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RACE, EDUCATION, AND THE EQUAL PROTECTION CLAUSE IN THE 1990S:
THE MEANING OF BROWN V. BOARD OF EDUCATION RE-EXAMINED IN
LIGHT OF MILWAUKEE'S SCHOOLS OF AFRICAN-AMERICAN IMMERSION

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I. THE MILWAUKEE PLAN: AN OVERVIEW

On September 20, 1990, the Milwaukee Board of Education voted to establish two public schools specifically designed to meet the academic and social needs of black boys.1 The pilot schools, to be called Schools of African-American Immersion, will emphasize black history and culture, build self-esteem, and promote the rewards of responsible male behavior.2 Notwithstanding the focus of the curriculum, school administrators promise that the schools will admit girls and youngsters of all races.3

The Milwaukee Plan, the first of its kind in the nation, was proposed as a means to counteract the pervasive academic underachievement of most black boys in the city's school system.4 Only two percent of black boys earned either an A or B grade point average and only seventeen percent earned at least a C average.5 While comprising twenty-eight percent of all students in the school district, black males represented fifty percent of all students suspended and ninety-four percent of all students expelled in recent years.6 Supporters of the plan contend that radical measures are necessary to defeat the cycle of academic underachievement that contributes to the disproportionate number of black men who become unemployed, jailed, or murdered.7

Educators are sharply divided over the merits of the plan. Some critics argue that an ethnocentric curriculum is inappropriate and educationally

2. Id.
3. Id. at 1, col. 2.
5. Id. at 12, col. 1.
6. Id.
7. Id. at 1, col. 1.
unsound in a multicultural nation. Critics also point to the grave moral and legal issues raised by a plan that they contend amounts to state-sponsored segregation. On the other hand, black proponents of the Milwaukee Plan state that they are simply substituting an African-American perspective for a European-American perspective. Because many large urban school districts are no longer educating large numbers of white children, the proponents argue that they have a responsibility to give black children "a good sense of self, a chance to relate to their identity and culture" through an ethnocentric curriculum. Some black educators also argue that black and white students have different "learning styles" and thus some traditional methods of teaching and testing are inappropriate for black students.

The educational issues raised by the Milwaukee Plan are inextricably linked to constitutional issues of the highest order. This paper examines the most important constitutional questions concerning whether an ethnic-oriented schoolwide curriculum represents a new form of unconstitutional state-initiated segregation. Answering this question requires a return to first principles of race, education, and the Equal Protection Clause announced by the U.S. Supreme Court in Brown v. Board of Education. In important ways the Milwaukee Plan provides a contemporary test of the limits and the continuing vitality of the meaning, premises, and philosophical underpinnings of Brown.

8. See, e.g., Johnson, supra note 1, at 26, col. 2 (statement of Charles V. Willie, Professor of Education, Harvard University); see also Lawton, supra note 4, at 12, col. 1 (statement of Felmers Chaney, President, Milwaukee Branch, National Association for the Advancement of Colored People).


10. Johnson, supra note 1, at 26, col. 3 (statement of Joyce Mallory, black member of the Milwaukee Board of Education).

11. Id.

12. Id. at 26, col. 1 (statement of Jawanza Kunjufu, black educational consultant); see also Boateng, Combatting Deculturalization of the African-American Child in the Public School System, in GOING TO SCHOOL: THE AFRICAN-AMERICAN EXPERIENCE (K. Lomotey ed. 1990).

13. The Milwaukee Plan also presents the separate but related question of gender-based discrimination within the meaning of the Equal Protection Clause. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). This form of discrimination is outside the scope of this paper. Also excluded from discussion is the applicability of statutory remedies for racial and gender discrimination in the public schools pursuant to Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. § § 2000a.


II. PHILOSOPHICAL UNDERPINNINGS OF BROWN V. BOARD OF EDUCATION

In Brown, the Supreme Court held that a state-initiated racial segregation of public schools renders such schools inherently unequal and violative of the Equal Protection Clause. The Court thereby expressly overturned the reasoning employed in a half-century of decisions in which it had permitted state-sanctioned "separate but equal" facilities in education and certain other public and private functions. The Court based its conclusion on essentially three principles: The psychological harm to black children caused by state-initiated segregation; the existence of certain "intangible" factors which produce a superior learning environment in an integrated rather than a segregated setting; and the critical role of the public schools in contemporary society. Each of these principles is discussed in turn in the following section.

A. State-initiated segregation of public schools stigmatizes black children and, in so doing, renders the segregated schools inherently unequal

To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Beneath this statement lies a series of assumptions. First, the segregated public school system that existed in the South in 1954 was established by a white-dominated society for the purpose of keeping blacks in an inferior position. This assumption can be fairly characterized as a matter of judicial notice. Second, black children's knowledge of the state's intent — even if
the segregated schools were nominally equal with respect to tangible factors — impaired their ability to learn.\textsuperscript{24} This assumption was based at least in part on contemporary social science research,\textsuperscript{25} the validity of which has been the subject of continuing controversy and dispute.\textsuperscript{26} The third assumption (also made explicit elsewhere in the opinion) is that blacks would learn better in an integrated rather than segregated environment.\textsuperscript{27} It is important to note that the third assumption does not necessarily derive from the first or second.

With respect to the first two assumptions, the Brown Court never had within its contemplation state-initiated segregation without demonstrably invidious intent and thus it never had to confront the question of whether stigma attaches to all state-initiated segregation (i.e., arguably the Milwaukee Plan) regardless of intent. This question, of course, appears to be more sociological and psychological in nature than legal. But it is important to remember that Brown was decided in large part on precisely these grounds.\textsuperscript{28}

The application of Brown's stigma standard (if that is what it is) to a Milwaukee-like plan would present jurisprudential issues of exceptional complexity. The underlying question may not be merely sociological and psychological, as in Brown, but also pedagogical. Assuming a court finds that a schoolwide ethnocentric curriculum constitutes state-initiated segregation, the court might be forced to decide whether such a curriculum is "invidious" within the meaning of Brown (i.e., producing "a feeling of inferiority" or "retarding the educational and mental development" of black students).\textsuperscript{29} Alternatively, a court might decide that the pedagogical question need not be reached, finding instead that the Brown "invidious" standard applies only to segregated public schools established by a governmental authority — presumably controlled exclusively by whites — for the purpose of keeping blacks in an inferior position.

\begin{itemize}
\item \textbf{24.} Brown, 347 U.S. at 498.
\item \textbf{25.} Id. at 494 n.11.
\item \textbf{26.} It is beyond the scope of this paper to assess the validity of the social science findings that provided at least a partial basis for the Brown decision. It is worth noting, however, that most researchers who have subsequently examined these findings have concluded that the findings are considerably more ambiguous than the original researchers had suggested. Several commentators have declared that the findings are methodologically unsound and that the Court was in error to rely on such findings. Yudof, School Desegregation: Legal Realism, Reasoned Elaboration and Social Science Research in The Supreme Court, 42 LAW \& CONTEMP. PROBS. 57, 70 (1978); see also Van Den Haag, Social Science Testimony in the Desegregation Cases — A Reply to Professor Kenneth Clark, 6 VILL. L. REV. 69 (1960).
\item \textbf{27.} Brown, 347 U.S. at 493; see also infra text accompanying notes 31-37.
\item \textbf{28.} See supra note 26 and accompanying text.
\item \textbf{29.} Brown, 347 U.S. at 494.
\end{itemize}
B. State-initiated segregated public schools are inherently unequal because of "intangible" factors

In finding state-initiated racially segregated public schools inherently unequal, the Court in Brown also explicitly relied on prior cases involving post-secondary schools in which the Court had found that black students were deprived of equal educational opportunities because of "intangible" factors. Examples of intangible factors in the context of a law school were set out in Sweatt v. Painter decided four years before Brown:

What is more important, the University of Texas Law School possesses to a far greater degree [than the segregated black Texas law school] those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions, and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

Put another way, blacks in a white-dominated society will learn better (or will learn more of what they need to learn) in an integrated environment rather than in a segregated environment. Such "intangible considerations," the Court in Brown declared, "apply with added force to children in grade and high schools."

30. Id. at 493 (citing Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)).
Brown’s “intangible consideration” doctrine can be viewed as diametrically opposed to the Milwaukee Plan in two ways. First, the doctrine appears to embrace the goal of integration, not merely the eradication of laws requiring segregation. Second, the doctrine implicitly endorses a curriculum and an educational setting that prepares the student for full participation in a society dominated by whites. It is difficult to argue that Milwaukee’s Schools of African-American Immersion will perform the assimilative function envisioned by the Court in Brown.

C. State-initiated segregated public schools are constitutionally defective in part because segregated black schools are disadvantaged with respect to performing the critically important functions of secularization, assimilation, and Americanization

In approaching this problem [of whether or not the Equal Protection Clause is applicable, we must consider public education in the light of its full development and its present place in American life. . . .

Today, education . . . is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.33

The evidence of whether the framers of the Fourteenth Amendment intended to outlaw racial segregation in public schools is ambiguous, bordering on doubtful.34 Because the Court in Brown could not frame its argument in terms of the original intent of the framers, it chose to emphasize what it considered the extreme importance of education in the mid-twentieth century.35 The language the Court used (quoted above) assumes great significance with respect to consideration of the Milwaukee Plan, because it reveals the Brown Court’s view of the nature and proper function of public school curricula.

Words such as “good citizenship,” “cultural values,” and “normal adjustment to the environment” are, of course, highly subjective and could conceivably be appropriated by both supporters and opponents of the Milwaukee Plan to defend their respective positions. It seems clear, however, that when considered in context with the rest of the Court’s opinion (espe-

33. Id. at 492-93.
35. Brown, 347 U.S. at 492.
cially the principle contained within the discussion of "intangible factors" \(^{36}\) these words were clearly intended to reinforce the view that public schools have assumed responsibility for performing the critically important functions of secularization, assimilation, and Americanization. As previously stated, it would be difficult to argue that Milwaukee's Schools of African-American Immersion will be well-suited to perform these functions.

III. CONSTITUTIONAL ARGUMENTS SUPPORTING THE MILWAUKEE PLAN BASED UPON ONE POSSIBLE INTERPRETATION OF THE BROWN PRINCIPLES

The preceding section provided an overview of the major principles underlying Brown and offered a preliminary assessment of the application of these principles to the Milwaukee Plan. This section will consider an interpretation of the Brown principles in a light most favorable to the Milwaukee Plan.

A. The Milwaukee Plan is not state-initiated segregation: Students of all races may apply to and attend Schools of African-American Immersion

Brown was decided within a context of laws prohibiting students of one race from attending public schools set aside for students of another race: The so-called dual school system that existed in much of the South in 1954.\(^{37}\) Milwaukee's Schools of African-American Immersion will be open to any student, regardless of race.\(^{38}\) In this limited sense, the Milwaukee Plan does not constitute de jure segregation of the type most clearly implicated in the Brown decision.

B. Even if the Milwaukee Plan is held to be a form of state-initiated segregation, the Milwaukee Board of Education cannot be imputed with the necessary intent to segregate within the meaning of Brown or its progeny

While the Milwaukee Plan does not constitute de jure segregation of the type most clearly implicated in the Brown decision, subsequent Supreme Court school desegregation cases make it clear that the scope of Brown is not limited to invalidating and remedying the effects of laws requiring dual public school systems. In Keyes v. Denver,\(^{39}\) the Court upheld a lower court

36. See supra text accompanying notes 30-32.
38. Johnson, supra note 1, at 1, col. 2.
ruling finding school attendance zones "gerrymandered" to induce racial segregation invalid for the same reason and to the same extent as statutorily mandated segregation. In Griffin v. County School Board, the Court held that the closing of all public schools in a county was unconstitutional because the Court found such closings were motivated by the state's intention to prevent white and black children from attending the same schools. In other words, the Court has subsequently interpreted the Brown holding to mean that the state cannot do indirectly what it is prohibited from doing directly, assuming, of course, that one can show the requisite intent.

With respect to the Milwaukee Plan, there can be no doubt that the Milwaukee Board of Education harbored a very specific intent when it established Schools of African-American Immersion, but whether the segregation of black and white children can be fairly imputed to the Board remains a principal issue for decision. For example, should the fact that some, perhaps most, black children are attracted to and desire to learn about "Eurocentric" culture (or, put another way, mainstream American culture) while almost no white children display interest in African culture be a subject of judicial notice? If so, should a court impute such knowledge to the Milwaukee school board? Supporters of the Milwaukee Plan would answer in the negative with respect to both questions. On a more practical level, should it matter that the two schools which are slated to become Schools of African-American Immersion are virtually all-black schools (presumably not as a result of pre-existing state-initiated segregation) and therefore, the Plan will not directly yield any substantial net increase in school segregation? Supporters of the Milwaukee Plan would answer in the affirmative: It matters that the two schools are currently all-black precisely because it goes to the intent of the Milwaukee school board to design curricula to meet the needs of its existing school populations.

40. Id. Some may argue that the Milwaukee Plan is a variant of the gerrymandered attendance zone.
42. Id. at 231.
43. In voting for the establishment of Schools of African-American Immersion, one black member of the Milwaukee Board of Education declared, "African-American males are doing dismally in our schools. We need to do something drastically different. And we need to do it quickly." Johnson, supra note 1, at 1, col. 1 (quoting Joyce Mallery).
44. Id. at 1, col. 2.
45. Moreover, the Constitution does not require the state to racially integrate schools in which the state did not directly or indirectly play a role in establishing the segregation.
C. Even if the Milwaukee Plan is held to be a form of state-initiated segregation accompanied by an intent to segregate, such "intent" is benign and of a form not contemplated within the holding of Brown or its progeny.

As previously noted, if a court were to find that the schoolwide ethnocentric curriculum embodied in the Milwaukee Plan were to constitute state-initiated segregation accompanied by an intent to segregate, that court might then be forced to decide whether the curriculum could be held to be "invidious" within the meaning of Brown (i.e., whether it produces "a feeling of inferiority" or retards "the educational and mental development" of black students). In answering this question, the court will be forced to decide whether to rely on the process of Brown or the result of Brown.

If the court elects to rely on the process of Brown, then the court would look to current theories and research findings in education and related social sciences regarding the question of whether ethnocentric education is a pedagogically sound approach to educating ethnic minorities. Supporters of the Milwaukee Plan would argue that the question presented is sufficiently different than the one before the Court in 1954 and so that, the Brown result (as distinct from the Brown process) is not controlling. Using the Brown process, on the other hand, the court (unlike the Supreme Court of 1954) would find little in the way of clear and definitive guidance on this point: Specialists appear to be sharply divided on the question of whether ethnocentric education is pedagogically sound. Supporters of the Milwaukee Plan could argue, however, that there is enough social science research to provide at least a rational basis for a school board to determine that schoolwide ethnocentric curriculum is appropriate for some minority students.

If the court instead elects to rely on the result of Brown to decide whether a schoolwide ethnocentric curriculum is invidious, then the court's decision would seem to favor the opponents of the Milwaukee Plan. This conclusion is derived from Brown's clear pronouncements that favor racial

47. The Brown Court in part relied on contemporary findings of social science research. Id. at 494, n.11; see also supra note 26.
49. If the Brown decision is controlling, then the Milwaukee Plan would be subject to a strict scrutiny rather than a rational basis standard of review. But supporters of the Milwaukee Plan would argue that Brown — or at least key portions thereof — is not applicable.
integration in public schools for its own sake.\textsuperscript{50} In the face of these pronouncements, supporters of the Milwaukee Plan can point to one central proposition which at least partially distinguishes the Plan on its face from the situation confronting the Supreme Court in 1954: That \textit{Brown} stands for the unconstitutionality of segregated public schools established by a governmental authority (probably controlled exclusively by whites)\textsuperscript{51} for the purpose of keeping blacks in an inferior position. If, above all else, \textit{Brown} stands for this proposition, then the Milwaukee Plan is constitutional.\textsuperscript{52}

\textbf{D. Courts are not competent to evaluate the curricular decisions of school officials}

Supporters of the Milwaukee Plan argue that establishing a school devoted to African-American culture is no different than establishing a school devoted to French, Japanese, or other national culture or language.\textsuperscript{53} Courts have rarely intervened in curricular decisions of school officials (with the major exception of establishment clause cases).\textsuperscript{54} A decision invalidating the Milwaukee Plan on constitutional grounds would elevate the courts into a super-educational board with final authority on curricular decisions in matters of language, culture, and civics. With few exceptions, such decisions properly rest with local boards of education and local educators, with appropriate supervision by the political branches of government.

\textbf{IV. Conclusion: Would the Supporters of the Milwaukee Plan Argue that Brown v. Board of Education Was Wrongly Decided?}

\textit{Brown v. Board of Education} stands as probably the most important Supreme Court decision of this century and the seminal event in the development of the mid-twentieth century civil rights movement.\textsuperscript{55} For, all its social and political importance to blacks, however, the decision contains

\textsuperscript{50} See \textit{supra} text accompanying notes 30-36 for discussion of the \textit{Brown} Court's reliance on "intangible" factors and the critical role of public schools in contemporary society with respect to secularization, assimilation, and Americanization.

\textsuperscript{51} The Milwaukee Board of Education consists of eight members, two of whom are black. Both black members voted in favor of the Plan. Johnson, \textit{supra} note 1, at 26, col. 3.

\textsuperscript{52} While some critics of the plan may argue that its probable effect is to keep blacks in an inferior position, it cannot seriously be argued that this was the purpose of the Milwaukee Board of Education in establishing Schools of African-American Immersion. \textit{See id.}

\textsuperscript{53} Lawton, \textit{supra} note 4, at 1, col. 1.

\textsuperscript{54} For example, the Supreme Court has held invalid a statute prohibiting the teaching of the theory of evolution in the public schools. Epperson \textit{v.} Arkansas, 393 U.S. 97 (1968).

certain major premises and philosophical underpinnings that have at times appeared inconsistent with positions taken by leading black educators and political activists. This inconsistency has been brought sharply into focus with the advent of Milwaukee’s plan to establish Schools of African-American Immersion.

Perhaps because of its critical historical, political, and symbolic importance, *Brown* has been largely exempt from searching critical commentary from those commentators who have claimed an affiliation with what used to be called the “civil rights movement,” or the loosely-knit coalition that survives in place of the movement. In light of the Milwaukee Plan, this silence may be at an end. And regardless of where one stands on this extremely difficult subject, reexamination of the limits and the continuing vitality of aspects of the nearly forty year old decision is healthy and overdue. As the United States becomes an ever-more multiethnic and multicultural society, the meaning and limits of *Brown* become a vital concern not just for the courts, but for the political branches and for us all.

56. *See supra* notes 12 and 48.

57. Of Principles A, B and C outlined in Part I of this paper, almost all commentators would accept the continuing vitality of Principle A. The Milwaukee Plan would probably be upheld under both a broad or strict view of Principle A. How one feels about Principles B and C — whether they are an integral part of the *Brown* holding and, if so, whether they continue to possess vitality with respect to the educational and social concerns of the 1990s — will largely determine whether one supports or opposes the Milwaukee Plan.