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Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate

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COMMENTS

ISSUES IN SCHOOL DESEGREGATION: THE DISSOLUTION OF A WELL-INTENTIONED MANDATE

> As I stand here and look out upon the thousands of Negro faces, and the thousands of white faces, intermingled like the waters of a river, I see only one face—the face of the future.
>
> Yes; as I gaze upon this great historic assembly, this unprecedented gathering of young people, I cannot help thinking—that a hundred years from now the historians will be calling this not the "beat" generation, but the generation of integration.
>
> Martin Luther King, Jr.[1]

I. INTRODUCTION

Since our country's inception, few societal or constitutional issues have remained as pervasive and politically charged, for so long a period, as the issue of racial segregation. An example of government action that classifies people by race, but purports not to disadvantage minorities, segregation refers to the "unconstitutional policy and practice of separating people on the basis of color, nationality, religion, etc. in housing and schooling."[2] Although members of every minority group in this country have suffered from various forms of discrimination at the hands of a society dominated by whites, the purpose of this Comment is to focus specifically on issues of racial separation as they relate to the public schooling of African-Americans.

Prior to a detailed analysis of certain issues interwoven with the concept of school desegregation, including *de jure* segregation,[3] *de facto*

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1. Martin Luther King, Jr., Speech Before the Youth March for Integrated Schools (Apr. 18, 1959), *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 34, 35 (James M. Washington ed., 1st ed. 1986).

2. BLACK'S LAW DICTIONARY 1358 (6th ed. 1990).

3. De jure segregation refers to segregation directly intended or mandated by law. BLACK'S LAW DICTIONARY 425 (6th ed. 1990). The term comprehends "any situation in which the activities of school authorities have had a racially discriminatory impact contributing to the establishment or continuation of a dual system of schools . . . ." BLACK'S LAW DICTIONARY 425 (6th ed. 1990).

segregation,[4] forced integration,[5] and the policies underlying school reform, Part II of this Comment briefly introduces the process undertaken by the federal courts in effectuating desegregation plans. Part III then outlines the decisions of the United States Supreme Court in the seminal desegregation cases. This historical summation will serve as a useful framework for understanding both the current state of school desegregation efforts and the need for instilling new theories regarding desegregation law.

In Part IV, this Comment discusses both the reasons for and the results of the Supreme Court's attitudinal changes with respect to desegregation litigation. Part V examines three major debates that underscore current analysis of desegregation law: the effects of drawing a constitutional distinction between *de jure* and *de facto* segregation, the propriety of using busing as the major desegregation remedy, and the prospect of utilizing "school reform" measures to effectuate desegregation decrees given the two movements' inherent differences.

Part VI argues that the desegregation effort of the past forty years, in the form of forced integration, has failed to bring about the results expected of integration and desired by its proponents: better educational opportunities for black[6] youths and the economic and employment benefits that should accrue as a result of those opportunities.

Part VII calls for a reformulation of the theories that underpin desegregation measures, arguing that until society is ready to accept and embrace racial harmony and equality as a requisite element of integrated learning, African-American students deserve the right to be free of oppressive desegregation efforts. This Comment concludes that this right seems particularly essential in light of the fact that many of the burdens associated with forced integration fall on black students themselves.

It should be stated from the outset that the intent of this Comment is not to introduce a new remedy to the desegregation dilemma that still plagues our country as it nears the dawn of a new century; indeed, forty years of analysis, litigation, and formulation by some of the most respected

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4. *De facto* segregation is "inadvertent and without assistance of school authorities and not caused by any state action, but rather by social, economic and other determinates." BLACK'S LAW DICTIONARY 416 (6th ed. 1990). For a discussion on the distinction between *de jure* and *de facto* segregation, *see infra* part V.A.

5. Integration refers to the bringing together of different races of people for the purpose of making them equal. BLACK'S LAW DICTIONARY 809 (6th ed. 1990).

6. In accordance with citation reference guides, *Marquette Law Review* advises using lowercase for the words "white" and "black" when referring to race. However, this author has left undisturbed those quotations that, as the result of the original author's personal preference, use uppercase when referring to race.

commentators, civil rights attorneys, and courts in the nation have failed to provide a solution that achieves significant results without exacting overly burdensome costs. Instead, this Comment was written to show that the road travelled by this country has reached a dead end with respect to desegregation law, and while we attempt to chart a new course based on true, rather than imagined, equality, we should give African-Americans the choice and the chance to attain a quality, but uncoerced, form of education.

II. THE PROCESS OF COURT-ORDERED DESEGREGATION[7]

The process of court-mandated desegregation can begin only with a finding that *de jure* segregation is present in a school district.[8] After such a finding, a federal district court will usually require the offending school board to propose a plan intended to desegregate its schools.[9] Should the court find the school board's plan unsatisfactory, the court will create and implement a plan it considers capable of remedying the segregation.[10]

Once a desegregation decree is entered by a district court, the school district is bound by its provisions and is under the jurisdiction of the court until the district has achieved "unitary status."[11] After the school district believes that it has achieved such status, it petitions the district court for dissolution of the decree (or a part thereof).[12] Guided by the holding in *Freeman v. Pitts*,[13] the district court will then rule on whether the school board has complied with any or all of the elements of the desegregation order.[14] Finally, the court will return to local authorities control over those elements of the new system that no longer foster discrimination.[15]

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7. Part II is but a skeletal overview of the desegregation process. Some desegregation cases remain in the federal court system for as long as thirty years, consisting of an endless number of rulings, appeals, and remands. However, Part II should assist the reader in comprehending some of the factual patterns outlined in Part III.

8. *See* Bradley W. Joondeph, Note, *Killing* Brown *Softly: The Subtle Undermining of Effective Desegregation in* Freeman v. Pitts, 46 STAN. L. REV. 147, 149 (1993).

9. *Id.*

10. *Id.*

11. *Id.* at 149-50. The term "unitary status" refers to the situation in which a school district removes the vestiges of state-sanctioned segregation, thereby creating a district that is not "dual," or segregated by race. A district achieves such status by meeting some or all of the court-imposed desegregation requirements. *See infra* part III.C.

12. *Id.* at 150.

13. 112 S. Ct. 1430 (1992). For a discussion of *Freeman*, *see infra* notes 76-82, 102-04 and accompanying text.

14. Joondeph, *supra* note 8, at 150.

15. *Id.*

III. HISTORY OF PRINCIPAL DESEGREGATION CASES

A. *From Separate But Equal to Inherently Unequal*

Any discussion regarding the issue of desegregation, irrespective of its relationship to education, must begin with *Plessy v. Ferguson*.[16] In *Plessy*, the Supreme Court formulated the "separate but equal" doctrine, holding that separate but equal treatment of human beings based on race did not violate equal protection provisions of the United States Constitution.[17] The Court grounded its holding on two principles. First, the Louisiana law calling for separate but equal train accommodations related only to "social" equality, a type of equality not constitutionally protected under the equal protection umbrella.[18] Second, the Louisiana law itself did not "stamp[] the colored race with a badge of inferiority."[19]

Plessy's separate but equal ruling remained the law for nearly sixty years. However, in *Brown v. Board of Education*,[20] the Supreme Court rejected the separate but equal doctrine, holding instead that separate educational facilities are inherently unequal.[21] The *Brown* Court held that

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16. 163 U.S. 537 (1896). Petitioner Homer Plessy was an American citizen residing in Louisiana; respondent John Ferguson was the judge of the criminal district court in New Orleans in which this case originally arose. According to the facts as described by the United States Supreme Court, Plessy was "seven eighths Caucasian and one eighth African blood . . . ." *Id.* at 538. Plessy boarded a Louisiana passenger train and "took possession of a vacant seat in a coach where passengers of the white race were accommodated . . . ." *Id.* Plessy was then informed by the train conductor that unless he moved to a coach "for persons not of the white race," he would be removed from the train. *Id.* Upon refusal of the order, Plessy was "ejected from [the] coach and hurried off to [prison]." *Id.*

17. *Id.* at 548.

18. *Id.* at 552.

19. *Id.* at 551. Justice Brown delivered the opinion of the Court and stated that if African-Americans felt inferior under Louisiana's train accommodations law, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*

It is worth noting that, in what is considered a classic dissent, the first Justice Harlan argued that the Louisiana law did in fact violate equal protection by interfering with the personal freedom of blacks. It was in this dissent that Justice Harlan penned the famous line, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting).

20. 347 U.S. 483 (1954). *Brown* served as a consolidated opinion to four independent, yet factually similar, cases. The cases arose in Kansas, South Carolina, Virginia, and Delaware. In each of the four instances, African-American minors "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race." *Id.* at 488.

21. *Id.* at 495. It should be noted that the holding in *Brown* is limited to the arena of public education. Indeed, to this day, the Supreme Court has never expressly overruled *Plessy*.

the Fourteenth Amendment's Equal Protection Clause prohibits the states from maintaining racially segregated schools, even though tangible factors (e.g., physical facilities, curricula, and teacher qualifications) may be equal.[22] Indeed, the Court premised its holding on the inequality engendered by intangible factors. According to the Court, separating children on account of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[23]

B. The Implementation Decisions

The *Brown* decision, while a landmark in constitutional law,[24] did little to actually change the educational systems of the South.[25] Only through a series of "implementation" decisions did any meaningful changes occur. Although most of these decisions were not handed down until the 1960s, the Court attempted to lay the foundation for change in the case of *Brown v. Board of Education* (*Brown II*).[26] In *Brown II*, the Supreme Court established several significant guidelines in the hope of effectively eliminating racial segregation from public schools. First, the Court gave the federal district courts primary responsibility to oversee desegregation procedures.[27] This was due to those courts' "proximity to local conditions."[28] Second, the Supreme Court instructed the district courts to use "equitable principles"[29] in "fashioning and effectuating the [desegregation]

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22. *Id.* at 492.

23. *Id.* at 494. Two peripheral issues should be noted with regard to the *Brown* holding. First, after 58 years, Justice Harlan's *Plessy* dissent was finally vindicated. Second, on the same day that *Brown* was decided, the Court held, in Bolling v. Sharpe, 347 U.S. 497, 500 (1954), that the federal government also could not operate racially segregated schools.

24. *Brown* was "hailed for undercutting decades of institutional racism and opening the doors of opportunity for African-Americans. A rousing celebration ensued at NAACP headquarters, where congratulatory telegrams came in from around the world." Melanie Conklin, *Beyond Integration*, ISTHMUS (Madison), Nov. 18-24, 1994, at 1.

25. In North Carolina, for example, just 0.026% of all black students attended desegregated schools seven years after the *Brown* holding. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994). In Virginia, the number was 0.09%. *Id.* Furthermore, "*not a single* black child attended an integrated public grade school in South Carolina, Alabama or Mississippi as of the 1962-1963 school year." *Id.*

26. 349 U.S. 294 (1955).

27. *Id.* at 299.

28. *Id.*

29. *Id.* at 300.

decrees."[30] Third, the district courts were directed to enter necessary orders and decrees "with all deliberate speed."[31]

After leaving authority of the desegregation process to the federal district courts in 1955, the Supreme Court distanced itself from the desegregation issue for nearly a decade. Then, beginning with the 1963 case of *Goss v. Board of Education*,[32] the Court began to place restrictions on the kinds of measures acceptable for implementing desegregation strategies. In *Goss*, the Court held that minority-to-majority transfer plans[33] were unconstitutional because it was inherent in their nature to promote discrimination.[34] The transfer provisions at issue in *Goss*, according to the Court, could not be "deemed to be reasonably designed to meet legitimate local problems, and therefore do not meet the requirements of *Brown*."[35]

In *Griffin v. County School Board*,[36] the Court again struck down as unconstitutional a county's attempt to circumvent desegregation orders.

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30. *Id.*

31. *Id.* at 301. With respect to *Brown II*, it is this Supreme Court directive that proved to be the most significant. Reams of paper have been exhausted in an effort to understand and explain the Court's logic regarding its "with all deliberate speed" phraseology. Although the Court placed the burden of proving the need for implementation delays on the school boards, *id.* at 300, much discussion surrounds the Court's decision to deny immediate relief to the victims of racially discriminatory public school policies. Indeed, "*Brown* is the only case . . . where the Supreme Court found a constitutional violation but did not order immediate vindication." Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 889 (1993). Likely, the Court feared that the result of instant desegregation would be violence between African-Americans and Caucasians. *But see* Lino A. Graglia, *The Busing Disaster*, 2 KAN. J.L. & PUB. POL'Y 13, (Summer 1992) (arguing that the Court's reluctance to enforce *Brown* was based on the knowledge that the South would basically abolish free public education by closing down its schools).

Note that as a result of the gradual desegregation allowed by the Court, the plaintiffs in *Brown* never stood a chance of reaping the benefits of their labor.

32. 373 U.S. 683 (1963). *Goss* served as a consolidated opinion to two cases originally commenced in separate federal district courts in Tennessee. The cases concerned black schoolchildren in Knoxville and Davidson County who sought desegregation of their respective public school systems. *Id.* at 684.

33. The transfer plans were a reaction to school district rezoning (the redrawing of attendance zones). Some Tennessee districts, in accordance with large scale desegregation plans, rezoned in such a manner as to create race-neutral schools. *Id.* However, transfer provisions written into the desegregation schemes would allow any student, upon request, to transfer from a school where he or she was a racial minority to a school where he or she was part of the racial majority. The plans were held constitutional at both the federal trial and appeals levels. Maxwell v. County Bd. of Educ., 203 F. Supp. 768 (M.D. Tenn. 1960), *aff'd*, 301 F.2d 828 (6th Cir. 1962).

34. *Goss*, 373 U.S. at 688.

35. *Id.* at 689.

36. 377 U.S. 218 (1964).

Instead of complying with desegregation requirements, a Virginia county decided to close its public schools and reopen white-only schools using state and local tax credits and grants.[37] The *Griffin* Court held that, under the particular circumstances, the closing of the public schools of Prince Edward County denied African-American schoolchildren the equal protection guaranteed by the Constitution.[38] The Court's reasoning was twofold. First, by closing the schools, the schoolchildren of Prince Edward County were treated differently from those of other counties since they "must go to a private school or none at all."[39] Second, it was clear that the public schools were closed and private ones were opened in order to guarantee that white and black children attended different schools.[40]

The Court's next significant involvement in the area of desegregation occurred in *Green v. County School Board*.[41] At issue in *Green* was whether a "freedom-of-choice" desegregation plan, which allows a student to choose her own public school, was acceptable under *Brown*.[42] The Court held that the scheme was unacceptable, concluding that "[r]ather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board."[43] The Court's holding made it clear that an officially segregated school system must be converted to a "unitary, nonracial system"[44] of public education.[45]

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37. *Id.* at 221.

38. *Id.* at 230.

39. *Id.*

40. *Id.* at 231. The Court indicated, however, that a county could close its public schools as long as the reasons behind the closures were constitutional. *Id.*

It is noteworthy that in *Griffin* the Court finally ran out of patience with the concept of "with all deliberate speed." The Court declared, "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." *Id.* at 234.

41. 391 U.S. 430 (1968).

42. *Id.* at 431-32. The facts surrounding *Green* are as follows: New Kent County, a small rural county in Eastern Virginia, had a population of about 4,500, half of which was black. *Id.* at 432. There was almost no residential segregation in New Kent, and there were only two public schools. *Id.* After the "freedom-of-choice" plan had been in effect in New Kent for three years, no white children had chosen to attend the formerly black school, and 85% of the black students remained in that school. *Id.* at 441. "In other words," the Court stated, "the school system remains a dual system." *Id.*

43. *Id.* at 441-42. In striking down the scheme, the Court identified a set of factors that was to be considered by lower courts when deciding whether a school district had complied with desegregation orders. The factors include student assignment, faculty, staff, transportation, extracurricular activities, and physical facilities. *Id.* at 435.

44. *Id.* at 440.

The Court's numerous rulings in *Swann v. Charlotte-Mecklenburg Board of Education*[46] provided the federal district courts with extensive guidance relating to the techniques permitted in desegregating dual school systems.[47] First, the Court drew an important distinction between *de jure* and *de facto* segregation. In order for segregation to be unconstitutional,

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45. *Id.* The Court did concede, however, that "freedom-of-choice" plans might serve as a constitutional, effective device in certain situations. *Id.*

The *Green* decision is significant for reasons other than those related to the "freedom-of-choice" plans. The Court, for the first time, addressed the importance of the effects of desegregation measures, and not merely the measures' intent. *See id.* at 437. "School boards such as the respondent [are] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. Good intentions on the part of school boards were no longer sufficient to mollify the Court, *see id.* at 438, for "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Id.* at 439.

46. 402 U.S. 1 (1971). In 1965, a federal district court implemented a desegregation plan, including a transfer provision, purportedly aimed at remedying segregated public school systems in North Carolina. Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*. 369 F.2d 29 (4th Cir. 1966). But by 1969, two-thirds of all African-Americans attending public school in the city of Charlotte—some 14,000 students—were educated at schools which were either all-black or more than 99% black. *Swann*, 402 U.S. at 7. Due to this inequity, and based on the Supreme Court's holding in *Green*, petitioners in *Swann* (parents of black children attending school in the Charlotte-Mecklenburg district) sought further relief from the District Court in achieving a unitary school system.

In April of 1969, the District Court ordered the school board to come forward with a plan for both faculty and student desegregation. Two plans were eventually submitted, one by the school board and one by a court-appointed expert. *Id.* at 8. (For a detailed discussion of the two plans, see *id.* at 8-10.) In February of 1970, the court adopted for implementation a plan that contained aspects of both the submitted plans. *Id.* at 10.

On appeal, the court of appeals remanded the case to the district court for reconsideration, concerned that, if carried out, particular provisions of the accepted plan would unduly burden the school district and its students. 431 F.2d 138 (1970).

On remand, the District Court received a new plan from the United States Department of Health, Education, and Welfare, a revised plan from a minority of the school board members (the minority plan), and an unrevised plan submitted by a majority of board members. *Swann*, 402 U.S. at 11. After lengthy hearings, the court concluded that three plans were reasonable—the one originally adopted by the court, the minority plan, and an early draft of the plan submitted by the expert. *Id.* When the full school board opted to not adopt any of the plans, the District Court ordered the implementation of the plan originally accepted. *Id.*

Undoubtedly disturbed by the money and time required to effectuate reasonable desegregation plans, the Supreme Court granted certiorari in *Swann* "to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action." *Id.* at 5.

47. Significantly, *Swann* was the first major desegregation case for the Court under Chief Justice Warren Burger. Chief Justice Earl Warren, a forerunner in civil rights issues and the author of *Brown*, retired in 1969 after 16 years on the Court.

it must be *de jure*, or officially maintained.[48] Thus, the lower federal courts may not order a school district to cure *de facto* segregation by adjusting the district's racial balance.[49] Second, the Court ruled that in trying to remedy dual school systems, the lower courts could consider a school district's overall ratio of black students to white students.[50] Third, the *Swann* Court upheld rezoning as a permissible means of remedying segregation.[51] Furthermore, the Court held that new attendance zones are not required to be "contiguous."[52] In stated that a school board plan that "pairs" or "groups" schools from non-contiguous parts of a city is a valid method of bringing racial balance to the schools.[53] Fourth, the Court ruled that bus transportation is a permissible means of bringing about desegregation.[54] However, a valid objection to busing exists "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[55] A fifth ruling by the *Swann* Court indicated that, once *de jure* segregation had been eliminated, year-by-year adjustments to student bodies were not required by the Constitution.[56]

Some twenty years after *Brown*, the Supreme Court decided the first school desegregation case concerning a northern American city.[57] *Keyes v. School District 1*[58] was the first in a line of northern-based cases in

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48. *Swann*, 402 U.S. at 17-18.

49. *Id.*

50. *Id.* at 25. However, the Court stated that the lower courts could not order every school to maintain a black/white ratio exactly equal to that of the whole district. *See id.* at 24. In sum, "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." *Id.* at 25.

51. *Id.* at 28.

52. In other words, zones altered to fight segregation need not be made up of schools in direct proximity to one another.

53. *Id.* at 28.

54. *Id.* at 30. "Desegregation plans cannot be limited to the walk-in school." *Id.*

55. *Id.* at 30-31.

56. *Id.* at 32. This ruling did not mean, of course, that the federal district courts could not do everything in their power to remedy future problems. However, it did mean that once state-imposed discrimination was removed from a school system, the district courts should not re-intervene absent evidence of *de jure* segregation. *Id.*

57. Because segregation was generally required by law in the South at the time *Brown* was decided, virtually all of the desegregation litigation that followed arose in a southern state. Conversely, statutorily-authorized segregation in the North was non-existent when the Court handed down its ruling in *Brown*.

58. 413 U.S. 189 (1973). *Keyes* concerned the school system of Denver, Colorado. According to the Supreme Court, the system had never operated under an official provision that mandated segregation. *Id.* at 191. However, the presiding federal district court found that the defendant school board, using rezoning tactics and school construction policies,

which the Court attempted to lay down rules dealing with the *de jure/de facto* distinction. The Court in *Keyes* emphasized that the differentiating factor between the two is the "*purpose* or *intent* to segregate."[59] More significant, however, was the Court's treatment of the effects of a finding that *de jure* segregation existed in a substantial portion of a school district. A finding that *de jure* segregation exists in one section of a school system "is highly relevant to the issue of the board's intent with respect to other segregated schools in the system."[60] Such a finding places on the offending school board the burden of proving that its actions as to other segregated schools "were not also motivated by segregative intent."[61]

In *Milliken v. Bradley*,[62] the Court addressed the question of whether a federally-ordered desegregation remedy could include suburban school districts when a city's school district is shown to be officially segregated.[63] The Court held that such a remedy is impermissible.[64] The thrust of the Court's holding was that the cross-district remedy promulgated by the district court would only be acceptable if its effect was to correct a cross-district wrong.[65]

The case law discussed up to this point has dealt strictly with segregation in the elementary and secondary school context. However, in *United States v. Fordice*,[66] the Court was faced with the issue of whether college

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intentionally segregated one part of the Denver city school system. *Id.* at 192-93.

59. *Id.* at 208.

60. *Id.* at 207. In other words, if a substantial portion of a school district is affected by *de jure* segregation, it is *prima facie* evidence that an unconstitutional dual system of education is in place throughout the entire district.

61. *Id.* at 209.

62. 418 U.S. 717 (1974).

63. *See id.* at 721. *Milliken* arose as the result of circumstances in Detroit, Michigan. The school district for the city of Detroit was predominantly black. The school districts of Detroit suburbs were predominantly white. After holding that the city school board segregated schools on a racial basis, the District Court for the Eastern District of Michigan ordered 53 suburban school districts to participate in a desegregation plan. Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972), *rev'd*, 418 U.S. 717 (1974). The court based its holding on the fact that a city-only desegregation plan would still leave many city schools at least 75% black.

64. *Milliken*, 418 U.S. at 752-53.

65. *Id.* at 744-45. In other words, the remedy might be acceptable if segregation in the city caused an effect in the suburbs, or vice versa.

While this argument is not void of substantive merit, it appears to be in conflict with the Court's holding in *Keyes* just one year earlier. Recall that the *Keyes* Court was willing to allow proof of segregation in one part of a district to establish a presumption of segregation in other parts of the same district. *See supra* note 60. However, the *Milliken* Court was unwilling to allow the same presumption to apply from one whole district to another whole district. *Milliken*, 418 U.S. at 744-45.

66. 112 S. Ct. 2727 (1992).

and university systems are subject to the same rules and standards applicable to intermediate-level educational facilities.[67] The Court held that the same basic rule of *Brown* applies at the college and university level, that is, that state-mandated segregation violates the Fourteenth Amendment and must be dismantled.[68] The Court went on to say, however, that the adoption and implementation of race-neutral admission policies alone is not enough to demonstrate that a state has abandoned its system of *de jure* segregation.[69] Any discriminatory policies that remain from a dual system of segregation must either be eradicated or shown to be necessary for the continuation of sound education.[70]

C. *The Supreme Court Retreats*

Chronologically, *Board of Education v. Dowell*[71] is misplaced in this Comment, for it was decided a full eighteen months before *Fordice*.

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67. *Fordice* involved the university system of Mississippi. Between 1848 and 1950, Mississippi established eight separate institutions of higher education; five were created solely to serve the educational needs of white students, and three were dedicated strictly to the education of African-Americans. *Id.* at 2732. Despite the decisions in *Brown* and subsequent segregation cases, however, Mississippi continued to maintain its policy of *de jure* segregation. Indeed, the first black student was not admitted to the (then) all-white University of Mississippi until 1962—and then only by way of a court order. *Id.*

Private petitioners initiated *Fordice* in 1975 (the United States filed a complaint in intervention not long thereafter). For the succeeding twelve years, the parties attempted to resolve their dispute through the "voluntary dismantlement by the State of its prior separated system." *Id.* at 2733. However, in the mid-1980s, more than 99% of Mississippi's white students were still enrolled in those five schools originally created to only educate whites. *Id.* at 2734. At the same time, the racial composition of the three universities set up to serve only black students' interests ranged from 92 to 99% black. *Id.* The parties proceeded to trial in 1987, concluding that "they could not agree on whether the State had taken the requisite affirmative steps to dismantle its prior *de jure* segregated system." *Id.*

68. *Id.* at 2735.

69. *Id.* at 2736. "That college attendance is by choice and not by assignment [as in elementary and secondary education] does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system." *Id.*

70. *Id.* The *Fordice* Court agreed with the lower courts that Mississippi had, in fact, removed its segregative admissions policy years ago (i.e., at the time *Fordice* was initiated, students were at least given the chance to attend any of Mississippi's universities). *See id.* at 2738. However, the Court pointed out that the mere abandonment of a segregative admissions policy does not necessarily eliminate all vestiges of an unconstitutional dual system. *See id.* at 2739. For example, the Court described how Mississippi still required higher college board scores to enter the previously-white universities than to enter the previously-black ones. *Id.* (This requirement, according to the Court, was compounded by the fact that, on average, white high school seniors score better on the college boards than do black high school seniors. *See id.*) This requirement, the Court admonished, was both traceable to the old *de jure* system and still having "present discriminatory effects." *Id.*

71. 498 U.S. 237 (1991).

However, *Dowell* represented the beginning of a new phase in desegregation law, whereby the Court began to relax the standards necessary for district courts to lift injunctions originally imposed as remedies to segregation. Therefore, a recapitulation of *Dowell* is best placed near the end of this historical summary.[72]

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72. The procedural history surrounding *Dowell* is extensive, as the litigation leading up to the Supreme Court decision began in 1961. In Oklahoma City, black students and their parents (the respondents in *Dowell*) commenced legal action against the school board to end *de jure* segregation in the public schools. *Id.* In 1963, the District Court for the Western District of Oklahoma found that the city was unlawfully and intentionally operating a school system segregated by race. *See* Dowell v. School Bd. of Oklahoma City Pub. Schs., 219 F. Supp. 427 (W.D. Okla. 1963).

In 1972, after finding that state-sanctioned segregation still remained in the public schools, the district court ordered the school board to adopt a complex system of desegregation remedies known as the "Finger Plan." (The author of the plan, Dr. John Finger, was an expert in education administration.) Dowell v. Board of Educ. of Oklahoma City Pub. Schs., 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). Under the new plan,

> kindergarteners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1-4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.

Dowell, 498 U.S. at 241.

Five years later, the school board petitioned the district court to lift the desegregation decree, claiming that pursuant to the Finger Plan, it had done its part to properly remedy *de jure* segregation. The court agreed and returned supervision of the desegregation policies to the school board. There was no appeal. In 1985, respondents petitioned the district court to reopen the case, contending that the school district had reverted to the use of racially discriminatory policies in its management of the public schools. The district court, however, refused to reopen the case, finding that the base components of the school system were sufficiently integrated. Dowell v. Board of Educ. of Oklahoma City Pub. Schs., 606 F. Supp. 1548, 1557 (W.D. Okla. 1985). The Court of Appeals for the Tenth Circuit reversed, 795 F.2d 1516, *cert. denied* 479 U.S. 938 (1986), holding that the district court's 1977 order returning supervision to the school board did nothing to actually terminate the original injunction. *Dowell*, 795 F.2d at 1519. Based on this finding, the court of appeals determined that the case was never "closed," and it remanded the case to determine whether the decree should be lifted or modified.

On remand, the lower court found that uncontrollable demographic changes, and not officially imposed discrimination, was the cause of any segregation present in the public schools. Dowell v. Board of Educ. of Oklahoma City Pub. Schs., 677 F. Supp. 1503 (W.D. Okla. 1987). As a result, the injunction was terminated.

Again, however, the court of appeals reversed. 890 F.2d 1483 (10th Cir. 1989). The court held that a desegregation decree should remain in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions[.]" *Id.* at 1490. The court found that since no such wrong existed regarding the Oklahoma City school district, termination of the original injunction was unwarranted.

The Supreme Court in *Dowell* took exception to the injunction standard proffered by the court of appeals, and it reversed the appeals court's holding.[73] In so doing, the *Dowell* Court implemented a new standard drastically different from the one it outlined in *Green*.[74] The Court remanded the case to the district court directing the lower court to decide whether "the [School] Board made a sufficient showing of constitutional compliance . . . in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[75] This new standard was the first step in making it easier for district courts to dissolve desegregation decrees.

Like *Dowell*, *Freeman v. Pitts*[76] was also decided before *U.S. v. Fordice*. However, a summary of *Freeman* is logically placed after a discussion of *Dowell*, for *Freeman* took the *Dowell* holding one step further and is considered by many to be a glaring example of the Court's willingness to ignore *de jure* segregation.[77]

In *Freeman*,[78] the Supreme Court held that "federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."[79] The *Freeman* holding was justified on two grounds. First, the Court noted that judicial intervention in overseeing

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Note that by the time the Supreme Court granted certiorari, 494 U.S. 1055 (1990), the issue in *Dowell* was no longer about desegregation; instead, the issue certified to the Court revolved around the need "to resolve a conflict between the standard [applicable to lifting injunctions] laid down by the Court of Appeals in this case and that laid down" by other federal appeals courts. *Dowell*, 498 U.S. at 244. (For an example of the injunction standard employed by other federal courts of appeals in the desegregation context, *see* Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239 (9th Cir. 1979), and Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).)

73. *Dowell*, 498 U.S. at 251.

74. One aspect of the *Green* decision was that district courts "should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

75. *Dowell*, 498 U.S. at 249-50 (footnotes omitted).

76. 112 S. Ct. 1430 (1992).

77. *See, e.g.*, Joondeph, *supra* note 8; Carter, *supra* note 31.

78. *Freeman* involved a district court-mandated desegregation order for a county in Atlanta, Georgia. Since 1969, the DeKalb County School System (DCSS) had been under court order to dismantle its dual school system. In 1986, DCSS petitioned the supervising district court to relinquish its jurisdiction. *Id.* at 1435-36. The court found that DCSS had met desegregation requirements as to four of the *Green* factors. As a result, the district court relinquished remedial control as to those four elements, retaining authority only over those requirements that had not yet been met. *Id.* at 1436. The court of appeals reversed, holding that the district court should have retained complete authority over DCSS until a full unitary system was put in place. 887 F.2d 1438 (11th Cir. 1989).

79. *Freeman*, 112 S. Ct. at 1445.

desegregation measures is only meant to be temporary.[80] Second, the Court determined that it is essential to return control of a school system to state and local authorities once that system is in compliance with the Constitution.[81] As is discussed later, the *Freeman* holding is criticized as a tool to be used to reintroduce segregation into a school system.[82]

IV. THE CHANGING ATTITUDES OF THE SUPREME COURT

A. Reasons

The attitude of the Supreme Court regarding school desegregation has ebbed in recent years.[83] While there could be a number of reasons for this attitudinal change, the result is clear: the Court is less sympathetic to plaintiffs in desegregation cases.[84] Certainly, plaintiffs are not losing all desegregation cases. However, neither are plaintiffs garnering the unanimity of the Court's votes in many of the relatively recent desegregation decisions.[85] According to one author, decisions that "once viewed school board responses to segregation with suspicion are now filled with expressions of school board good faith."[86]

There could be many reasons for this change in attitude. Conceivably, some of the change can be attributed to the personal views of those Supreme Court Justices put in place by the Reagan and Bush administrations.[87] However, this cannot account for all of the change considering, for example, that *Keyes* and *Milliken* were decided in 1973 and 1974, respectively. Perhaps societal changes, particularly demographic ones, have had a hand in changing the Court's attitude.[88]

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80. *Id.*

81. *Id.*

82. *See infra* notes 102-04 and accompanying text.

83. *See, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

84. *See* Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863 (1993).

85. *See id.* at 864-65. For example, *Keyes* was decided by a vote of 6-2 (Justice White did not partake in the decision); the *Milliken* decision could barely muster a majority at 5-4; and one Justice dissented in part in *Fordice*. This lack of unanimity was not the case, of course, for the nearly 20 years after *Brown*, when the Court handed down unanimous desegregation decisions every time. *Id.* at 865.

86. *Id.* at 864.

87. *Id.*; Carter, *supra* note 31, at 895. *But see* Alfred A. Lindseth, *A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 881 (1993).

88. *See* Hansen, *supra* note 84. Mr. Hansen, however, does not think that this is the primary reason for the Court's change of heart. While conceding that many of the Court's decisions themselves attribute the attitudinal change to the ever-changing facets of society,

In all likelihood, though, there is more to it. Maybe the Court is simply displaying its frustration because it cannot seem to put an end to the desegregation litigation.[89] This thesis, as postulated by Chris Hansen, is an intriguing one. Mr. Hansen proposes that the federal judiciary in general is giving up on court-imposed desegregation because "[u]nlike disputes brought to the executive or legislative branches, a dispute brought to the judicial branch is not supposed to arise over and over again."[90] The theory is premised on the notion that courts, by their nature, are accustomed to finite projects, with definitive beginnings and conclusive endpoints, which bring about success in remedying the offensive action.[91] It follows from Mr. Hansen's argument that the Supreme Court, fed up with its inability to achieve success in the area of school desegregation, is simply throwing up its proverbial arms and relinquishing jurisdiction over school districts.[92]

Alfred Lindseth, however, in *A Different Perspective: A School Board Attorney's Viewpoint*,[93] refutes Mr. Hansen's theory.[94] Mr. Lindseth, while agreeing that plaintiffs are losing more desegregation cases,[95] contends that the change is due to sweeping societal changes that have taken place over the past twenty-five years.[96] It is for this reason, and not ineffectiveness, that "courts are increasingly willing to give school boards their full day in court, rather than holding them presumptively liable."[97]

In his article, though, Mr. Lindseth sounds too much like a "school board's attorney" and not enough like an objective observer. For example, Mr. Lindseth blithely asserts that the goal of eliminating state-imposed segregation has "[b]eyond question . . . been accomplished",[98] that "unlike the all-white school boards of the past . . . the school boards of today are almost always composed of individuals of good faith, and of all races",[99] and that "[w]here one-race schools persist today, they do so because of

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Mr. Hansen sees this as a cover-up. *Id.* at 864.

89. *See id.*

90. *Id.* at 869.

91. *Id.* at 864.

92. Indeed, "recent Supreme Court decisions . . . ignore the tremendous racial imbalances in our public schools and express a zeal to declare an end to federal court supervision over school desegregation." Carter, *supra* note 31, at 885.

93. Lindseth, *supra* note 87.

94. *Id.* at 880.

95. *Id.*

96. *Id.* at 881.

97. *Id.*

98. *Id.*

99. *Id.* at 882.

housing patterns, with little or no causal relationship to the former dual school system."[100] These claims are unsubstantiated and are merely cast out with the expectation of blind acceptance on the part of the reader.[101]

B. Results

Regardless of one's beliefs with respect to the cause of the Court's change in attitude, however, one thing is certain: the shift has helped pave a smoother road for defendants in new desegregation actions and for those ex-defendants who desire to reintroduce segregation into their schoolrooms.

With respect to the resegregation issue, the *Freeman* decision most shocks the conscience of one who holds a high regard for civil rights. In upholding the legitimacy of incremental withdrawal over a school district's plan to desegregate, the *Freeman* Court increased the likelihood that "school districts will *de facto* resegregate before fully complying with *Brown*."[102] For example, once a district court finds that local authorities have satisfied an element of a desegregation order, control over that element is returned to the school district. As a result, discriminatory school authorities could take measures to "aggravate existing racial imbalances" while hiding under the protective cloak of constitutionally-permitted *de facto* segregation.[103] Indeed, "*Freeman* implicitly allows unlawfully segregated school systems to take steps that reverse the process of desegregation so long as such steps are not motivated by discriminatory intent."[104]

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100. *Id.*

101. Mr. Lindseth is correct in one regard, however. He states that more and more school boards, confident that they have remedied the *de jure* segregation perpetuated by past school boards, will "seek to be released from court supervision." *Id.* at 886. *See also* Steven I. Locke, Comment, Board of Education v. Dowell: *A Look at the New Phase in Desegregation Law*, 21 HOFSTRA L. REV. 537, 537-38 (1992).

For a general discussion of the failure of integration, *see infra* part VI.

102. Joondeph, *supra* note 8, at 161.

103. *Id.*

104. *Id.* For a concurring viewpoint, *see* Carter, *supra* note 31, at 891 (arguing that the *Freeman* Court made it too easy to reestablish racially identifiable schools because it incorrectly assumed that *de jure*-type segregation had been eliminated from school districts). "[R]esolv[ing] doubt about the elimination of *de jure* segregation in favor of the local autonomy of school boards . . . is incomprehensible when it was those very school boards that committed the constitutional violations." *Id.* at 892.

V. THE UNDERLYING DEBATES

A. De jure *Versus* De facto *Segregation*

The court-imposed desegregation process occurs only upon a finding of intentional segregation. It is not surprising, then, that since 1971, when the Supreme Court in *Swann* drew the constitutional distinction between *de jure* and *de facto* segregation, many cases have dealt with the application and implications of the distinction. No decision handed down by the Court, however, implies that it is prepared to discard the distinction. Thus, it is still the law that desegregation measures can only be ordered by the courts in those situations that involve officially-mandated segregation.[105]

This is not to say, however, that "unofficial" segregation cannot foster invidious discrimination in its own ways. Indeed, it has been suggested that African-American schoolchildren are now victims of a new form of segregation that is both representative of and equally oppressive as the old dual systems: *de facto* segregation.[106]

De facto segregation is normally considered to be a result of only unintentional determinates.[107] However, one is hardly required to stretch one's mind to realize that the protection afforded to *de facto* segregation could serve as a refuge for discrimination.[108] It is quite possible that "[a]doption of the de facto concept . . . represented a decision to limit the ambit of the equal protection guarantee to calculated discrimination and thus exclude the less visible but equally harmful and more pertinent forms of unconscious racial aversion."[109]

Commentators have argued that *de facto* segregation could spawn results offensive enough to bring it within the protection of the Fourteenth Amendment. For example, it has been suggested that this less blatant form of segregation perpetuates racial stereotypes by withholding from black and white children the opportunity to interact with each other.[110] It is also argued that "the isolation of black children in all-black or nearly-all-black schools makes them especially vulnerable to subtle and covert

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105. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

106. *See, e.g.*, John M. Jackson, Comment, *Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia*, 55 OHIO ST. L.J. 415, 416-17 (1994).

107. *See supra* note 4.

108. *See* Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 125 (1987).

109. *Id.*

110. *See* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972).

forms of discrimination in the distribution of educational resources."[111] Furthermore, it could be argued that due to the difficulty in proving discriminatory intent on the part of state officials, it is possible that a good deal of *de jure* segregation is allowed to pass by the boards in the name of *de facto* segregation. Removing the distinction, at least as it relates to constitutional protection, would eliminate this possibility. Indeed, "[t]he difficulty of detecting racial motivation . . . may suggest the desirability of desegregation as a prophylaxis [in all circumstances] if nothing else."[112]

But is it true that all of the negative effects of *de jure* segregation are found to exist with *de facto* segregation? Most assuredly, the answer is no. The basic underpinning of *de jure* segregation, of course, is that the segregation results from purposeful and intentional state action. Oftentimes, the resulting harm of *de jure* segregation is not the segregation itself, but the *legitimacy* placed on it by those we consider "officials." However, where *de facto* segregation exists—a true result and reflection of local economic and social factors—blame cannot be ascribed to a school board that merely operates a school in the "segregated" community. The maintenance of a neighborhood school under such circumstances does not necessarily signal that the segregation is endorsed or even intended by state officials.[113]

B. The Busing Debate

In the forty years since the *Brown* decision, courts have struggled to devise plans that effectively remedy unconstitutional segregation. According to the Supreme Court, compulsory integration by way of busing is seen as the best way to properly desegregate racially divided schools,[114] albeit with some limitations.[115] Not surprisingly, an intense argument has arisen among the public as to whether busing is, in fact, a proper method of integrating students. But there is an almost bizarre quality to this debate—regardless of which side is argued, the underlying presumption is the same: compulsory busing has served to *increase* racial separation in schools.

"How ever many the causes of the deplorable current condition of American grade school education, none has been more important than the

111. *Id.*
112. *Id.*
113. *See id.*
114. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-30 (1971).
115. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

misguided attempt by the . . . Court to compel school racial balance."[116] So goes the argument for the detractors of integration through busing. Essentially, those who agree with this line of reasoning believe that housing patterns (and other elements of *de facto* segregation), and not school officials, are to blame for racially imbalanced schools.[117]

This argument claims that busing has driven the middle class from city public schools, leading to the privatization of grade school education in American suburbia.[118] Those who oppose integration contend that its purpose, to achieve the same black-white ratio in a public school that exists in the school district as a whole,[119] is inherently absurd. To them, it makes no sense to remove children from their own neighborhood schools and transport them across a district to another school, all in the name of (supposed) unofficial segregation.[120] Those who disfavor forced busing contend that it results in a depleted inner-city, devoid of money, leadership, and, for that matter, whites.[121]

Oddly enough, some who agree with the flip side of the integration debate, that busing is a proper desegregation remedy, reach essentially the same conclusion. Recall that in *Milliken*, the Supreme Court overturned a district court desegregation decree that would have integrated black city students, through busing, with (mostly) white suburban children.[122] The Court precluded the use of interdistrict busing, permitting instead only intradistrict busing when attempts were made to remedy segregation. Pro-busers contend that this holding, by limiting busing measures, has contributed to the demise of inner-city schools and an increase in racial imbalance.

In his article *Public School Desegregation: A Contemporary Analysis*,[123] Robert Carter argues that the *Milliken* decision "encouraged white flight from the cities to the suburbs where white children could be protected from forced integration."[124] (Evidently, the Supreme Court faced quite a dilemma in deciding *Swann*—reject busing as a remedy and encourage white flight and resulting inner-city breakdown, or accept busing

116. Graglia, *supra* note 31, at 13.
117. *Id.* at 18.
118. *See id.* at 13.
119. *Id.* at 16.
120. *Id.*
121. *Id.* at 13.
122. Milliken v. Bradley, 418 U.S. 717, 752-53 (1974).
123. Carter, *supra* note 31.
124. *Id.* at 890. For a concurring viewpoint, see Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of* Brown, 20 HASTINGS CONST. L.Q. 649, 659-60 (1993).

and encourage the privatization of schooling and the resulting inner-city breakdown.) Mr. Carter further argues, not unlike those who disagree with the concept of compulsory busing, that a consequence of white flight to the suburbs was the loss of income needed to fund urban public schools.[125] The conclusion of this argument is that by rejecting the use of integration, the *Milliken* decision fostered the growth of segregated schools in metropolitan areas of the country.[126]

C. *Desegregation Versus School Reform*[127]

Whether courts in general are willing to admit it, their job of devising appropriate remedies to fight segregation has gotten tougher over the last dozen or so years. This is due to the fact that since the early 1980s, educators, politicians, and business leaders have been working to reform our nation's schools through myriad programs and initiatives[128]—all the while making it more difficult for courts to structure meaningful and beneficial desegregation decrees.

As the struggle to attain the lofty goal of *Brown* continues, large numbers of school districts[129] still operate under some form of court

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125. Carter, *supra* note 31, at 890.

126. *Id.*

127. The concept of school reform is not limited to issues surrounding desegregation, but instead encompasses a host of initiatives aimed at improving America's schools generally. For purposes of this Comment, however, it is instructive, for two reasons, to mention one school reform measure in particular—the "African-American immersion schools." First, this initiative does, in fact, find its roots in the desegregation issue. Second, it is a good example of the type of reform that can give rise to the potential conflict described under the subheading accompanying this note.

The immersion school concept is relatively new. The schools are, of course, race-exclusive, and their purpose is to provide a learning environment that is sensitive to and takes particular account of black culture. *See* Kevin Brown, *After the Desegregation Era: The Legal Dilemma Posed by Race and Education*, 37 ST. LOUIS U. L.J. 897, 899 (1993). In so doing, these schools use what has come to be known as an "Afrocentric curriculum." Generally, "an Afrocentric curriculum teaches basic courses from a perspective that uses Africa, and the socio-historical experience of Africans and African-Americans, as its reference point." *Id.* This curriculum model thus allows blacks to study "from a perspective that places them, and their ancestors, at the center." *Id.*

For an article supporting the use of immersion schools on a trial basis, see Roberta L. Steele, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591 (1993).

128. *See* David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61 (Winter 1992-93).

129. A school district is defined as

> [a] public and quasi municipal corporation, organized by legislative authority or direction, comprising a defined territory, for the erection, maintenance, government, and support of the public schools within its territory in accordance with and in

supervision.[130] The special legal obligations under which these districts operate could potentially interfere with the competing goals of school reform, leaving to the courts the daunting task of formulating functional (and constitutional) decrees that facilitate both desegregation and national reform.[131]

This is not to say that, at least to a certain extent, school desegregation and school reform are not designed to accomplish the same thing, namely, improved achievement in American schools.[132] Indeed, "today's school desegregation plans contain many of the same programs recommended by school reformers."[133] This relationship notwithstanding, the risk of conflict remains significant, primarily for three reasons.

The first source of potential conflict is political—the two movements have different constituencies.[134] While school desegregation issues are most often addressed by members of minority communities, school reform is largely spearheaded by white, middle-class residents of suburbs.[135] Surely, any effort on the part of reformers to exclude minorities of necessary school resources will be met with hostility.

The second source of conflict is structural. While school desegregation tends to "centralize" school systems, school reform usually "decentralizes" a school district.[136] A centralizing force has two basic effects: it strengthens the administrative authority of a school district as a whole, and it weakens the authority of individual schools within that district.[137] Court desegregation orders, intended to reassign students and provide for overall district monitoring, have a centralizing effect. Conversely, decentralizing forces remove decision-making power from districts generally, leaving parents and individual educators with localized autonomy.[138] Common

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subordination to the general school laws of the state, invested, for these purposes only, with powers of local self-government and generally of local taxation, and administered by a board of officers, usually elected by the voters of the district . . . . BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

130. *See* Tatel, *supra* note 128, at 63. *See also* Brown, *supra* note 127, at 898 (stating that there are over 500 such districts).

131. Tatel, *supra* note 128, at 63.

132. *Id.*; Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954).

133. Tatel, *supra* note 128, at 63. For example, it is not uncommon today for courts to include intra- and interdistrict choice options, teacher training programs, and after-school and summer programs in their desegregation plans.

134. *Id.* at 64.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

reform efforts such as school-choice and school-based management have this decentralizing quality.[139]

The third source of conflict derives from the special limitations under which a desegregating school district operates.[140] For example, if a desegregating district must retain a court-specified number of minority students, any potential reform effort in that district utilizing school choice would likely face opposition from the court.[141]

School reform efforts, while potentially beneficial to millions of schoolchildren, have made the courts' unenviable job of desegregating (unwilling) school districts that much more difficult. However, as the following sections point out, the desegregation efforts undertaken by the courts thus far, while originally well-intentioned, have not attained the goal that underpins ever desegregation decree: providing African-American youths with an education founded squarely on quality.

VI. THE FAILURE OF INTEGRATION

As far as American law and its doctrines are concerned, no intentional, harmful segregation exists in the hallways of our nation's schools. How could it be otherwise? The doctrine of "separate but equal" was repudiated forty years ago and replaced by the doctrine of "separate education is inherently unequal." *Brown*'s holding was clear: The Constitution, the supreme law of the land, will not tolerate racially segregated schools. Granted, this holding was greeted with a fair amount of resistance.[142] But in the years following *Brown*, this resistance was easily brushed aside as the result of the Court's ill-fated usage of the phrase "with all deliberate speed." The Court apparently rectified the error, first in *Griffin*, then in *Green*, declaring that "[t]he time for mere 'deliberate speed' has run out,"[143] and that "[t]he burden on a school

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139. *Id.*

140. *Id.*

141. *Id.*

142. *See, e.g.*, Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99 (1991). "When integration was first attempted in the 1950s, it met such resistance from white parents and students that it was unlikely that the educational needs of Black children could have been met." *Id.* at 107. Following *Brown*, school board officials closed schools, employed delaying tactics, devised plans that were ruses, or ignored decrees altogether in order to circumvent substantive desegregation. *Id.* As recently as 1975, whites stoned school buses in Boston in order to avoid desegregation. *Id.* at 110.

For a complete history of early opposition to desegregation, see generally NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE (1969).

143. Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964).

board today is to come forward with a plan that promises realistically to work . . . *now*."[144] After *Green* in 1968, it appeared as though substantive desegregation measures were finally embraced by the Court and truly expected of the South.

Quickly, however, things changed. By 1970, "public and judicial enthusiasm for the [desegregation] mandate began to wane."[145] The general public's apprehension was fueled by the threat of the desegregation process stretching into the northern and western parts of the country.[146] The judicial enthusiasm for desegregation displayed by the pro-civil rights Court of the 1960s waned mostly as a result of turnover on the Court.[147] Consequently, only a few short years after gaining strength, *Brown*'s mandate again wilted.

The shift in the makeup of the Supreme Court during the early Nixon years had a profoundly negative effect on the possibility of eliminating segregation in our schools. During the 1970s, the Court scaled down desegregation law in the following four ways: (1) by limiting the desegregation mandate to *de jure* segregation;[148] (2) by disallowing inter-district integration;[149] (3) by holding that the duty to desegregate is not a lasting responsibility;[150] and (4) by requiring direct, rather than circumstantial, evidence of intent to segregate.[151]

It would be terribly misleading to imply that the Court decisions mentioned in the footnotes accompanying the preceding paragraph are solely responsible for the desegregation dilemma. Prejudice, poverty, economics, and a host of other societal factors are also to blame. The bottom line, however, is that America's schools are still not integrated. Nationwide, over sixty percent of African-American public school students attend schools where a majority of the students are black.[152] Thirty-two percent attend schools that are at least ninety percent black;[153] in the

144. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).
145. Lively, *supra* note 124, at 652.
146. *Id.*
147. *Id.* at 652, n.22 and accompanying text.
148. Keyes v. School District 1, 413 U.S. 189 (1973).
149. Milliken v. Bradley, 418 U.S. 717 (1974).
150. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). ("[H]aving once implemented a racially neutral attendance pattern in order to remedy . . . perceived constitutional violations," no duty exists to prevent or correct resegregation unless it is the product of official discriminatory purpose. *Id.* at 436-37.)
151. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).
152. Brown, *supra* note 127, at 898.
153. *Id.*

Northeast, almost fifty percent of all blacks attend such schools.[154] Furthermore, only 3.3% of white public school students attend schools in central city school districts.[155] Indeed, "[w]here opposition to unitary schools was especially deep-seated, evasive strategies have continued to breed, and desegregation even now has become only a partial reality."[156]

VII. A CALL FOR QUALITY-BASED EDUCATION[157]

> [T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there 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 place-holders, 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 contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and Truth, outweigh all that the mixed school can offer.
>
> —W.E.B. DuBois[158]

Integration was never intended to be solely about providing blacks the opportunity to simply *attend* school in an integrated setting—instead, it was hoped that wide-scale integration would improve the quality of life for blacks generally by improving the *quality* of the education to be received, which in turn would reduce unemployment and poverty rates. Up to this point, however, desegregation efforts have not accomplished these goals.[159]

Given this failure, it appears the time has come to at least supplement, if not completely overhaul, current desegregation efforts and the theories that underlie them.[160] Often cited by blacks as a preferred method to

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154. *Id.*

155. *Id.* at n.5.

156. Lively, *supra* note 108, at 121.

157. For an excellent article on the constitutional right to a "minimally adequate" education, see Morgan, *supra* note 142.

158. W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO EDUC. 328, 335 (1935).

159. *See, e.g.*, Steele, *supra* note 127, at 591-93; *see also supra* notes 152-56 and accompanying text.

160. One leading commentator put it this way: "The limited erosion of racial isolation in the nation's schools, and our failure to curb the obvious educational ills of black students,

integration is the return to race-separate, but equal, schools. "[M]any African-Americans, feeling betrayed by the burden of segregation and busing that fell heavily on their children without the desired results, are championing the separate-but-equal doctrine that the Supreme Court set out to destroy."[161] This is true "despite the fact that [all-black schools] are glaring symbols of racial separation by force of law."[162]

To African-American proponents of the return to dual school systems, "control of the schools appears to be perhaps a more important goal than desegregation. They argue that remedies that strive to achieve racial balance should be abandoned because progress under *Brown* has been slow and because all black schools promote racial pride."[163] Even Judge Robert Carter,[164] an ardent supporter of integration, states that it is "no longer possible to wait for integration. We must focus on the crisis in our inner-city schools which have been abandoned. What is desperately needed is decent schools that will provide the means for a toehold on the ladder to mainstream employment."[165]

What these parents and students are calling for, essentially, is choice—the choice to attend, for example, equal but single-race or predominately black universities, immersion schools,[166] neighborhood schools,[167] and magnet schools.[168] With appropriate funding, these

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have necessitated a reexamination of our commitment to mandatory desegregation as the focus, or even an element, of a national educational and racial strategy." DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 579 (3d ed. 1992).

161. Conklin, *supra* note 24, at 1. The president of the Urban League of Greater Madison stated: "'Separate but equal is not that bad. . . . We tried this integration thing. We've had it for the last 25 years. It hasn't worked.'" *Id.*

Said the chairperson for the Parents of African-American Students Committee at one of Madison's largest high schools:

> I'm sick and tired of busing our children to hell and back and then having someone say "We've done it". . . . Bullshit. You have not done it. We're not talking about quotas. We're talking about designing a system that gives equity to the children and where justice can be seen. It's been 40 years—leave our children alone.

Id. at 8.

162. Wendy R. Brown, *School Desegregation Litigation: Crossroads or Dead End?*, 37 ST. LOUIS U. L.J. 923, 931 (1993).

163. Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 811 (1985) (footnote omitted).

164. Carter, *supra* note 31.

165. *Id.* at 896.

166. *See supra* note 127.

167. The term "neighborhood school" is self-explanatory. The schools' purpose is two-fold. First, they reduce the need for expensive, time-consuming, and burdensome large-scale busing efforts. Second, they allow for more parental involvement in the schooling of children, particularly for parents in low income brackets who may not own an automobile or are unable

types of institutions could arguably provide a high-quality education to African-American students while lessening the burden and stigmatization of forced integration. Consequently,

> [i]ntegration can no longer be viewed as the only constitutionally viable solution to the problem of ensuring equal educational opportunity to African-American citizens. The maintenance of historically Black colleges, and immersion schools at the primary and secondary education levels, is constitutionally permissible and necessary to ensure the fulfillment of the individual and class interests of those seeking redress.[169]

VIII. CONCLUSION

Individual choice has always been a linchpin of our society.[170] Members of the African-American community must be granted the opportunity to attend race-separate schools *that are equal in all respects to a school that is considered a "white school"*. Such an opportunity seems particularly relevant given that blacks are the ones required to shoulder the burden of integration and that the "benefits of school desegregation are illusory to many African-American children in the United States[.]"[171] Quite clearly, and regardless of how one feels about separate educational facilities, state-enforced segregation and segregation based on personal

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to afford taking time off from work.

168. Magnet schools use a distinctive school curriculum, organized around special themes such as mathematics, performing arts, and the sciences, to draw students interested in specific topics. *See* Kimberly C. West, Note, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 YALE L.J. 2567, 2568-69 (1994). "The major difference between magnet schools and specialty schools is that magnet students are generally selected as a result of their professed interest in the school rather than according to their performance on an aptitude test or during an audition." *Id.* at 2569.

169. Brown, *supra* note 162, at 937. Ms. Brown continues:

> Blacks who advocate for the continued existence of historically Black institutions are not saying the same thing as white segregationists. We are not saying that whites are unfit to associate with Blacks. We are not saying that whites have no rights that Blacks are bound to respect as did the Supreme Court in the *Dred Scott* decision. We are not saying that whites are inferior or that whites are property which should be bought and sold into slavery. Therefore applying the concept of *Brown*—the notion that separate is inherently unequal—to prevent historically Black colleges from flourishing in a way that allows for the provision of equal educational opportunity, in a culturally relevant setting, is a form of punishing the victim for doing the best under the circumstances, and taking away those accomplishments.

Id. at 935.

170. For a general discussion of freedom of choice concepts as they relate to desegregation, see Paul Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

171. Steele, *supra* note 127, at 591-92.

choice are two very distinct processes. The fact that the Constitution does not countenance *de jure* segregation does not mean that educational separateness, especially in light of the unremarkable results realized under the rubric of integration, cannot be self-imposed.

It is frightening that some *forty years* after racially segregated schools were outlawed, a result achieved through the promise of a well-intentioned mandate, there is little to show for our desegregation efforts. The message is clear: Society is not yet able, or at least willing, to discard firmly ingrained racial barriers.

In an ideal society, of course, public schools would be both integrated and adequate. When it becomes clear that that goal is unattainable, however, one of the two elements must give way. And when one of the two elements has already served as the focal point for change, but has failed to bring about the desired change, necessity and fairness require that the other element be given its due regard.

This author is quick to admit that reneging on the *promise* of *Brown*—a quality education for all—is not at all an option. I do not support the outright dismantlement of the entire desegregation movement. Nor do I support the courts' return of partially segregated districts to local school boards. To me, that situation is but the relinquishment of a potentially discriminatory bud, whose flowering will require little more than simple care and know-how on the part of school boards. With their power re-invoked, education officials will likely choose to adopt, or re-adopt, race-based student placement methods. That represents *de jure*, and thus unconstitutional, segregation.

The promise of *Brown*, however, will only be realized following a reevaluation of the means by which desegregation is to be achieved. This is especially true given (1) the Supreme Court's recent hostility toward both desegregation plaintiffs and efforts and (2) the fact that forced integration by way of busing has only served to increase separateness anyway. Until our society and our courts are willing to back up the rhetoric so often heard in courtyards and courtrooms—that America is a melting pot of racial and ethnic diversity replete with advantageous amenities—and given that racism in our country is far from eradicated,[172]

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172. Although it hardly seems necessary to supply a footnote for the purpose of trying to substantiate the notion that racism exists in today's society, the following quotations are appropriately illustrative given their context.

> [T]he years 1980 to the present have drained away the euphoria that the *Brown* case produced and have made me face up to the reality that ours is still a racist society. I, along with the other NAACP lawyers involved with *Brown*, had always assumed that by our grandchildren's generation integration in the schools would have turned

Brown and its progeny are of limited use to those African-Americans seeking *both* an integrated and a quality education. Indeed, researchers have concluded that unless administrators, teachers, and parents are committed to the implementation of a desegregation plan, it is likely that the plan will fail due to ineffectiveness.[173]

It is clear that many African-Americans are willing to accept an increase of racial imbalance in public schools in exchange for improved school performance. And although I fervently agree with the underlying premise of desegregation, and while I vehemently decry any form of racial discrimination, I am convinced that forced integration, without more, is not the answer to the problem of a segregated school system. According to Judge Carter, in order to secure quality education for African-Americans,

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> children away from racial hatred. . . . [However,] [t]he vehemence of the racial animosity, distrust and pure hatred spewed out by whites both privately and publicly is alarming. The Reagan and Bush years [were] marked by such negativism about race relations that many white Americans seem convinced that racism is appropriate as long as it is called something else.

Carter, *supra* note 31, at 886.

> Over the years researchers have noted a steady decline in the number of whites willing to tell public opinion pollsters that they think blacks are inferior or that they oppose equal educational opportunities for blacks. That being the case, little basis would appear to be present in the majority community for resistance to the legitimate desire of black parents for quality schooling through desegregation. . . .
>
> Yet whites do resist because the very effort by blacks to obtain education and integration threatens in varying degrees the vested interest in the superior societal status that whites believe they have earned or to which they feel inherently entitled. This is particularly the case when it comes to sharing the usually limited resources of the public schools.

Derrick Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281, 287-88 (1981).

> Principles of color blindness are only effective when society operates on a racially neutral basis. Such is not the case in the United States today. Despite the enactment of the Civil War Amendments between 1865 and 1870, the repudiation of the 'separate but equal doctrine' in 1954, and the enactment of the Civil Rights Act of 1964, our society continues to treat people differently based on their race. The pervasive de facto segregation in suburban residential areas and public school systems is evidence of a racist society. Achievement of the American dream remains outside the grasp of most African-Americans.

Steele, *supra* note 127, at 599-600 (footnotes omitted).

173. *See* Robert L. Crain & Rita E. Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 HARV. C.R.-C.L. L. REV. 693, 703 (1982); *see also* P. BERMAN & M. MCLAUGHLIN, FEDERAL PROGRAMS SUPPORTING EDUCATIONAL CHANGE, VOL. VIII: FACTORS AFFECTING IMPLEMENTATION AND CONTINUATION 12-21, 30-31 (1977). As another article noted: "Except in a handful of states, there has been no assistance, apart from court orders, to make desegregation work." Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 779 (1993).

"[w]e need to change human behavior."[174] With this I agree. However, it appears unlikely that forced integration alone is going to bring about that change. "Racial parity cannot be achieved through the application of colorblind principles in an atmosphere of racism."[175]

Sadly, Dr. Martin Luther King, Jr.'s prophecy of a united "integration generation" did not come to fruition.

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174. Carter, *supra* note 31, at 894.
175. Steele, *supra* note 127, at 601 (footnote omitted).