown* carried a message to the nation, a message designed, at a minimum, to make the white majority less convinced of its own superiority.

16. *Id.*

17. See *Cumming v. Board of Educ. of Richmond County*, 175 U.S. 528, 545 (1899) (school board need not cease to fund a high school for whites while it "suspend[s] temporarily and for economic reasons the high school for colored children"); *Gong Lum v. Rice*, 275 U.S. 78, 83-85 (1927) (affirming a state court's decision that plaintiff of Chinese ancestry "is not entitled to attend a white public school" as long as there is a school for the "brown, yellow or black races" in the neighborhood); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (since state provides a law school for whites, it must provide equal opportunity for resident black applicants either by admitting plaintiff to white law school or by establishing a law school for blacks, but not by paying for tuition to attend an adjacent state's law school); *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (state violates equal protection when it denies legal education to black plaintiff while providing it for whites); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (law school for blacks was substantially inferior in faculty, library, prestige, and other measures; therefore, black applicant must be admitted to the white law school to effectuate his constitutional right to a "legal education equivalent to that offered by the State" to white students); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 640 (1950) (black doctorate student prevented from receiving equal educational opportunity by being relegated to "Reserved for Colored" setting in the classroom, library, and cafeteria).

18. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 582-747 (1976). Of course, the actual impact of *Brown* has been enormous:

Because *Brown* rejected the very second-class citizenship afforded African Americans in earlier Supreme Court cases such as *Dred Scott v. Sandford* and *Plessy v. Ferguson*, *Brown* has had a profound impact on the dismantling of apartheid in America. In fact, it revitalized the Fourteenth Amendment's original purpose: to help Blacks claim their right to national citizenship. Not only was *Brown* the authority for the prohibition of segregation in a wide range of public activities, it provided the legal underpinnings for the Civil Rights Act of 1964.

Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1288 (1992).

19. *Brown*, 347 U.S. at 494-95.

Yet the *Brown* Court itself was troubled by the implications of its decision and waited for a consensus to develop.²⁰ The initial decision in *Brown* was delayed a year as the case was carried over from the 1953 Term to the 1954 Term.²¹ The Court saved consideration of the relief issue for yet another year in *Brown II*.²²

If *Brown I*'s commitment was still to be taken seriously, the Court in *Brown II* certainly expressed discomfort with what it unleashed. Resistance was viewed as inevitable, recalcitrance almost invited.²³

20. In a significant way, *Brown* itself may exemplify the first set of promises both offered and retracted, because of what *Brown* was not—it was not a command for integration. *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (The Constitution “does not require integration. It merely forbids discrimination.”).

The decision may also be representative of the insular treatment of desegregation cases. *Brown* dealt only with education, and required subsequent litigation to extend the principle to all areas of government action. *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (municipal golf course); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses). Alan David Freeman argues more broadly that the Supreme Court's treatment of each instance of a civil rights violation as a discrete and anomalous artifact limited the transformative possibilities of the civil rights movement. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1056-57 (1978).

21. See Philip Elman, interviewed by Norman Silber, *The Solicitor General's Office, Justice Frankfurter and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 832 (1987).

22. 349 U.S. 294 (1955).

23. The resistance was forthcoming; see, e.g., Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 807 (1991):

There is no denying that southern resistance to *Brown* was massive, manifesting itself in a variety of forms such as constitutional amendments requiring school closures, substitution of private schools (with tuition subsidies) for public schools, criminal laws forbidding school integration, resolutions of interposition purporting to nullify the *Brown* decision, NAACP harassment laws, and widespread physical violence and economic coercion.

For documentation of resistance to the *Brown* mandate and to specific desegregation orders, see *Cooper v. Aaron*, 358 U.S. 1 (1958) (state officials); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (attempts at school closure); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 417, 422 (8th Cir. 1985) (documenting thirty years of resistance to and interference in court ordered desegregation, during which state and school officials used every conceivable trick to maintain segregation, including “grossly overclassifying its black pupils into special education and educable mentally retarded (EMR) categories”); *Briggs*, 132 F. Supp. at 777 (The court expresses its own particular resistance to desegregation by emphasizing that the Supreme Court “has not decided that the states must mix persons of different races in the schools” and that “[t]he Constitution . . . does not require integration. It merely forbids discrimination.”); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 845 n.3 (5th Cir. 1966) (“In each of the seven cases before this Court, no start was made toward desegregation of the schools until 1965, eleven years after *Brown*. In all these cases, the start was a

Conspicuous in its absence from *Brown II*'s commands was a specific relief order; instead, the Court remanded the collected cases and directed federal district courts to retain jurisdiction until each school district "achieve[d] a system of determining admission to the public schools on a nonracial basis."²⁴ The Court expressly permitted consideration of local conditions and vested district courts with equitable discretion to "take into account the public interest in the elimination of such obstacles in a systematic and effective manner."²⁵ Partly as a consequence, the oxymoronic "all deliberate speed" requirement did not turn into a mandate of "at once" or "now" until a decade later.

3. NARROWING OF THE VISION

In 1969, in *Green v. County School Board*,²⁶ the Court required a desegregation plan that "promises realistically to work now."²⁷ In *Green*, the Court disapproved of "freedom of choice" plans²⁸ and held that school systems with de jure segregation were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."²⁹

Yet just as the Court demanded for the first time immediate response to its desegregation mandate, it both narrowed the scope and envisioned the end of that mandate. *Brown* could have been read either as a proscription of any segregation or only of segregation explicitly caused

consequence of a court order obtained only after vigorous opposition by school officials."). See generally Alexander Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

24. *Brown II*, 349 U.S. at 300-01.

25. *Id.* "But it should go without saying," the Court continued, "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.*

26. 391 U.S. 430 (1968).

27. *Id.* at 439. See also *Griffin*, 377 U.S. at 234 ("The time for mere 'deliberate speed' has run out."); *Alexander v. Holmes County Bd. of Edu.*, 396 U.S. 19, 20 (1969) (stating that "the obligation of every school district is to terminate dual school systems at once").

28. Justice Brennan, writing for a unanimous Court, was unmistakably impatient with the tactics of the school board, whose "first step [toward dismantling its dual system] did not come until . . . 10 years after *Brown II* directed the making of a 'prompt and reasonable start.'" *Green*, 391 U.S. at 438. The Court sharply castigated the "freedom of choice" dodge: In the three years that the choice plan operated, no white student chose to attend any all black school, and 85% of the black students still attended the school to which they had been assigned by state law just a few years before. *Id.* at 441.

29. *Id.* at 437-38.

by purposeful government action.³⁰ Decisions in the 1970s, beginning with *Green*, and coincident with the actual enforcement of the *Brown* mandate, chose to read *Brown* as prohibiting only intentional segregation.³¹ *Green* also anticipated the end of court supervision. The Court delineated components for district courts to examine in order to determine whether a school system remained dual or was unitary: student body, faculty, staff, transportation, extracurricular activities, and facilities.³²

In constructing the criteria, *Green* exhibits a departure from both the promise of *Brown* and from its implicit contextualism. The factors focus narrowly on intraschool ingredients, rather than permitting, let alone requiring, consideration of such related elements as racially located government housing starts, provision of other government services in a race-conscious manner, employment statistics reflecting racial disparities, or patterns of race-based behavior in the community.

Although there are early glimmerings of a more contextual approach,³³ the decisions in the 1970s almost uniformly continued *Green*'s narrow focus on the discrete components of a dual school system easily within the grasp of a school board. The decisions largely ignored or diminished the effects of various social conditions, such as residential or housing patterns.³⁴ While the Court recognized that system-wide

30. Archibald Cox demonstrates how *Brown* is capable of being interpreted either way. ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 78 (1976) (discussing *Brown*'s statement that "separate educational facilities are inherently unequal," which seems to command integrated education regardless of the cause of the segregation). Indeed, prior to the 1970s, a number of federal courts read *Brown* to require the elimination of *de facto* segregation in education. See, e.g., *Blocker v. Board of Educ.*, 226 F. Supp. 208, 228-29 (E.D.N.Y. 1964); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *modified*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 150 (5th Cir. 1972). Professor Michael Klarman has concluded that the Warren Court itself would likely have rejected the *de jure/de facto* distinction. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 280-82 (1991).

31. *Green*, 391 U.S. at 439 ("[T]he court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971) (the desegregation mandate extends only to "racial discrimination through official action"); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198 (1973) ("[P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.").

32. *Green*, 391 U.S. at 435.

33. *Keyes*, 413 U.S. at 196 (holding that in defining what constitutes a segregated school, courts must look at "the community . . . attitudes toward the school").

34. *Swann*, 402 U.S. at 22 ("We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious

violations necessitated comprehensive relief, it refused to require that schools reflect the racial balance of the population.³⁵ The Court acknowledged the messages conveyed when local government units attempted to circumvent desegregation plans, yet urged district courts in fashioning remedies to exhibit "a sensitivity to local conditions."³⁶ While the Court made sweeping pronouncements that "[t]he measure of any desegregation plan is its effectiveness,"³⁷ the Court nevertheless permitted district judges and school authorities to take into account "the practicalities of the situation."³⁸ In each case, aspiration was sharply and abruptly undercut by the Court's ready acquiescence to current conditions.

By the time of *Swann v. Charlotte-Mecklenburg Board of Education*,³⁹ the tension between order and equality was patent. In *Swann*, the Court explicitly articulated the ambivalence of the prior cases. Indeed, in many ways *Swann* is a dialogue with itself, reflecting the Court's struggle with the obligation to do justice, on the one hand, and recognition of the threat to racial order that fulfillment of that obligation clearly entailed.⁴⁰ The *Swann* Court thus candidly acknowledges the interplay of educational and residential segregation,⁴¹ yet steers away

or ethnic grounds.").

35. *Id.* at 24.

36. *Wright v. Council of Emporia*, 407 U.S. 451, 466 (1972).

37. *Davis v. Board of Sch. Comm'rs*, 402 U.S. 33, 37 (1971).

38. *Id.*

39. 402 U.S. 1 (1971).

40. Some language in *Swann* suggests that the commitment to equality must be taken seriously, but this language is almost immediately countered with statements reflecting the Court's discomfort with what it may have unleashed. *Id.* at 6. ("This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands.") The Court is cognizant of tensions regarding the necessity of utilizing the judicial power and the limitations on its efficacy. Compare the Court's lament that "[d]eliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance," *id.* at 13, with the Court's recognition of the limitations on judicial authority: "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Id.* at 16.

41. The *Swann* Court noted:

The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated

from a more comprehensive resolution of the problem of racial segregation.⁴² *Swann* ultimately devolves to "a balancing of the individual and collective interests".⁴³ The approved measures include racial balancing ratios, minority-to-majority transfer policies, alteration of school attendance zones, and busing,⁴⁴ but all are carefully qualified.⁴⁵

The hard-won unanimity of the Court in *Swann*⁴⁶ lapsed the following term in *Wright v. Council of Emporia*.⁴⁷ Although the Court, by a 5-4 vote, prevented a city from seceding and constructing its own school district, which would have frustrated the county's desegregation order, a strong dissent by Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, revisited the theme that "the normal movement of populations could bring about . . . shifts [in the racial composition of schools] in a relatively short period of time."⁴⁸ Some racism was

school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

Id. at 14 (footnote omitted).

42. The *Swann* Court stated:

We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Id. at 23.

Yet the *Swann* Court did not completely shut the door on consideration of the relationship between societal and school factors in the formulation of a desegregation order: "[Patterns of school construction] may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing, a district court may consider this in fashioning a remedy." *Id.* at 21.

43. *Id.* at 16.

44. *Id.* at 23-30.

45. These measures may not be appropriate except where a school board had abdicated its power to the court through inaction and delay, *id.* at 24-25; *de facto* segregation is not at issue, *id.* at 23; and the existence of one-race schools in a district does not conclusively indicate the need for a desegregation order. *Id.* at 26.

46. See generally BERNARD SCHWARTZ, *SWANN'S WAY* (1986) (discussing the six drafts of the *Swann* opinion). As Dean Haywood Burns notes, *Swann* marks the last time the Court spoke with a single voice in a major desegregation case. Haywood Burns, *The Activism Is Not Affirmative*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986*, at 95, 98 (Herman Schwartz ed., 1987).

47. 407 U.S. 451 (1972).

48. *Id.* at 474 (Burger, C.J., dissenting).

viewed as natural—implicit in the way people conducted their affairs and chose their residences—and thus untouchable by the Constitution.⁴⁹

4. THE FORMAL SEPARATION OF STATE RESPONSIBILITY

Keyes v. School District No. 1,⁵⁰ decided in 1973, involved a challenge to segregation in the Denver area schools. The district court found intentional segregative conduct, such as manipulation of attendance zones and racially premised teacher assignments, with respect to thirty-eight percent of the black student population.⁵¹ The Supreme Court approved system-wide relief predicated on this showing of segregative actions in “a meaningful portion of the school system.”⁵²

Yet just as *Keyes* implemented the favorable presumption that intentional actions in one part of a school district were related to the existence of segregated schools in another part of the district, it cabined relief in future cases by carefully circumscribing what government conduct is reachable under the Equal Protection Clause. *Keyes* solidified the distinction between de jure and de facto segregation—between intentional segregative actions of the government requiring desegregation and segregation arising from social conditions not directly tied to purposeful segregation by school authorities.⁵³ The *Keyes* Court thus envisioned a formalistic and binary universe, where conduct was either governmental in origin or not. The former was redressable under the Constitution; the latter—no matter the causative interplay of government and societal forces—was not.

Keyes, and the later cases of *Dayton Board of Education v. Brinkman*⁵⁴ and *Columbus Board of Education v. Penick*,⁵⁵ developed and then expanded the effects of presumptions regarding intentional

49. The dissenters could not have been unaware that the “normal movement of populations” was racially driven, for as they note shortly thereafter, the danger of “white flight” to outlying county areas “seems remote in a situation such as this where there is a predominantly Negro population throughout the entire area of concern.” *Id.* at 475.

50. 413 U.S. 189 (1973).

51. *Id.* at 199.

52. *Id.* at 208.

53. *Id.* (“We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.”).

54. 443 U.S. 526, 536 n.9 (1979) (Court created a presumption that past segregative effects may relate to current practices: “proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct”).

55. 443 U.S. 449, 464 (1979) (evidence of disparate impact of government policies is relevant to prove intentional discriminatory state action).

government conduct. Yet the subtext reads more powerfully: The cases subtly shifted attention toward the distinction between the intent of government action and the effects of that action, and away from broader possibilities of focusing on the systemic network of segregation's causal forces. Despite recognition at the time of the *Keyes* decision that the harms of *de jure* and *de facto* segregation were indistinguishable,⁵⁶ and that official and social causes might not be readily separable,⁵⁷ the majority limited the corrective obligation of the government to segregation directly traceable to racially motivated decision making by government officials.

While the message of *Keyes* might have been mixed, *Milliken v. Bradley (Milliken I)*⁵⁸ clearly signaled the Court's retrenchment from the promise of *Brown* and crippled the construction of viable desegregation remedies. In *Milliken*, the Detroit Board of Education had created racially drawn optional attendance zones, bused black students to predominantly black schools further away from predominantly white schools which had available space, and engaged in racially segregative patterns of school construction. The district court determined that various branches of the Michigan state government had permitted restrictive covenants to be enforced and had engaged in racially disparate funding of public housing.⁵⁹ The district court found that it would be impossible to desegregate the Detroit school system without involving the suburbs.⁶⁰

The Supreme Court reversed the desegregation decree, holding that absent an interdistrict violation, "there is no constitutional wrong calling for an interdistrict remedy."⁶¹ In response to the dissent's argument that

56. *Keyes*, 413 U.S. at 230 n.14 (Powell, J., concurring in part, dissenting in part) ("If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation.") (quoting ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 119 (1970)).

57. *Id.* at 216 (Douglas, J., concurring) ("I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state action or policies."). See also *Bradley v. Milliken*, 338 F. Supp. 582, 592 (E.D. Mich. 1971) ("We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation.").

58. 418 U.S. 717 (1974).

59. *Bradley v. Milliken*, 338 F. Supp. 582, 587-89 (E.D. Mich. 1971).

60. *Id.* at 594. See *Bradley v. Milliken*, 345 F. Supp. 914, 916 (E.D. Mich. 1972) ("[R]elief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city . . ."). See also *Milliken I*, 418 U.S. at 763 (White, J., dissenting) (If the suburbs cannot be part of the desegregation order, "deliberate acts of segregation and their consequences will go unremedied.").

61. *Milliken I*, 418 U.S. at 745.

the state had deliberately engaged in conduct that had created an "inner core of Detroit [that] is now rather solidly black,"⁶² the *Milliken I* majority held that government responsibility ended at the school district boundary. Thus, without evidence that the state had discriminatorily drawn the district boundaries or evidence of "a constitutional violation within one district that produces a significant segregative effect in another district,"⁶³ the Constitution pulls up short at the school district boundaries. The majority explained this reverence for district boundary lines: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."⁶⁴

5. THE REJUVENATION OF "NATURAL RACISM"

Just a few short years after effective enforcement of *Brown*, *Pasadena City Board of Education v. Spangler*⁶⁵ heralded the end of the desegregation dream. In *Spangler*, the district court required a school board under a desegregation order to conduct annual modification of attendance zones to adjust for resegregation due to changing patterns of residential demographics. The Supreme Court reversed and held that once the district court issued its approval of a plan intended to arrive at racially neutral attendance patterns, it could not order yearly readjustments to account for "[t]his quite normal pattern of human migration."⁶⁶ Even though the board of education had "not yet totally achieved the unitary system," the *Spangler* Court clearly feared federal district court supervision of desegregation decrees operating "in perpetuity."⁶⁷

Spangler was more than a curtailment of the power of the federal judiciary to remedy race discrimination. In its ruling that federal courts are without power to reach private demographic behavior, *Spangler* echoed the themes of *Swann* and *Milliken* that compartmentalized private

62. *Id.* at 759 (Douglas, J., dissenting).

63. *Id.* at 745.

64. *Id.* at 741-42.

65. 427 U.S. 424 (1976).

66. *Id.* at 436.

67. *Id.* The resegregation of the population in Pasadena could have been read to indicate that the desegregation plan was never effectively implemented, as the Court did in *Green* when it judged a desegregation plan on an effectiveness test and concluded that the school board's freedom of choice plan was in no way effective in ending the segregated system and, therefore, was not an adequate remedy to the state-created dual school system.

and governmental conduct. The Court assumed the fiction that private and governmental conduct are noninteractive, and that, for constitutional purposes, the two spheres of conduct are isolated from one another. More powerfully, and much more sadly, *Spangler* contains fatalistic conclusions about racism: It assumes that white flight from blacks is inevitable and unremediable; it assumes that changes in the racial composition of residential patterns are caused by factors outside government influence or control; and it deems this racism untouchable by the Constitution.⁶⁸ *Spangler* also anticipates the easy declaration of victory brought home in *Dowell* and *Freeman*. *Spangler* permits the inference that once unitary status has been achieved in certain, although not all, aspects of school administration, the obligation to desegregate has been satisfied.

B. The Decisions in *Freeman* and *Dowell*

1. BOARD OF EDUCATION V. DOWELL

In 1991, the Supreme Court decided *Board of Education of Oklahoma City Public Schools v. Dowell*.⁶⁹ Before the commencement of the initial desegregation suit in 1961, the Oklahoma City public schools were segregated by law. The district court initially ruled that the board of education had, since 1955, taken advantage of existing patterns of residential segregation in Oklahoma City to maintain a segregated school system.⁷⁰ In response to the *Brown I* decision, the Oklahoma City School Board had simply replaced black schools and white schools with black neighborhood schools and white neighborhood schools. Where white students were in black neighborhood school zones, the board had routinely and extensively employed a minority-to-majority transfer policy.⁷¹ The district court enjoined the transfer policy and ordered the school board to devise and implement an effective integration plan.⁷²

68. See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 28 (1989):

[W]hile *Spangler* . . . appears to be a case in which the Supreme Court is simply recognizing the limits of judicial power to affect private behavior, in fact the case illustrates the profound ways in which judicial power has helped to shape the legal and social landscape so that a white parent who wants to resist desegregation feels not a gravitational pull to accept racial integration as inevitable, but instead a pull to follow her worst instincts and flee.

69. 111 S. Ct. 630 (1991).

70. *Dowell v. School Bd. of Okla. City Pub. Sch.*, 219 F. Supp. 427, 433-35 (W.D. Okla. 1963).

71. *Id.*

72. *Id.* at 447.

Patterns of residential segregation initially set by Oklahoma constitutional and statutory law early in the century continued unabated in the Oklahoma City School District throughout the 1960s.⁷³ In 1972, finding that the school district's voluntary efforts to desegregate were unsuccessful, the district court ordered the adoption of a comprehensive desegregation plan, involving busing and student assignments.⁷⁴ In 1977, the court entered an order finding that the school district was operating a unitary system and terminating the court's active supervision, but did not lift the injunction regarding student assignments.⁷⁵ The board continued to comply with the plan until 1984.

Residential patterns changed during the 1970s and 1980s. Blacks moved into the formerly all-white northern, southern, and western sections of the district, but the original eastern section remained black, and the portion of the school district identifiable as black grew in geographic area.⁷⁶ In 1984, the school board unanimously adopted the "Student Reassignment Plan," which eliminated compulsory busing and reassigned students to their neighborhood schools. Under the Student Reassignment Plan, almost half of the elementary schools would become ninety percent or more single race.⁷⁷ To challenge the resegregation and enforce the outstanding injunction, the plaintiffs filed a motion to reopen the litigation, which the district court denied.⁷⁸ The Court of Appeals

73. *Dowell v. Bd. of Educ. of Okla. City Pub. Sch.*, 677 F. Supp. 1503, 1506-07 (W.D. Okla. 1987).

74. In 1965, the district court found essentially the same lack of affirmative effort by the school board to remedy existing segregation that it had found in 1963. *Dowell v. School Bd. of Okla. City Pub. Sch.*, 244 F. Supp. 971, 977 (W.D. Okla. 1965). The court again ordered the board to present a plan, but this time to incorporate the recommendations of a court appointed expert. *Id.* at 982. Finally, in 1970, the board presented the Cluster Plan, which was approved by the district court. *Dowell v. Board of Educ. of Okla. City Pub. Sch.*, 307 F. Supp. 583, 595 (W.D. Okla. 1970). In implementation, however, the school board, "without notice to or permission by the court, proceeded to emasculate the plan." *Dowell v. Board of Educ. of Okla. City Pub. Sch.*, 338 F. Supp. 1256, 1263 (W.D. Okla. 1972). This prompted the court, in 1972, to reject the school board's plan as ineffective, to dismiss the board's consultant's plan as unworkable, and to accept the solution offered by the plaintiffs—the Finger Plan. *Id.* at 1269, 1273.

75. *Dowell v. Bd. of Educ. of Okla. City Pub. Sch.*, 606 F. Supp. 1548, 1554 (W.D. Okla. 1985).

76. *Dowell v. Board of Educ. of Okla. City Pub. Sch.*, 890 F.2d 1483, 1494-96 (10th Cir. 1989).

77. "As a consequence of the Plan, eleven of the District's sixty-four elementary schools enrolled 90% + black children. Twenty-one elementary schools became 90% + white and non-black minorities." *Id.* at 1487 (citation omitted).

78. *Dowell v. Board of Educ. of Okla. City Pub. Sch.*, 606 F. Supp. 1548 (W.D. Okla. 1985).

for the Tenth Circuit reversed, holding that the district court erred by not recognizing the plaintiffs' contention that the defendants had abandoned the court-approved plan.⁷⁹ On remand, the district court determined that the school board had acted in good faith and that the residential segregation in Oklahoma City was the result of private decisions too attenuated from official acts to require continued judicial supervision.⁸⁰ Again, the Tenth Circuit reversed the district court and held that the desegregation decrees should not be modified or lifted unless the school district could establish "dramatic changes in conditions unforeseen at the time of the decree that . . . impose extreme and unexpectedly oppressive hardships on the obligor."⁸¹

The Supreme Court in *Dowell*, in an opinion written by Chief Justice Rehnquist, held that following a finding of unitariness, a federal district court should terminate its supervisory jurisdiction where a school board "had complied in good faith with the desegregation decree since it was entered, and [where] the vestiges of past discrimination had been eliminated to the extent practicable."⁸² The Court emphasized the transitional nature of the *Brown* mandate: "[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination," and school desegregation orders "are not intended to operate in perpetuity."⁸³

To ascertain whether past discrimination had been eradicated, the Court directed lower courts to its prior decisions in *Swann* and *Green*, which articulated the factors of "student assignments . . . 'faculty, staff, transportation, extra-curricular activities, and facilities.'"⁸⁴ The *Dowell* Court did not further define "unitariness," although it remarked that "a school district could be called unitary and nevertheless still contain vestiges of past discrimination."⁸⁵

The clear import of *Dowell* is that it eliminates federal supervisory jurisdiction upon a finding of unitariness. The implicit presumption is that any segregation occurring after the determination of unitariness is de facto, and a plaintiff must commence an entirely new suit and demonstrate

79. *Dowell v. Board of Educ. of Okla.*, 795 F.2d 1516, 1523 (10th Cir.), cert. denied, 479 U.S. 938 (1986).

80. *Dowell v. Oklahoma City Pub. Sch., Indep. Dist.* 89, 677 F. Supp. 1503, 1512-13 (W.D. Okla. 1987).

81. *Dowell v. Board of Educ. of Okla. City Pub. Sch.*, 890 F.2d 1483, 1490 (10th Cir. 1989) (quoting Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1110 (1986)).

82. *Board of Educ. of Okla. City Pub. Sch. v. Dowell*, 111 S. Ct. 630, 638 (1991).

83. *Id.* at 637.

84. *Id.* at 638 (quoting *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968)).

85. *Id.* at 635.

present purposeful discrimination on the part of the school board to re-establish federal court supervision. *Dowell* also foreshadows much of *Freeman's* "natural" racism with its tacit approval of the district court's finding that the racial imbalance in Oklahoma City was due to "private decisionmaking and economics."⁸⁶

2. FREEMAN V. PITTS

One year after its decision in *Dowell*, the Supreme Court made clear its message in *Freeman v. Pitts*.⁸⁷ In *Freeman*, the Court held that federal supervisory jurisdiction of a desegregation decree may be incrementally withdrawn. Of far greater significance than its doctrinal holding is the attitude adopted by the Court toward racism: its placement of racism in a narrow historical context and its myopic view of the causes of segregation.

Freeman involved the DeKalb County, Georgia, public schools, which had operated a dual system of de jure segregation for decades prior to *Brown I*.⁸⁸ In 1968, when the suit was instituted, the DeKalb County School System (DCSS) was operating a "freedom of choice" plan.⁸⁹ In 1969, the federal district court ordered the DeKalb County Board of Education to desegregate its dual system by closing a few all-black schools and redrawing district lines. In 1976, responding to the plaintiffs' allegations that the DCSS violated the 1969 plan, the district court ordered additional free transportation and reassignment of faculty and staff.⁹⁰ In 1983, the plaintiffs filed a supplemental motion, complaining of limitations on majority-to-minority transfers and requesting that the court enjoin construction of additional facilities designed to accommodate an overabundance of students at a predominantly white high school. The district court refused to issue an injunction, finding that the plaintiffs had not shown that the planned expansion was motivated by discriminatory

86. *Id.* at 638 n.2.

87. 112 S. Ct. 1430 (1992). The message was clarified by the symbolism of the Court's refusal to decide the reprise of *Brown*. See *Board of Educ. of Topeka v. Brown*, 112 S. Ct. 1657 (1992) (remanding to the Tenth Circuit Court of Appeals for consideration in light of *Freeman* and *Dowell*). The Court effectively avoided reaffirming the *Brown* desegregation order, thereby allowing *Freeman* to stand as the dominant symbol.

88. *Freeman*, 112 S. Ct. at 1436.

89. "Freedom of choice" plans were the diversion rejected as inadequate in *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968). The *Green* Court found that these plans, which permitted individuals to choose the schools they would attend, prevented or delayed conversion from dual to unitary systems. *Id.* at 438-42.

90. *Pitts v. Freeman*, 887 F.2d 1438, 1443 (11th Cir. 1989).

intent.⁹¹ The Eleventh Circuit Court of Appeals reversed, ruling that until the DeKalb school system had achieved unitary status, "official action that has the *effect* of perpetuating or reestablishing a dual school system violates the defendants' duty to desegregate."⁹²

On remand, the district court held that the school system had eliminated segregation and achieved unitary status in the categories of student assignment, transportation, and extracurricular activities.⁹³ The court relinquished jurisdiction over these categories and retained supervision over the areas of faculty assignments and quality of education. On appeal, the Eleventh Circuit Court of Appeals reviewed the district court's factual findings that the DCSS spent more money per white student than per black student; that black administrators were assigned disproportionately to predominantly black schools and white administrators were assigned disproportionately to white schools;⁹⁴ and that although black students comprised forty-seven percent of the school population, "50-percent of the black students attend schools with black populations of more than 90-percent. Similarly, 27-percent of the DCSS's white students attend schools with white populations of more than 90-percent."⁹⁵ The Eleventh Circuit reversed the district court's incremental relinquishment of jurisdiction and held that a court must retain complete supervisory authority until a school system has achieved unitary status in all six of the categories specified in *Green*.⁹⁶ The court stated, "[W]e will not permit resegregation in a school system that has not eliminated all vestiges of a dual system."⁹⁷ The court of appeals also found that the district court erred by dismissing court supervision over the area of student assignments.⁹⁸

91. *Pitts v. Freeman*, 755 F.2d 1423, 1425 (11th Cir. 1985) (citing *Pitts v. Freeman*, No. 11946, slip op. at 8 (N.D. Ga. Feb. 22, 1984)).

92. *Id.* at 1427.

93. *Freeman*, 887 F.2d at 1444.

94. *Id.* at 1441 ("Black persons constitute approximately 30-percent of DCSS elementary school administrators (principals, assistant principals, and lead teachers). Yet, black administrators constitute less than 10-percent of the administrators in majority white schools. Conversely, black administrators constitute 60-percent of DCSS administrators in schools with black populations of more than 81-percent.").

95. *Id.* "In addition, 62-percent of the DCSS's black students attend 30 schools with black populations at least 20-percent higher than the system average. Fifty-nine percent of its white students attend 37 schools with white populations at least 20-percent higher than the average." *Id.* at 1441 n.2.

96. *Id.* at 1446.

97. *Id.* at 1446-47.

98. *Id.* at 1448.

The Supreme Court in *Freeman* reversed the court of appeals and held—by an eight-to-zero vote fragmented by four separate opinions⁹⁹—that a district court could remove federal supervision in stages, before a system had achieved unitary status in all of the areas of student assignments, transportation, physical facilities, extracurricular activities, assignment of teachers and administrators, and allocation of resources.¹⁰⁰ Before ordering partial withdrawal of jurisdiction, district courts are directed to consider whether there has been full compliance with respect to the factors where supervision is to be eliminated; whether retention of jurisdiction over some factors is necessary to achieve compliance regarding other factors; and whether the system has exhibited a good faith commitment to implementation of the decree.¹⁰¹

Justice Kennedy's opinion for the Court strongly emphasized the demographic changes that had occurred in the school system since the 1969 desegregation order: a change in racial composition from 5.6% black students in 1969 to forty-seven percent black students in 1986; and a demarcation between the northern section of DeKalb County, which had remained predominantly white, and the southern half, which had become predominantly black.¹⁰² The Court explained that the remaining segregation was essentially a natural or "inevitable" condition.¹⁰³

The Court deemed these demographic changes independent of the prior *de jure* segregation, proclaiming them instead the product of voluntary "private choices."¹⁰⁴ The *Freeman* majority ruled that there was no constitutional connection between the DCSS's pattern of faculty and staff assignments, limitations on majority-to-minority transfers, and construction patterns, on the one hand, and the resulting demographics,

99. Justice Thomas took no part in the decision, because the case was argued before he joined the Court. Justice Kennedy wrote the opinion, joined by Justices Rehnquist, White, Scalia, and Souter; Justice Scalia and Justice Souter each wrote a concurring opinion; and Justice Black wrote an opinion concurring in the judgment, joined by Justices Stevens and O'Connor.

100. *Freeman*, 112 S. Ct. at 1445-46.

101. *Id.* at 1446.

102. *Id.* at 1437-38.

103. *Id.* at 1448.

104. *Id.*

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.

Id.

on the other.¹⁰⁵ Instead, the Court viewed the resulting racial mix as the “not always fortunate,” but “somewhat predictable” consequence of changing residential preferences.¹⁰⁶

Freeman revised the contours of the constitutional obligation expressed in *Keyes v. School District No. 1*¹⁰⁷ to remove “all vestiges of state-imposed segregation”:¹⁰⁸

In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.¹⁰⁹

The *Freeman* Court reiterated the notion expressed in *Dowell* that desegregation orders were intended only as a transitory measure.¹¹⁰ The Court also stated that the “ultimate objective” in desegregation cases is “to return school districts to the control of local authorities.”¹¹¹

In concurrence, Justice Scalia seemed willing to assume that the segregation in DeKalb County was unrelated to discrimination: “At some time,” the Justice wrote, “we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution, dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.”¹¹² “We must soon revert,” Justice Scalia declared, “to the

105. Although the Court recounted plaintiffs’ contention that the DCSS had not used a variety of desegregation tools available to it, such as the DCSS’s refusal to create subdistricts and racially balance the subdistricts, the limited expenditure of funds for minority educational programs, the absence of busing, and the DCSS’s failure to eluster schools to create feeder patterns that integrate, the Court relied instead on a district court finding that with respect to student assignments, the county had “effectively desegregated DCSS for a period of time.” *Id.* at 1439 (citation omitted).

106. *Id.* at 1448. The Court cited to evidence produced in the district court “that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50%-50% mix.” *Id.*

The Supreme Court also apparently took judicial notice of national social mobility patterns. *See id.* (citing U.S. DEP’T. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 19, tbl. 25 (111th ed. 1991)).

107. 413 U.S. 189 (1973).

108. *Id.* at 200.

109. *Freeman*, 112 S. Ct. at 1448.

110. *Id.* at 1445.

111. *Id.* Compare this with *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968), in which the Court declared that the ultimate objective was the creation of a “unitary system in which racial discrimination would be eliminated root and branch.”

112. *Freeman*, 112 U.S. at 1453 (Scalia, J., concurring).

ordinary principles of our law, of our democratic heritage, and of our educational tradition"¹¹³

Justices Souter, Blackmun, Stevens, and O'Connor departed from the majority's emphasis on a causal lapse. In a separate concurrence, Justice Souter cautioned that when judges release a school system from supervision, they must be careful that the vestiges of discrimination from one or several of the *Green* factors do not "act as an incubator for resegregation in others."¹¹⁴ Justice Blackmun, in a concurrence joined by Justices Stevens and O'Connor, noted that in the thirty-eight years since *Brown*, the majority of black students in DeKalb County "never have attended a school that was not disproportionately black."¹¹⁵ Justice Blackmun's concurrence joined in the remand decision to encourage the district court to consider whether the school board's actions regarding such factors as school closures, building sites, faculty integration, and apportionment of funds exacerbated the segregation in DeKalb County.

C. A Doctrinal Critique

To commend these opinions for preserving what is left of the equal protection of the laws would be to damn them with faint praise indeed. Sadly, even that praise is unwarranted.

Dowell and *Freeman* continue the fragmentation, the isolation, the marginalization of desegregation jurisprudence.¹¹⁶ As we intend to show, that jurisprudence is now divorced from history, from its experiential context, and ultimately from its moral roots. Of immediate concern, that jurisprudence is now also strangely removed from the constitutional mandate it is intended to realize: The law of desegregation, as it is expressed in these opinions, now frustrates rather than fosters the equal protection of the law.

In at least four ways, *Dowell* and *Freeman* threaten to extend equal protection doctrinal components to absurd extremes. The first concerns the Court's construction of "state action." It is, perhaps, too late in the day to challenge the doctrinal manifestation of the public/private

113. *Id.* at 1454.

114. *Id.* at 1455 (Souter, J., concurring).

115. *Id.* at 1455 (Blackmun, J., concurring).

116. The progeny of *Brown* had already earned what Professor James Liebman has termed "the age's most damning epithet, 'incoherent.'" Liebman, *supra* note 7, at 352 (citing Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 87 (1978)). Our concern is that desegregation jurisprudence may soon warrant a more damning indictment: It may be irrelevant.

dichotomy.¹¹⁷ But it is not too late to insist that the unfortunate roots of the state action requirement¹¹⁸ do not find a parallel in an equally tragic legacy. *Dowell* constricts the state in an absurd temporal sense; *Freeman* fragments the state in an equally absurd bureaucratic sense. As a result, whatever authenticity the public/private dichotomy may otherwise claim in the segregation context is surely compromised by these decisions. If the difference between de jure and de facto segregation truly can be realized through five years of "good faith" compliance, as in *Dowell*, or truly can be realized in one aspect of the schooling process but not another, as in *Freeman*, then it is perhaps time to re-examine whether this distinction serves any useful function beyond the legitimation of preconceived results.

117. For juridical and academic critiques of this dichotomy, see Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 34-41 and sources cited therein.

118. See Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 31-34. Justice Bradley's opinion in the Civil Rights Cases, 109 U.S. 3 (1883), which effectively rewrote the Fourteenth Amendment by adding the rigid "state action" requirement, see John A. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552, 569 (1971), marked the completion of an intellectual journey that involved more than a little political intrigue. Justice Bradley's votes on the Electoral Commission of 1877 were the decisive ones, effectively granting victory in the disputed presidential election to Republican moderate Rutherford B. Hayes. See C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 150-62 (1966). They were highly controversial votes: Accusations were tendered, but never proved, that Justice Bradley experienced something of a midnight conversion on the eve of the vote, a change in thinking reputedly prompted by visits from the representatives of certain well-heeled interests. See *id.* at 156-64; see also Justice Bradley's response found in Joseph P. Bradley, *Reply to Charges as to Conduct as Member of Electoral Commission*, in *MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY* 220, 220-22 (Charles Bradley ed., 1902). In return for the acquiescence of Southern Democrats in Hayes' election, the Republicans promised an effective end to the federal Reconstruction effort in the South (principally through the withdrawal of federal troops) as well as a share (particularly to Southern rail interests) in the emerging economic order. See VANN WOODWARD, *supra*, at 51-67; ERIC FONER, *RECONSTRUCTION, 1863-1877: AMERICA'S UNFINISHED REVOLUTION* 575-601 (1988). This agreement—the Compromise of 1877—was subject to occasional breach, but in a broad political sense was largely upheld. VANN WOODWARD, *supra*, at 244-46.

Historian C. Vann Woodward has noted that the 1883 decision in the Civil Rights Cases "constituted a sort of validation of the Compromise of 1877, and it was appropriate that it should have been written by Justice Joseph P. Bradley . . ." VANN WOODWARD, *supra*, at 245. That may have been more than coincidence. Justice Bradley was assigned the opinion by Chief Justice Morris Waite, who considered Justice Bradley his "most trusted aide." See Scott, *supra*, at 567-68. The Chief Justice himself had exchanged correspondence with President Hayes in the summer of 1882; "I agree with you entirely," the Chief Justice had written in reply to the President, "as to the necessity of keeping public sentiment at the south in our favor." Scott, *supra*, at 568.

The next two doctrinal components are integrally related to the "state action" inquiry. At least initially, the equal protection plaintiff has the burden of proving that the state *intentionally caused* the segregation. These twin requirements of "intent" and "causation" are indeed staples of equal protection—for better or worse¹¹⁹—but the "tradition" supporting them is not nearly as stable as Justice Scalia, for example, intimates in his concurrence in *Freeman*. Both requirements remain in their formative stages,¹²⁰ and these decisions raise the possibility that, at least in the desegregation context, the prima facie requirements of "intent" and "causation" in fact reflect a barely rebuttable presumption that desegregation is de facto no matter the historical and contemporary context.

To begin with, Justice Scalia's insistence that the plaintiffs prove "intent" and "causation" is not formally shared by the Court's majority in *Freeman*. But the opinions for the Court achieve the same end. It is, after all, a constructive "good faith" defense that the Court articulates: "Good faith" is merely "a factor," to be sure, but too easily, it appears, a dispositive one. This new deference to the "honest" efforts of the state effectively shifts the burden of proof to the desegregation plaintiff whenever a school district can cite *some* evidence that, for a "reasonable" period, it gave desegregation the old college try.

Whether the burden is shifted de jure or de facto, the renewed emphasis on "intent" becomes somewhat difficult to square with the common observation—made by no lesser authority than Justice Scalia himself—that "intent" is largely indeterminate.¹²¹ Concomitantly, the insistence that plaintiffs demonstrate a causal nexus between past segregative acts and current segregation creates a similar tension with the

119. See Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 34 n.91 (critique of "causation"), 56-57 (critique of "intent"); see also Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 134-36 (1987) (rejecting the "intent" test as inadequate to secure protection against modern wrongs). But see David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1644 (1991) (noting that the "disparate treatment approach" to cases of racial discrimination in employment "is today both an ineffective and a costly method" of combatting discrimination).

120. The "intent" requirement was formalized within the past two decades. See *Washington v. Davis*, 426 U.S. 229 (1976). Meanwhile, the "causation" requirement has yet to receive clear explication in this constitutional context, although it clearly seems to underlie the reasoning of *City of Richmond v. Croson*, 488 U.S. 469 (1989). Even the de jure/de facto distinction is of relatively recent vintage. See *supra* note 30 and accompanying text.

121. See *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting).

oft-stated view that "causation" is inherently manipulable.¹²² What is more, Justice Scalia, at least, seems perfectly cognizant of both the deficiencies and the significance of the emperor's new wardrobe: Vacuous as the terms may be, the decision to assign the burden of proof on "intent" and "causation" will doom one side or the other to failure.¹²³

But it is the determination that it is the plaintiff who should be doomed—by bearing, formally or effectively, a burden of proof that is all but unbearable—that is utterly at odds with prevailing jurisprudence. These are, after all, termination requests that are under review. Accordingly, in each such case, the state has segregated, has done so intentionally, and—if there is indeed a controversy—some evidence of segregation persists. In such circumstances, there is no precedent for shifting the burden of proof back to the plaintiff to reprove each element of the initial claim; on the contrary, the teaching of *Brown* and its progeny is that certain harms inhere—as a matter of law—in the fact of state-sponsored segregation and that the state has an obligation to ameliorate those harms.¹²⁴ A state seeking to avoid the normal legal consequences of such a finding surely has the burden of demonstrating its entitlement to an exception.¹²⁵ Moreover, when those harms have already been traced to the state, and when they persist, the natural and logical presumption—always rebuttable—is that they remain traceable to the already identified source. When law and logic are in such harmony, and when, as we shall shortly demonstrate, historical and contemporary evidence also concur, it should take more than the Court's political predilections to command a contrary result.

Finally, the *Dowell* and *Freeman* opinions are purportedly rooted in structural constitutional concerns, i.e., separation of powers and federalism. As we will develop shortly, the deference granted these concerns is, given the history of desegregation, at least a bit perverse. More to the point here, that deference is quite at odds with the teachings of equal protection jurisprudence, dating to the original construction of the clause itself.¹²⁶ The Fourteenth Amendment was of course designed

122. See, e.g., Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 34 n.91.

123. *Freeman*, 112 S. Ct. at 1452.

124. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) (state is obliged to "counteract the continuing effects of past school segregation"); see also *Board of Educ. of Okla. City Pub. Sch. v. Dowell*, 111 S. Ct. 630, 648 (1991) (Marshall, J., dissenting) ("Consistent with the mandate of *Brown I*, our cases have imposed on school districts an unconditional duty to eliminate any condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation.").

125. Cf. FED. R. CIV. P. 8(c).

126. See Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 25-28, 51-52.

as an encroachment on the powers of the states, and it has consistently been applied, by Chief Justice Rehnquist and by Justice Scalia, to limit important local prerogatives.¹²⁷ Why that understanding should not govern these cases, and why “local control” should now be the apotheosis of equal protection jurisprudence, is—at a doctrinal level—something of a mystery; moreover, placed in their historical and sociological contexts, these paeans to “local control” are not merely mysterious, but a good deal worse.¹²⁸

II. DOWELL, FREEMAN, AND THE COLOR LINE

A. Drawing the Color Line

Attempts to assess the desegregation effort—its successes and failures, the wisdom of the effort, the very viability of the effort—are notably ahistorical, as if the story of “race” and “racism” began the day before *Brown*. Curiously absent from most narratives of the desegregation effort—and certainly from the juridical retellings¹²⁹—is the story of the *segregation* effort, of the drawing of the color line.¹³⁰

127. See, e.g., *City of Richmond v. Croson*, 488 U.S. 469 (1989).

128. See *infra* notes 222-23 and accompanying text.

129. Recent opinions of the United States Courts of Appeals evidence this trend. For most, the story begins after *Brown*; see, e.g., *Little Rock Sch. Dist. v. Pulaski County Sch. Dist.*, 921 F.2d 1371, 1376 (8th Cir. 1990) (Little Rock, Arkansas school desegregation case “has its roots in the 1950’s, when the Supreme Court” outlawed segregation); *United States v. State of Mississippi*, 921 F.2d 604, 606 (5th Cir. 1991) (“factual story” of Laurel, Mississippi schools “commences in December 1987”); *United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1302 (11th Cir. 1989) (“chain of events leading to this lawsuit” involving Lowndes County, Alabama schools “began in 1986”); *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 751 (5th Cir. 1989) (history of Oxford, Mississippi school dispute begins in 1969); *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 854 F.2d 127, 128 (5th Cir. 1988) (history of Starkville, Mississippi school dispute begins with *Brown*); *Stout v. Jefferson County Bd. of Educ.*, 845 F.2d 1559, 1560 (11th Cir. 1988) (“the history of this litigation” involving Jefferson County, Alabama schools “may be traced to 1965”); for others, even that abridged story has been told before and apparently is not worth re-telling. See, e.g., *Flax v. Potts*, 915 F.2d 155, 157 (5th Cir. 1990) (recent opinion comprehensively reviews past thirty years of school dispute in Fort Worth, Texas and “we see no need to repeat that narrative”); *Morgan v. Nucci*, 831 F.2d 313, 315 (1st Cir. 1987) (history of Boston school desegregation set out in previous decisions). The impression left by these persistent omissions is not so much that the problem of forced segregation is part of the past, but rather that the problem never existed. *But see* *Brown v. Board of Educ. of Topeka*, 892 F.2d 851, 854-55 (10th Cir. 1989) (describing Topeka, Kansas schools prior to *Brown I*).

130. It was Dr. W.E.B. Du Bois, of course, who memorialized this phrase when he observed, in 1903, that “[t]he problem of the twentieth century is the problem of the color line.” Fully half a century later, Dr. Du Bois wrote:

The suggestion apparently is that there is no story to tell: Nothing happened and no one did anything; the color line simply *was*.

Eluding the tale of the segregation effort affords a certain comfort to some quarters. By ignoring its origins, the color line becomes an evolutionary truth, rooted in some undiscoverable primal moment, shaped perhaps by unalterable tribal instincts.¹³¹ Forged this way by the mysterious forces of creation, the story of segregation becomes at once too profound and too elusive to tell. The story, in some important ways, also becomes irrelevant, and the sense of relief is compounded by the realization that the otherwise painful history of segregation is not one of "our" making:¹³² It just happened, it's nobody's fault, and it's nobody's responsibility.

But there is a story to tell, and the tale of the segregation effort contains some embarrassing truths both for those who have constructed it and for those who today deny its relevance. And if the story is painful to hear, it is nonetheless an ultimately empowering one, for it suggests

I still think today as yesterday that the color line is a great problem of this century. But today I see more clearly than yesterday that back of the problem of race and color, lies a greater problem which both obscures and implements it: and that is the fact that so many civilized persons are willing to live in comfort even if the price of this is poverty, ignorance and disease of the majority of their fellow men; that to maintain this privilege men have waged war until today war tends to become universal and continuous, and the excuse for this war continues largely to be color and race.

DU BOIS, *supra* note 1, at xv.

131. Explicit descriptions of racism as a tribal urge were common in the heyday of Jim Crow, *see, e.g.*, William I. Thomas, *The Psychology of Race-Prejudice*, in *THE SOCIOLOGY OF RACE RELATIONS: REFLECTION AND REFORM* 7, 9 (Thomas F. Pettigrew ed., 1980) [hereinafter *SOCIOLOGY OF RACE RELATIONS*] (insisting, in a 1904 article for *The American Journal of Sociology*, that "[r]ace-prejudice is an instinct originating in the tribal stage of society"); similar arguments seem to be enjoying a certain resurgence today. *See* RICHARD C. LEWONTIN ET AL., *NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE* 27 (1984) (noting modern political expressions of the view that racism is natural, and their linkage to the contentions of Harvard sociobiologist E.O. Wilson that tribalism and xenophobia are genetically based).

132. "Our" history, of course, is a good deal more benign; consider the ennobling attributes described by Justice Scalia in *Freeman v. Pitts*, urging an end to the presumption that current segregative effects reflect the impact of past segregative design:

We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging Equal Protection violations must prove intent and causation and not merely the existence of racial disparity, . . . that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, . . . and that it is "desirable" to permit pupils to attend "schools nearest their homes"

Freeman v. Pitts, 112 S. Ct. 1430, 1454 (1992) (Scalia, J., concurring) (citations omitted).

that the racism which pervades America's soul is no less an artifact than the laws that formalize it; that de facto segregation is as much a political construct as de jure segregation; and that the promises of *Brown*—challenged as they have been by nullification and interposition,¹³³ by obstinacy and avoidance,¹³⁴ and now by the resanctification of private decision making and economics¹³⁵—remain today both viable and fully realizable. As Frederick Douglass said of slavery a century ago: “[W]hat man can make, man can unmake”;¹³⁶ segregation, the history suggests, is for us now to unmake.

A number of observations inform the view that the color line in America was not discovered, but was on the contrary quite deliberately drawn. And while these observations—very briefly summarized below—might not permit a conclusive resolution of the questions surrounding the source of American racism, they do seem to thoroughly embarrass the claim that racism is either innate or inevitable.

Consider, to begin with, the observation that color prejudice was not always a part of the encounters between Europeans and Africans. The

133. In response to *Brown*, conservative Virginians claimed the right of “interposition” of state authority against unlawful federal intervention. The interposition plan was adopted in Virginia, Alabama, Georgia, Mississippi, South Carolina, and Louisiana. Legislatures in Alabama, Georgia, and Mississippi declared *Brown* “null and void.” See COMER VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 154-63 (3d rev. ed. 1974).

134. Senator Harry Byrd of Virginia called for “massive resistance” to *Brown*'s mandates. South Carolina, North Carolina, and Louisiana adopted resolutions of protest. Some forty-two prosegregation measures were passed in the immediate aftermath of *Brown*: Louisiana and North Carolina prohibited public spending for desegregation; Georgia made such spending a felony; and Mississippi criminalized the act of attending desegregated schools. Mississippi and South Carolina amended their constitutions to permit local subdivisions to abolish public schools; Georgia did the same through legislation. North Carolina adopted a program of grants to parents to pay the cost of private school tuition; other states sold or leased their schools to private educational facilities. Public schools in several Virginia counties outside the nation's capital were closed in the face of desegregation orders; so too were the schools in Little Rock, Arkansas. *Id.*

135. See *Board of Educ. of Okla. City Pub. Sch. v. Dowell*, 111 S. Ct. 630, 638 n.2 (1991) (sustaining viability of district court determination that current residential segregation was the result not of past school board segregative policies but of “private decisionmaking and economics”). See also *Freeman*, 112 S. Ct. at 1447-48 (upholding district court finding that present racial imbalance in schools was caused not by the school district, but by “independent factors,” such as the “private choices” that produce “massive demographic shifts”); *id.* at 1453 (Scalia, J., concurring) (“[A] multitude of private factors has shaped school systems in the years after abandonment of *de jure* segregation—normal migration, population growth . . . , ‘white flight’ from the inner cities, increases in the costs of new facilities . . .”).

136. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 176 (1990).

ancient Egyptians, Greeks, Romans, and early Christians did not share the modern preoccupation with skin color. At least through the sixth century, the extensive and prolonged contacts between black and white populations were largely unencumbered by philosophical, scientific, or religious notions of racial hierarchy.¹³⁷ As late as the seventeenth century, European accounts of the African peoples, including the accounts rendered by white slave-traders, acknowledged the curious difference in skin hues without attendant notions of relative superiority or inferiority.¹³⁸ Significantly, this essentially neutral disposition toward skin color appears to fairly describe the early American attitude toward race. Race was not, at the outset, an invariable indicium of servitude: The modern equation of "black" and "slave" was not initially a part of the colonial psyche, but arose instead only as a practical exigency. Through the early part of the eighteenth century, colonial conceptions of involuntary servitude were, in terms of "race," all-embracing: They included Africans, Europeans, and Native Americans.¹³⁹ For essentially pragmatic reasons, the latter two groups proved poor choices as bondsmen;¹⁴⁰ international events, meanwhile, radically altered the demographic composition of the servant class to increase the proportion of Africans.¹⁴¹ In short, Africans became the preferred bondsmen not through some perceived mandate—biological, philosophical, religious, or otherwise—but instead largely by default.

137. See FRANK M. SNOWDEN, JR., *BEFORE COLOR PREJUDICE* 63-108 (1983) (concluding, ultimately, that for the ancients, "color played no significant role").

138. See PETER KOLCHIN, *UNFREE LABOR: AMERICAN SLAVERY AND RUSSIAN SERFDOM* 184 (1987).

139. See *id.* at 31-32.

140. European servitude generally included some prospects for manumission; moreover, the supply of willing Europeans was not stable. American Indians—and to some extent the Europeans—were able to escape their servitude, and posed a substantial threat of reprisal. The marked "difference" of Africans extended to each pertinent aspect: Their servitude was unencumbered by relevant traditions; the supply of involuntary bondsmen was eventually plentiful; they were strangers in the new land; and were isolated from supportive communities. See VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* 3-8 (1981); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 151-52 (1978); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 89 (1968).

141. The British victory in the War of the Spanish Succession, known in America as Queen Anne's War, was memorialized in the Treaty of Utrecht of 1713, in which France conceded to the British the right to participate in the *absentia*, the slave trade with Spanish America. See SAMUEL E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 136-39 (1965). This concession guaranteed British domination of the global slave trade and, consequently, ensured an ample supply of African slaves for the American colonies. See KOLCHIN, *supra* note 138, at 15.

But if the empirical correlation of "black" and "bondsmen" was largely accidental, the political correlation of "black" and "slave" certainly was not. The ambiguous nature of servile relationships through the seventeenth and early eighteenth centuries facilitated class alliances unencumbered by barriers of "race": As the rebellions of that period indicate, the divisions between white indentured servant and black slave were far less clear than the divisions between master and bondsmen.¹⁴² The gradual change in demographics permitted but did not compel a reversal of this emphasis; the master class, literally fearing for its survival, seized the opportunity.¹⁴³ Its efforts were manifest in statutory initiatives that formalized chattel slavery,¹⁴⁴ compelled the social segregation of the races,¹⁴⁵ and created a racial hierarchy of political and economic rights.¹⁴⁶ The result, by the middle of the eighteenth century, was the codified isolation of the "black slave."¹⁴⁷

The modern picture was completed by the development of the final correlation: The dominant culture's "natural" equation of "black" and "inferior." It was, perversely, the philosophical precepts of the movement for independence that ultimately demanded this subordination of Africans and African-Americans. The bourgeois ethic of the pre-revolutionary era was not incompatible with slavery: Slavery required no prepolitical justification because almost no one perceived it as wrong.¹⁴⁸ But the dissonance between, on the one hand, the liberal rhetoric that gave justification to the new republic and, on the other, the undeniable realities of chattel slavery demanded some formal reconciliation. Inevitably, this reconciliation had to be achieved through the construction of some "natural" hierarchy—a political philosophy that exalts "natural" liberty over political power could tolerate no less. And if the "natural" inequalities among men could serve to explain their relative positions in

142. See *id.* at 32-34; ZINN, *supra* note 136, at 32-38; HIGGINBOTHAM, *supra* note 140, at 35; MORISON, *supra* note 141, at 113-15.

143. See HARDING, *supra* note 140, at 30-31; HIGGINBOTHAM, *supra* note 140, at 26-31.

144. See KOLCHIN, *supra* note 138, at 31-35.

145. See HIGGINBOTHAM, *supra* note 140, at 40-47, 154-59.

146. See KOLCHIN, *supra* note 138, at 34-35; ZINN, *supra* note 136, at 36-38; HARDING, *supra* note 140, at 28-34; HIGGINBOTHAM, *supra* note 140, at 38, 54-55, 154-59.

147. See KOLCHIN, *supra* note 138, at 35.

148. See *id.* at 31. But see MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860*, at 6-7 (1981) (contending that, in the sphere of social relations, the master-slave relationship challenged the inability of bourgeois ideology to embrace a totalistic conception of interpersonal relationships).

society,¹⁴⁹ then surely the existence of master and slave could find its own "natural" explanation—one that, by then, could be based with stunning elegance on the color of a man's skin.

A lie repeated with enough frequency and conviction can surely assume the life of a truth, and this almost certainly was the case with the myths of race and racism. Generation after generation, through slavery, Jim Crow, and beyond, the belief in natural race and racism—in racial instincts, natural racial affinities, and racial supremacy and inferiority—pervaded all aspects of the dominant culture. It tainted its science,¹⁵⁰ its religion,¹⁵¹ its art,¹⁵² and its law,¹⁵³ and left its

149. See THE FEDERALIST No. 10, at 78-79 (James Madison) (Clinton Rossiter ed., 1961).

150. See generally STEPHEN J. GOULD, THE MISMEASURE OF MAN 30-72 (1981) (describing and debunking the "scientific" efforts to prove racial inferiority); see also SEYMOUR SARASON & JOHN DORIS, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY 289-311 (1969) (describing eugenicist efforts to establish a correlation between race and degenerative intellectual deficiency).

151. Religion has been utilized to preserve racial hierarchy in at least two ways. First, the relationship between religious orthodoxy and social order has at times been particularly pronounced in matters of race: The work of Creation—and specific tenets of Christianity—have been cited as affording justification for racial differentiation and subordination, including race-based slavery. See, e.g., KOLCHIN, *supra* note 138, at 170-74 (observing that the religious justification for servitude was "pervasive in the slave South"); W.E.B. DU BOIS, *Will the Church Remove the Color Line*, in DU BOIS, *supra* note 1, at 219, 220-23 (observing that the Christian church sponsored and defended slavery and later accepted racial caste); Guy B. Johnson, *A Sociological Interpretation of the New Ku Klux Movement*, in THE SOCIOLOGY OF RACE RELATIONS, *supra* note 131, at 70, 73-74 (noting the antinomies of religious orthodoxy and liberalism and their relationship to racial hierarchy). Second, the evangelical zeal of white Christians in the antebellum South served more than the altruistic purposes of the mission: It was aimed as well to encourage obedience and passivity among the enslaved. See KOLCHIN, *supra* note 138, at 220. See also Roger Biles, *A Bittersweet Victory: Public School Desegregation in Memphis*, 55 J. NEGRO EDUC. 470, 480-81 (1986) (noting the willingness of religious institutions to offer parochial education as an alternative to public education during controversy over desegregation).

152. See, e.g., SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA (Jannette L. Dates & William Barlow eds., 1990); Sander L. Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth Century Art, Medicine, and Literature*, in "RACE," WRITING, AND DIFFERENCE 223 (Henry Louis Gates, Jr. ed., 1985) [hereinafter "RACE," WRITING, AND DIFFERENCE]; Steven C. Dubin, *Symbolic Slavery: Black Representations in Popular Culture*, 34 SOC. PROBS. 122 (1987) (examining popular culture items that represent black Americans in degrading, stereotyped ways and objectify former sets of work roles and social relations).

153. The sources, of course, are endless. For overviews, see DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992); HOGGINBOTHAM, *supra* note 140; VANN WOGDWARD, *supra* note 133; Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

malignant stain on the soul of Americans of all color.¹⁵⁴ In the end, the historical narrative was obscured by an ideology of racial order; faith in the worth of all humanity was supplanted by deference to the interests of powerful men.

And of course, the myths infected the schools. Education had long been a privilege denied Africans and African-Americans; before the Civil War, every Southern state except Tennessee prohibited the instruction of slaves.¹⁵⁵ Manumission brought the promise of change, and there were glimmers of hope during Reconstruction in the extraordinary efforts of the freedmen to secure widespread access to education;¹⁵⁶ in the work of the Reconstruction state legislatures to establish open educational systems;¹⁵⁷ and in the national Republican party's attempt—however short-lived—to guarantee by federal law the right to an integrated education.¹⁵⁸ But on the whole, the promise far exceeded the reality,

154. Dr. Du Bois wrote:

The tragedy of a man who wants to be upright and just and truthful, and who is born or who has his lot cast in the South, is astonishing. His actions must contradict his religion, his political life must go contrary to the democratic framework, his natural sympathy must be curtailed and distorted by artificial race hate; and his whole sense of justice and right must be twisted into keeping Negroes poor, ignorant, and sick; and whatever of this program he shrinks from doing himself, he stops his ears and blinds his eyes and turns over to the worst elements of the white community while he sits dumb. The whole thing comes to be considered inevitable, because of a cultural pattern which says that people belonging to different racial groups cannot inhabit the same world in peace and progress.

W.E.B. DU BOIS, *Reconstruction, Seventy-Five Years After*, in DU BOIS, *supra* note 1, at 79, 87-88.

155. FONER, *supra* note 118, at 96. Foner estimates that over 90% of the South's black population was illiterate in 1860. *Id.* Accord Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 738 n.9 (1985).

156. See FONER, *supra* note 118, at 98, *passim*; W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 637-67 (1962).

157. See FONER, *supra* note 118, at 366-67. Significantly, while black Americans remained underrepresented in the Reconstruction legislatures, *id.* at 352-55, they did secure the top educational posts in four states: In the mid 1870s, African-Americans served as the Superintendent of Education for the states of Arkansas, Florida, Louisiana, and Mississippi, and in those positions "exerted a real influence on the new school systems." *Id.* at 353-54.

158. The provision outlawing discrimination in the public schools was originally a part of the Civil Rights Bill of 1874. FONER, *supra* note 118, at 532. African-Americans, particularly in the South, considered the provision vital to the bill. *Id.* at 534. However, in the face of stiff opposition from Southern whites, it was dropped from the Bill when it was reintroduced at the beginning of the 1875 session. *Id.* at 553-54. As a consequence, the Civil Rights Act of 1875 prohibited discrimination in public accommodations, but not in the public schools.

and with the coming of Redemption,¹⁵⁹ even modest gains were largely undone.¹⁶⁰

The Jim Crow system, which supplanted slavery—and which formally governed the lives of most black Americans through the first half of the twentieth century—largely filled the void left by the demise of the customs integral to the antebellum South.¹⁶¹ The rules changed, but the order—the racial hierarchy—remained stable.¹⁶² As before, the denial of equal opportunity was vital.¹⁶³ The growth of the public schools necessitated affirmative acts to suppress black education: Some of these were legal, some extra-legal. As to the former, racial segregation¹⁶⁴—combined with grotesque disparities in the allocation of educational resources¹⁶⁵ and radical differences in the focus and depth

159. Redemption is the period of Southern history marked by the end of Reconstruction—the Compromise of 1877 is generally regarded as marking its formal demise—and by the return to power of Southern Democrats. The Redeemers' efforts would largely be directed toward the renewal of the antebellum order, a project they pursued with much zeal and considerable success. See generally FONER, *supra* note 118, at 564, *passim*.

160. See *id.* at 589-98, describing the fiscal retrenchment of the Redcemer legislatures and its substantial impact on the emerging systems of public education, together with the comprehensive system of hierarchical controls that frustrated other forms of black advancement.

161. See VANN WOODWARD, *supra* note 133, at 22-23.

162. As always, "race" was the excuse, not the motivation. As Dr. Du Bois wrote, "[I]t was not . . . race and culture calling out of the South in 1876; it was property and privilege, shrieking to its kind, and privilege and property heard and recognized the voice of its own." DU BOIS, *supra* note 156, at 630.

163. Dr. Du Bois succinctly summarized the Jim Crow ideology: "Negroes can be best kept from too great and fast advance by segregating them into cheaper facilities and opportunities." W.E.B. DU BOIS, *Pechstein and Pecksniff*, in DU BOIS, *supra* note 1, at 270, 274.

164. See Heaney, *supra* note 155, at 751 n.110 (1985). Surveying the school segregation laws and practices that prevailed at the turn of the century, Judge Heaney notes that segregation was required by law in 19 states (Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia) and was permitted in two others (New York and Pennsylvania). It prevailed in practice in other states like New Jersey.

165. See *id.* at 752-53; FONER, *supra* note 118, at 534; W.E.B. DU BOIS, *The Social Effects of Emancipation*, in DU BOIS, *supra* note 1, at 71, 77-78; W.E.B. DU BOIS, *The Negro Common School in Georgia*, in DU BOIS, *supra* note 1, at 109, 143; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 169 (1975) (1935 yearbook published by the *Journal of Negro Education* reported that the average white child had two and one-half times as much spent on his annual education as the average black child, while white teachers got paid on the average twice as much as black teachers). The disparities which gave rise to one of the lawsuits ultimately consolidated in *Brown* are telling: In the fiscal

of the curricula¹⁶⁶—was both pervasive and effective.¹⁶⁷ As to the latter, a relentless scheme of orchestrated violence—directed principally at educated black Americans¹⁶⁸—achieved for white supremacy what laws alone could not. The unequivocal message to black Americans was that education afforded no way out;¹⁶⁹ the message for white Americans

year 1949-1950, Clarendon County, South Carolina spent \$179 per white pupil and \$43 per black pupil; its 2375 white pupils were taught in 12 school buildings valued at \$673,850; and its 6531 black pupils were taught in 65 buildings valued at \$194,675. *Id.* at 8. The County had 30 buses for the white students, none for the black students. *Id.* at 4.

166. "The education of blacks, when it was permitted or provided, was tailored to prepare them for their more or less ascribed positions in adult life." John U. Ogbu, *Class Stratification, Racial Stratification, and Schooling*, in *CLASS, RACE, AND GENDER IN AMERICAN EDUCATION* 163, 172 (Lois Weis ed., 1988) [hereinafter *CLASS, RACE, AND GENDER IN AMERICAN EDUCATION*]. See also NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 25, 47 (1991) (noting that education for Mississippi sharecroppers was limited principally to vocational training, as part of a plan to preserve an ample supply of cheap labor).

167. See, e.g., Fannie Allen Neal, *Confronting Prejudice and Discrimination: Personal Recollections and Observations*, in *OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA* 26, 27-28 (Harry J. Knopke et al. eds., 1991) [hereinafter *OPENING DOORS*]:

My formal education began in the "separate but equal" schools of Montgomery County. I walked ten miles a day to and from school and I saw the white children being bused to school. Sometimes the children would throw trash at us from the windows and call us all kinds of names. When we moved to Montgomery, I enrolled in school there and completed grammar school and junior high school. This was in 1935, and in Montgomery County, when you finished the ninth grade, if you were black, you couldn't go to high school unless you could get \$12.50 every three months to go to Alabama State, which at that time was a state normal school. There was no public high school for blacks anywhere in Montgomery County.

168. See Leon F. Litwack, *Hellhound on My Trail: Race Relations in the South from Reconstruction to the Civil Rights Movement*, in *OPENING DOORS*, *supra* note 167, at 3, 9-11 (1991); see also FONER, *supra* note 118, at 428 (noting the Ku Klux Klan violence directed at black churches and schools); DU BOIS, *supra* note 156, at 645-47 (describing violence against black school teachers and the burnings of black school buildings).

169. See the recollections of Pauli Murray, describing the world she encountered in North Carolina around the time of World War I:

Our seedy run-down school told us that if we had any place at all in the scheme of things it was a separate place, marked off, proscribed and unwanted by the white people. We were bottled up and labeled and set aside—sent to the Jim Crow car, the back of the bus, the side door of the theater, the side window of a restaurant. We came to know that whatever we had was always inferior. We came to understand that no matter how neat and clean, how law abiding, submissive and polite, how studious in school, how churchgoing and moral, how scrupulous in paying our bills and taxes we were, it made no

was that it was proper to hate. The myths, shielded by ignorance and brutality, were secure.

And, geographically, they were pervasive. African-Americans comprised just two percent of the population in the Reconstruction North and were largely confined to urban enclaves.¹⁷⁰ Segregation there was a fact, if not the law:¹⁷¹ The economic interests may not have been identical to the Southern concerns,¹⁷² but the goals—the suppression of opportunity and the preservation of privilege—were very much the same. This did not change—indeed it may have intensified—with the massive northern migration of African-Americans in the midtwentieth century. In at least some cities, “de facto” residential and school segregation were officially encouraged to preserve a political status quo.¹⁷³

But the triumph of the myths was never complete: Truth and the truth seeker have a certain resilience of their own. The Abolition movement, Reconstruction, and a durable bi-racial populism,¹⁷⁴ with universal educational opportunity as a recurring object,¹⁷⁵ all surfaced to embarrass the claim of natural racism—or, at the very least, to challenge its inevitability. Thus, the landscape that the Supreme Court would survey in 1954 provided an ongoing reminder that the truths of race and racism rested not in immutable instinct, but instead in political

essential difference in our place.

Litwack, *supra* note 168, at 5-6.

170. FONER, *supra* note 118, at 472.

171. See *id.* at 366 (racially mixed schools in the North were “far from common”); see also VANN WOODWARD, *supra* note 133, at 18 (noting that by 1860 segregation pervaded all aspects of the free black Northerner’s life).

172. In the agrarian South, the former master class sought principally to maintain a stable supply of cheap labor; in the North, the mercantile and later industrial capitalist classes had comparable goals, tempered—quite often to the severe detriment of black laborers—by the competing interests of “organizing” labor. See FONER, *supra* note 118, at 479-80 (summarizing the tensions between the early labor movements and the interest of black laborers).

173. See, e.g., LEMANN, *supra* note 166, at 91-93 (describing Mayor Daley’s efforts in Chicago to preserve the Ward-centered political machinery by maintaining the existing racial character of each ward); James J. Fishman & Lawrence Strauss, *Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver’s Public Schools*, 32 HOW. L. J. 627, 638 (1989) (describing effort to segregate housing in Denver).

174. See, e.g., VANN WOODWARD, *supra* note 133, at 65, noting that bi-racial populism, and elements of Southern racial moderation, survived beyond the end of the federal commitment to Reconstruction in 1877. It would be almost two decades before economic crisis, party politics, and the “permission-to-hate” signals from the federal government, including the federal courts, would temporarily halt the bi-racial movement. See *id.* at 75-82.

175. See FONER, *supra* note 118, at 592.

contingency: In seventeen states, schools were segregated by law,¹⁷⁶ but in sixteen others, segregation was formally prohibited.¹⁷⁷

B. *Maintaining the Color Line*

The roots of America's racism may well be clear, but its persistence remains somewhat a mystery. If racism is neither innate nor inevitable, why—after Emancipation, Reconstruction, and a Second Reconstruction—does the color line persist?

The initial response is that it might not: The color line which divides white and black America today is demonstrably less distinct and rigid than the one which has historically prevailed. A recent survey of the evidence on racial attitudes concludes that, at least in what they say, "white Americans are gradually becoming less prejudiced and more egalitarian."¹⁷⁸ Over the past four decades, negative stereotypes of black Americans have consistently faded,¹⁷⁹ while pro-integration sentiments have consistently risen.¹⁸⁰ By 1980, over ninety percent of white northerners and seventy-five percent of white southerners supported school integration; by 1982, the support for integration was at ninety percent for the entire national sample.¹⁸¹ A slightly earlier survey, done in 1978, indicated that roughly three-quarters of the general white population had no objection to their child being in a school where half the children were black; over forty percent had no objection if a majority of the children were black.¹⁸² And in a 1988 survey, more whites reported

176. VANN WOODWARD, *supra* note 133, at 145. Segregation was also mandated in the District of Columbia. *Id.* North Carolina and Florida extended their segregation requirements to school textbooks; in Florida, the texts were even required to be stored apart. *Id.* at 102.

177. *Id.* at 145. Four states permitted segregation as a local option; eleven states had no formal segregation policy. *Id.*

178. John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice*, in *OPENING DOORS*, *supra* note 167, at 119. The authors reviewed surveys and nationwide polls spanning the period from 1942 to 1988 to complement the results of their own behavioral research. *See also* PAUL M. SNIDERMAN & MICHAEL G. HAGEN, *RACE & INEQUALITY: A STUDY IN AMERICAN VALUES* 112 (1985); HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 193-95 (1985).

179. Dovidio & Gaertner, *supra* note 178, at 120.

180. *Id.* at 123-25.

181. *Id.* at 124. The increase in support for integration is dramatic: Among white Southerners, it has increased from two percent in 1942 and 45% in 1970; among white Northerners, from 40% in 1942 and 80% in 1970. *Id.*

182. Howard Schuman & Lawrence Bobo, *An Experimental Approach to Surveys of Racial Attitudes*, in *SURVEYING SOCIAL LIFE: PAPERS IN HONOR OF HERBERT HYMAN* 60, 67-68 (Hubert J. O'Gorman ed., 1988) [hereinafter *SURVEYING SOCIAL LIFE*]. A

that they would prefer to live in a neighborhood racially mixed "half and half" than in a neighborhood with "mostly whites."¹⁸³

But there are reasons to be cautious. The surveys consistently reveal that a significant minority in the white population—roughly twenty percent—continues to demonstrate direct, traditional racial prejudice.¹⁸⁴ Moreover, there are undeniable indications of ambivalence in the surveys,¹⁸⁵ indications that racial prejudice persists among white Americans,¹⁸⁶ but in more subtle forms.¹⁸⁷

1983 follow-up study demonstrated that these attitudes were not simply testing artifacts. *Id.* See also SCHUMAN ET AL., *supra* note 178, at 105-09 (charting the relatively stable white support for varying degrees of school integration in thirteen separate surveys from 1970 to 1983: In excess of 90% of the white respondents would not object to sending their children to a school with "a few" black children, roughly three-quarters had no objection to a school where "half" the children were black, and between 37% and 43% would not object to schools where "more than half" of the children were black).

183. Dovidio & Gaertner, *supra* note 178, at 125. The margin of preference was 13 percentage points: 46% to 33%. *Id.*

184. *Id.*

185. See *id.* at 125-27. To take one interesting example, a mid-1980s study split the national survey sample of white Americans. For the first group, presented with just two options, 94% preferred that white and black students attend the same school and just 6% preferred separate schools. For the second group, the percentages were 85% to 4%; and 11% selected the third option: "something in between." Schuman & Bobo, *supra* note 182, at 70.

186. And this racial prejudice may be on the rise. See SCHUMAN ET AL., *supra* note 178, at 200 ("It appears that the civil rights movement and the events leading up to it greatly influenced the attitudes of white people in the United States, creating effects that are still being felt, but that the effects from that earlier period are diminishing and further impetus will be needed if the momentum of change is to be sustained."); Gerald G. Pine & Asa G. Hilliard III, *Rx for Racism: Imperatives for America's Schools*, 1990 PHI DELTA KAPPAN 593, 593-95 (noting increase in overt manifestations of racial intolerance). The college campus, to take what might be an immediate example, has seen a recent upsurge in instances of racial intolerance, a trend witnessed by at least some members of the legal academy. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 433; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

187. See, e.g., Dovidio & Gaertner, *supra* note 178, at 119 (evidence suggests that modern racism is expressed "in more subtle, indirect, and rationalizable ways"); see also Thomas F. Pettigrew, *The Nature of Modern Racism in the United States*, 2 REVUE INTERNATIONALE DE PSYCHOLOGIE SOCIALE 291 (1989) (modern racism characterized by (1) rejection of gross stereotypes and blatant discrimination; (2) opposition to racial change for ostensibly nonracial reasons; (3) group-based self-interest and subjective threat; (4) individualistic conceptions of opportunity in America; (5) normative compliance without complete internalization; and (6) indirect micro-aggressions and avoidance).

It is impossible, of course, to conclusively establish the relationship between these modern forms of racism and their more virulent historical counterparts. But the evidence strongly suggests that what is manifest today represents just a stage in the evolutionary process: that modern racism is a direct descendant of the color line drawn nearly three centuries ago, and is shaped and sustained by the same political forces.

Modern racism,¹⁸⁸ like its predecessor, is not fairly attributable to individual pathology.¹⁸⁹ On the contrary, the cognitive processes that provide the foundation for individual racial prejudice—the ability to differentiate—is normal and quite benign.¹⁹⁰ But while the individual may have an innate ability to differentiate based on “race,” it is principally the work of sociocultural influences that makes “race” salient in particularized contexts.¹⁹¹ Thus “race,” itself largely a social

188. “Modern racism” is not a term of art, but is used here to denote those attitudes and behaviors that correlate first, with a positive belief in racial inferiority or racial deviance and second, with a normative belief in “race-neutral” policies and practices that result in the perpetuation of racial hierarchy. It differs from “old-fashioned” race prejudice in that its prescriptive behaviors are not explicitly race based. Thus understood, “modern racism” is actually a conflation of several distinct contemporary theories: “aversive racism,” “functional racism,” and “symbolic racism,” the last of which itself comprises several distinct views. See Dovidio & Gaertner, *supra* note 178, at 131-43. See also Donald R. Kinder, *The Continuing American Dilemma: White Resistance to Racial Change 40 Years After Myrdal*, 42 J. SOC. ISSUES 151, 154 (1986).

189. See, e.g., Dovidio & Gaertner, *supra* note 178, at 127-28 (“Researchers currently involved in the psychological study of racial prejudice generally agree that prejudice, discrimination, and racism are not necessarily a reflection of psychopathological processes.”).

190. *Id.* at 127-29. Even the personal need for self-esteem, the motivational factor associated with racism in some modern psychological theories, see, e.g., GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1954), is itself quite normal and benign.

191. See, e.g., Marc Howard Ross, *The Role of Evolution in Ethnocentric Conflict and Its Management*, 47 J. SOC. ISSUES 167, 182 (1991) (“Culturally evolved predispositions, which are independent of, or even at odds with, inclusive fitness processes, are important in explaining the strength of ethnic attachments and the intransigence of ethnocentric conflicts.”); Gary M. Ingersoll, *Race and Ethnic Relations Among High School Youth: Perspectives from Psychology*, 18 INT’L J. GROUP TENSIONS 20, 21-22 (1988) (inter-ethnic prejudice a “learned response” comprised of cognitions, emotions, and response tendencies).

Even when race is a salient factor in influencing behavior, it does not operate uniformly. See, e.g., Patricia G. Ramsey & Leslie C. Myers, *Salience of Race in Young Children’s Cognitive, Affective, and Behavioral Responses to Social Environments*, 11 J. APPLIED DEVELOPMENTAL PSYCHOL. 49 (1990) (study of cognitive, affective, and behavioral responses to racial differences among black and white children ages four to six concluded that race was a factor when children categorized people and chose friends, although the salience of race varied across tasks and dimensions); *id.* at 49 (black and white children showed similar levels of racial salience on cognitive tasks but differed in

construction,¹⁹² evokes principally the attitudes and attributes developed by social processes.¹⁹³

Moreover, it is social norms that make specific differentiating behaviors either more or less acceptable. The norm, for example, which permits a preference for persons who are subjectively similar need not be accompanied by a comparable norm for disliking persons who are "different"; indeed research indicates that biased positive attitudes (e.g., by whites toward whites) are not invariably accompanied by equally biased negative attitudes (e.g., by whites toward blacks).¹⁹⁴ Specific negative responses to differentiating characteristics seem to find expression where they appear to enjoy social sanction. "Racism" is perpetuated, in this sense, by its own long-standing tradition.¹⁹⁵

affective and behavioral patterns: White children showed stronger and more consistent same-race preferences than their Black peers did). Indeed, responses to "race" may at times be manifestations of more generalizable tendencies. See, e.g., Michael W. Giles & Arthur S. Evans, *Social Distance: Ingroup Integration and Perceived External Threat*, 14 W. J. BLACK STUD. 30 (1990) (analysis of survey data reveals that both black and white persons who felt warmer toward their own racial group also felt warmer toward the racial outgroup, leading to hypothesis that persons may possess a general predisposition toward closeness that does not distinguish between ingroups and outgroups).

192. See *infra* notes 281-388 and accompanying text.

193. See, e.g., Robin M. Williams, Jr., *Racial Attitudes and Behavior*, in SURVEYING SOCIAL LIFE, *supra* note 182, at 331-33; see also Dovidio & Gaertner, *supra* note 178, at 129-30. Significantly, it is not just white Americans who learn, through social interaction, that "race" matters: The experience of racism makes race more salient for African-Americans as well. See, e.g., Vetta L. Sanders-Thompson, *Perceptions of Race and Race Relations Which Affect African American Identification*, 21 J. APPLIED SOC. PSYCHOL. 1502 (1991) (study concluding that perceived experiences of racism have an important impact on each parameter of African-American subjects' racial identification).

194. See, e.g., Patricia G. Ramsay, *The Salience of Race in Young Children Growing Up in an All-White Community*, 83 J. EDUC. PSYCHOL. 83 (1991) (study of 93 preschool children from virtually all-white community finds that race is salient in cognitive responses; children preferred members of groups whom they saw as similar to themselves, but the converse relation between dissimilarity and rejection was not found; consistency between cognitive and affective responses increased with age); see also Dovidio & Gaertner, *supra* note 178, at 137-38 (observing that white subjects in experiments may have positive responses to white targets without correlative negative responses to black targets).

195. See Dovidio & Gaertner, *supra* note 178, at 130 (noting that Americans are socialized into a scheme with historical racist roots); see also Patricia Rooney-Rebeck & Leonard Jason, *Prevention of Prejudice in Elementary School Students*, 7 J. PRIMARY PREVENTION 63 (1986) (study of effects of cooperative group peer tutoring on the inter-ethnic relations of first and third grade children (black, white, and latino) finds that for first graders, inter-ethnic interactions and sociometric choices increased, and arithmetic and reading grades improved but found no significant changes among the third graders; difference, study posits, may be that first grade children have experienced only a short

Consistent with these understandings, evidence suggests that racism can be "unlearned" through the meaningful engagement of countervailing epistemological and moral truths. As to the first, the epistemological premises for racist behavior can be refuted through interracial learning.¹⁹⁶ When it is clear that the real meanings of "race" are social and not biological, the negative racial schema is substantially undone.¹⁹⁷ Significantly, such a result cannot be obtained merely through the insistence on "colorblindness." Rather, the insistence that "race" has no contemporary meaning resolves the impossible dissonance between the reality of racial oppression and society's egalitarian ideals only through denial.¹⁹⁸ "Race," however, does not lose its salience through mere proclamation;¹⁹⁹ one unfortunate consequence of these inauthentic attempts to resolve the dissonance may actually be the entrenchment of racist beliefs.²⁰⁰

history of competitive academic exercises and their overt ethnic prejudice may be less ingrained).

196. See, e.g., Williams, *supra* note 193, at 332; David N. Berg, *Objectivity and Prejudice*, 27 AM. BEHAVIORAL SCIENTIST 387 (1984) (examining the epistemology of prejudice and observing that the facts used to evaluate the prejudicial nature of a group's attitudes and behavior are products of intergroup dynamics, the consequences of the influence of group membership on the perception and interpretation of experience; and contending that an intergroup perspective on objectivity redresses the extreme view that all knowledge is verifiable by observation and analysis of the other group). On the impact of desegregation in this regard, see *infra* notes 396-99, 429-38 and accompanying text.

197. See, e.g., Judy H. Katz & Cresencio Torres, *Combating Racism in Education: A White Awareness Approach*, 10 EARLY CHILD DEV. & CARE 333 (1983) (noting that training that enables white people to learn about racism as a process has been proven successful in reducing negative racial attitudes and behaviors).

198. See Hayman, *Re-Cognizing Inequality*, *supra* note 5, at 18-20. In the context of the ineluctable truths of racial oppression, this ideology of race-neutrality is, as Professor Patricia Williams describes, "racism in drag." PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 116 (1991).

199. See, e.g., JANET WARD SCHOFIELD, *BLACK AND WHITE IN SCHOOL* 220 (1989) (noting that in an "officially colorblind milieu," race retains its salient features); SCHUMAN ET AL., *supra* note 178, at 201 (concluding that "America is not much more color-blind today than it ever was, and despite some small increase in the rate of racial inter-marriage, a melting-pot solution to racial differences in America has not occurred, nor is it likely to in the foreseeable future.").

200. See Judith H. Skillings & James E. Dobbins, *Racism as a Disease: Etiology and Treatment Implications*, 70 J. COUNSELING & DEV. 206 (1991) (suggesting that the notion of a disease model of racism has both heuristic and clinical utility to the extent that the "disease" is an outgrowth of the cognitive schema which treats race as "irrelevant," a schema developed in response to the dissonance caused by evidence of racial oppression in an ideologically egalitarian society). It is substantially for this reason that Professor Delgado contends that the race-neutral schema of antidiscrimination law may "heighten the predicament of people of color." Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1396 (1991) (review essay on ROY L. BROOKS,

The proclamation of competing moral truths *can* counter racist attitudes, but, at this normative level, they must directly challenge the norms on which racism is constructed. Research suggests that appeals to the ethic of individualism do not meet the moral challenge; on the contrary, this ethic seems positively correlated with negative racial attitudes and behavior²⁰¹—including a failure of interracial empathy and a tendency to discount the effects of racial discrimination²⁰²—and the reinforcement of the individualist ethos may actually exacerbate negative race-related tendencies.²⁰³

RETHINKING THE AMERICAN RACE PROBLEM). As Professor Delgado writes:

[I]f our system of laws is scrupulously fair and neutral, and black persons are still not getting ahead—well, what can be done? Legal approaches based on formal equality, then, enable those in power to blame the victims while assuring themselves and each other that they are free from any fault.

Id. (citations omitted).

201. This observation has generated a politically charged debate over the existence and meaning of “symbolic racism.” Compare Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414 (1981) with Paul M. Sniderman et al., *The New Racism*, 35 AM. J. POL. SCI. 423 (1991). The points of agreement, however, are quite substantial. See, e.g., Kinder, *supra* note 188, at 154; see also SCHUMAN ET AL., *supra* note 178, at 190-91 (surveying the literature). The critics of “symbolic racism” have confirmed the existence of a correlation between “political conservatism,” marked principally by a commitment to individualistic ideologies, and conventionally racist attitudes, like, for example, the notion that African-Americans are more lazy and irresponsible than whites. See Sniderman, *supra*, at 445. They confirm as well the finding that proponents of individualistic ideology are more likely than others to disavow institutional efforts to assist African-Americans. *Id.* The dispute is over the interpretation of these findings: the critics hold that the opposition to remediation or other interventions is driven by a race-neutral ideology, while the proponents of “symbolic racism” insist that it reflects a conjunction of that ideology and traditional racial prejudice. *Id.* at 442-46. See Kinder, *supra* note 188, at 154-55. Significantly, “symbolic racism” theorists do not proffer the view that individualist ideology is merely a convenient rationalization for conventional racist motives. *Id.*

202. See SNIDERMAN & HAGEN, *supra* note 178, at 81-102; see also Williams, *supra* note 193, at 335 (noting study classifying respondents into six categories based on their explanation of differences in black and white achievement, and finding that of the six, “individualists” were the ones most likely to oppose institutional intervention against racial discrimination).

203. See Irwin Katz & R. Glen Hass, *Racial Ambivalence and American Value Conflict: Correlational and Priming Studies of Dual Cognitive Structures*, 55 J. PERSONALITY & SOC. PSYCHOL. 893 (1988) (significant positive correlations were usually found between pro-black and humanitarianism-egalitarianism scores and between anti-black and Protestant ethic scores with some evidence of a causal relationship between the core ethic orientation and racial attitudes). Cf. Marguerite Ross Barnette, *Educational Policy Trends in a Neoconservative Era*, in BLACK EDUCATION: A QUEST FOR EQUITY AND EXCELLENCE 36, 44 (Willy DeMarcell Smith & Eva Wells Chunn eds., 1991) [hereinafter BLACK EDUCATION] (contending that “individualistic-private pursuits” may

The set of norms that does appear to provide an effective counter to racist tendencies is that which includes principles of fairness and equality.²⁰⁴ But these norms are comparatively abstract and complex²⁰⁵ and, perhaps as a consequence, apparently fragile.²⁰⁶ Modern racism, in fact, does not so much confront these norms as it does elude them.²⁰⁷ The effectiveness of egalitarian norms thus apparently depends upon their presentation in clear and unambiguous terms,²⁰⁸ when the divorce between the norm and the racist behavior is made clear, the modern subject, who may not recognize the behavior as racist, can and does reject the behavior in favor of the egalitarian norm.²⁰⁹

It is worth reiterating, however, that the norm and its application must be unambiguous. The most significant feature of modern racism is its ability to assimilate some conception of the egalitarian framework while avoiding the implications of the normative mandate for specific contexts. Thus, modern racism eludes the contradiction between racist behavior and egalitarian norms through such rationalizing devices as the diffusion of responsibility (i.e., the denial of a personal obligation to realize equality)²¹⁰ and the attribution of the racist attitude to a larger social force.²¹¹ This latter phenomenon has been documented in a recurrent tendency among white Americans to underestimate the strength of the equality norm and to overestimate racism,²¹² and may be partly

be the ideological antithesis of the search for equity).

204. See Dovidio & Gaertner, *supra* note 178, at 130-32.

205. *Id.* at 130.

206. See *supra* notes 184-87 and accompanying text.

207. See Dovidio & Gaertner, *supra* note 178, at 131, *passim*.

208. See, e.g., Fletcher A. Blanchard et al., *Reducing the Expression of Racial Prejudice*, 2 PSYCHOL. SCI. 101 (1991) (finding that exposure to strong antiracist normative influences induced the expression of stronger antiracist opinions, while overhearing others voice opinions reflecting strong acceptance of racism led subjects to express antiracist opinions less strongly than when no influence was exerted).

209. See *id.* at 131-40, 148; see also Walter G. Stephan & Cookie W. Stephan, *Emotional Reactions to Interracial Achievement Outcomes*, 19 J. APPLIED SOC. PSYCHOL. 608 (1989) (study of interracial partnership interactions on an achievement task reveals that, under conditions of low public self-awareness, black partners were given less credit for success and blamed more for failure than white partners, but that this prejudicial pattern of attributions disappeared under conditions of high public self-awareness).

210. See Dovidio & Gaertner, *supra* note 178, at 134.

211. See, e.g., Hubert J. O'Gorman, *Pluralistic Ignorance and Reference Groups: The Case of Ingroup Ignorance*, in SURVEYING SOCIAL LIFE, *supra* note 182, at 145, 161-63 (summarizing evidence that whites historically overestimate the strength of white segregationist support).

212. See, e.g., Ernest Spaight, *Racial Prejudice Toward Blacks among White Churchgoers*, 28 PSYCHOL. J. HUMAN BEHAV. 1 (1991) (individual churchgoers demonstrated less racial prejudice within themselves than they perceived existed throughout the rest of the members of the congregation).

responsible for the inflation of a minor demographic phenomenon into the myth of "white flight."²¹³

Of course, the subtle and indirect nature of modern racism does not make it any less debilitating for its victims.²¹⁴ At the same time, those very qualities do increase the need for a leadership that is both insightful enough to recognize the subtle hand of racism, and dedicated enough to articulate the demands of equality in an unambiguous and uncompromising voice.²¹⁵ In this recognition lies one of the truly heroic features of *Brown v. Board of Education*,²¹⁶ and perhaps the most tragic failing of *Freeman* and *Dowell*.²¹⁷

C. Dowell, Freeman, and the Color Line

If *Brown v. Board of Education* is a watershed in constitutional history, then *Dowell* and *Freeman* are shockingly ahistorical in two significant ways: first, in ignoring all that preceded *Brown*, and second, in ignoring all that came after. As to the first, *Dowell* and *Freeman* suggest a complete ignorance of the long history of purposeful racial discrimination that led the Court to *Brown*. These opinions do not discuss that history, do not assess its impact and seem utterly unaffected by it.²¹⁸ The meaning of centuries of oppression, including the unique

213. See Liebman, *supra* note 7, at 357 (noting that research into the "problem" of white flight—the only federally-funded desegregation research of the Reagan years—found little evidence to support the existence of an independent phenomenon); Fishman & Strauss, *supra* note 173, at 659 (summarizing evidence that presumed "white flight" in Denver was a myth). The debate over "white flight" is far from resolved. Compare Leslie G. Carr & Donald J. Zeigler, *White Flight and White Return in Norfolk: A Test of Predictions*, 63 SOC. EDUC. 272 (1990) with David J. Armor, *Response to Carr and Zeigler's "White Flight and White Return in Norfolk,"* 64 SOC. EDUC. 134 (1991).

214. See Dovidio & Gaertner, *supra* note 178, at 146-47. Professor Delgado describes traditional racism and modern racism as substantive and procedural racism, respectively; their impact upon the victims of racial oppression is essentially the same. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 104-09 (1990).

215. Cf. Judy Scales-Tront, *A Judge Shapes and Manages Institutional Reform: School Desegregation in Buffalo*, 17 REV. L. & SOC. CHANGE 119, 134 (1989-90) (Describes success of Buffalo, New York desegregation effort and notes that Judge John Curtin "sent two unambiguous messages to the Buffalo community. The first was that the schools must be desegregated. . . . The second message was that the success of desegregation rested upon the involvement of the entire community.").

216. But not, sadly, many of its progeny, including its namesake just a year later. See *supra* notes 21-128 and accompanying text.

217. See *infra* notes 455-60 and accompanying text.

218. Justice Kennedy's opinion for the Court in *Freeman* devotes just one passing sentence to the pre-*Brown* world, see *Freeman*, 112 S. Ct. at 1436; and, quite incredibly,

harms visited by generations of racial segregation, is completely elided both from the Court's epistemology and from what passes for a metaphysic.

One consequence of this willful blindness is that the Court is able to perpetuate the illusions inhering in the public/private dichotomy. Specifically, ignoring the history of the drawing of the color line permits the continued belief in the myths of race instincts and natural racism, and the realization of those beliefs in the dispositive distinction between de jure and de facto segregation.²¹⁹

The public/private dichotomy, to begin with, does not offer an authentic representation of the truths of American racism. Its manifestation in the distinction between de jure and de facto segregation is especially flawed: The notion that current racial segregation may be the result of "private" choices, either purely or principally, is contradicted by both the history of American racism and its contemporary reality. The truth is that the tradition of racial oppression, including racial segregation, has always enjoyed some form of state sanction, and that the structures and forces established by the state continue to make the tradition a living one.

This is so, importantly, even in the absence of a determinable, individualistic "intent." Indeed, modern racism no longer needs recourse to overt acts manifesting traditional racial *animus*: In the contemporary context of entrenched racial inequities, willful indifference suffices. Today, the epistemological canon of "colorblindness" combines with the *ethos* of "individual choice" to preserve America's racial hierarchy just as surely as did Jim Crow. The difference, ultimately, is one neither of kind nor degree, but merely of style.²²⁰

purports to summarize the impact of centuries of racial subordination only by quoting a forty-year-old passage from *Brown*, a passage that is itself a quotation from the district court. *Id.* at 1443. Meanwhile, Justice Scaha's concurring opinion in *Freeman* contains not one word about the centuries of forced segregation that predated *Brown*. *Id.* at 1450-54. Chief Justice Rehnquist's opinion for the Court in *Dowell* makes no mention of the world before *Brown*. *Dowell*, 111 S. Ct. at 633-38. The reader learns that Oklahoma's schools were segregated by law from the date of its admission to the Union in 1905 only by reading Justice Marshall's dissenting opinion. *Id.* at 639-40.

219. See generally Hayman *Re-Cognizing Inequality*, *supra* note 5, at 34-41; cf. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 76 ("When we ignore the history of racism in America, we fail to understand the history and present configuration of the American legal system.").

220. Cf. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 207 (1991): "If Americans had to discriminate directly against other people's children, I believe most citizens would find this morally abhorrent. Denial, in an active sense, of other people's children is, however, rarely necessary in this nation. Inequality

Ironically, the decisions in *Dowell* and *Freeman* not only deny these historical and contemporary truths, they threaten to deny as well the continued viability of the constitutional dichotomy which obscures them. The absurd suggestion that a historically insignificant passage of time and a half-hearted desegregation effort can transform de jure segregation into de facto segregation surely undermines the integrity of that distinction, in addition to being quite at odds with contemporary understandings of racism.

As for the Court's faith in "good faith," it must first be remarked that it is at least misguided and perhaps disingenuous to characterize the efforts set forth in these cases as "good faith" ones. If, indeed, these were sincere efforts by responsible public bodies, then it is perhaps time to abandon *Brown's* quixotic mission and candidly acknowledge our helplessness and despair. We would suggest, however, that based on these records, this surrender would be premature.

The Court's essential underlying preinise—that modern racism can be "unlearned" and that public authorities can play a significant role in the effort—is not inaccurate. But it is absurd to suggest that the efforts described in these cases could have had such an effect. Racist behavior, it is true, can be mitigated by meaningful intervention, specifically, by an unambiguous commitment to egalitarian norms and an unequivocal declaration of the behaviors they proscribe. But neither the national commitment to desegregation nor the local efforts in *Dowell* and *Freeman* fairly meets this description. On the contrary, the "commitment" manifest in these cases is essentially the same "commitment" that has plagued the desegregation effort from the start: It is a foot-dragging, half-hearted, two-faced effort, accompanied by much hemming and hawing, whimpering and whining, and winking and nodding. In the end, this form of "commitment" does far more to encourage modern racism than it does to deter it.

As to "the passage of time," the otherwise linear thinkers on the Court show a remarkable aptitude for modern physics in their relative assessments of the temporal periods implicated in these cases.²²¹ The history of state obstinacy and avoidance that followed *Brown* is tightly condensed in the Court's jurisprudence; simultaneously, the periods of "good faith" compliance with court decrees swell to monumental proportions, and the prospective periods of continued supervision literally extend off the chart. The centuries of pre-*Brown* history, meanwhile, collapse into a single imperceptible point. Einstein would be proud. But even granted the inherent relativity of time, it surely strains credulity to

is mediated for us"

221. Cf. Tribe, *supra* note 68.

suggest that a few years of even genuine effort on the part of the state is a "reasonable" period of time for undoing the consequences of centuries of official race-hate. Not even the most ardent supporters of *Brown* harbored that much optimism for their project.

As these distortions might suggest, these opinions do not limit their omissions to the pre-*Brown* history: They elude as well the meanings of all that has happened in the nearly forty years of post-*Brown* history. The shameless paeans to "local control" are unaccompanied by any sense of insight into the meaning of that phrase in the context of these disputes.²²² The Court's rash condemnation of "judicial tutelage" and the "draconian remedies" of federal supervision reflect no appreciation of the historical significance of this language.²²³ It is as if the past four decades never were.

Perhaps most telling of all, the Court's sanctification of "individual choice" is not tempered by any apparent awareness of the historical prominence of this concept in the desegregation struggle. The language and rationale are eerily reminiscent of the "Parker doctrine," the view—proffered by the Southern courts, among others—that *Brown* merely sanctioned individual decisions, including equally the decision to choose integrated or segregated schools.²²⁴ On remand from *Brown*, federal judge John Parker had written in the South Carolina case:

Nothing in the Constitution or in the decision of the Supreme Court takes away from the people the freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such discrimination as occurs as the result of voluntary action. It merely forbids the use of government power to enforce segregation²²⁵

222. See, e.g., VANN WOODWARD, *supra* note 133, at 153 (noting the gleeful response of Georgia Lieutenant Governor Ernest Vandiver to *Brown II*'s remand to local judges: "they are steeped in the same traditions that I am. . . . A "reasonable time" can be construed as one year or two hundred. . . . Thank God we've got good Federal judges.").

223. See, e.g., Dan T. Carter, *From Foster Auditorium to Sanders Auditorium: The "Southernization" of American Politics*, in OPENING DOORS, *supra* note 167, at 64, 69-70 (describing "the theme of constitutional oppression by a federal executive and judicial dictatorship" used by George Wallace as code for the horrors of racial integration).

224. See, e.g., KLUGER, *supra* note 18, at 751-52 (describing the "Parker doctrine," utilized as an evasive device by the Southern courts, which essentially held that *Brown* merely permitted, but did not require, racial integration, subject to individual choice).

225. *Id.* at 752.

That *Brown* did not “merely” forbid the continuation of official segregation and that *Brown* could not be evaded through the exaltation of “choice” had supposedly been settled by the Court over two decades ago.²²⁶ But both the tenor and result of the Court’s current opinions seem to place this historical truth in some doubt. On this and other scores, the Court’s memory is disturbingly unreliable; but then again, the selective nature of this amnesia suggests that other factors are at play.

Ultimately, the most distressing aspect of this historical vacuum is that the Court seems to have lost sight of its own institutional role. In this context, perhaps more than any other, the Court’s negation of its own history sends a powerful regressive message. The perception of inevitability that is so vital to the desegregation effort has now been eroded, perhaps beyond repair.²²⁷ As a consequence, the task of dismantling the structures of modern racism, and of building a new and truly equal society, is now clearly in the hands of “the people.”²²⁸ The faith is surely appreciated; still, “the people” could use a little help.

III. DOWELL, FREEMAN, AND THE CONSTRUCTION OF RACE

A. *The Construction of Race*

A decade before *Brown*, Gunnar Myrdal documented the vicious cycle of racial oppression and stratification in the epic work, *An American Dilemma*.²²⁹ The society he described was marked by absurd racial disparities in economic status, in health, and in educational opportunity, and these disparities, he noted, both fed and thrived on the living tradition of racial prejudice. And fully half a century later, it is shocking how little in this society has changed.

226. See *supra* notes 28-29 and accompanying text.

227. See Thomas F. Pettigrew, *Advancing Racial Justice: Past Lessons for Future Use*, in *OPENING DOORS*, *supra* note 167, at 165, 168 (noting that “[t]he perception of inevitability, with or without approval, is a vital ingredient in the acceptance of social change” and that the 1980s may be seen as eroding the perception that racial progress was inevitable).

228. *Freeman*, 112 S. Ct. at 1454 (Scaha, J. concurring) (urging a reversion to “our democratic heritage” and a return of control over public schooling “to locally elected authorities acting in conjunction with parents”).

229. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

America's white citizens average roughly twice the income of its black citizens;²³⁰ its black citizens are unemployed at over twice the rate.²³¹ Its white citizens are more than twice as likely as its black citizens to live in a family with an annual income in excess of \$50,000;²³² its black citizens are roughly three times more likely to live in poverty.²³³ Its white citizens have substantially lower mortality rates

230. According to the report *African Americans in the 1990's*, published by the Population Reference Bureau, overall black income is 53% of white income and the median value of homes owned by black Americans in 1987 was \$48,800, compared to \$69,300 for white Americans. Lynne Duke, *Economic Disparity Deepened During 1980s; Report Shows Both Poverty, Affluence Grew*, WASH. POST, Aug. 9, 1991, at A12; see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION PROFILE OF THE UNITED STATES 1989, at 32 (Apr. 1989) [hereinafter POPULATION PROFILE] (ratio of black-white family income in 1987 was .56); cf. Francine D. Blau & Marianne A. Ferber, *Discrimination: Empirical Evidence from the United States*, 77 AM. ECON. REV. 316, 319 (1987) (surveying the empirical studies and concluding that "even when fairly refined measures of productivity-related characteristics are held constant, blacks and women earn less than whites and men").

231. Following is a comparison of average monthly unemployment rates for black and white Americans from 1980 to 1987:

<u>Year</u>	<u>Black</u>	<u>White</u>
1980	14.3%	6.3%
1981	15.6%	6.7%
1982	18.9%	8.6%
1983	19.5%	8.4%
1984	15.9%	6.5%
1985	15.1%	6.2%
1986	14.5%	6.0%
1987	13.0%	5.3%

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 377 (109th ed. 1989) [hereinafter STATISTICAL ABSTRACT].

232. According to the Population Reference Bureau, one in seven black families had incomes above \$50,000 in 1989 compared with one in three white families. Duke, *supra* note 230, at A12.

233. In the mid-1980s, the black poverty rate rose to 31.1%, while the white poverty rate declined from 11% to 10.5%. The poverty rate for black children reached 45.6%. The number of blacks who are among the very poorest—those with incomes below half the poverty level—has increased 69% since the late 1970s. Jeffries & Brock, *African-Americans in a Changing Economy: A Look at the 21st Century*, CRISIS, June/July 1991, at 30; see also POPULATION PROFILE, *supra* note 230, at 34 (noting that in 1987, poverty rates were 10.5% for white Americans and 33.1% for black Americans). Professor Roy L. Brooks has charted overall class disparities based on 1988 Census Bureau data as follows:

than its black citizens;²³⁴ its black citizens are more likely to be murdered as young adults.²³⁵ By virtually every measure, black Americans collectively are impoverished relative to white Americans.

1. RESIDENTIAL SEGREGATION

Decades of government-sponsored housing discrimination have significantly shaped patterns of residential segregation. Contrary to the notion that racial segregation occurs because of "natural" migration patterns, ample evidence demonstrates the connection between government actions and private behavior. The lingering effects of Jim Crow laws,

Household Income	Percentage of African-American Population	Percentage of White Population
Upper class		
Over \$100,000	1.0	3.4
\$75,000-\$100,000	1.6	4.5
Middle class		
\$50,000-\$75,000	7.3	14.2
\$35,000-\$50,000	11.4	18.1
\$25,000-\$35,000	12.5	16.5
Working class		
\$15,000-\$25,000	19.4	18.6
\$10,000-\$15,000	13.1	9.8
Poverty class		
Under \$10,000	33.8	14.8

ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 37 (1990).

234. Dr. Christopher J.L. Murray of the Harvard University Center for Population Studies reports that mortality among black females between the ages of 15 and 60 is 79% higher than among white females and mortality among black males in the same age group is 189% higher than among white males. *Correspondence—Mortality Among Black Men*, 322 NEW ENG. J. MED. 205, 205 (1990). The black male mortality rate ("45Q15," the probability ratio utilized in a recent World Bank study) of 30.3% is higher than the mortality rate in Gambia, India, or El Salvador. *Id.* at 206.

235. In 1988, black Americans constituted 12.2% of the total American population, POPULATION PROFILE, *supra* note 230, at 36, but in 1989, 49.1% of all American murder victims were black Americans. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 10 (1990). Of the 8460 murder victims aged 15 to 29, 4765 (56.3%) were black, while 3498 (41.3%) were white. *Id.*

coupled with current real estate policies and practices,²³⁶ government housing starts, and lending and zoning practices,²³⁷ have isolated black Americans in the inner cities and poorer suburbs.²³⁸ “[N]early half of black Americans are still trapped in the poorest neighborhoods of central cities.”²³⁹ A not insignificant number of recent cases have recognized the interaction of discriminatory government practices and resulting residential segregation.²⁴⁰ Specific government programs designed to improve housing conditions for the poor have been shown to perpetuate patterns of racial segregation.²⁴¹

The separate residential spheres are far from equal. Approximately “a third of all poor African Americans live in substandard housing—about

236. Dorn Bishop, *Fair Housing and the Constitutionality of Measures Affecting Community Ethnicity*, 55 U. CHI. L. REV. 1229 (1988) (“[T]he real estate industry . . . has participated in a number of racially discriminatory housing policies, including racial steering and ‘blockbusting.’”); *Fair Housing Amendments Act of 1987: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Judiciary*, 100th Cong., 2d Sess. 7-8 (1988) (testimony of Althea Simmons, Director, Washington Bureau, NAACP, that the HUD report of 1980 indicated over two million instances of housing discrimination).

237. See Suja A. Thomas, Note, *Efforts to Integrate Housing: The Legality of Mortgage Incentive Programs*, 66 N.Y.U. L. REV. 940, 941 nn.10-11 (1991).

238. BROOKS, *supra* note 233, at 71.

Twenty-two years after passage of the Fair Housing Act of 1968, housing in the United States continues to be characterized by a high degree of racial segregation. . . . the average level of residential segregation between blacks and whites has declined by only seven percent in the nation’s 25 largest cities since 1950.

Julius L. Chambers, *Black Americans and the Courts: Has the Clock Been Turned Back Permanently?*, in *THE STATE OF BLACK AMERICA* 9, 17 (National Urban League, Inc. ed., 1990) [hereinafter *STATE OF BLACK AMERICA*].

239. Richard Kirkland, Jr., *What We Can Do Now*, FORTUNE, June 1, 1992, at 41.

240. See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) (holding that the city’s action of locating almost all subsidized public housing projects in Southwest Yonkers created an extreme segregative effect), *cert. denied*, 486 U.S. 1055 (1988); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 423-25 (8th Cir. 1985) (ruling that the State of Arkansas maintained the Little Rock School District as the only school district for black citizens and thus created a segregated residential pattern in Little Rock), *cert. denied*, 476 U.S. 1186 (1986); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986) (finding that the city had discriminatorily provided municipal street paving and maintenance in “white” and “black” areas).

241. James W. Fossett & Gary Orfield, *Market Failure and Federal Policy: Low-Income Housing in Chicago 1970-1983*, in *DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION* 158 (Gary A. Tobin ed., 1987) (correlating Housing and Urban Development’s section 8 housing vouchers with racial segregation). See also *Young v. Pierce*, 628 F. Supp. 1037 (E.D. Tex. 1985).

two-and-a-half times the proportion of poor whites living in such circumstances."²⁴²

Residential segregation is an isolating phenomenon on more than the obvious level. Substantial research documents that segregation in predominantly minority communities is associated with lower quality schools, increased health and safety risk factors, and inadequate provision of government services.²⁴³ Housing segregation may substantially impair employment opportunities.²⁴⁴

2. SOCIOECONOMIC STRATIFICATION

The scope and depth of socioeconomic inequality experienced by black Americans is staggering. By every measure, black economic progress has slowed in the past decade.²⁴⁵ "The median net worth of white Americans (\$47,815) is more than ten times that of blacks (\$4,606)."²⁴⁶ According to 1989 Census Bureau data, median black family income stayed constantly at sixty percent of that of median white family income for the decades 1969-89.²⁴⁷ "[T]he portion of blacks living in poverty in 1987 was thirty-three percent, three times the white rate and higher than in 1969."²⁴⁸ A significantly greater percentage of black children than white children live in poverty.²⁴⁹ Racial disparities in

242. John E. Jacob, *Black America, 1989: An Overview*, in STATE OF BLACK AMERICA, *supra* note 238, at 1, 2.

243. Douglas Massey et al., *The Effect of Residential Segregation on Black Social and Economic Well-Being*, 66 SOCIAL FORCES 29, 30 (1987).

244. Stanley P. Stocker-Edwards, *Black Housing 1960-1980: The Development, Perpetuation, and Attempts to Eradicate the Dual Housing Market in America*, 5 HARV. BLACKLETTER J. 50, 87 (1988).

245. "With a [Racial Parity Index] of 100 measuring full parity, the scale stands at only 47. That is a drop from 51.2 in 1967, so the gap has widened in the last two decades." Jacob, *supra* note 242, at 5.

246. Rochelle L. Stanfield, *Black Frustration*, NAT'L J., May 16, 1992, at 1162.

247. *Id.*

248. The black underclass is growing. Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1027 (1989). "More than 30 percent of blacks were in poverty in 1989, and while the number was stable during the 1980s, the depth of peverty increased (that is, those who were peor were further behind)." Phillip L. Clay, *Housing Opportunity: A Dream Deferred*, in STATE OF BLACK AMERICA, *supra* note 242, at 74. "Black family poverty is triple the white rato, and it will take 169 years at the current rate of change for black and white families to have the same peverty rate." Jacob, *supra* note 242, at 6.

249. Robert J. Taylor et al., *Developments in Research on Black Families: A Decade Review*, 52 J. MARRIAGE & FAM. 993, 1001 (1990). See also David J. Eggebeen & Daniel T. Lichter, *Race, Family Structure, and Changing Poverty Among American Children*, 56 AM. SOC. REV. 801, 809 (1991) (In 1960, "[b]lack children were 4.6 times

unemployment, underemployment, and discouragement have widened.²⁵⁰

Even when blacks and whites receive equivalent educations, whites have significantly greater employment opportunities.²⁵¹ Job advancement and economic opportunities for black Americans are similarly limited,²⁵² and black Americans have been systematically excluded from positions of power.²⁵³

3. RACE, LIFE, AND DEATH

A recent study of excess mortality rates notes that “[d]eath rates for those between the ages of 5 and 65 were worse in Harlem than in Bangladesh.”²⁵⁴ The root causes of this mortality rate, the study concluded, were “vicious poverty and inadequate access to the basic health care that is the right of all Americans.”²⁵⁵ Harlem’s population is ninety-six percent black.²⁵⁶ The situation in Harlem is not an isolated

more likely than white children to be deeply poor and 3.5 times more likely to be relatively poor. What is surprising—and discomfoting—is that these black/white poverty ratios have changed very little over the ensuing decades.”); Tom Wicker, *The Persistence of Inequality*, N.Y. TIMES, Mar. 8, 1992, § 7, at 1 (“Nearly half—44.8 percent—of black children live below the poverty line, compared to only 15.9 percent of white children.”).

250. In 1988, unemployment rates for inner-city black male teenagers were “40%-50%, three times higher than in 1960.” Jewelle T. Gibbs, *Young, Black, in Critical Condition*, L.A. TIMES, May 29, 1988, § 5, at 1. In 1987, the unemployment rate for black adults was 15%, twice the rate for white adults. David Treadwell & Barry Bearak, *Marches Off Target?; Covert Bias of '80s Splits Rights Effort*, L.A. TIMES, Jan. 31, 1987, at 1.

251. Wicker, *supra* note 249 (“Among men with four years of college, blacks earn \$798 for each \$1,000 of income earned by whites at the same level of education; black college men earn only a few dollars more than white men who went no farther than high school.”).

252. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 539 (1988) (“About one-third of all [law schools] have no black faculty members. Another third have just one.”). Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1264 (1991) (“While blacks make up twelve percent of the population, they own only two percent of all business firms.”).

253. See NAACP Legal Defense and Education Fund, *The Color of Justice*, A.B.A. J., Aug. 1992, at 62 (“Of the nearly 12,000 full-time state court judges across the country [in 1991], only 465 were African American.”); Talbot D’Alemberte, *Racial Injustice and American Justice*, A.B.A. J., Aug. 1992, at 58, 60 (“Only 4.3 percent of 837 federal judges are black, and progress has stalled because only 16 black . . . federal judges have been appointed in the last 11 years.”).

254. Colin McCord & Harold P. Freeman, *Special Article—Excess Mortality in Harlem*, 322 NEW ENG. J. MED. 173, 176 (1990).

255. *Id.* at 177.

256. *Id.* at 173.

phenomenon: Researchers found "strikingly higher rates of death and disease in Philadelphia's poorer communities," communities which, coincidentally, had the highest concentrations of nonwhite residents.²⁵⁷ Nationally, mortality among black females between the ages of fifteen and sixty is seventy-nine percent higher than among white females. American white males have a sixteen percent probability of dying between the ages of fifteen and sixty; American black males have a 30.3% probability, a level in excess of the mortality rates among men in some of the poorest developing nations in the world.²⁵⁸

Significant interracial differences exist in virtually all rates of morbidity, mortality, and disease. The average life expectancy for blacks was 69.2 years in 1988, a decrease from the historical high of 69.5 years in 1985, while white life expectancy remained constant at 75.6 years.²⁵⁹ The infant mortality rate is twice as high for blacks as whites.²⁶⁰ Blacks disproportionately suffer from infectious diseases,²⁶¹ cancer,²⁶² kidney

257. *Correspondence—Excess Mortality in Harlem*, 322 NEW ENG. J. MED. 1606 (1990). The researchers reported that:

Like Harlem, Lower and Upper North Philadelphia also have the city's highest concentrations of nonwhite residents (83.4 and 74.9 percent). Death rates standardized for age are almost twice as high in Lower and Upper North Philadelphia as in the city's wealthiest communities. For some causes of death, such as homicide or legal intervention (injury caused by a law-enforcement agent), tuberculosis, and bronchitis or asthma, the disparity is fourfold to sevenfold. Infant mortality rates in Lower and Upper North Philadelphia are twice the national rate and on a par with those in much of the Third World.

Id. at 1606 (citations omitted).

258. *Correspondence—Mortality Among Black Men*, 322 NEW ENG. J. MED. 205, 205-06 (1990). Certain popular myths notwithstanding, over 80% of the differential between white and black men is due to causes other than homicide. *Id.* at 206.

259. Robert Byrd, *Heart Disease, Homicide Help Cut Blacks' Life Expectancy*, SEATTLE TIMES, July 26, 1991, at B4. "In general, black Americans have a death rate one and one-half times that of whites, and black life expectancy is declining—from 69.7 years in 1984 to 69.4 years in 1986. During that period, life expectancy for the entire population remained constant at 75 years." Lo Salle D. Loffall, Jr., *Health Status of Black Americans*, in STATE OF BLACK AMERICA, *supra* note 238, at 122.

260. Oswald Johnston, *Bulk of Americans Living Longer But Blacks Are Not*, L.A. TIMES, Apr. 9, 1991, at A1.

261. Christine Gorman, *Why Do Blacks Die Young?*, TIME, Sept. 16, 1991, at 50 ("Black toddlers are three times as likely as white youngsters to die from meningitis, pneumonia or influenza."); Rebecca Perl, *Resurgent Tuberculosis Strikes Minorities Hard*, ATLANTA J. CONST., May 1, 1992, at A8 (approximately 70% of the 25,000 tuberculosis cases in 1990 occurred in minorities).

262. Suzanne P. Kelly, *Blacks at Higher Risk for Cancer*, STAR TRIB., Dec. 8, 1991, at 1B (Research conducted by the American Cancer Society "from 1978 to 1981 found that the cancer rate for blacks was 372.5 per 100,000, compared with 335 per 100,000 for whites."). Significant racial differences exist in survival rates: "The overall

failure,²⁶³ AIDS,²⁶⁴ cardiovascular²⁶⁵ and cerebrovascular²⁶⁶ disease, and diabetes.²⁶⁷

Substantial racial differences exist in access to preventive health care. By a variety of measures—average annual physician visits, insurance coverage for medical care, and availability of health services in the residential area—many more blacks than whites receive substandard health care.²⁶⁸ The American Medical Association Council on Ethical and Judicial Affairs has concluded that blacks receive less aggressive medical treatment than whites.²⁶⁹

Here as elsewhere, the power of the political culture—a power even to remake the “biological” individual—cannot be overlooked.²⁷⁰ This

five-year cancer survival rate for blacks is 38 percent, compared with a 52 percent rate for whites.” *Id.*

263. “The rate of kidney failure for African-Americans is three times the national average.” Monte Williams, *This Research Group Fights To Reduce Blacks' Vulnerability to Disease*, CHI. TRIB., Sept. 5, 1990, at 16. Yet, “[a] study commissioned by the State Health Department has found that blacks are less likely than whites to get on waiting lists for kidney transplants in the New York metropolitan area and less likely to receive a transplant in hospitals throughout the state.” David Zinman, *Kidney Treatment: Is There Bias?*, NEWSDAY, Apr. 30, 1991, at 55.

264. Gorman, *supra* note 261, at 50 (“Black men are three times as likely [as white men] to contract AIDS.”).

265. “Deaths from diseases of the heart are 40 percent more frequent in blacks.” Williams, *supra* note 263, at 16.

266. Domenico Inzitori et al., *Racial Differences in the Anterior Circulation in Cerebrovascular Disease; How Much Can Be Explained by Risk Factors?*, 47 ARCH. NEUROL. 1080 (1990).

267. Centers for Disease Control, *Prevalence, Incidence of Diabetes Mellitus—United States, 1980-1987*, 264 JAMA 3126, 3127 (1990) (Each year during the years surveyed, 1980-87, the reported incidence of diabetes mellitus was higher for blacks than whites: “In 1987, prevalence for black females was more than twice that for white females . . . ; for black males, the prevalence was about one third higher than for white males.”).

268. Leffall, *supra* note 259, at 121.

269. Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care*, 263 JAMA 2344, 2345 (1990) (reviewing a variety of studies examining the provision of medical services in cardiology—“the black men were only half as likely to undergo angiography and one third as likely to undergo bypass surgery as the white men”; renal disease—“blacks accounted for 33% of patients with end stage renal disease, but only 21% of patients who received kidney transplants”; internal medicine—blacks were much less likely to receive intensive care treatment for pneumonia; and obstetrics—in clinically comparable populations, blacks were given cesarean sections less than whites).

270. *See, e.g.*, James A. Thomas & James E. Dobbins, *The Color Line and Social Distance in the Genesis of Essential Hypertension*, 78 J. NAT'L. MED. ASS'N 532 (1986) (noting that the impact of culture and color-consciousness politics on biology is pervasive and that race as a risk factor for hypertension may be dependent on the impact of racial definitions on the generation of emotions).

is true in certain obvious senses—national health care or insurance is clearly one—but it is true in less obvious senses as well. The desegregation of North Carolina hospitals affords an example. In 1960, black physicians made up 2.2 percent of all U.S. physicians.²⁷¹ There were few modern hospitals where black physicians could practice, and white physicians did not necessarily make their services available to black patients. In the South in particular, the U.S. Civil Rights Commission determined that eighty-five percent of the hospitals practiced some form of discrimination.²⁷² “White” medicine was conflicted:

In the area of race relations, southern white physicians confronted two conflicting sets of values within themselves. On the one hand, they attempted to uphold the high moral and religious precepts embodied in the Hippocratic and Maimonidean medical credos. On the other hand, they yielded to economic, social, and sexual jealousies; to considerations of prestige and conformity; and to group racial prejudices. . . . Some white physicians tried to pursue the high ideal of compassionate medical care. . . . In contrast to these laudable efforts, a social compact of white physicians, lawyers, courts, and hospital administrators perpetuated the practice of racism throughout much of southern medicine. At times, they rationalized it as the need to maintain the independence of local hospital governing boards, but their racism was as pernicious and strongly defended as that in almost any other aspect of southern life.²⁷³

In North Carolina, hospitals in Greensboro²⁷⁴ and Wilmington²⁷⁵ were desegregated by federal judicial decree, and hospitals in Charlotte desegregated directly after the Greensboro order.²⁷⁶ The abysmal state of health care for blacks²⁷⁷ improved after hospital desegregation.²⁷⁸ Although it is impossible to “quantify the health benefits of medical

271. Edward C. Halperin, *Special Report—Desegregation of Hospitals and Medical Societies in North Carolina*, 318 *NEW. ENG. J. MED.* 58 (1988).

272. *Id.*

273. *Id.* at 62-63.

274. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963).

275. *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964).

276. Halperin, *supra* note 271, at 61.

277. *See id.* at 58 (noting that “[p]overty, the lack of black physicians, the lack of white physicians caring for blacks, and inferior hospital services all contributed to high morbidity and mortality rates among blacks” in 1960).

278. *Id.* at 62.

desegregation as an isolated event,²⁷⁹ especially given the palsyng effects of the continuing economic distress of minority populations, some trends are undeniable: Rates of infant, neonatal, fetal, and maternal death fell during desegregation; the probability of a black woman being attended by a physician at delivery increased; and overall, the large gap in life expectancy between white and nonwhite women began to narrow.²⁸⁰

B. The Construction of Race and Academic Achievement

The vast socioeconomic gap between black Americans and white Americans has a corollary in educational achievement.²⁸¹ America's white citizens are more likely than its black citizens to receive undergraduate and graduate education;²⁸² its black citizens are more likely to be suspended, expelled, or failed from high school.²⁸³ America's white citizens consistently out-score its black citizens on standardized assessments of aptitude and achievement,²⁸⁴ its black citizens are disproportionately represented in remedial education classes

279. *Id.*

280. *Id.*

281. As this Article seeks to demonstrate, that correlation is neither a coincidence nor a reflection of innate black/white differences; on the contrary, the disparity in educational achievement is simultaneously a reflection and a source of the continuing disparity between black and white Americans in the broader culture. See *infra* notes 331-88 and accompanying text.

282. According to statistics of the U.S. Bureau of the Census, in 1987, 17.1% of the white American population completed one to three years of college and 19.9% completed four years or more; the percentages for black Americans were 15.7% and 10.7% respectively. STATISTICAL ABSTRACT, *supra* note 231, at 131. In 1988, 1.3% of the white American population was enrolled full or part time in a graduate program; the percentage of black Americans similarly enrolled was .75%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SCHOOL ENROLLMENT—SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS: OCTOBER 1988 AND 1987, at 35 (1990). For a more comprehensive review of the educational disparities between black and white Americans, see BROOKS, *supra* note 233, at 81-82.

283. A study of 174 school districts with at least 15,000 students and black enrollment of at least one percent determined that black students were more than twice as likely as white students to be corporally punished or suspended and 3.5 times more likely to be expelled. KENNETH J. MEIER ET AL., RACE, CLASS AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION 4-5 (1989). Black students, remarkably, were just 18% more likely to drop out of school and 27% less likely to graduate. *Id.*

284. See, e.g., Sylvia T. Johnson, *Test Fairness and Bias: Measuring Academic Achievement Among Black Youth*, in BLACK EDUCATION, *supra* note 203, at 76, 77-84. The difference is generally estimated at about one standard deviation. See SCHOFIELD, *supra* note 199, at 75.

and are more likely to be labeled "mentally retarded."²⁸⁵ These broad differences are particularly acute in the fields of math and sciences, where America's black citizens are offered fewer courses as primary and secondary school students; demonstrate less achievement and aptitude at the conclusion of their schooling; and are underrepresented as undergraduate majors and as bachelor's, master's, and doctoral degree recipients in these fields.²⁸⁶

The relentless disparity in white and black achievement demands some explanation. Two sets of factors, independently or in some gestalt, are conventionally cited. The first may be roughly described as social conditions and the second as innate abilities. The decision to assign more or less explanatory value to these factors has far reaching political implications. If social factors provide the essential account, either alone or in their interaction with the biological individual, then some responsibility for the inequity may be fairly fixed with the dominant social classes, who may also be justly charged with affording some redress. The moral premise for state-ordered desegregation rests at least partly in this understanding. If, on the other hand, the account is reduced to innate individual propensities, then responsibility for achievement disparity must be fixed with the individual and her Creator; in this scheme, redress by the dominant classes becomes less a matter of fairness or justice and more a matter of charity. The effort to achieve equality through desegregation is, in this view, at best futile, and at worst unnatural.

1. THE BIOLOGICAL ACCOUNT

In some quarters, the appeal of the biological explanation is undeniable: It affords the observer an easy accounting, but an accounting without accountability. The biological account offers, first, all the elegant persuasiveness of simple-minded reductionism: It is a theory made for

285. See, e.g., MEIER ET AL., *supra* note 283, at 4-5 (noting curricular tracking differences for black and white students); LEWONTIN ET AL., *supra* note 131, at 118 (noting that black Americans, like other "racial" minorities, are disproportionately represented among those labeled "mentally retarded" and that white Americans have been assigned, on the average, higher IQ's); Asa G. Hilliard III, *Misunderstanding and Testing Intelligence*, in ACCESS TO KNOWLEDGE: AN AGENDA FOR OUR NATION'S SCHOOLS 145, 148-49 (John I. Goodlad & Pamela Kcating eds., 1990) [hereinafter ACCESS TO KNOWLEDGE] (noting disproportionate placement of African-American students in classes for the educably mentally retarded, a practice that ultimately culminated in an investigation by the National Academy of Sciences Panel on Placing Children in Special Education); see also *infra* notes 407-09 and accompanying text.

286. Jeannie Oakes, *Tracking in Mathematics and Science Education: A Structural Contribution to Unequal Schooling*, in CLASS, RACE, AND GENDER IN AMERICAN EDUCATION, *supra* note 166, at 106, 107-08.

quick mass consumption.²⁸⁷ The single-variable explanation is not plagued by the complexities that inhere in multifactored theories of social construction or interrelational development, and its single variable—the biological individual—may be delineated in the sort of concrete and determinate language that eludes those theorists who would point to social “forces” and interactive “gestalts.”²⁸⁸

But even more attractive, in some quarters, is the message: The biological explanation legitimizes both the processes and the products of social organization. Individuals and groups are aligned in the social order as the just consequence of their innate talents; hierarchy becomes natural, inequality part of Creation’s plan.²⁸⁹

But the biological explanation is plagued by both conceptual and empirical flaws: It is, simultaneously, both meaningless and wrong. As

287. But, of course, elegance is not a virtue—not when it denies the inherent complexity of human experience. See, e.g., Phillip E. Converse, *Generalization and the Social Psychology of “Other Worlds,”* in *METATHEORY IN SOCIAL SCIENCE: PLURALISMS AND SUBJECTIVITIES*, 42, 47-49 (Donald W. Fiske & Richard A. Schweder eds., 1986) [hereinafter *METATHEORY IN SOCIAL SCIENCE*] (noting that a “major difference between the stuff of social science and the stuff of a science like physics [is that for the former] the subject matter is more complex, and by some orders of magnitude”). Moreover, “[c]omplexity need not be a reflection of some deficiency in the modes of discourse or analysis but may well be an inherent property of the systems being studied.” Frank M. Richter, *Nonlinear Behavior*, in *METATHEORY IN SOCIAL SCIENCE*, *supra*, at 284, 292. Certainly this is the case for “race”; it would be the case for virtually any description of personhood. See Paul F. Secord, *Explanation in the Social Sciences and in Life Situations*, in *METATHEORY IN SOCIAL SCIENCE*, *supra*, at 197, 218:

[B]oth persons and social phenomena are stratified into many levels. They can be seen as having physical, biological, psychological, and sociological levels, for example, although of course other categorizations are possible. Because persons are complex entities with internal states, they must be treated holistically; moreover, they behave within a set of complex social structures. These properties of the world demand that application be interdisciplinary—no one discipline can aspire to explaining social behavior in real-world settings.

In short, there simply are no single definitions—no “covering laws”—to do all that “race” has done and continues to do. “Many a realist,” it has been observed, “wants concepts to name entities that exist in nature quite apart from man’s construing. Social inquiry . . . would be better off without that aspiration.” Lee J. Cronbach, *Social Inquiry by and for Earthlings*, in *METATHEORY IN SOCIAL SCIENCE*, *supra*, at 83, 97.

288. Cf. Williams, *supra* note 193, at 345 (noting general desire of “an individualistic and experimental psychology that wished to exclude complex and ‘vague’ sociocultural factors from laboratory studies and detached individual subjects”). On the other hand, even biological definitions must admit certain contingencies; DNA itself is a “complex contingent mechanism.” Roy D’Andrade, *Three Scientific World Views and the Covering Law Model*, in *METATHEORY IN SOCIAL SCIENCE*, *supra* note 287, at 19, 21.

289. In simple terms, the approach is known as “blaming the victim.” See Robert B. Hill, *Structural Discrimination: The Unintended Consequences of Institutional Processes*, in *SURVEYING SOCIAL LIFE*, *supra* note 182, at 353, 365.

to the first, the biological account, somewhat more than socioeconomic explanations, tends to hypostatize the terms of the achievement inquiry. This is true not only for the criteria of achievement—for “merit” and its many proxies, including “intelligence”—and for the measurement process—for “difference” and its single-axis reductions to “inferior” and “superior”—but is equally true for the principal variable in the inquiry, i.e., for “race.” None of these terms can claim integrity independent of the political contingencies which construct them; all derive their meaning both from specific subject-object interactions and from the larger political context in which those interactions take place.²⁹⁰ To speak, then, of “racial difference” in “achievement” (or “aptitude” or “merit”) without critical consideration of the ways in which the relevant terms are constructed is to deprive the discourse of its central meanings: The rhetoric of achievement is invariably reduced to abstract tautology.

The debate over race differences in intelligence is illustrative. Consider first the concept of “intelligence.” There is, of course, no universally accepted definition of “intelligence,” a fact that immediately threatens to turn any discussion of the topic into an exercise in pedantics. With due regard for this risk, this Article proposes as its working definition of intelligence that offered by Ashley Montagu, i.e., that intelligence is “the capacity to develop responses to any and every challenge of the environment.”²⁹¹

Three aspects of this conception warrant immediate attention. First, while intelligence may be viewed as a “capacity,” it is not typically conceived of as static. Intelligence itself is indistinguishable from the exercise of intellect; it is organic, it is a process, and it can be learned.²⁹² Second, intelligence necessarily derives its meaning from its context: As the demands of the environment change, so too will change the meaning of “intelligence.”²⁹³

Intelligence, then, is not constant—not across time, not across context. But if intelligence is essentially relative in this spatiotemporal sense, it is not essentially relative as among groups or individuals: inherently, there is no need for this type of comparison and certainly no need for hierarchical ordering. This is the third and final aspect of the concept of intelligence that demands attention: The concept necessitates

290. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990) (contending that difference is not inherent and immutable but rather is constructed in the course of relationships).

291. Ashley Montagu, *The Sociobiology Debate: An Introduction*, in *BIOLOGY, CRIME AND ETHICS* 24, 32 (F. Marsh & J. Katz eds., 1985).

292. See Hayman, *Presumptions of Justice*, *supra* note 5, at 1223-24.

293. See, e.g., Hilliard, *supra* note 285, at 153-55 (noting the need to understand “intelligence” in cultural and political context).

the identification of a capacity for response, but it does not necessitate the linear differentiation of capacity, either for specified responses or in general. If this sort of ordering based on intelligence is required, then it is for political reasons, and not because of the demands of the scientific construct.²⁹⁴

When intelligence testing takes place, and when individuals or groups are "ordered" by their performance, two profound fallacies are committed, regardless of the apparent "validity" or "reliability" of the assessment process.²⁹⁵ The first is the fallacy of reification, of pretending that this abstract, complex, contingent process can be identified as a single entity, and then treating that entity as if it were something real. The fallacy is compounded by the pretense that intelligence, even as a real entity, can be measured by determinable criteria, and by then treating the measurement results as if they were in fact the entity—as if IQ, for example, were in fact "intelligence" (and as if, of course, "intelligence" were itself something real).²⁹⁶

The second fallacy is the fallacy of ranking, of insisting that objects can, indeed must, be ordered in a linear progression from lowest to highest. Abstract ability is not merely quantified for one individual or group; it is actually used for the normative comparison of individuals and groups. "Difference," made determinable, is thus transformed into "better" and "worse."

These fundamental errors are compounded by the inevitable biases in assessment schemes.²⁹⁷ And yet "intelligence" testing continues,

294. GOULD, *supra* note 150, at 24.

295. *See id.* at 23-26.

296. *See* Johnson, *supra* note 284, at 76, 87 ("We do not measure minds the way we measure the length of a room.").

297. In the United States, the standard assessments of intelligence, scales for the measurement of IQ, seem to measure adequately only one or two broadly defined factors: verbal comprehension and, at times, perceptual organization. Hale, *Evaluation of Intelligence, Achievement, Aptitude, and Interest*, in *PSYCHOLOGICAL EVALUATION OF THE DEVELOPMENTALLY AND PHYSICALLY DISABLED* 41, 48-50 (Vincent B. Van Hasselt & Michel Hersen eds., 1987). These limited factors are measured only through norm-reference to Western conceptions of middle-class achievement. *Id.* at 52. The result has been a body of literature establishing the class and cultural biases of most IQ instruments; the evidence has been so overwhelming that the courts, not generally known for their receptiveness to social science proof, *see* Hayman, *Presumptions of Justice*, *supra* note 5, at 1250-51, have been compelled to recognize the problem. *See, e.g.,* Larry P. v. Riles, 495 F. Supp. 926, 952-60 (N.D. Cal. 1979) (enjoining the use of nonvalidated IQ tests as criteria for placement of black school children in classes for the educably mentally retarded), *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (affirming on statutory grounds but reversing Fourteenth Amendment determination); *In re William L.*, 383 A.2d 1228, 1243 n.26 (1978) ("Experts generally agree that socially and culturally disadvantaged people tend to score lower on standardized intelligence tests, which suggests

largely now through habit, and—outside the scientific community—without much insight or reservation.²⁹⁸

Implicit in this critique of the conventional uses of “intelligence” is a parallel critique of the positivist constructions of “difference.” Such constructions, which seek to fix the locus of “difference” in the biological individual, ignore the fundamentally relative nature of the term. “Difference,” first, is necessarily relative in the sense that it develops only from a subject-object relationship; that is, “difference” requires subject to assign the attribute to the object.²⁹⁹ In the case of “racial differences,” it is of paramount significance that they have been largely defined by a dominant subject—the white majority—which, through deliberate attempts to subordinate and through the failure of comprehension that resulted from minority exclusion, has not always constructed “difference” in a way that fairly represented the minority object.³⁰⁰

that cultural bias may affect the result.”). Repeatedly, efforts have been made to rid the assessment schemes of their bias; these efforts—not surprisingly, given the nature of the task—have inevitably failed. See, e.g., Albert J. Berkowitz, *Mental Retardation: A Broad Overview*, in THE RETARDED OFFENDER 47, 49 (Miles B. Santamour & Patricia S. Watson eds., 1982) (observing that “[t]here is little disagreement that racial and social biases have not been adequately addressed or accounted for in evaluation procedures”); Daniel J. Reschly, *Evaluation of the Effects of SOMPA Measures on Classification of Students as Mildly Mentally Retarded*, 86 AM. J. MENTAL DEFICIENCY 16 (1981) (noting that changes in evaluation instruments and methodologies aimed at eliminating cultural bias have not been entirely successful).

298. An illustrative byproduct of the fixation with measured intelligence has been the periodic re-creation of mental retardation. There were at one time more “mentally retarded” people than there are today, but with each change in the assessment scheme, thousands of “mentally retarded” people no longer had mental retardation. Today, persons who score two standard deviations below the mean on standardized intelligence scales and who exhibit “deficiencies” in “adaptive behavior” are considered “mentally retarded.” AMERICAN ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (Herbert J. Grossman ed., 1983) [hereinafter CLASSIFICATION IN MENTAL RETARDATION]; see also AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) 31-32 (3d ed. rev. 1987). In 1959, the behavioral deficiency component was added, shrinking the class by adding criteria for membership. In 1973, the IQ component was adjusted from one standard deviation to two standard deviations below the mean, shrinking the class this time by making the existing criteria more rigorous. See CLASSIFICATION IN MENTAL RETARDATION, *supra*, at 5-7. See generally Hayman, *Presumptions of Justice*, *supra* note 5.

299. See, e.g., MINOW, *supra* note 290; Hayman, *Presumptions of Justice*, *supra* note 5.

300. On the contrary, minority “difference” historically has been reduced to inferiority or deviance:

Conventional mainstream educational research has stabilized a discourse around the “deviance” of disadvantaged groups in terms of a variety of

"Racial differences" are also relative in a second sense in that they are matters of degree, not kind. The human experience is in most ways a common one, and this is as true between "racial" groups as it is within "racial" groups. But some groups, as groups, have been more differentiated than others: They have been re-created through discriminatory processes as particularly "different" groups,³⁰¹ as especially "discrete and insular" minorities.³⁰² Such processes, over time, exaggerate both the reality and the perception of "difference," obscuring the subject and object's common humanity.

But although difference is, in these twin senses, necessarily relative, the relationship it signifies is not necessarily norm-referenced, reducible, or hierarchical. These have been the tragic distortions visited upon the concept by the biological conception of difference: the insistence upon an "objective" normative baseline; the reduction of departures from this baseline to a single-axis continuum; and the conception of this continuum as a vertical one, as a reflection of relative worth.

As it pertains to differences in "intelligence," what results is a linear differentiation of groups and individuals that ignores the possibility, and the value, of endless multifactored variation in adaptive processes. It is an exercise that serves only political ends: The single-axis continuum does not authentically represent intellectual "difference"; it does not facilitate an accurate accounting for "difference"; and it provides no assistance to those who must respond to "difference."³⁰³ After all, for those involved

measures of differences such as I.Q. tests, originally calibrated on the normative "performance" of middle-class white males. Having arrived at these measures of individual differences, mainstream researchers then turned around and typecast whole social groups. . . . [G]enetic differences were conceptualized as determining the hierarchy of classes and races and men's superiority over women. On the terrain of education, proponents of mental testing, social efficiency, and scientific management . . . went somewhat further and argued that minorities and immigrant men and women were a threat to the social order.

Cameron McCarthy & Michael W. Apple, *Race, Class and Gender in American Educational Research: Toward a Nonsynchronous Parallelist Position*, in CLASS, RACE, AND GENDER IN AMERICAN EDUCATION, *supra* note 166, at 9, 12 (footnotes omitted).

301. See John U. Ogbu, *Overcoming Racial Barriers to Equal Access*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 59, 61-64 (noting that racial stratification—the construction of instrumental and expressive barriers and responses to those barriers—has largely dominated the experience of "involuntary" minorities in a way not experienced by of immigrant minorities).

302. Cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

303. See, e.g., Hilliard, *supra* note 285, at 149 (observing that intelligence testing serves no valid pedagogical purpose).

in the learning process, "it's not how smart you are, but how you are smart."³⁰⁴

Finally, the flaws that inhere in conventional usages of "intelligence" and "difference" inhere as well in the concept of "race." To begin with, the biological construction of "race" is essentially a practical one. It consists principally of "racial" categories established according to major skin color, with borderline cases distributed among these "races"—or designated as new "races"—"according to the whim of the scientist."³⁰⁵ Ultimately, the classifications do not much matter, because the "race" created by biology has, measured on its own terms, very limited significance.³⁰⁶ Certain genetic differences apparently account for limited physiological differences among the "races," and there are, in certain medical contexts, concomitant needs to recognize them.³⁰⁷ But even in the realm of the natural sciences, the origins of "racial" distinctness are problematic:³⁰⁸ The distinction between "biological

304. Kenneth A. Sirotnik, *Equal Access to Quality in Public Schooling: Issues in the Assessment of Equity and Excellence*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 159, 163.

305. LEWONTIN ET AL., *supra* note 131, at 126.

306. *See id.*:

Of all human genetic variation known for enzymes and other proteins, where it has been possible to actually count up the frequencies of different forms of the genes and so get an objective estimate of genetic variation, 85 percent turns out to be between individuals within the same local population, tribe, or nation; a further 8 percent is between tribes or nations within a major "race"; and the remaining 7 percent is between major "races." That means that the genetic variation between one Spaniard and another, or between one Masai and another, is 85 percent of all human genetic variation, while only 15 percent is accounted for by breaking people into groups.

307. There are, for example, apparent racial differences in bone mass, and accordingly, a need for "race-specific normal values" for accurate assessments of bone development and disease. Robert S. Weinstein & Norman H. Bell, *Diminished Rates of Bone Formation in Normal Black Adults*, 319 NEW ENG. J. MED. 1698, 1700 (1988). Similarly, recent research has suggested "the importance of increased awareness of the possibility of differences in drug response and in dose requirements among patients from various ethnic and racial groups." W. Kalow, *Editorial—Race and Therapeutic Drug Response*, 320 NEW ENG. J. MED. 588, 589 (1989).

308. Black patients, for example, are twice as likely as white patients to have decreased renal function. Stephen G. Rostand et al., *Renal Insufficiency in Treated Essential Hypertension*, 320 NEW ENG. J. MED. 684 (1989). But there is an ongoing debate as to whether this disparity reflects exclusively or even primarily intrinsic (i.e., genetic) differences as opposed to socioeconomic ones. *See Correspondence—Hypertension, Race and Renal Insufficiency*, 321 NEW ENG. J. MED. 690-692 (1989). The authors of one recent study of the matter noted the increased interest in genetic explanations. "This is difficult," they concluded, "because the concept of race is arbitrary and imprecise and may be imbued with environmental, social, economic, and genetic factors. Although we believe that genetic factors may be involved, our paper

race" and the "race" constructed by social forces generally collapses under the weight of inquiry.³⁰⁹

Even within the "biological" realm, then, "race" has multiple dimensions and origins, and the distinctions are by no means clear. And in assessing its relationship to achievement, the many aspects of "race" must all be considered: its historical dimension,³¹⁰ its socioeconomic dimension,³¹¹ its cultural dimension,³¹² and even the linguistic referents that inhere in "race" itself.³¹³

cannot be considered support for this view." *Id.* at 692.

Black Americans, to take another example, have a fourfold higher risk of end-stage renal disease than American whites, a consequence, in part perhaps, of the increased prevalence of hypertension and diabetes among blacks, but not singly attributable to these or any other causes. Bertram L. Kasiske et al., *Special Article—The Effect of Race on Access and Outcome in Transplantation*, 324 *NEW ENG. J. MED.* 302, 302 (1991). Proportionally fewer black patients, however, have received kidney transplants, particularly from living donors. *Id.* "It is likely," a recent study concluded, "that both biologic and socioeconomic differences between blacks and whites contribute to this inequality." *Id.* at 306. The study noted that "the problems of racial and ethnic inequality that characterize kidney transplantations are present or even magnified for the transplantation of other organs." *Id.* (noting that proportionally fewer black than white patients have undergone pancreas and liver transplantations).

309. "Clearly," to take one example, "socioeconomic status influences access to health services." Paul H. Wise & Leon Eisenberg, *Editorial—What Do Regional Variations in the Rates of Hospitalization of Children Really Mean?*, 320 *NEW ENG. J. MED.* 1209, 1209-10 (1989). In this and other ways, social experience has the potential to alter even the biological being. "The power of poverty to shape children's health is profound, but it is also elastic. In different communities—indeed in different families—the impact of poverty on children's health is shaped by a variety of social and environmental forces that enhance or attenuate the power of poverty to find clinical expression." *Id.* at 1209-10. The rate of low birth weight among black infants, to take one example, is over twice that of white infants; the rate has declined at a slower pace than for white infants, and the disparity between the two has in fact increased in recent decades. Jann L. Murray & Merten Bernfield, *The Differential Effect of Prenatal Care on the Incidence of Low Birth Weight among Blacks and Whites in a Prepaid Health Care Plan*, 319 *NEW ENG. J. MED.* 1385, 1385 (1988). When increased levels of prenatal care are made available to both black and white mothers, the result is a proportionally greater reduction in low birth weight among the black infants. *Id.* at 1388-89. However, black mothers generally use prenatal care services less extensively than white mothers; among the cited possible factors contributing to this differential are transportation deficiencies, child-care difficulties, employment demands, and possible differences in cultural perceptions of the value of prenatal care. *Id.* at 1390.

310. See *supra* notes 137-228 and accompanying text.

311. See *supra* notes 230-80 and accompanying text.

312. See *infra* notes 348-70 and accompanying text.

313. It is a peculiar trait of the Western (or at least American) language for describing human conduct that the language is largely intentional, i.e., that its referents are largely psychological conditions (intentions) rather than nonvolitional expressions (motions). Kenneth J. Gergen, *Correspondence versus Autonomy in the Language of*

But the most important features of "race" are two all-pervasive contemporary truths. First, "race" necessarily denotes hegemony over opportunities to succeed in the dominant culture. Historically, this has been manifest in the relentless devaluation of African-American potential,³¹⁴ a process that persists today in marginally more subtle forms.³¹⁵ Concomitantly, the construction of "race" has invariably included hegemony over the processes for defining merit.³¹⁶ The dominant culture thus simultaneously defines the criteria of merit and limits access to the means of their satisfaction. It is not surprising, then, that researchers have consistently discovered race bias in standard "intelligence" measurement techniques;³¹⁷ it is but one manifestation of the larger truth that the critical misunderstandings surrounding the nature of measured intelligence tend to work to the persistent detriment of African-Americans.³¹⁸

Understanding Human Actions, in METATHEORY IN SOCIAL SCIENCE, supra note 287, at 146-49. This set of referents provides a framework for a descriptive activity that is relatively independent of the person and conduct it is designed to describe. Id. at 148. "Race," in this sense, may be seen as an expression of an internal essence by an autonomous being, rather than, for example, an expression of constraining or actualizing forces external to the "racial" person. The intentionalist bias inherent in the interpretation of "race," as well as the perceived autonomy of the interpretive exercise, facilitates the creation of meanings independent of the "racial" object. "Race" as "biological" thus becomes the exclusive meaning only through the negation of alternative interpretations.

314. Ogbu, *supra* note 301, at 59.

315. See *infra* notes 341-88 and accompanying text.

316. Significantly, the dominant culture has controlled both the practice and theory for delineating, understanding, and assessing "merit." See McCarthy & Apple, *supra* note 300, at 11 (noting that "[m]odern educational theories (radical and mainstream) share with classical social science theories general genealogical origins and connections and certain Anglo-Eurocentrism"); see also Donald K. Cheek, *Social Science: A Vehicle of White Supremacy?*, 10 INT'L J. ADVANCEMENT COUNSELLING 59 (1987) (noting the role of white cultural bias in influencing the definition of terms, research problems, and the structuring of research in the social sciences).

317. Hilliard, *supra* note 285, at 150.

318. *Id.* at 155. It is not, after all, merely coincidence that mild "mental retardation" is confined almost exclusively to lower socioeconomic classes. See Bonnie J. Breitmayer & Craig T. Ramey, *Biological Nonoptimality and Quality of Postnatal Environment As Codeterminants of Intellectual Development*, 57 CHILD DEV. 1151, 1151 (1986). Nor is it coincidence that black Americans are so disproportionately represented in those same classes. See THOMAS D. BOSTON, *RACE, CLASS AND CONSERVATISM 3* (1988), concluding that: "[T]he disproportionate representation of blacks among the lower-classes is itself a product of discrimination. Indeed, the entire black class structure has been distorted by the historic and contemporary practices of racial subordination in American society." Given that, it should come as no surprise to find that black Americans, like other "racial" minorities, are disproportionately represented among those labelled "mentally retarded" and that white Americans have been assigned, on the average, higher IQs. See LEWONTIN ET AL., *supra* note 131, at 118. Of course, the

In the final analysis, then, assertions of racial superiority or inferiority in intelligence become meaningless except as pure tautology. But even measured on their own hypostatized terms, the assertions of innate racial superiority have a second flaw: They are utterly without empirical support. The inherent intellectual inferiority of the black "race" has a long tradition in American science,³¹⁹ but it is a tradition marred equally by fundamental conceptual fallacy³²⁰ and by faulty experimental design and execution.³²¹ The tradition, in most circles, has been thoroughly debunked; where it lingers, it does so largely as an exercise of political will.³²²

What ultimately distinguishes these "scientific" efforts to vindicate white hegemony is their willful ignorance of the roots of "racial difference."³²³ There is no hint of insight into the artifactual nature of the criteria of merit, no hint of recognition of the pervasive manner in which political society shapes individual lives—both in reality and perception—and shapes them quite often as lives lived in "race."³²⁴ In

myths surrounding racial differences in intelligence are harmful beyond the mere fact of measurement: The myth perpetuates an all-pervasive prophecy of failure that is, too often, self-fulfilling. See *infra* notes 348-70, 407-09 and accompanying text.

319. See, e.g., LEWONTIN ET AL., *supra* note 131, at 63-129; JORDAN, *supra* note 140, at 482-511; GOULD, *supra* note 150.

320. See *supra* notes 287-304 and accompanying text.

321. See LEWONTIN ET AL., *supra* note 131; GOULD, *supra* note 150.

322. See LEWONTIN ET AL., *supra* note 131, at 17-36. A recent review of the literature uncovered only five studies that attempted to separate the genetic from the social in assessments of "racial" difference in IQ. "Like all studies of the heritability of IQ," the review concluded, "these five have more or less serious methodological problems, and no positive conclusions can be reached using them." *Id.* at 127. For what they were worth, the studies failed to reveal a statistically significant "racial" difference in inherited IQ; taken strictly on their face, the studies collectively offer more support for black "superiority" than for notions of white "supremacy." *Id.* at 127-28. See also Leon J. Kamin & Sharon Grant-Henry, *Reaction Time, Race, and Racism*, 11 INTELLIGENCE 299 (1987) (refuting A.R. Jensen's well-publicized claims that blacks are slower than whites in choice reaction time related to mental processing tasks).

323. Dr. Du Bois wrote:

The race problem is not insoluble if the correct answer is sought. It is insoluble only if the wrong answer is insisted upon as it has been for thrice a hundred years. A very moderate brain can show that two and two is four. But no human ingenuity can make that sum three or five. This American science has long attempted to do. It has made itself the handmaid of a miserable prejudice. In its attempt to justify the treatment of black folk it has repeatedly suppressed evidence, misquoted authority, distorted fact and deliberately lied. It is wonderful that in the very lines of social study, where America should shine, it has done nothing.

DU BOIS, *supra* note 1, at 303.

324. For example:

the biological scheme, white is intelligent, black less so, and it becomes the inviolate assumption of the meritocratic order. Lost somehow is the recognition that "white" and "black" are largely political constructs, not natural ones;³²⁵ that "intelligence" exists only in reified form, not as a determinate absolute; and that the comparisons between both groups and individuals—"more" intelligent, "less" so—are meaningful only in bureaucratic contexts, to compensate, perhaps, for the harm visited by the reification of meritocratic "difference" in the first place.³²⁶

2. AN EXPERIENTIAL ACCOUNT

The insistence on a more authentic account of the relationship between "race" and "achievement" is not an insistence that "race" can have no biological meaning; it is a denial that its only meaning is biological, that "race" can have any one meaning.³²⁷ "The truth is,"

Suppose the slaves of 1860 had been white folk. Stevens would have been a great statesman, Sumner a great democrat, and Schurz a keen prophet, in a mighty revolution of rising humanity. Ignorance and poverty would easily have been explained by history, and the demand for land and the franchise would have been justified as the birthright of natural freemen.

DU BOIS, *supra* note 156, at 726.

325. But the truth is difficult to elude. The *Plessy* Court, for example, collapses its own theory of innate, immutable "race" when, at the close of its tortured opinion, it defers to state law to fix the "racial" distinction. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

326. See Hayman, *Presumptions of Justice*, *supra* note 5.

327. See JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 234-35 (1986):

Categorization is the operative form of legal ordering. Animals we order, or categorize, without regard to what they may think about it—those with good fat over here, those with good hair there, those with good bones over there. Human beings are different. Human beings classify themselves, betake themselves into categories. An official might bark to men and women on a truck, blacks over here, Hispanics over there, and it rises up in the breast of the man or woman on the truck to say I am not only that, or even that at all. . . . Pushed and prodded, and grouped from the outside like an animal he might be, but never from the inside. Black I am not only, or black I am but not what that person has in mind by black. I am not a bone to be eaten.

Similarly, the insistence that "racial difference" is principally "subjective" is not necessarily an insistence that no difference inheres in the racial object; there are a "wide range of alternative positions concerning science and subjectivity-objectivity that one might credibly adopt in a postpositivist world." Richard A. Schweder & Donald W. Fiske, *Introduction: Uneasy Social Science*, in *METATHEORY IN SOCIAL SCIENCE*, *supra* note 287, at 1, 17. It is, however, an insistence that not all difference can be reduced to inherent, objective traits: The inescapable complexity of human being and behavior precludes that position. Moreover, it is an insistence that much of what passes for inherent difference is in fact the product of subjective encounters.

Professor Anthony Appiah concludes, "that there are no races: there is nothing in the world that can do all we ask 'race' to do for us."³²⁸ But if there can be no "race," there nonetheless are, as Professor Appiah notes, "civilizations where we now speak of races."³²⁹ And it is in that context that "race" demands definition, or rather, definitions: definitions that reflect insight into the forces that construct "race" without blindly perpetuating the need for it.³³⁰

Race, in contemporary America, is a way of life. A life lived in race is a life with a discrete history and a certain destiny; it is a life, depending on the race, more likely either to enjoy wealth or to endure poverty; it is a life with its own culture, its own attitudes, its own expectations, its own dreams.³³¹ A life lived in race—and that is every

328. Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in "RACE," WRITING, AND DIFFERENCE, *supra* note 152, at 35. Each of the four perspectives suggested above is itself incomplete; they inform the process of comprehending "race" principally through their consideration as a whole. The deconstructive perspective, for example, has its own assumptions of internal autonomy; as Professor Appiah observes:

Race, we all assume, is, like all other concepts, constructed by metaphor and metonymy; it stands in, metonymically, for the Other; it bears the weight, metaphorically, of other kinds of difference. Yet, in our social lives away from the text-world of the academy, we take reference for granted too easily. Even if the concept of race is a structure of oppositions—white opposed to black (but also to yellow), Jew opposed to Gentile (but also to Arab)—it is a structure whose realization is, at best, problematic and, at worst, impossible. If we can now hope to understand the concept embodied in this system of oppositions, we are nowhere near finding referents for it.

Id.

329. *Id.*

330. See the recollections of a Mississippi girl in Litwack, *supra* note 168, at 6: "[T]here is a difference in knowing you are black and in understanding what it means to be black in America. Before I was ten I knew what it was to step off the sidewalk to let a white man pass." (footnote omitted).

331. See, e.g., Ogbu, *supra* note 301, at 69 (describing the pervasive "racial stratification" of contemporary America); Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93, 96 (1989) ("[N]o American of African descent, regardless of status or success, is safe from racial aggression ranging from an unthinking insult to a life-threatening attack."). Dr. King wrote:

Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your brothers and sisters at whim; when you have seen hate-filled policemen curse, kick and even kill your sisters and brothers at whim; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society . . . ; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer

American life—is a life defined by race: in reality and perception; in action and outlook; consciously, unconsciously, and everything in between. Race is all-pervasive.³³²

But race is more than the lived experience of an individual or group: race has, in America, an institutional life beyond human intention or ideation.³³³ America's economy, its culture, and its political traditions have been rooted in substantial part in race. The structures and the forces of American social life have been deliberately devised and maintained to enforce the hierarchical divisions of color.³³⁴ Today, these constructs perpetuate the lines drawn long ago: Through the technocratic processings of bureaucratic machinery,³³⁵ through official indifference and apathy,³³⁶ and—more than occasionally—through the subtle but deliberate manipulations of the “neutral” rules of meritocracy,³³⁷ the tradition of race remains a living one with hardly a discernable effort.³³⁸ Race, in this sense, is today more than the economic, cultural, or political

resentments; when you are forever fighting a degenerating sense of “nobodiness”—then you will understand why we find it difficult to wait.

MARTIN LUTHER KING, JR., *Letter From a Birmingham Jail*, in *WHY WE CAN'T WAIT* 81-82 (1964).

332. See Neal, *supra* note 167, at 37:

Allow me to summarize about what meaning there may be in my life story. First, racism has been a pervasive reality in my life. It affected my very physical survival and that of my family. . . . Although they were intelligent, hardworking, and responsible in every way, my parents lived in a system that kept them down or, as the white folks would say, “in their place.” And because they were in that place, there was no way out for them.

Racism determined where I went to school, even if I could get an education. It determined where I would work Racism kept blacks from voting, and from participating, in our democratic government. Public accommodations, work, recreational facilities, public libraries and museums—all of these were places forbidden to blacks. We couldn't even get a drink of water or use a public bathroom. In effect, blacks were powerless; we had no control over our lives.

333. See, e.g., McCarthy & Apple, *supra* note 300, at 28-30.

334. “The political system denied [black Americans] a voice; the judicial system . . . functioned largely to advance and reinforce their economic and social repression. The history of race relations is a history of *legal violence*” Litwack, *supra* note 168, at 17.

335. See, e.g., Craig Haney, *The Fourteenth Amendment and Symbolic Legality*, 15 L. & HUM. BEHAV. 183, 187 (1991); Lawrence, *supra* note 153, at 325; Fishman & Strauss, *supra* note 173, at 664.

336. See, e.g., Hayman, *Presumptions of Justice*, *supra* note 5.

337. See *id.*

338. See Hill, *supra* note 289, at 354 (“[T]he persistence of racial inequalities today is due primarily to institutional structures and processes and only secondarily to individual prejudice and discrimination.”).

perspective of individual lives: *Race is the economy, race is the culture, race is politics.*

Thus understood, it becomes possible to offer a more authentic account of the correlation between race and achievement. Setting aside, to some degree, some of the conceptual flaws inherent in the inquiry—flaws which, in one sense or another, account for much of the measured difference in achievement—the experiential account of “race” suggests at least some positive explanations for the disparity in black and white achievement. It suggests that the differences are in part rooted in “race,” but not in the hypostatized “race” of the biological account, nor indeed of the recent Supreme Court decisions which embrace the same conception—positivist, individualist, intentionalist—of contemporary life.³³⁹ On the contrary, the “race” which accounts for differential achievement is race as it is experienced—economically, culturally, and politically. And it is this understanding—that “race” difference is artifactual, and irrelevant to our common humanity—that desegregation promised to restore.³⁴⁰

a. Race, economics, and academic achievement

Research consistently establishes the correlation between socioeconomic status and academic achievement. There is, for example, a direct and proportional relationship between wealth and score on the Scholastic Aptitude Test (SAT)³⁴¹ and between wealth and various measures of math aptitude and achievement.³⁴² Indeed, much of the racial difference in academic achievement disappears when the race groups are controlled for socioeconomic status.³⁴³

339. See *infra* notes 442-50 and accompanying text.

340. See SCHOFIELD, *supra* note 199, at 234:

Although the lessons to be learned about . . . attending a [desegregated] school like Wexler did not always come easily, the words of Stan, a black eighth grader, capture beautifully one of the important things that interracial schools can teach.

Interviewer: Are you glad you came to Wexler or do you wish you had gone to another school? . . .

Stan (black): I guess I am glad I came here. I learned a lot of things about people.

Interviewer: What kinds of things, can you tell me?

Stan: How people really are the same, and in some ways . . . different.

341. See ALPHONSO PINKNEY, *THE MYTH OF BLACK PROGRESS* 155-56 (1984).

342. See Oakes, *supra* note 286, at 109-10.

343. See *id.* (finding that “[m]uch of the educational difference between minorities and whites disappears when family income and parent education are controlled”); Naney

More specifically, two poverty factors seem to be associated with depressed academic achievement: long-term poverty and the poverty concentration of the school. Regarding the former, research indicates that for each year of student poverty, the likelihood of falling behind in grade level increases by two percent.³⁴⁴ Regarding the latter, academic failure is more closely correlated with schoolwide concentration of poverty than it is with individual poverty.³⁴⁵ Of course, these twin poverty factors are disproportionately present for African-American students.³⁴⁶ To some extent, then, "racial" differences in achievement are no more than the predictable corollaries of poverty.³⁴⁷

b. Race, culture, and academic achievement

Part of the "racial" difference in academic achievement may reflect the failure of the public schools to adequately respond to the unique capacities and needs of African-American cultures. Consider, first, the evidence suggesting that many African-Americans share a distinctive attitude shaped in part by their experience as "involuntary minorities."³⁴⁸ Historical factors³⁴⁹ and contemporary realities³⁵⁰

Nichols & Ann Watts McKinney, *Black or White Socio-Economically Disadvantaged Pupils—They Aren't Necessarily Inferior*, 46 J. NEGRO EDUC. 443, 443-49 (1977) (finding "no difference in either academic progress or personality growth" when socioeconomic variable controlled).

344. Martin E. Orland, *Demographics of Disadvantage: Intensity of Childhood Poverty and Its Relationship to Educational Achievement*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 43, 50. Race *qua* race is not necessarily a factor for victims of long-term poverty; rather, poverty remains a governing force for academic success or failure after controlling for confounding variables, including race. *Id.* at 49.

345. *Id.* at 54.

346. *Id.* at 55.

347. Even real organic differences in cognitive function are caused not by the biological fact of "race," but by the concomitants of a "racial" life lived in poverty. Research has consistently confirmed, for example, the inverse relationship between blood lead concentration and early cognitive development, Anthony J. McMichael et al., *Port Pirie Cohort Study: Environmental Exposure to Lead and Children's Abilities at the Age of Four Years*, 319 NEW ENG. J. MED. 468 (1988); the impacts of lead exposure may in fact be cumulative and may result in long-term impairment. *Id.* at 474. An eleven-year follow-up study on lead toxicity determined that exposure resulted in "significant and serious impairment of academic success," including a seven-fold increase in failure to graduate from high school. Herbert L. Needleman et al., *The Long-Term Effects of Exposure to Low Doses of Lead in Childhood: An 11-Year Follow-up Report*, 322 NEW ENG. J. MED., 83, 86 (1990). Moreover, research consistently indicates that children from families "in lower socioeconomic groups are more vulnerable to the effects of lead than children from more favored backgrounds." *Id.* at 87.

348. Ogbu, *supra* note 301, at 61; *see also* Ogbu, *supra* note 166, at 177, observing that:

have combined to generate considerable anger and alienation regarding mainstream American institutions.³⁵¹ These feelings clearly extend to the public schools.³⁵² Historically viewed as harboring the best hope for the realization of racial justice³⁵³—an attitude evidenced in the fervent commitment to the desegregation effort—the public educational process is now viewed with an increasing bitterness and sense of betrayal.³⁵⁴

for a large segment of the black population, whether living in the ghetto or in the suburb, there exists a distinct black social identity or sense of peoplehood and a distinct black cultural frame of reference that guides their relationship with whites and that guides their behavior, especially in white-controlled institutions.

See also Richard A. Davis, *The Legacy of Poverty: A Study in the Persistence of Penurious Attitudes and Behaviors in the Black Middle Class*, 13 W. J. BLACK STUDIES 208 (1989) (noting the presence of distinct attitudinal and behavioral legacies of poverty in the black middle class, including differences in beliefs about work, and perceived prospects for children).

349. See Ogbu, *supra* note 301, at 68-69 ("Generations of shared knowledge and experience of discrimination appear to have led [black Americans] to believe that they cannot 'make it' by merely following the rules of behavior or cultural practices that work for white Americans.").

350. See, e.g., Oakes, *supra* note 286, at 110 ("[A]nticipation of employment discrimination may play a significant role in shaping these 'negative' attitudes."); James E. Cheek, *A Leadership Blueprint for Equity and Excellence in Black Higher Education*, in BLACK EDUCATION, *supra* note 203, at 18, 20-21 (noting effects of perceived racism on dropouts); Shelly Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340 (1983) (black workers pursue less training than white workers due to diminished expectation of fair return).

351. James P. Comer, M.D., *Home, School, and Academic Learning*, in ACCESS TO KNOWLEDGE *supra* note 285, at 23, 34-35. Part, but not all, of this perception may be a correlate of social or economic class. See Ogbu, *supra* note 166, at 165-72, emphasizing that racial stratification contributes to this alienation phenomenon in ways not strictly attributable to class. Accordingly, research demonstrates that much, but not all, of the black-white achievement gap is closed when the comparisons are controlled for family income and parental educational expectations. See Oakes, *supra* note 286, at 109.

352. John U. Ogbu, *Structural Constraints in School Desegregation*, in SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS 21, 37-39 (Jeffrey Prager et al. eds., 1986) [hereinafter SCHOOL DESEGREGATION RESEARCH].

353. During Reconstruction, for example, this sentiment was shared by black and white Americans. See generally FONER, *supra* note 118, at 96-98, 534, *passim* (describing commitment to education among Reconstruction black Americans); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 111 (1990) (Reconstruction republican commitment to the education of the freedmen).

354. See Litwack, *supra* note 168, at 12 (noting that the historical faith in the power of education soon led for most black Americans only to frustration and disappointment); See also Ogbu, *supra* note 352, at 37-38. Professor Ogbu notes that "the inferior economic niche usually occupied by caste-like minorities fosters both school training and an epistemology not conducive to conventional school success." *Id.* at 23.

The schools, sadly, have failed to respond to the unique needs generated by this perception.³⁵⁵ “[M]ost schools,” writes Professor John Goodlad, “simply do not provide environments congenial to students who fail to adapt to the conventional expectations and regularities of schooling.”³⁵⁶ For all students, such school difficulties force a choice between the culture of school and the culture of home: The inhospitable educational environment makes the choice tragically easy.³⁵⁷ For African-American students, the conflict is heightened by the intensifying dissonance between the skepticism of the home culture and the increasingly illusory promises of academia,³⁵⁸ promises that may be articulated in voices that are insensitive³⁵⁹ or outright hostile.³⁶⁰ Already alienated students thus find themselves caught in a relentless gestalt of academic depression: Failure breeds distrust breeds failure.³⁶¹

In particular, he notes, black Americans “do not believe that their public school education is designed to educate their children as effectively as the schools educate white children.” *Id.* at 37. Consequently, “as a people, not just as individuals, blacks are more or less convinced that the public schools cannot be trusted to educate black children well.” *Id.* at 38. See also Ogbu, *supra* note 166, at 172-77.

355. It is gainsaid that such an attitude can have an impact on academic achievement. See, e.g., Comer, *supra* note 351, at 23, 26 (noting that academic learning is in part a function of social-interactive and psycho-emotional development).

356. John I. Goodlad, *Common Schools for the Common Weal: Reconciling Self-Interest with the Common Good*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 1, 9.

357. Comer, *supra* note 351, at 23, 30-31.

358. Professor John Ogbu observes that those African American students who make the contrary choice—i.e., who choose to follow the mainstream path to academic success—are forced in this and other ways to abandon their cultural identity; they are forced, in effect, to join “the enemy.” Ogbu, *supra* note 166, at 177.

359. See Charles M. Hodge, *Educators for a Truly Democratic System of Schooling*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 259, 264-67 (concluding that “[t]eacher-education programs continue to prepare prospective teachers who tolerate discrimination and unequal treatment of students”).

360. See, e.g., Joyce E. King, *Dysconscious Racism: Ideology, Identity, and the Miseducation of Teachers*, 60 J. NEGRO EDUC. 133 (1991) (study of 57 student teachers concludes that they demonstrate internalized ideologies that justify the racial status quo and devalue cultural diversity); see also James Stanlaw & Alan Peshkin, *Black Visibility in a Multi-Ethnic High School*, in CLASS, RACE, AND GENDER IN AMERICAN EDUCATION, *supra* note 166, at 209, 225 (“As one white teacher said about several of his black students who were tossing paper on the floor, ‘I tell them, I don’t care if you throw that shit on the floor now, because you’re just going to be coming back here a couple years from now and picking it up every day.’”)

361. See, e.g., Ogbu, *supra* note 166, at 170-71 (summarizing the “counter-academic behaviors” engaged in by African American students); R. Patrick Solomon, *Black Cultural Forms in Schools: A Cross National Comparison*, in CLASS, RACE, AND GENDER IN AMERICAN EDUCATION, *supra* note 166, at 249, 256-57 (summarizing “counter-school and oppositional” behaviors by African American students); cf. James P. Comer et al., *School Power: A Model for Improving Black Student Achievement*, in BLACK

Schools may fail African-American students in a second way. There is some evidence to suggest that learning styles reflect the attributes of the surrounding culture, and that distinct cognitive styles may reflect the distinct attributes of cultures or subcultures.³⁶² The case for the existence of distinct African-American cultures is a strong one,³⁶³ and whether they reflect the persistent influence of Western African culture,³⁶⁴ the historical discontinuity of the American experience,³⁶⁵ or some combination of these and other factors, the essential thesis is that these distinct cultures may be reflected in a distinct learning style for African-American children.³⁶⁶

EDUCATION, *supra* note 203, at 187, 199 (noting general correlation between academic achievement and student perception of school climate).

362. See JANICE HALE-BENSON, *BLACK CHILDREN: THEIR ROOTS, CULTURE, AND LEARNING STYLES* 21-40 (1986); see also Ogbu, *supra* note 352, at 37 (noting that, between black and white Americans, "interests and epistemologies are not identical because of differences in actual experiences and in perceptions of the reasons for the differential experience").

363. See, e.g., Solomon, *supra* note 361, at 249 (noting that "[t]he presence of cultural forms in schools mediated by race has been highlighted in recent years by researchers in both Britain and the United States"); Ogbu, *supra* note 352 (distinct cultural frame of reference); James Jones, *Piercing the Veil: Bi-Cultural Strategies for Coping with Prejudice and Racism*, in *OPENING DOORS*, *supra* note 167, at 179, 185-89 (distinct cultural ethos); Stanlaw & Peshkin, *supra* note 360, at 224 (different black and white rhetorical styles).

364. See HALE-BENSON, *supra* note 362, at 9-19; cf. Bennetta Jules-Rosette & Hugh Meehan, *Schools and Social Structure: An Interactionist Perspective*, in *SCHOOL DESEGREGATION RESEARCH*, *supra* note 352, at 205, 221 (noting that "exposure to European languages introduces patterns of conceptual ordering and recall that are not explicit in some African languages").

365. See KOLCHIN, *supra* note 138, at 196, *passim*.

366. See HALE-BENSON, *supra* note 362, at 40-44; Charles D. Moody, Sr. & Christella D. Moody, *Elements of Effective Black Schools*, in *BLACK EDUCATION*, *supra* note 203, at 176, 183 (noting research finding a "culturally-specific method of organizing and processing information"); cf. SCHOFIELD, *supra* note 199, at 216 (observing that experience and perception are strongly influenced by race). Hale-Benson's thesis, and her method, have prompted at least one significant critique from the legal academy. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1817 n.304 (1989). The resultant dialogue, formally over the distinctiveness and merit of the minority perspective in legal scholarship, compare *id.* with *Colloquy*, 103 HARV. L. REV. 1844-54 (1990), is in part a microcosm of the greater dialogue on "race" and "difference" depicted in the instant work. The baseline presumptions of the participants seem quite opposed. On the one hand, where "race" is absolute and "difference" real, the notion of "racial difference" is fundamentally taboo. On the other hand, where "race" is largely experiential and "difference" artifactual, the notion of "racial difference" suggests primarily a need to re-examine the differentiating processes and, in particular, their potential for hierarchical ordering. Hale-Benson's work, it seems, surely contributes to this re-examination of meritocracy, even if, as an empirical matter, it offers nothing close

The implications for the American educational system are obvious and profound: If Euro-Americans are, in general, exhibiting greater facility with the criteria and processes of academic achievement, it is because, in substantial part, Euro-Americans have devised them. Moreover, Euro-Americans have devised those criteria largely without the participation of African-Americans: The persistent segregation and exclusion of African-Americans from the dominant culture simultaneously serves to insulate the dominant criteria of achievement from the influence of African-American culture, and to perpetuate the existence of an African-American culture that is "different" from, and subordinate to, the dominant perspective.³⁶⁷ Indeed, schools generally fail to accommodate "different" learning styles and kinds of intelligence;³⁶⁸ African-American differences, in particular, are largely ignored by the educational process.³⁶⁹ Education—"academic achievement"—thus becomes another expression of cultural hegemony.³⁷⁰

This, in part, was the great promise of *Brown*: Through the regular interaction of black and white children, the cultural aspects of hegemony would eventually be overcome. The "stigma" of black inferiority—and of white superiority—would dissipate in part because African-American children would obtain greater facility with the dominant Euro-American criteria of achievement and in part because the dominant criteria of achievement would, over time, become less distinctly Euro-American and more fairly representative of all American cultures.

to a satisfactory conclusion.

367. See Sally Lubeck, *Nested Contexts*, in CLASS, RACE, AND GENDER IN AMERICAN EDUCATION, *supra* note 166, at 43, 48 (noting the way in which "monocultural" research on children "has been presented as representative of the human race so that people who fail to conform to expectations have been perceived as deficient or deviant"); cf. Patrick C. McKenry et al., *Research on Black Adolescents: A Legacy of Cultural Bias*, 4 J. ADOLESCENT RES. 254 (1989) (contending that "[u]nderstanding of Black adolescence is limited due to the cultural bias inherent in much of the research literature, . . . reflected in bias in the philosophical approaches, theoretical frameworks, sampling, instrumentation, and data analysis used in the study of Black youth.").

368. See Goodlad, *supra* note 356, at 13 (noting that this failure results in "clearly prejudicial practices").

369. See, e.g., Stanlaw & Peshkin, *supra* note 360.

370. See Solomon, *supra* note 361, at 262 (finding that "researchers have established strong linkages between black oppositional culture in U.S. schools and the more historically rooted black-white antagonism that constitutes the racial formation in that society").

c. Race, politics, and academic achievement

Part of the "racial difference" in academic achievement may also reflect real differences in formal educational opportunity, a factor equally shaped by socioeconomic conditions. A recent report prepared for the House Committee on Education and Labor documented substantial inequities in school financing both within and among the states, and determined that "fiscal inequity ordinarily is translated into major differences in the educational services provided by wealthy and poor school districts."³⁷¹ It noted, not surprisingly, that the principal victims of fiscal inequity were often racial and ethnic minorities.³⁷²

These well-documented educational inequities³⁷³ are manifest in a host of material ways. Poor districts must depress the salary structures for their teachers,³⁷⁴ are disproportionately plagued by teacher shortages,³⁷⁵ and are forced to rely on long-term "substitute"

371. HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2D SESS., A REPORT ON SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUITY ON THE EDUCATION OF STUDENTS AT RISK 19-24, 44 (Comm. Print 1990) (prepared by William L. Taylor & Diane M. Piche).

372. *Id.* at 19-24. Given these disparities, it is not surprising that, in general, black students enrolled in private schools out-perform their public school counterparts. See Comer et al., *supra* note 361, at 198-99.

373. For a work that examines the human dimensions of the House Report, see KOZOL, *supra* note 220. Kozol's work documents the inequities both through experiential account and statistics; it is impossible to read his work and not agree that current educational inequities constitute a national tragedy. See also John E. Jacob, *Taking the Initiative in Education: The National Urban League Agenda*, in BLACK EDUCATION, *supra* note 203, at 13, 14-15 (noting the underfunding of educational programs for at-risk students).

374. See, e.g., KOZOL, *supra* note 220, at 30 (disparities between salaries in East St. Louis and St. Louis), 69 (disparities between schools in and around Chicago). Ruthie Green-Brown, Principal of Camden High School in Camden, New Jersey, describes the dilemma:

"My first priority, if we had equal funding," says the principal when I return to see her at the end of school, "would be the salaries of teachers. People ask me, 'Can you make a mediocre teacher better with more money?' I am speaking of the money to *attract* the teachers. In some areas where I run into shortages of staff—math and science in particular—I get provisional teachers who are not yet certified but sometimes get highly talented, exciting people. As soon as he or she becomes proficient—squat!—where is she? Out to the suburbs to earn \$7,000 more"

Id. at 145.

375. Linda Darling-Hammond & Joslyn Green, *Teacher Quality and Equality*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 237; see also Oakes, *supra* note 286, at 117 (noting that minority and poor students are less likely to have access to a teacher who is a computer specialist).

teachers³⁷⁶ and underqualified entrants.³⁷⁷ Poor districts lack the physical plant facilities,³⁷⁸ the computer and modern communications equipment,³⁷⁹ and the curricular materials³⁸⁰ to achieve even the most basic educational objectives. And whatever learning might be attempted must take place under physical conditions that most American workers would find utterly intolerable.³⁸¹

Disparate allocations of resources are not the only manifestations of "racial difference" in American education. The hierarchy which pervades America's schools is reflected as well in the curricula. In part, perhaps, because of the disparities in resources, poorer districts do not offer the

376. See, e.g., KOZOL, *supra* note 220, at 24 (East St. Louis—with a school population that is 98% black—forced to rely on 70 "permanent substitutes" at a salary of \$10,000 per year).

377. See Darling-Hammond & Green, *supra* note 375, at 239-40.

378. See, e.g., KOZOL, *supra* note 220, at 14, 32, *passim*. The following passage is representative; the author has met a small group of elementary-aged children in East St. Louis, including a nine-year-old boy named Smokey:

"I have a eat with three legs," Smokey says.

"Snakes hate rabbits," Mickey says, again for no apparent reason.

"Cats hate fishes," Little Sister says.

"It's a lot of hate," says Smokey.

Later, at the mission, Sister Julia tells me this: "The Jefferson school, which they attend, is a decrepit hulk. Next to it is a modern school, erected two years ago, which was to have replaced the one they attend. But the construction was not done correctly. The roof is too heavy for the walls, and the entire structure has begun to sink. It can't be occupied. Smokey's sister was raped and murdered and dumped between the old school and the new one."

Id. at 14.

379. See, e.g., *id.* at 29 (no or unusable audio-visual equipment); Oakes, *supra* note 286, at 116 (fewer microcomputers available for poor and minority students).

380. See, e.g., KOZOL, *supra* note 220, at 27 (science labs in East St. Louis 30 to 50 years outdated), 37 (elementary class in East St. Louis has just one workbook for entire class; history teacher has 26 books for 110 students), 110 (South Bronx high school student went two months without English class textbook, entire year without Science text), *passim*.

381. See Darling-Hammond & Green, *supra* note 375, at 243. Jonathan Kozol writes:

A 14 year-old girl with short black curly hair says this: "Every year in February we are told to read the same old speech of Martin Luther King. We read it every year. 'I have a dream . . .' It does begin to seem—what is the word?" She hesitates and then she finds the word: "porfunctory."

I ask her what she means.

"We have a school in East St. Louis named for Dr. King," she says. "The school is full of sewer water and the doors are locked with chains. Every student in the school is black. It's like a terrible joke on history."

KOZOL, *supra* note 220, at 34-35.

range of liberal arts or advanced science and math courses routinely available in other districts.³⁸² The curricula of the poor districts, on the other hand, do have a disproportionate abundance of remedial courses and reflect much less emphasis on college preparatory courses and much more on vocational training.³⁸³ The unavoidable conclusion is that America's poor and minority citizens are being assigned their life's station at an early age.³⁸⁴

Even within individual schools, research documents disturbing educational inequities. The modern preoccupation with academic "tracking," a practice that appears to afford little or no educational benefits to most students,³⁸⁵ tends to limit the educational opportunities available to African-American students, who find themselves assigned with uncommon frequency to low achieving tracks.³⁸⁶ A recent study of 174 school districts with at least 15,000 students and one percent black enrollment documented this and other trends, concluding that "[t]he sorting practices of schools are associated with racial disproportions."³⁸⁷ Specifically, the study noted that a black student is nearly three times more likely to be placed in a class for the educably mentally retarded than is a white student and is thirty percent more likely to be assigned to a trainable mentally retarded class than a white student, while "[a]t the

382. See, e.g., Oakes, *supra* note 286, at 115 (fewer math and science offerings in poor and minority schools).

383. Jeannie Oakes & Martin Lipton, *Tracking and Ability Grouping: A Structural Barrier to Access and Achievement*, in ACCESS TO KNOWLEDGE, *supra* note 285, at 187, 198.

384. See Oakes, *supra* note 286, at 112 (noting that judgments rendered in elementary school on a child's intellectual ability will mediate educational opportunities for the rest of her life). Curricular differences and tracking assignments are, of course, routinely justified as appropriate in light of the student's measured capacities. But as Professor Oakes notes, "growing evidence suggests that these differences (in measured ability to learn) may in part be artifacts of schooling experiences"; moreover, "even those poor and minority students who *do* achieve in mathematics and sciences may attend schools where advanced courses are simply not offered." *Id.* at 115. See also Eva Wells Chunn, *Sorting Black Students for Success and Failure: The Inequity of Ability Grouping and Tracking*, in BLACK EDUCATION, *supra* note 203, at 93, 94-100 (summarizing the ways in which race and class influence academic sorting practices, and the ways in which the resultant academic labels shape subsequent teacher expectations and behaviors). See also KOZOL, *supra* note 220, at 74-76.

385. See, e.g., Oakes & Lipton, *supra* note 383, at 189-94 (concluding that "tracking and rigid ability grouping are generally ineffective, and for many children, harmful").

386. See, e.g., Chunn, *supra* note 384, at 101-03 (reviewing tracking statistics demonstrating both "low expectations" and "inequitable sorting practices" for black students); Goodlad, *supra* note 356, at 13-14 (noting that poor and minority children are disproportionately represented in the "low" tracks).

387. MEIER ET AL., *supra* note 283, at 4-5.

other end of the sorting spectrum,” the study observed, “a white student is 3.2 times more likely to be assigned to a gifted class than is a black student.” A black student, meanwhile, is more than twice as likely as a white student to be corporally punished or suspended, and 3.5 times more likely to be expelled. Given all of this, what is remarkable about the disparity in educational outcomes—that black students are eighteen percent more likely to drop out of school and twenty-seven percent less likely to graduate³⁸⁸—is that it is not much greater than it is.

C. Race and Desegregation

1. THE GOALS OF DESEGREGATION

Any meaningful assessment of the “success” of desegregation obviously requires some definition of the criteria for success. This rather unremarkable observation is a good deal less axiomatic than it might seem: The Supreme Court has now so thoroughly conflated the means—desegregation—with the ends—however they might be defined—that the latter are no longer a part of the Court’s discourse.³⁸⁹ Meanwhile, those critics who deride desegregation as a “failed” effort are notably unwilling to share their notions of what “success” might have entailed.³⁹⁰ What results is a rather vacant dialogue that reveals much less about the consequences of desegregation than it does about the perspective of the beholder. It need not be that way.

We believe that it is possible to identify a set of criteria for measuring the success of desegregation that will generate something of a consensus. Several sources suggest themselves. The constitutional mandate of equal protection is an obvious starting point: It is, we submit, impossible to meaningfully engage in this task without some reference to equality. *Brown* clarifies the meaning of equality in this context: Separate is inherently unequal. Moreover, *Brown* offers an explicit rationale: The inequality is manifest, in part, in a stigma of inferiority perpetuated by state sponsored, racial segregation.

Three variables thus emerge from *Brown*: equality, segregation, and the stigma of inferiority. Moreover, *Brown*’s logic is fairly patent: The causal nexus between segregation and perceived inferiority is supported by social science, and the relationship between that perception of hierarchy and the adjudicatory finding of unconstitutional inequality is to

388. *Id.* at 5.

389. *See infra* notes 452-54 and accompanying text.

390. *See infra* notes 439-41 and accompanying text.

be found in the Court's holding that black children are, as a consequence of the stigma, denied equal educational opportunity.

Buried in these nexus, we believe, are to be found the real meanings of *Brown*, and also the unstated premises of the debate over desegregation's success. Racial segregation was unconstitutional as more than pure tautology: Segregation constructed artifactual racial differences—it affected the hearts and minds of America's children—and these in turn perpetuated a racial hierarchy in academic achievement. By commanding desegregation, then, *Brown's* immediate goal was the eradication of racial stigma, but its ultimate goal was the destruction of the artifactual differences in educational attainment.

The foregoing is made more clear when one considers the social science evidence presented to the Court in *Brown*. The argument of the social scientists in *Brown* described a three-part, self-perpetuating cycle: Racial prejudice produced segregation; segregation produced differential self-concepts and achievement; the resulting differences heightened racial prejudice.³⁹¹ It was, in essence, a relentless gestalt of inequality. *Brown* explicitly adopts the understanding reflected in the second stage of the cycle: Racial segregation constructs racial differences. But to perpetuate the cycle, these differences must include more than a strictly internalized stigma of inferiority: They must be externally manifest if they are to have any social salience. Thus it is that *Brown* focuses on the stigma not only as an effect, but also as a cause of further—"objective"—inequity.³⁹²

Thus understood, *Brown* itself sets forth two goals of desegregation: to improve the self-concept of black students, and to remove the artifactual racial differences in academic achievement. To these we would add a third goal, one suggested by the *Brown* social scientists but, perhaps for obvious reasons, not explicitly taken up in *Brown*. Desegregation should target not only the sense of black inferiority, but the sense as well of white superiority. This it can achieve first by denying one means of expression to notions of racial hierarchy; second by reducing the degree of manifest racial difference; and third by promoting inter-racial contacts to foster an appreciation of the contextual nature of salient racial differences.

391. See Walter G. Stephan, *School Desegregation: Short-Term and Long-Term Effects*, in *OPENING DOORS*, *supra* note 167, at 100, 101-02.

392. The overriding goal of the *Brown* plaintiffs, after all, was educational equality. See, e.g., Derrick Bell, *Law, Litigation, and the Search for the Promised Land*, 76 *GEO. L.J.* 229, 235 (1987) (reviewing *MARK V. TUSHNET, THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987)) ("[T]he priority for black parents has always been better schools, not desegregated schools.").

2. THE DESEGREGATION VARIABLES

If one uncontested truth does emerge from the desegregation studies, it is that it is virtually impossible to generalize about the effects of desegregation: The success, or failure, of the efforts is highly contextual. The significant variables have been variously described, and the list of factors ranges in length from short³⁹³ to long³⁹⁴ to endless.³⁹⁵ However, if one broad theme unites the analyses, it is that the desegregation effort must take place in the context of a broader commitment to racial equality: when that commitment is manifest—in the classroom,³⁹⁶ the school,³⁹⁷ and the community³⁹⁸—desegregation

393. Stanlaw & Peshkin, *supra* note 360, at 221-25 (three factors account for apparent success of desegregation at subject school: (1) ideal population ratio; (2) unique history of community; and (3) similarity in communicative styles of black and non-black students).

394. See, e.g., Stephan, *supra* note 391, at 113 (recent review of literature identifies 20 situational factors that influence intergroup relations).

395. See, e.g., Judith Preissle Goetz & E. Anne Rowley Breneman, *Desegregation and Black Students' Experiences in Two Rural Southern Elementary Schools*, 88 ELEMENTARY SCH. J. 489, 500 (1988) (outcomes vary because the way schools adapt to desegregation is as unique as each school).

396. See, e.g., David Rosenfield et al., *Classroom Structure and Prejudice in Desegregated Schools*, 73 J. EDUC. PSYCHOL. 17, 23 (1981) (finding that equal status in achievement and socioeconomic class is a significant contributor to development of interracial classroom friendships); Joyce L. Epstein, *After the Bus Arrives: Resegregation in Desegregated Schools*, 41 J. SOC. ISSUES 23, 35, 40-41 (1985) (integrated, equal status teaching programs produce highest gains in minority academic achievement; resegregated, rigid tracking produces negative impact).

397. See, e.g., Helen A. Moore, *Effects of Gender, Ethnicity, and School Equity on Students' Leadership Behaviors in a Group Game*, 88 ELEMENTARY SCH. J. 515, 524-525 (1988) (high-equity environment in desegregated schools increases reality and perception of multiracial leadership behavior); Edison J. Trickett et al., *Natural Experiments and the Educational Context: The Environment and Effects of an Alternative Inner-City Public School on Adolescents*, 13 AM. J. COMMUNITY PSYCHOL. 617 (1985) (alternative public school in New Haven, Connecticut positively affected student satisfaction with a variety of aspects of school life and induced some positive changes in interracial attitudes); William B. Lacy et al., *Fostering Constructive Intergroup Contact in Desegregated Schools: Suggestions for Future Research*, 52 J. NEGRO EDUC. 130 (1983) (surveying literature and concluding that schools that are desegregated only to the extent that a certain numerical racial balance is achieved in enrollment may find that racial stereotypes are reinforced and intergroup hostility still exists, and that in order for all races to react and learn comfortably in the same environment, the contact among students must provide (1) equal status for all, (2) strong institutional support for positive relations, and (3) cooperative interaction aimed toward achievement).

398. Increasingly, desegregation researchers are observing the importance of the larger cultural context in which the desegregation effort takes place; the focus cannot be exclusively on the school as an insular entity. See, e.g., Jeffrey Prager et al., *The*

generally achieves its objectives; when that commitment is lacking, the effort may be undermined.³⁹⁹

Within this broad framework, several specific factors frequently emerge as particular threats to the desegregation effort. First, and perhaps most obvious, is the failure to effect and sustain physical desegregation. Obviously, it is impossible to fairly measure the impact of desegregation when that plan has not been effectuated. And, nationally, racial segregation remains the rule, not the exception.

In the first three years after *Brown*, 723 school districts and school units were formally desegregated,⁴⁰⁰ but in the next three year period, 1958-1960, the number dropped to forty-nine. By 1964, only one percent of America's black schoolchildren were attending desegregated schools.⁴⁰¹ The next ten years saw relatively rapid desegregation; still, by 1972, just forty-four percent of the Southern black schoolchildren and twenty-nine percent of the Northern black schoolchildren were attending

Desegregation Situation, in SCHOOL DESEGREGATION RESEARCH, *supra* note 352, at 3, 10-11 (urging a "situational analysis" of desegregation that considers the role of both "micro" and "macro-processes"); Gerald D. Suttles, *School Desegregation and the "National Community,"* in SCHOOL DESEGREGATION RESEARCH, *supra* note 352, at 47, 48-49 (noting that "public schools in America are only weakly differentiated from the local community" and urging a "macrosociological approach" to school desegregation); Mark Granovetter, *The Micro-Structure of School Desegregation*, in SCHOOL DESEGREGATION RESEARCH, *supra* note 352, at 81, 84 (noting need for analysis "which links the school and its students to broader levels of social structure"); Bennetta Jules-Rosette & Hugh Mehan, *Schools and Social Structure: An Interactionist Perspective*, in SCHOOL DESEGREGATION RESEARCH, *supra* note 352, at 205, 225 (calling for increased attention to "interactional mechanisms by which the structures of class and intercultural relations in society are reflected in educator-pupil relations"); Randi L. Miller, *Desegregation Experiences of Minority Students: Adolescent Coping Strategies in Five Connecticut High Schools*, 4 J. ADOLESCENT RES. 173, 187 (1989) ("[s]tudent experiences in school are not only products of social and structural forces within the school but also reflect status and power relationships in the larger society"); Martin Patchen et al., *Determinants of Students' Interracial Behavior and Opinion Change*, 50 SOC. EDUC. 55, 73 (1977) (finding that cultural forces and norms beyond the school environment are significant variables in determining the impact of desegregation on race-related attitudes and behavior); Randi L. Miller, *Beyond Contact Theory: The Impact of Community Affluence on Integration Efforts in Five Suburban High Schools*, 22 YOUTH & SOC'Y 12, 27 (1990) (finding that community affluence was negatively correlated to acceptance of desegregation).

399. See, e.g., Stephan, *supra* note 391, at 115 (cooperative, equal status, individualized contact supported by authority figures can improve race relations and lead to increases in self-esteem and minority achievement); cf. Williams, *supra* note 193, at 342 (acceptance of integration is most likely when sense of threat is low and perceived similarity is high).

400. VANN WOODWARD, *supra* note 133, at 167.

401. Stephan, *supra* note 391, at 103.

schools that were majority white. And this was the peak. Nearly all the desegregation that has occurred took place between 1964 and 1974.⁴⁰² Over the past twenty years, the occasional high-profile desegregation case has been offset by the resegregation of previously integrated schools.⁴⁰³ Today, both empirical and anecdotal evidence embarrass the national commitment to desegregation. By 1988, only seven of the nation's twenty-five largest school systems maintained a white enrollment of more than thirty percent.⁴⁰⁴ The National School Boards Association estimates that nearly two-thirds of all black youngsters still attend schools where black students comprise a majority of the pupils; in Illinois and New York, over eighty percent of the black students are in such schools.⁴⁰⁵ And author Jonathan Kozol, who examined thirty neighborhoods for his work on educational equality, noted that most of the urban school districts he visited were ninety-five to ninety-nine percent nonwhite; "in no school," he wrote, "were nonwhite children in large numbers truly intermingled with white children."⁴⁰⁶

Kozol's observation implicates the second frequent barrier to desegregation success: Even when physical desegregation has occurred, there is often a failure to achieve genuine integration.⁴⁰⁷ Desegregated schools often remain segregated *within* the school, due in substantial part to academic tracking and school disciplinary practices.⁴⁰⁸ One recent study of 174 school districts concluded that "[r]acial biases in special education, ability grouping, curriculum tracking, and discipline have replaced segregation as the single greatest obstacle to equal educational opportunities."⁴⁰⁹

402. *Id.*

403. *Id.* at 104 (citing changing demographic patterns, notably "the suburbanization of whites and the higher birth rates of minority groups").

404. Darling-Hammond & Green, *supra* note 375, at 240.

405. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 162-63 (1992).

406. KOZOL, *supra* note 220, at 3. "As the 1990's begin," Julius Chambers concludes, "more black children attend racially isolated schools than at any time since the early 1970s." Chambers, *supra* note 238, at 9, 19.

407. "Ability tracking" not only limits the extent of physical integration within the classroom, but apparently stifles social integration where interracial groups are present. See, e.g., Sandra Bowman Damico & Christopher Sparks, *Cross-Group Contact Opportunities: Impact on Interpersonal Relationships in Desegregated Middle Schools*, 59 SOC. EDUC. 113, 122 (1986) (theorizing that ability tracking creates norms—emphasizing individual academic achievement and the desirability of homogeneity—that contradict the goals of desegregation).

408. See *supra* notes 283-86, 382-88 and accompanying text; see also Fishman & Strauss, *supra* note 173, at 667 (describing the use of school suspensions in preventing effective desegregation in Denver).

409. MEIER ET AL., *supra* note 283, at 4.

Third, the desegregation of student populations has not been accompanied by the necessary desegregation of educational authority. Evidence suggests that an integrated bureaucracy and teaching staff are not only more responsive to minority needs but help dispel the pervasive myths of white superiority.⁴¹⁰ Black teachers, in fact, have been identified as "the single most effective force in limiting the amount of second-generation discrimination against black students."⁴¹¹ But desegregation planners⁴¹² and public school teachers⁴¹³ remain largely white. In fact, many black principals and teachers were forced out of their positions during the implementation of desegregation plans;⁴¹⁴ perhaps they were not "qualified" to oversee the instruction of white students, or perhaps it was the *quid pro quo*. Whatever the reason, by

410. See *id.* at 18; Goetz & Breneman, *supra* note 395, at 497-98 (noting the deleterious effects on minority children of their white teachers' insistence on "colorblindness").

See also Nancy H. St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence*, in *RACE AND SCHOOLING IN THE CITY* 84, 99 (Adam Yarmolinsky et al. eds., 1981):

Whether for children of either race the benefits [of desegregation] outweigh possible harm seems to depend on how desegregation is accomplished in schools—on the leadership given by the principal, on a teaching staff that is unbiased and trained in ways of handling diversity in the classroom, on the cultural pluralism of the curriculum, and—above all—on equality of status for each racial group within the school.

These findings seem to echo the understandings of Dr. Du Bois, expressed over half a century ago:

[T]here is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

W.E.B. DU BOIS, *Does the Negro Need Separate Schools*, in *DU BOIS*, *supra* note 1, at 278, 288.

411. MEIER ET AL., *supra* note 283, at 6.

412. See Barbara A. Sizemore, *Educational Research and Desegregation: Significance for the Black Community*, 47 *J. NEGRO EDUC.* 58 (1978) (noting that minorities are generally excluded from desegregation research, planning, and policy making).

413. See, e.g., Mary E. Dilworth, *Black Teachers: A Vanishing Tradition*, in *BLACK EDUCATION*, *supra* note 203, at 54, 55.

414. See MEIER ET AL., *supra* note 283, at 17; Stephan, *supra* note 391, at 103-04.

1986 the proportion of black public school teachers stood at just 6.9%.⁴¹⁵

3. THE IMPACT OF DESEGREGATION

In light of the above, one possible response to the query whether desegregation has worked is that no answer is possible until desegregation has been tried. Place the effort in context—in the long history of racial oppression, in the pervasive culture of subordinating racial differentiation—and its predictable impacts certainly must be negligible. But the evidence surprises.⁴¹⁶ The literature strongly suggests that desegregation *can* work; moreover, it consistently demonstrates that desegregation *has* worked, that—at times, in places—the desegregation effort has produced significant progress toward its goals.

a. On academic achievement

A 1978 review of the literature determined that desegregation sometimes raises minority achievement in the short run—the more-or-less standard contingencies involving classroom, school, and community context were complicating factors—and that desegregation nearly always raises minority achievement in the long run.⁴¹⁷ A 1985 review of reported studies determined that the net impact of desegregation efforts, of “effective” and “ineffective” plans alike, was an increase in black academic achievement of approximately .2 standard deviations, or roughly

415. Dilworth, *supra* note 413, at 55.

416. See, e.g., Suttles, *supra* note 398, at 49:

In reviewing the literature on school desegregation, I am persistently surprised at the positive expectations of researchers. It is expected that minority performance will increase, that interracial relations will improve, and that local civic life will quicken. Actually, in most instances I would have expected the reverse. After decades of pervasive school segregation, there is little reason to expect agreeable interracial relations in the short term. A strong academic social climate is always difficult to achieve in our public schools, where problems of social control are intensified

Accordingly, it is with some perplexity that I find that most studies of school desegregation show some modest positive effect on interracial relations and achievement if not on civic cooperation. Of course, there are some substantial differences, but the outstanding finding seems to be their unevenness with respect to desegregation itself.

(footnotes omitted) (citations omitted).

417. Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 L. & CONTEMP. PROBS. 17, 49-50 (1978).

one-fifth of the achievement gap.⁴¹⁸ A 1988 review concluded that "the bulk of the data to date support the notion that school desegregation . . . may improve minority [academic] achievement . . ." ⁴¹⁹ And a 1991 survey of these and other reviews determined that desegregation sometimes increases black achievement and rarely decreases it.⁴²⁰ At the same time, no reviewed study has suggested that desegregation has negative effects on white achievement.⁴²¹

b. On self-concept

The hypothesis that desegregation would improve black self-esteem accepted as its premise, of course, that black self-esteem was in need of improvement, either absolutely or relative to whites. Whatever validity that premise may have held in 1954, it appears not to be the case today.⁴²² There is no reason to assume that African-American schoolchildren⁴²³ are generally plagued by a negative self-image, and this appears to be the case regardless of the desegregation situation.⁴²⁴

418. Paul M. Wortman & Fred B. Bryant, *School Desegregation and Black Achievement: An Integrative Review*, 13 SOC. METHODS & RES. 289, 318 (1985).

419. Janice L. Streitmatter, *School Desegregation and Identity Development*, 23 URBAN EDUC. 280, 285 (1988).

420. Stephan, *supra* note 391, at 106-07.

421. *Id.* at 107.

422. The social science evidence on which this premise was based in 1954—including the famed doll studies by Drs. Kenneth and Mamie Clark—is now being revisited; there is some suggestion that its results are at least partly the artifacts of some combination of methodological orientation and historical contingency. *See, e.g.*, Morris Rosenberg, *Self-Esteem Research: A Phenomenological Corrective*, in SCHOOL DESEGREGATION RESEARCH, *supra* note 352, at 175, 176-78. Of course, one cannot overlook the role of *Brown*, and of the studies which helped support the decision, in shaping the cultural landscape and rendering certain truths about "race" historically contingent.

423. This conclusion may not be generalizable to the adult population. *See id.* at 182-85 (noting the unique features of the child's perspective, including a relative naivete regarding the level of racial prejudice in the society as a whole).

424. *See, e.g.*, Stephan, *supra* note 391, at 107; Edgar G. Epps, *The Impact of School Desegregation on the Self-Evaluation and Achievement Orientation of Minority Children*, 42 L. & CONTEMP. PROBS. 57, 75-76 (1978). This is not to say, of course, that there is no variation in the self-esteem of African-American schoolchildren; on the contrary, it may vary with broad cultural factors, *see, e.g.*, Gloria J. Powell, *Self-Concepts Among Afro-American Students in Racially Isolated Minority Schools: Some Regional Differences*, 24 J. AM. ACAD. CHILD PSYCHIATRY 142, 149 (1985) (finding that racially isolated minority schools in the large urban metropolis had "become fortresses of cynicism, self-defeat, and alienation" but that Southern communities had developed "a social and cultural milieu within their schools and communities that fostered self-concept and self-esteem as well as individual and collective achievement"), and with individual

Not surprisingly, then, early studies of desegregation found little effect on the self-esteem of African-American children.⁴²⁵ A 1978 review of the literature on the subject pronounced it inconclusive, but noted that desegregation certainly was not harmful to black self-esteem.⁴²⁶ Subsequent research has indicated that in desegregated schools, self-esteem is as high for black students as it is for white students.⁴²⁷ Research also suggests that white students attending predominantly black institutions experience significant positive development of their social self-concept.⁴²⁸

c. On racial attitudes and behavior

In the Social Science Statement prepared for *Brown*, the social scientists of 1954 noted the four conditions that likely must obtain before desegregation could positively influence racial attitudes and race relations: (1) an equivalence of activities and opportunities for all students regardless of race; (2) the firm and consistent endorsement of desegregation by those in authority; (3) the absence of interracial student competition; and (4) interracial contacts that permit mutual learning.⁴²⁹ As one of the authors of that statement notes, these conditions, which are substantially mirrored in contemporary contact theory, "have rarely characterized school desegregation as it has been carried out."⁴³⁰

But when these conditions do in part obtain, and sometimes even when they do not, the literature reveals a significant positive impact on interracial behavior. A 1978 review noted the surprising consistency in the findings of methodologically rigorous studies: Race remained a factor in interpersonal relationships, but it was not as powerful as gender, and

variations in personal self-esteem. See Williams, *supra* note 193, at 343.

425. See, e.g., Walter G. Stephan & David Rosenfield, *Effects of Desegregation on Race Relations and Self-Esteem*, 70 J. EDUC. PSYCH. 670, 677-78 (1978) (finding no positive impact on self-esteem but suggesting that, given relative infancy of desegregation effort, such early results are "not surprising").

426. Epps, *supra* note 424, at 68-71.

427. Bruce R. Hare, *Self-Perception and Academic Achievement: Variations in a Desegregated Setting*, 137 AM. J. PSYCHIATRY 683, 687 (1980) (finding that after ten years of desegregation, there was no significant difference between black and white fifth-grade students with regard to general or area-specific self-esteem, but that differences could be correlated with socioeconomic status).

428. Charles V. Willic, *The Intended and Unintended Benefits of School Desegregation*, in BLACK EDUCATION, *supra* note 203, at 127, 131-32.

429. Stuart W. Cook, *Experimenting on Social Issues: The Case of School Desegregation*, 40 AM. PSYCHOL. 452, 459-60 (1985).

430. *Id.* at 459.

interracial relationships were formed.⁴³¹ Subsequent research has offered consistent support for the thesis posited in the *Brown* Statement: Desegregation can enhance the quantity and quality of interracial relationships, with equal status emerging as the most significant variable.⁴³²

A national study designed to proportionally reflect all mediating factors concluded that "desegregation, net of all other status characteristics, is positively associated with racial tolerance for both whites and blacks."⁴³³ A review of longitudinal studies noted that the studies, without exception, revealed that school desegregation leads to increased desegregation in later life,⁴³⁴ a phenomenon that frequently translated into significant economic advantages for minority adults.⁴³⁵

Finally, commentators have noted that racial attitudes and interracial behaviors are not necessarily linked.⁴³⁶ At times, desegregation may result in more positive interracial behavior even though racial attitudes

431. John B. McConahay, *The Effects of School Desegregation Upon Students' Racial Attitudes and Behavior: A Critical Review of the Literature and a Prolegomenon to Future Research*, 42 LAW & CONTEMP. PROBS. 77, 101 (1978).

432. See, e.g., Charles S. Bullock III, *Contact Theory and Racial Tolerance Among High School Students*, 86 SCH. REV. 187, 210 (1978) (mere fact of desegregation does not necessarily increase racial tolerance; measures of more intimate contact which imply some degree of equality of status are positively correlated with increased tolerance); Maureen T. Hallinan & Richard A. Williams, *Interracial Friendship Choices in Secondary Schools*, 54 AM. SOC. REV. 67 (1989) (survey analysis reveals that while personal characteristics of individual students and pairs of students had the strongest effects on friendship choices, organizational characteristics of the school, e.g., tracking, were also important); Philip Friedman, *Racial Preferences and Identifications of White Elementary Schoolchildren*, 5 CONTEMP. EDUC. PSYCHOL. 256, 262 (1980) (replicating Clark studies and finding that preference for non-white dolls among white children is higher in multiracial schools); Carole G. Goldstein et al., *Racial Attitudes in Young Children as a Function of Interracial Contact in the Public Schools*, 49 AM. J. ORTHOPSYCHIATRY 89, 97 (1979) (interracial classroom contact led to "increased preference for and acceptance of blacks in both black and white children").

433. Richard R. Scott & James McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 AM. EDUC. RES. J. 397, 412 (1982).

434. Jomills Henry Braddock II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 1984 PHI DELTA KAPPAN 259, 260. Subsequent work confirms this trend. See, e.g., Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267 (1989); Jomills Henry Braddock II, *School Desegregation and Black Assimilation*, 41 J. SOC. ISSUES No. 3, at 9 (1985).

435. Braddock et al., *A Long-Term View of School Desegregation*, *supra* note 434, at 261-62; Stephan, *supra* note 391, at 109-10.

436. See, e.g., Ingersoll, *supra* note 191, at 23 ("prejudicial beliefs are not always good predictors of prejudicial behavior").

appear to lag behind.⁴³⁷ Thus it appears that desegregation may improve race relations without improving racial attitudes by establishing a more salient egalitarian norm.⁴³⁸

In the face of this evidence, America's national white leadership has undertaken to proclaim the failure of the desegregation effort. Masked, albeit barely, in the occasional guise of assaults on the means rather than the ends—"busing" is the choice proxy, an irony in that access to buses was for generations a privilege whites reserved for their children—the tragic tale of the flawed and futile effort to engineer social equality has been told by no lesser authorities than the President of the United States⁴³⁹ and the Assistant Attorney General for Civil Rights.⁴⁴⁰ The

437. See SCHOFIELD, *supra* note 199, at 214; see also SCHUMAN ET AL., *supra* note 178, at 202 (noting "abundance of nonsurvey evidence of genuine change in white actions toward blacks"); Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 559 (1980) (reviewing literature and concluding that "whites today are complying with the norms of nondiscrimination but they have not yet internalized them"); Barbara J. Bank et al., *Normative, Preferential and Belief Modes in Adolescent Prejudice*, 18 SOC. Q. 574, 586-87 (1977) (distinguishing norms and preferences and finding that respondents' preferences were less favorable to integration than were their norms). "Perhaps," Professors Dovidio and Gaertner write, "the racial tolerance that is prominent in America's consciousness today may tomorrow become part of America's unconscious." Dovidio & Gaertner, *supra* note 178, at 148.

438. See Stephan, *supra* note 391, at 111; John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1717 (1991) (post-*Brown* civil rights law "at first, may not have changed the attitudes, but it appears to have altered the behavior, of discriminatory employers"); see also *supra* notes 204-09 and accompanying text.

439. In 1970, Richard Nixon determined that, for base political reasons, the Administration's take on the desegregation effort had to be that it had not worked. See LEMANN, *supra* note 166, at 210. Presidents Ford and Carter both expressed reservations about busing. See Charles B. Vergon, *School Desegregation: Lessons From Three Decades of Experience*, 23 EDUC. & URBAN SOC'Y 22, 28 (1990). In 1984, Ronald Reagan told a Charlotte, North Carolina crowd that Democrats "favor busing that takes innocent children out of the neighborhood school and makes them pawns in a social experiment that nobody wants. And we've found out that it failed." Francis X. Clines, *White House Aides Minimize Results*, N.Y. TIMES, Oct. 29, 1984, at A29; LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 82 (1987). An editorial response to President Reagan in the *Charlotte Observer* noted the city's pride in its fully integrated schools, and said:

"It would have been quite appropriate and very much appreciated if you had noted that accomplishment, which any president might hold up as a model to the rest of the country. Instead, you said something quite different, an unwelcome reminder of some ugly emotions and unfounded fears that this community confronted and conquered more than a decade ago."

Id. at 82-83 (quoting *You Were Wrong, Mr. President*, CHARLOTTE OBSERVER, Oct. 9, 1984, at 10A). As an aside, one of the Authors of the instant work was a student teacher

tale has had a certain resonance in the land.⁴⁴¹ And now the Supreme Court seems ready to join the chorus.

D. *Dowell, Freeman*, and the Construction of Race

The Court does not discuss race in *Dowell* or *Freeman*; it does not explicate the racial differences in socioeconomic or academic achievement nor does it examine the role of desegregation, empirically or ideally, in addressing these differences. This is part of the impoverishment of desegregation jurisprudence: Race is isolated and marginalized; education is removed from its broader cultural contexts; and school desegregation itself is divorced from its practical and policy objectives. Last, and worst, the desegregation effort is torn from its moral underpinnings; robbed in the end of all its meaning, the ghettoization of desegregation is made complete.

I. THE COURT COMMUNICATES AN INAUTHENTIC, INDIVIDUALISTIC UNDERSTANDING OF RACE

To the standard division of the public and private realms the Court now adds a series of more specific and equally artifactual dichotomies: between race and economics, between race and culture, between race and politics. Thus, it is "economics" that shapes residential patterns, and its correlation with "race" is either coincidental or not of the state's doing. Private choices—by inference, noneconomic ones—also contribute to residential segregation, and their correlation with "race" is also either happenstance or, presumably by more than tautology, also not attributable to the state. Finally, resolution of the issues raised in these cases is to be

in the Charlotte-Mecklenburg school system in 1977-78: The *Observer* got it right.

440. See William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1002 (1984): "After more than a decade of court-ordered busing, the evidence is overwhelming that the effort to desegregate through wholesale reliance on race-conscious student assignment plans has failed. The damage to public education wrought by mandatory busing is evident in city after city . . ." Reynolds cites no authority for these propositions; what is intriguing is the notion that he believed no authority was needed.

441. See, e.g., KOZOL, *supra* note 220, at 127, describing a conversation with suburban white high school students in Rye, New York:

"I don't think that busing students from their ghetto to a different school would do much good," one student says. "You can take them out of the environment, but you can't take the environment out of *them*. If someone grows up in the South Bronx, he's not going to be prone to learn." His name is Max and he has short black hair and speaks with confidence. "Busing didn't work when it was tried," he says . . .

had through the local political process, whose association with race is, at worst, unintentional.

"Race," as it is imagined by the Court, has been stripped of its historical meaning and is now divorced from its economic, cultural, and political contexts. What remain in the Court's new world are merely biological individuals who, alone or in occasional aggregates, are guided by their competitive desires or limitations, by their genetic or psychological urgings or limitations, or by their ability or inability to access political power. Most importantly, if race is a correlate of any of these capacities, it is through the work of nature and not the constructions of the state. In rejecting, as a consequence, the social constructions of race, the Court proffers a view that is contradicted by history, inconsistent with the empirical data, refuted by virtually every social science and natural science theorist, and embarrassed by the experience of every American. Ultimately, the Court eludes the truth that race is, in America, a political reality.⁴⁴² These failings aside, what the Court offers is a defensible conception of "race."⁴⁴³

2. THE COURT MARGINALIZES RACE

By ignoring the authentic meaning of race, the Court adopts an essentially assimilationist perspective: Race, it seems, no longer matters. But in the real world in which students live and learn, race does matter, and race-consciousness must be a part of the desegregation plan. Pretending that race is irrelevant merely adds insult to centuries of injury.

Worse, the Court's pretense aggravates the harm.⁴⁴⁴ Black, formerly inferior, is now invisible. But the Court's vision of a colorblind society does not square easily with the truths of the desegregation struggle, and neither does its preoccupation with the perceived interests of the white majority.⁴⁴⁵ The object of *Brown*, after all, was not to

442. See Jones, *supra* note 363, at 182. Of course, as Professor Mari Matsuda notes, there are clear normative implications to the acceptance, or denial, of the realities of "race" and other categories: "[T]he categories threaten people because positioning people in structures of subordination implicates all of us. It denies random and individual explanations of who we are and what our responsibilities are to others." Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1776 (1990).

443. What remains, of course, is its ideological defense, and on this ground its standing is secure.

444. See *supra* notes 196-200 and accompanying text, for a discussion of the evidence that ignoring "race" actually fosters the development of modern racism.

445. The Court seems determined to constitutionalize the observation that desegregation plans have been designed not so much to achieve the greatest practicable amount of desegregation for blacks and other racial minorities, but to be least offensive

have all children, black and white, love only white dolls, but rather to love equally.

Given the Court's attitude, the calls from all quarters for separate but equal schools are bound to have an increasing resonance.⁴⁴⁶ But whatever merit such proposals may have in light of the prevailing political contingencies,⁴⁴⁷ it must never be forgotten that their necessity arises only because of the false dichotomy constructed by the Court: Desegregation need not be inconsistent with pluralism.⁴⁴⁸ If separate schools are to be tolerated, it must be only for pragmatic reasons, and not because of a willingness to embrace the ideology that permits, indeed perpetuates, the ghetto: Ghettos do not revitalize;⁴⁴⁹ separate is not equal.⁴⁵⁰

to whites. Willie, *supra* note 428.

446. See, e.g., Derrick Bell, *The Case for a Separate Black School System*, in BLACK EDUCATION, *supra* note 203, at 136; cf. Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992) (separate but equal curriculum).

447. Compare Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) with *Commentary: On Racial Realism*, 24 CONN. L. REV. 497 (1992).

448. See Asa G. Hilliard III, *Reintegration for Education: Black Community Involvement with Black Students in Schools*, in BLACK EDUCATION, *supra* note 203, at 201, 207 (call for awareness of cultural pluralism is not a call for segregation). Dr. Du Bois confronted the issue over seventy years ago:

Here is a dilemma calling for thought and forbearance. Not every builder of racial co-operation and solidarity is a Jim Crow advocate, a hater of white folk. Not every Negro who fights prejudice and segregation is ashamed of his race.

W.E.B. DU BOIS, *Jim Crow*, in DU BOIS, *supra* note 1, at 267, 268.

449. See, e.g., LEMANN, *supra* note 166, at 347 ("the clear lesson of experience . . . is that ghetto development hasn't worked").

450. Jonathan Kozol describes his conversation with African-American high school students in East St. Louis:

"If the government would put a huge amount of money into East St. Louis, so that this could be a modern, well-equipped and top-rate school," I ask, "with everything that you could ever want for education, would you say that racial segregation was no longer of importance?"

Without exception, the children answer, "No."

"Going to school with all the races," Luther says, "is more important than a modern school."

KOZOL, *supra* note 220, at 31.

3. THE COURT ISOLATES THE EDUCATIONAL PROCESS FROM ITS BROADER CULTURAL CONTEXTS

The Court's opinions reflect no real insight into the historical or contemporary significance of education in the quest for equality.⁴⁵¹ Nor do the opinions reflect an understanding of the flip side of this coin, of the role played by education in the history and contemporary reality of racial hierarchy. On the contrary, the educational systems and processes as depicted by these opinions function in a cultural vacuum; the Court, in the desegregation context, loses all sight of the "work of the schools."⁴⁵²

Explicitly, the isolation of the educational process is achieved through the continued fragmentation of desegregation. This now clearly includes the view that desegregation is the proper remedy only for intentional discrimination by local school boards, as distinct from other state actors. This undeniably is consistent with the trend in desegregation doctrine, but it remains quite at odds with an authentic understanding of the very real working relationship between the schools and other public authorities.⁴⁵³

More fundamentally, the Court fails to recognize the cultural interrelationship of the educational and political processes. The public schools reflect the broader political culture.⁴⁵⁴ The Court's failure to

451. Indeed, Professor Michael Klarman suggests that the real doctrinal meaning of *Brown I* is to be found in its treatment of education as a fundamental right. See Klarman, *supra* note 30, at 238-39.

452. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (inculcation of the "fundamental values necessary to the maintenance of a democratic political system" is the "work of the schools").

453. See, e.g., LEMANN, *supra* note 166, at 91-92:

It is obvious in retrospect that the established black neighborhoods were far too small to hold all the black people coming to Chicago, but [Mayor] Daley's efforts were directed at finding ways to maintain the color line. His school superintendent, Ben Willis, . . . was immediately faced with the problem of severe overcrowding in the black schools. Instead of integrating the adjacent and usually half-empty white schools, Willis put the black schools on double shifts, eight to noon and noon to four, and installed "Willis Wagons"—trailers converted into temporary classrooms—in their playgrounds, thereby creating an urban equivalent of the inferior rural black school systems of the South. . . . Daley did not object, and when others objected, the ruler of all Chicago would point out that the Board of Ed[ucation] was an independent agency and there was nothing he could do.

See also Fishman & Strauss, *supra* notes 173, at 660-63 (politicization of school issues in Denver).

454. See, e.g., Suttles, *supra* note 398, at 48 (observing that "public schools in America are only weakly differentiated from the local community"); Randi L. Miller,

perceive this is manifest both in its willingness to believe that ongoing segregation is the result of factors independent of school authorities—as if the schools neither prompt nor respond to the goals of their constituents—and in the Court's cavalier treatment of the constitutional interests at stake. What is at risk here is nothing less than the continued viability of the promise of a caste-free society; if the Court does not recognize these stakes, then its obtuseness is embarrassing. If the Court does see what is at stake here, then its response is truly shameful.

4. THE COURT DIVORCES DESEGREGATION FROM ITS PRACTICAL AND POLICY OBJECTIVES

Neither *Dowell* nor *Freeman* attempts to assess the success or failure of the desegregation effort, either generally or in the respective communities. Neither *Dowell* nor *Freeman* discusses the achievement gap between black and white Americans, nor do they discuss the cultural, economic, and political forces that perpetuate that gap. Neither *Dowell* nor *Freeman* addresses the unique harms visited by educational segregation: not the racist attitudes it promotes, not the empirical inequalities it invariably entails.⁴⁵⁵ It is as a consequence a rather barren territory that the Court explores in the course of these opinions, and when the journey is over, one cannot help but wonder: Just what was the point?

There was, presumably, a purpose for desegregation, and the Court, presumably, knows it. But one searches in vain for an elaboration of this purpose: All that is offered is a single paragraph from *Brown*; the intervening four decades, evidently, have produced no new insights.

By reducing *Brown* to a vacant icon, *Dowell* and *Freeman* elude its central meaning: Segregated schools deprive America's children of the equal protection of the laws. The Court's new willingness to tolerate segregation can be squared with *Brown* only if the Court is prepared to reject either *Brown*'s claim that inequality inheres in racial segregation,

Desegregation Experiences of Minority Students: Adolescent Coping Strategies in Five Connecticut High Schools, 4 J. ADOLESCENT RES. 173, 187 (1989) ("student experiences in school are not only products of social and structural forces within the school but also reflect status and power relationships in the larger society").

455. But for some Americans, the truth is not obscured. Jonathan Kozol relates the remarks of "Israel, a small wiry Puerto Rican boy" in South Bronx's Morris High School: "'People on the outside,' he goes on, 'may think that we don't know what it is like for other students, but we visit other schools and we have eyes and we have brains. You cannot hide the differences. You see it and compare . . .'"

KOZOL, *supra* note 220, at 104.

or *Brown's* belief that this harm could be undone by compulsory desegregation. The Court, however, does neither.

Given the available evidence, the Court was surely right to refrain from pronouncing the theoretical or empirical failure of desegregation. But the Court's concomitant refusal to meaningfully discuss the issue deprives *Brown* of its salience: The case for desegregation remains a powerful one, and the Court might have said as much. After all, *Brown's* principles *are* worth reaffirming: In purely empirical terms, the need—and the promise—is greater than ever.

The consequences of the Court's actions, and omissions, will become apparent over the generations. One prospect is particularly frightening. There is now a danger of a renewed stigma of "racial inferiority," one even more insidious than the pre-*Brown* stigma in that it now carries with it a certain despairing air of inevitability. "That stigma," Professor Rosemary Salomone notes, "will continue to limit the career and educational opportunities of black students for generations to come, long after schools have theoretically equalized educational services."⁴⁵⁶ This prospect might have been foreclosed, but the Court's opinions disappoint: In the struggle for inequality, *Dowell* and *Freeman* strive only for irrelevance.

5. THE COURT ELIDES THE MORAL JUSTIFICATIONS FOR THE DESEGREGATION EFFORT

There is a final failing in *Dowell* and *Freeman*, one that both transcends and subsumes all of their other flaws and that perhaps best explains their disturbing lack of resonance. The opinions are, it seems to us, decidedly amoral; as such, they are worse than irrelevant, they may be truly regressive.

456. ROSEMARY SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* 77 (1986). In some quarters, the "stigma" is already being reformulated. "For the past twenty years," the Heritage Foundation reported in 1984, "federal mandates have favored 'disadvantaged' pupils at the expense of those who have the highest potential to contribute to society." Report of the Heritage Foundation, quoted in ANN BASTIAN ET AL., *CHOOSING EQUALITY: THE CASE FOR DEMOCRATIC SCHOOLING* 14 (1986). Whatever its empirical accuracy, the statement is extraordinary for its premise: that there are identifiable students with "the highest potential to contribute to society" and, presumably, of course, other students with "lower" and even "lowest" potentials. But the declaration assumes all that the truths of human experience deny: that there are absolute criteria for an ideal society, absolute criteria for the value of a contribution to society, and absolute criteria for measuring the potential to contribute. The declaration is viable, in other words, only as a proclamation of the necessity of perpetual hegemony.

The opinions in *Dowell* and *Freeman* evidence no sense of the moral justifications for *Brown*. On the contrary, in the place of the egalitarian norms that support *Brown*, the Court now substitutes its anti-ethos of rampant individualism. Private choice is once again both the reality and the ideal: The cycle is complete—we are indeed back to *Plessy*.

But *Plessy* was wrong not merely for its belief in “racial instincts” and “self-imposed” stigma. *Plessy*’s individualism was both descriptive and normative: If the races were to mix on the “social” plane, it was to be only as a matter of choice.⁴⁵⁷ But as the first Justice Harlan knew in *Plessy*, this matter of choice had to be viewed in context. And in the context of the pervasive inequalities that marked *Plessy*’s day, it was, for Justice Harlan, inaccurate to call Jim Crow a matter of choice, and morally wrong to sanction it.⁴⁵⁸

One would have thought that *Brown* had fully resolved this issue: “The people” cannot “choose” segregated schools. And yet *Dowell* and *Freeman* reinstate “private choice” as the apotheosis of constitutional jurisprudence, and in so doing, replicate *Plessy*’s sins. The “people” do not “choose” segregated schools,⁴⁵⁹ and the Court is wrong to sanction their existence.

It is, ultimately, a question of moral responsibility. Justice Scalia is probably right when he says that we can never accurately sort out the many factors, “public” and “private,” that account for the racial hierarchy that pervades our nation’s schools. But epistemological uncertainty need not cripple the metaphysic: As Albert Camus wrote, “[A] man can’t cure and know at the same time. So let’s cure as quickly as we can. That’s the more urgent job.”⁴⁶⁰

In this understanding lies the most tragic failing of the *Dowell* and *Freeman* decisions: They do not heal. Paralyzed, perhaps, by the uncertainty, or driven, perhaps, by a redemptive political will, the Court renounces its role as the mediator of equality. Confronted with the need for a strong moral stance, the Court wavers. Indeed, it does not strain credulity to find in these opinions sympathy for those who hate, understanding for their irrational fears, and encouragement for the

457. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896).

458. “The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.” *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

459. Evidently, this is equally true for African-Americans and white Americans. See *supra* notes 178-83 and accompanying text.

460. ALBERT CAMUS, *THE PLAGUE* 195 (Stuart Gilbert trans., 1972). For an effort to develop a jurisprudence rooted in Camus’s philosophy of rebellion and an application of the jurisprudence to the struggle for constitutional equality, see Hayman, *Re-Cognizing Inequality*, *supra* note 5.

rightness of their cause. That is, tragically, more comprehension and compassion than the Court displays for those engaged in the struggle to be equal.

One can fairly debate the depth and dimension of the Court's new moral commitments: They may not transcend a pragmatic ambivalence.⁴⁶¹ But whatever else might be said about the morality that underlies this new jurisprudence, one thing is clear: This is not the moral vision for which people gave their lives—it is not the vision they thought they saw in *Brown*. “[R]acial separation,” Justice Marshall reminds the Court in *Dowell*, “remains inherently unequal.”⁴⁶² And unequal, he might have added, remains inherently wrong.

CONCLUSION

What began forty years ago as a journey of promise is being shepherded off the course by the very institution charged with leading the way. *Dowell* and *Freeman* harken back to both the concepts and the social message of *Plessy v. Ferguson*: the idea that some racism is natural, inherent in the human condition, inevitable, and, as a consequence, constitutionally tolerable. Despite the recent history of discriminatory government actions in so many areas, the Court now sharply separates “private choices” and government responsibility—and acknowledges no interaction between the public and private spheres. Absent from the Court's desegregation jurisprudence is any sense of history—any recognition of the government's continued role in the

461. We will relegate to this footnote our discussion of the incendiary, but likely inevitable, question whether the *Freeman* and *Dowell* opinions are manifestations of contemporary racism. Our own answer is that we simply do not know. Certainly they manifest the ideological correlates of “modern racism.” See *supra* notes 198-203 and accompanying text. But if racism, modern or otherwise, also necessarily includes a distinctly racial component (notions, typically, of racial inferiority or deviance), see *supra* notes 187-88, then the diagnosis must be beyond the reach of this effort. Of course, we could speculate, and the incongruity between the doctrinal positions staked out by individual Justices in race and nonrace cases, coupled, perhaps, with the insights gleaned from biographical data, might even meaningfully inform the speculation. But we question the value of that project. What we are certain of is that *Freeman* and *Dowell* are tragically flawed on their face, and that their predictable impact is the perpetuation of racial segregation in American schools and pervasive racial hierarchy. Determining whether the opinions *purposefully* discriminate based on race necessitates judgments in which we would have much less confidence; the Court's equal protection doctrine notwithstanding, we are unpersuaded that it should inatter whether insult accompanies the injury.

462. Board of Educ. of Okla. City Pub. Sch. v. Dowell, 111 S. Ct. 630, 648 (1991) (Marshall, J., dissenting).

maintenance of the color line. In this collapsed history, the Court heralds the end of desegregation before, in truth, it has even begun.

On the epistemological level, *Dowell* and *Freeman* lack authenticity; empirically, they are without foundation. A rich literature—from anthropology, genetics, history, and social psychology—explodes the myth of “natural racism” and embarrasses the belief in a biologically determinable “race.” But these insights elude the Court: It substitutes ideology for truth and winds up with anachronisms.

And so, with *Freeman* and *Dowell*, the acculturation of racism continues. The decisions send a powerful normative message about the behaviors that are constitutionally acceptable and socially appropriate. In the face of evidence that properly constructed and committed desegregation efforts can effect, and have effected, integrative social changes, the Court caters to the fear of failure. Or perhaps it is the fear of success. Racial separatism is, after all, no longer the private choice of most Americans; how fitting, then, that *Brown*'s authentic legacy should rob *Freeman* and *Dowell* of even this weak claim to a moral foundation.

What the Court achieves in *Freeman* and *Dowell* is only another needless test of the decency of the American people. The Court does not really abdicate its leadership role; as each Justice surely knows, the Court, as an institutional matter, has no choice but to lead. But the road it takes is the low one; the path leads backward . . . one hundred years. Worse still, when the people under its stewardship arrive at the new destination fixed by the Court, and recognize in that site the origins of their journey, they will find themselves a poorer people: cheated of a century that could have been used to build equality, robbed of a million dreams. And in that moment of awareness—when they see the broken promise, and feel their hearts break with it—the fate of this nation will once again hang in the balance. But this time, its people will be less understanding, less trusting, less hopeful. And their appeals for justice having been exhausted, they will this time weigh the value of demands.

No justice. No peace.⁴⁶³

463. “The logical end of racial segregation is Caste, Hate, and War.” DU BOIS, *supra* note 1, at 275.