Hastings Constitutional Law Quarterly

Volume 20
Number 3 *Spring 1993*

Article 6

1-1-1993

Desegregation and the Supreme Court: The Fatal Attraction of Brown

Donald E. Lively

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly

 Part of the Constitutional Law Commons

Recommended Citation

Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of Brown*, 20 Hastings Const. L.Q. 649 (1993).
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol20/iss3/6

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Desegregation and the Supreme Court: The Fatal Attraction of *Brown*

By DONALD E. LIVELY*

Introduction

The desegregation era has been notable for exceptional demands and disappointing results. The desegregation mandate, as introduced by *Brown v. Board of Education*,[1] deviated from principles of constitutional review that had routinely accommodated or deferred to classifications and distinctions on the basis of race.[2] Recent Supreme Court decisions have, however, trimmed constitutional requirements for a society that has left behind formal segregation, but not realities of racism and discrimination. As ultimately defined, the law of the land is that the achievements of *Brown* need not be preserved[3] and the undoing of segregation itself is required only "to the extent practicable."[4]

Investment in the desegregation mandate for less than four decades contrasts with the use of the separate but equal doctrine for half of the Fourteenth Amendment's existence. The result is consistent, however, with two centuries of constitutional jurisprudence that belatedly responded to issues of race, and has since consistently qualified and narrowed the principles that would reckon with discrimination and its legacy. The Thirteenth Amendment prohibited slavery,[5] which northern states had accommodated as a cost of establishing a viable union.[6] When southern states attempted to reintroduce slavery in function rather than

* Professor, College of Law, The University of Toledo. J.D., University of California, Los Angeles; M.S., Northwestern University; A.B., University of California, Berkeley.

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

2. *Id.* at 495.

3. *See infra* notes 83-113 and accompanying text.

4. *See infra* notes 120-26 and accompanying text.

5. U.S. CONST. amend. XIII.

6. The hard bargaining of Georgia and South Carolina with northern states, which may have objected to slavery but nonetheless considered concessions essential to create a union, is discussed in DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 2-27 (1978).

form immediately after the Thirteenth Amendment's enactment,[7] the Fourteenth Amendment was framed and ratified to secure the citizenship of all persons born or naturalized in the United States, including those of African descent[8]. It also established privileges and immunities incidental to national citizenship and prohibited states from denying to any person due process or equal protection of the law.[9] For nearly a century, judicial review of the Fourteenth Amendment was notable for its deference to official schemes and policies that favored whites and burdened other racial groups.[10]

The recharting of equal protection principles in 1954 was thus performed against a backdrop of profound racial prejudice and discrimination. As central features in the nation's traditions, these were potent factors that could not be erased by a single judicial decree or series thereof. To the extent that racism survived the recasting of legal principle, it presented a persistent risk of diluting or defeating any constitutional commitment toward reckoning with the nation's legacy of racial injustice. The danger was compounded by the possibility that fatigue, indifference, or impatience with the intractable problem of race might set in and undermine grand objectives in much the same way that fading interest sapped motivation to achieve the goals of the Civil War amendments in the post-Reconstruction period.[11]

The desegregation mandate's devitalization, despite the reality that racially identifiable and unequal schools endure as pervasive rather than exceptional phenomena, suggests the possibility that history has repeated itself. It invites attention not only to the wisdom of ending the era but to the decision to commence it. Desegregation essentially has been an affirmative action policy that in significant ways has failed and, absent evidence that society was reasonably likely to adhere to its requirements in a comprehensive and enduring way, may have been a misplaced investment.

---

7. In response to the Thirteenth Amendment, many southern states immediately enacted the Black Codes, which imposed extensive restraints upon blacks and established race-dependent systems of civil and criminal law.

8. U.S. CONST. amend. XIV.

9. *Id.*

10. *See infra* notes 14, 79-89 and accompanying text.

11. After a flurry of congressional activity in the late 1860s and early 1870s, Congress ceased generating significant civil rights legislation for nearly a century. The Supreme Court from the late 19th century to the middle of the 20th century also narrowed the scope of the federal interest in civil rights and deferred to state action that formally classified on the basis of race. *See* The Civil Rights Cases, 109 U.S. 3 (1883) (holding Congress may only reach state action in legislating under Fourteenth Amendment); *see also* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding racial segregation in rail accommodations a reasonable exercise of police power).

The *Brown* decision displaced the separate but equal doctrine that had defined racial jurisprudence under the Fourteenth Amendment since the late nineteenth century. Although the Thirteenth and Fourteenth Amendments respectively had prohibited slavery[12] and established citizenship and its incidents for a new class of citizens,[13] it was not until 1954 that the racist ideology of pro-slavery jurisprudence was fully repudiated.[14] The *Brown* Court determined that officially segregated education connoted racial inferiority.[15] Equally significant for purposes of establishing a Fourteenth Amendment violation was the determination that enforced separation denied equal educational opportunity.[16] Elimination of official segregation was apt, overdue, and an indubitable achievement of the desegregation mandate. The *Brown* decision redefined the Fourteenth Amendment and, in so doing, prohibited what the Framers themselves had countenanced.[17] It also reinvigorated the federal interest in civil rights and equality that had inspired the Fourteenth Amendment, and had largely been suppressed by subsequent glosses.[18]

12. As the first of the reconstruction amendments, the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." U.S. CONST. amend. XIII.

13. The Fourteenth Amendment responded primarily to the Black Codes and harassment of unionists in the immediate postbellum South. The Codes, by comprehensively limiting the liberty and rights of blacks, maintained the functional equivalent of slavery. The origins of the Fourteenth Amendment are detailed in 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888 (1978); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER THE LAW (1982).

14. The post-war amendments overturned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), in form. Official discrimination and segregation reflecting premises of white superiority, however, were upheld until the Court invalidated prescriptive racial separation in public schools in *Brown*. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (establishing the "separate but equal" doctrine that survived until 1954), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954); *see also* The Civil Rights Cases, 109 U.S. 3, 25 (1883) (denying Congress the power to prohibit "mere discriminations" by private persons and entities and accommodating society's traditional race-dependent distribution of privileges).

15. *Brown* at 494 ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

16. *Id.* ("[S]egregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.") (alterations in original).

17. Congress generated the Fourteenth Amendment for ratification while contemporaneously providing for racial segregation of public schools in the District of Columbia. *See* DONALD E. LIVELY, THE CONSTITUTION AND RACE 47 (1992).

18. Ratification of the Fourteenth Amendment represented a redistribution of federal and state interests in citizenship and its incidents. Prior to the amendment's constitutional enshrinement, citizenship was a status conferred by states which also determined the nature and scope of rights and liberties. The Fourteenth Amendment established a national interest in freedom and equality and authorized Congress to secure those interests against racially discriminatory action by the states. In theory, the amendment rolled back a previous ruling that regarded constitutional rights as a check only upon federal power. *See* Barron v. Mayor of

Widespread resistance toward the implementation of desegregation delayed meaningful progress.[19]" The process eventually was advanced by congressional enactments enabling the Justice Department to bring desegregation actions and denying federal funds to school districts not complying with the requirements of *Brown*.[20] By the late 1960s, as the desegregation process threatened to reach the North and West, public and judicial enthusiasm for the mandate began to wane.[21] The Court was also recast with personnel less amenable to vigorous equal protection remedies.[22] Within two decades of *Brown*, the Court qualified the desegregation mandate so that it did not reach so-called de facto segregation,[23] generally could not implicate predominantly white suburbs,[24] and did

---

Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833). In practice, however, the federal interest would later be checked by jurisprudence that perceived the threat of federal power being used "to create a code of municipal law for the regulation of private rights." The Civil Rights Cases, 109 U.S. 3, 11 (1883) (denying Congress power to prohibit segregation in various public venues).

19. The decade following *Brown* was characterized by widespread resistance, evasion, and delay. For examples of subterfuges or inactions that maintained segregation as a function of custom rather than official dictate, see Wright v. City Council of Emporia, 407 U.S. 451 (1972) (invalidating subdivision of school district calculated to insulate white community from constitutional demands); Green v. County Sch. Bd., 391 U.S. 430 (1968) (striking down freedom of choice plan that failed to effect dismantling of dual school system); Rogers v. Paul, 382 U.S. 198 (1965) (rejecting desegregation of one grade per year as insufficient to satisfy Fourteenth Amendment demands); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (finding that closure of public schools was prompted solely to avoid desegregation).

20. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6(d) (prohibiting discrimination in public schools).

21. *See* LIVELY, *supra* note 17, at 118-120.

22. During the 1968 presidential campaign, Richard Nixon promised to appoint Supreme Court justices who would animate the equal protection guarantee less vigorously. *See* LOUIS M. KOHLMEYER, GOD SAVE THIS HONORABLE COURT 114 (1972); THEODORE H. WHITE, THE MAKING OF THE PRESIDENT—1968 396 (1969). Nixon's appointment of Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist proved critical to the unwinding of the desegregation mandate in the 1970s. *See infra* notes 59-75 and accompanying text. Justice Blackmun eventually subscribed to what became the minority position that desegregation responsibilities should not end until they are "fully completed and maintained so that the stigmatic harm identified in *Brown I*, will not recur." Board of Educ. v. Dowell, 111 S. Ct. 630, 647 (1991) (Marshall, J., dissenting). Even so, Justice Blackmun joined the Court's unanimous conclusion a year later that desegregation was necessary "to the extent practicable" and not as a permanent requirement. Freeman v. Pitts, 112 S. Ct. 1430, 1446 (1992) (quoting *Dowell*, 111 S. Ct. at 638).

23. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973) (holding segregation not attributable to official action is constitutionally insignificant), discussed *infra* notes 59-65 and accompanying text.

24. *See* Milliken v. Bradley, 418 U.S. 717 (1974) (holding that metropolitan desegregation remedy exceeds scope of harm because suburban school districts had not contributed to urban segregation and had not manipulated district lines in race-dependent fashion), discussed *infra* notes 66-70 and accompanying text.

not necessarily impose lasting responsibilities.[25] Compounded by the determination that education was not a fundamental right,[26] the desegregation mandate became an ever diminishing source of constitutional returns. It had defeated formal segregation but ultimately accommodated functional or reconstituted racial separation. Education itself remained characterized by segregation and inequality.[27] At its height, the desegregation mandate demanded elimination of segregation "root and branch."[28] Its actual legacy is much less, insofar as equal protection standards have been adjusted to require only the pruning of overt manifestations of discrimination. The objective of eradicating segregation "root and branch" has been scaled down by contemporary case law, which now requires desegregation "to the extent practicable" and describes "the ultimate objective" of remediation as "returning school districts to the control of local authorities."[29]

The *Brown* decision radically redirected equal protection doctrine and required extensive cultural upheaval, but was premised upon assumptions that eventually limited its achievements. Given the backdrop against which *Brown* emerged, and the manifestly racist tradition that it repudiated, the *Brown* decision has presented a unique challenge to critics. To question the quality of its calculus runs a risk of being typed as racist or reactionary. Not surprisingly, therefore, the *Brown* decision has been treated with deference even by some of its most logical critics. Although not grounded in interpretive norms ordinarily acceptable to exponents of judicial restraint and political conservativism,[30] *Brown* nonetheless is a decision they strive to rationalize and accept. Robert Bork, an ardent advocate of originalism, has noted the deviation between the desegregation principle and the Framers' acceptance of formal racial separation.[31] Still, he has embraced the *Brown* ruling as the necessary function of a choice between revising the meaning of equal protection or effectively reading it out of the Constitution.[32] Justice Scalia has identi-

25. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (finding no further duty to desegregate unless resegregation is a function of official design), discussed *infra* notes 71-75 and accompanying text.

26. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-37 (1973).

27. *See id. See also* Freeman v. Pitts, 112 S. Ct. 1430, 1437-48 (1992); Dowell v. Board of Educ., 111 S. Ct. 630, 635-37 (1991).

28. Green v. County Sch. Bd., 391 U.S. 430, 438 (1968).

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

30. The decision is at odds with original thinking that did not contemplate racially mixed education, as evidenced by contemporaneous provision for segregation of education in the District of Columbia. *See supra* note 17 and accompanying text.

31. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 82-83 (1990).

32. *See id.*

fied desegregation as an exception to his otherwise unbending view that race-conscious policies are constitutionally unacceptable.[33] Such efforts at accommodation are mystifying in some ways, revealing in others, and ultimately as unconvincing as they are disproportionate to the significance of *Brown* as it has devolved. The inclination to except *Brown* from interpretive norms suggests theoretical maneuvers that are more patronizing than honest. The abiding effort to square doctrine with incompatible theories of judicial restraint, especially as the desegregation principle itself has been gutted, indicates analytical confusion, selective distortion prompted by concern for appearance, and perhaps an unconscious concession to the rightness of a result that if fully acknowledged would undermine a favored judicial theory or political agenda.

Given the historical significance of race and impediments to the elimination of racial distinctions, the desegregation formula, if not programmed for failure, was at least a high risk proposition. It has been noted that, especially in the South, official segregation was not merely a means of separation, but involved "one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own."[34] Repudiation of such a system was appropriate, and a compelling justification existed for policies that would repair a legacy of accumulated group disadvantage. The provision for relief "with all deliberate speed,"[35] rather than demanding immediate compliance, signaled judicial equivocation that eventually would undermine the realization of *Brown*'s full potential. Inadequate or incomplete enforcement also illuminated an unfortunate overemphasis upon assimilation as the sole path to destigmatization. Such an emphasis disregarded the more profound reality that stigmatic harm ultimately is traceable to racial assumptions that were capable of surviving the system of formal, legal segregation. Because racial prejudice could not reasonably have been expected to dissipate by virtue of constitutional reformulation alone, a major risk to the fulfillment of *Brown*'s promise was that doctrine would freeze as discriminatory methodologies changed from overt to subtle and resistance to change was compounded by indifference. The risk has materialized into reality, as standards have not developed beyond the point of reckoning with formal segregation or discrimination.

33. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521, 524 (1989) (Scalia, J., concurring) (arguing constitutional color-blindness is a fixed rule except when "necessary to eliminate maintenance . . . of a system of unlawful racial classification" or in the event of a "social emergency rising to the level of imminent danger to life and limb").

34. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).

35. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

The remedial methodology of desegregation itself, moreover, may actually have enhanced stigmatic injury to the extent that it tied perceptions of personal or group adequacy to full acceptance by a society resistant to comprehensive integration. Compounding the negative fallout from *Brown* have been reduced desegregative demands and a failure to account effectively for educational opportunity.

This article will examine the original assumptions of the *Brown* Court and possibilities for meaningful change as a function of revised Fourteenth Amendment criteria; identify how contemporary case law effectively has foreclosed the desegregation era; and consider why the desegregation principle in significant part has been a constitutional failure.

I. The Rise and Fall of the Desegregation Principle

The desegregation mandate consummated a two-decade long litigative effort to defeat official segregation.[36] As described by Thurgood Marshall, who helped direct the National Association for the Advancement of Colored People's litigative strategy against segregation, the challenge was calculated first to contest unequal funding and ultimately to demonstrate that separate facilities were inherently unequal.[37] From the NAACP's initial attack on official segregation came progress toward actualizing the long-neglected second prong of the separate but equal doctrine. Beginning in the mid-1930s, federal and state courts required states to equalize public education at the graduate and professional levels.[38] Insofar as states did not provide separate higher education to black students, they were obligated to admit them to previously all-white schools.[39] Initial pressure to desegregate thus was exerted not by demanding an end to separation, but rather by insisting on the premise of equality. Direct and comprehensive dismantling of official segregation would not be achieved for another generation.

36. The National Association for the Advancement of Colored People (NAACP) sought to challenge official segregation at what was perceived to be its most vulnerable point. The initial focus thus was upon graduate and professional education, where the persons affected were relatively few and mature. It was calculated that if segregation could be defeated at the highest academic levels, the entire system of racial separation eventually would unwind. The NAACP's strategy is discussed in KENNETH F. RIPPLE, CONSTITUTIONAL LITIGATION 121-36 (1984); *see also* Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education through Resort to the Courts*, 21 J. NEGRO EDUC. 316 (1952).

37. Marshall, *supra* note 36, at 318.

38. Initial court rulings required states to provide legal education to black students, rather than subsidize their enrollment out of state, and if necessary, to integrate public law schools. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Pearson v. Murray, 182 A. 590 (Md. 1936).

39. *Gaines*, 305 U.S. at 352; *Pearson*, 182 A. at 594.

When conceived and as pursued, the aim of undoing segregation was not consensually subscribed to even among critics of the established order. W.E.B. DuBois noted, contemporaneously with the NAACP's initial success, that "[o]ther things being equal" desegregated schools were the ideal, but "things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all the mixed school can offer."[40] The pertinence of DuBois's observation was renewed in the post-*Brown* era as desegregation evolved in the direction of formal equality, without concern for equal educational opportunity, in a still largely segregated environment.[41] The Court in *Brown* determined that racially segregated public schools never could be equal for purposes of the Fourteenth Amendment.[42] Implicit in that conclusion and corresponding doctrinal revision was the sense that equal opportunity would be secured and connotations of racial inferiority would vanish through desegregation. Constitutional redirection was premised, however, upon dubious assumptions about the past and risky calculations of the future.

Having requested and heard reargument on the Fourteenth Amendment's original intent, the *Brown* Court concluded that the Framers' purpose was uncertain.[43] That determination is at least questionable because, notwithstanding the usual difficulties in discerning official motive,[44] the Framers' aims and premises were not especially obscure. Although generating the Fourteenth Amendment, Congress also had provided for segregated schools in the District of Columbia.[45] The ratifying states, moreover, included some that had prohibited education of blacks and others that allowed it only on a segregated basis.[46]

The original contemplations of the Fourteenth Amendment's architects have been a persisting challenge to exponents of judicial restraint, who strive to reconcile *Brown* with their theories of review.[47] Insofar as

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

41. The internalization of discriminatory attitudes and presumptions and their manifestation in the form of tracking, discipline, and teacher expectations in desegregated settings are discussed in *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142 (5th Cir. 1972) (en banc).

42. *See* Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954).

43. *Id.* at 490 (noting "little in the history of the Fourteenth Amendment relating to its intended effect on public education").

44. *See infra* note 65 and accompanying text.

45. *See supra* note 17 and accompanying text.

46. Ohio and Massachusetts, for instance, had segregated educational systems that survived litigative challenges. *See* State *ex rel.* Gaines v. McCann, 21 Ohio St. 198 (1872); Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849).

47. *See supra* notes 32-33 and accompanying text. Herbert Wechsler, a few years after *Brown*, criticized the decision for deviating from principles of constitutional neutrality. Her-

the *Brown* decision is driven by a revised understanding that repudiates original segregative expectations, such efforts at accommodation are futile. They also stretch logic needlessly beyond the plausible sense that public education over the course of time had become critically tied to original concern with basic opportunity for self-development.[48] The determination that the Amendment's history was uncertain, especially after postponement of a decision for a full term to hear arguments on that particular question,[49] weakened the Court's logic. Without an honest historical accounting, education had become connected to the Fourteenth Amendment in a way never contemplated by the Framers.[50]

By encouraging affected states to participate in the framing of relief and vesting state and local officials and lower courts with implementation and oversight responsibilities, the Court anticipated cooperation in the transition from dual to unitary schools.[51] Expectations of acquiescence were confounded initially by resistance to and evasion of the mandate.[52] The efficacy of the *Brown* principle ultimately would depend upon the Court's ability to have it enforced. In one notable instance, desegregation was accomplished by armed intervention.[53] It was boosted further by federal legislation authorizing the United States Attorney General to bring desegregation actions and denying federal funding to school dis-

---

bert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26 (1959). Although objecting to the premises of *Brown*, Wechsler nonetheless was hopeful that a principled basis could be discovered for it that would square with acceptable interpretive history. *See id.*

48. The Fourteenth Amendment in large part constitutionalized the Civil Rights Act of 1866, which stressed basic guarantees for self-development such as contractual liberty, property rights, freedom to travel, and equal treatment under the law. *See* LIVELY, *supra* note 17, at 45-47. Neither education generally, nor its racially mixed nature, figured as a basic right or interest. *Id.* at 47. Compare with *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

49. Brown v. Board of Educ., 345 U.S. 972 (1953) (requesting reargument focused particularly upon Framers' understanding and judicial power to abolish segregation).

50. *See Brown*, 347 U.S. at 493.

51. *See* Brown v. Board of Educ., 349 U.S. 294, 299-300 (1955) (local courts relied upon to take advantage of their "proximity to local conditions" and ensure compliance with desegregation mandate being effected in "good faith"). Dual and unitary terminology has been used by the Court to describe formally segregated and nondiscriminatory school systems respectively. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 435-36 (1968).

52. The history of southern intransigence is detailed in NORMAN DORSEN ET AL., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 701-09 (4th ed. 1979).

53. The governor of Arkansas attempted to enforce a state law declaring desegregation unconstitutional. Resistance ultimately was overcome by resort to federal troops and an order denying the school board any delay in implementing a desegregation plan. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

tricts not complying with *Brown*.[54]

Efforts to avoid the process persisted throughout the desegregation era. After more than a decade of intransigence and evasion by many school districts, the Court insisted upon desegregation remedies that "promise[ ] realistically to work *now*."[55] By then, however, the changes contemplated by the *Brown* Court had eluded nearly an entire generation of public school students. One school system subject to the original desegregation order in *Brown* itself remained unchanged a decade after the decision.[56] At the same time, barely two percent of southern black students attended schools where they did not constitute the dominant racial group.[57]

Unresponsiveness to *Brown* was reminiscent of early reaction to the Fourteenth Amendment itself. Although the Amendment reflected a new federal interest in civil rights and equality and provided a tool for attacking state devices for denying or limiting basic rights and equality, the Amendment's initial agenda was weakened by competing priorities and continued resistance to change. As reunification and economic development became more pressing, the nation's commitment to civil rights and societal change lapsed.[58] Similarly, after several years of judicial and legislative activity on behalf of civil rights, the Court began to trim the scope of the *Brown* mandate.

The Supreme Court enunciated the first significant qualification in *Keyes v. School District No. 1*.[59] Unlike the South, where segregation was maintained by legal prescription, the North and West achieved similar results through official decisions with respect to district lines, school siting, pupil placement, and other race-dependent variables.[60] In *Keyes*, the Court determined that such policy-making "establishe[d] a prima facie case of intentional segregation."[61] Of particular long-term significance was the Court's illusory distinction between de jure and de facto

54. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000e-2(j) (prohibiting discrimination by public schools and by programs receiving federal funding).

55. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

56. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (en banc), *cert. denied*, 389 U.S. 840 (1967).

57. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 124 (95th ed. 1974).

58. *See* LIVELY, *supra* note 17, at 74-84.

59. 413 U.S. 189 (1973).

60. The nature of school segregation in the North is discussed in GUNNER MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM IN AMERICAN DEMOCRACY 621 (1944); Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

61. *See Keyes*, 413 U.S. at 213.

segregation,[62] and its determination that only the former was constitutionally objectionable.[63] Since *Keyes* required courts to discern de jure segregation before ordering desegregation, it became the plaintiff's responsibility to demonstrate that racial separation was attributable to intentional official action.[64] The finding of a constitutional violation in *Keyes* itself may have suggested that its analytical framework could be used to support demands for desegregation. In fact, as motive-referenced standards have evolved in response to challenged policies by schools and other public institutions, the *Keyes* requirement of official action has proved effective primarily in curtailing the Fourteenth Amendment's demands.[65]

Further qualifying the demands of the desegregation mandate was the Court's determination, one year after *Keyes*, that interdistrict relief was not a remedial option. In *Milliken v. Bradley*,[66] it rejected the trial court's findings that state involvement in the segregation of Detroit schools justified a desegregation plan comprehending the city and its suburbs.[67] The Court emphasized that suburban communities had not colluded directly with the city for segregative purposes and, notwithstanding their common status with the city as subdivisions of the state, were immune from responsibility for fixing any constitutional violation.[68] As a consequence of the *Milliken* decision, the phenomenon of

62. School segregation in many communities descends from a history that includes officially enforced restrictive covenants, federal lending policies that denied home loans that would lead to racially mixed neighborhoods, school construction policies, public housing siting and distribution of urban development funds. *See Keyes*, 413 U.S. at 216 (Douglas, J., concurring); PAUL JACOBS, PRELUDE TO RIOT: A VIEW OF URBAN AMERICA FROM THE BOTTOM 139-41 (1967).

63. *Keyes*, 413 U.S. at 208.

64. *See Keyes*, 413 U.S. at 207-08 (asserting plaintiff's obligation to establish prima facie case of segregative intent which state has opportunity to rebut).

65. Because discriminatory purpose may be concealed, subtle, or unconscious, efforts to identify it tend to be futile. By establishing motive-referenced standards and rejecting the significance of statistical disparities, the Court has limited the possibility of proving racial discrimination against minorities. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 312 (1986). In the past decade, the Court has identified only a few instances in which standards of proof were satisfied. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1987) (holding a prosecutor may not use peremptory challenges in a racially discriminatory fashion); Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating state criminal law enacted for patently discriminatory reasons); Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982) (holding redistribution of power to require busing constitutionally impermissible).

66. 418 U.S. 717 (1974).

67. The district court had determined that the state had facilitated segregation in Detroit by nullifying a voluntary segregation plan, overseeing segregative construction policies, implementing a transportation plan that was racially steered, and sanctioning race-dependent attendance plans. *See id.* at 734-35 n.16; *id.* at 770-71 (White, J., dissenting).

68. *Id.* at 746-47.

white flight received constitutional blessing. Justice Marshall objected that the Court was abandoning its responsibility for the consequences of the desegregation command which it had entered two decades earlier.[69] He perceived in the decision a sense that the desegregation process "ha[d] gone far enough."[70]

The *Milliken* decision established geographical restrictions upon the desegregation mandate. In *Pasadena City Board of Education v. Spangler*,[71] the Court emphasized that desegregation responsibilities also were subject to time limitation.[72] Specifically, the Court concluded that once a racially neutral attendance pattern was implemented, further constitutional duties would not be imposed in response to demographic change.[73] Barring proof of official contribution to or manipulation of racial composition, therefore, resegregation was not a basis for further remediation.[74] Justice Marshall argued unsuccessfully that when a state has "created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together, [it] is responsible for the fact that many whites will react to the dismantling of that segregated system by attempting to flee to the suburbs."[75] By the 1970s, the desegregation principle had been redefined to the point that it functioned only in rare instances where official wrong was manifest, afforded few meaningful remedies in major urban centers, and became only a passing obligation.

The principles enunciated in *Keyes*, *Milliken*, and *Spangler* profoundly limited the prospective operation of the desegregation mandate. They also generated obvious questions with respect to whether the accomplishments of the *Brown* mandate could be preserved and whether any constitutional obligation existed to maintain them. Integration maintenance efforts in some cities have led to sometimes incongruous and unsettling results. One city, for instance, reverted to racially identifiable schools at the primary level in hopes of preserving integration at the

69. *Id.* at 806 (Marshall, J., dissenting).

70. *Id.* at 814 (Marshall, J., dissenting).

71. 427 U.S. 424 (1976).

72. *See id.* at 436-39 (finding that desegregation remedies not intended to be permanent).

73. *See id.* (holding that school boards, "having once implemented a racially neutral attendance pattern," have no further obligation to remediate absent evidence of official resegregative intent).

74. *See* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 32, *reh'g denied*, 403 U.S. 912 (1971) (finding no further constitutional responsibility necessary absent "showing that . . . State has deliberately attempted to . . . affect the racial composition of the schools").

75. Milliken v. Bradley, 418 U.S. 717, 806 (1974) (Marshall, J., dissenting).

secondary level.[76] Another restricted transfers from minority dominated schools to integrated settings out of concern that white flight would be exacerbated.[77] Such policies have responded to abiding difficulties in actualizing the goals of *Brown* and desegregation itself. So elusive did the aims of *Brown* become that preservation of the process was prioritized above and to the detriment of the opportunity it was intended to secure. Recent case law has emphasized that such "heroic efforts" are not obligatory,[78] and effectively has reduced desegregation to a ritual that must be performed to render segregation constitutionally permissible.

II. Reversion to Constitutional Norms

A persistent aspect of relevant constitutional review has been the misperception of racial reality, or manipulation of it, to avoid constitutional strictures. Such analytical failure is a phenomenon that precedes and postdates the *Brown* decision. The Supreme Court upheld slavery and denied citizenship status to all persons of African descent, for instance, in the belief that they were "beings of an inferior order and altogether unfit to associate with the white race . . . and lawfully . . . reduced to slavery."[79] Even after the Fourteenth Amendment was framed and ratified, the Court regarded exclusion of blacks from public accommodations and reservation of social privileges for whites as "mere discriminations."[80] The separate but equal doctrine advanced a premise that any harm from official segregation was attributable not to the law itself but to the construction that "the colored race chooses to put . . . on it."[81] Such rationalization was a jurisprudentially polished veneer upon a policy that was the cornerstone of white supremacy, which assumed that "blacks were inherently inferior . . . , a conviction being stridently trumpeted by white supremacists from the press, the pulpit, and the platform, as well as the legislative halls of the South."[82]

The *Brown* Court eventually recognized that prescriptive separation on the basis of race was a constitutionally significant source of stigma-

76. *See* Riddick v. School Bd., 627 F. Supp. 814, 818 (E.D. Va. 1984), *aff'd* 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

77. *See* Parent Ass'n v. Ambach, 738 F.2d 574, 576 (2d Cir. 1984).

78. Freeman v. Pitts, 111 S. Ct. 1430, 1447 (1992).

79. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

80. The Civil Rights Cases, 109 U.S. 3, 25 (1883) (holding that denial of certain privileges to blacks, such as access to public accommodations, not significant enough to merit congressional attention pursuant to Fourteenth Amendment).

81. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

82. Leonard W. Levy, *Plessy v. Ferguson*, *in* CIVIL RIGHTS AND EQUALITY 174 (Kenneth L. Karst ed., 1989).

tizing injury and an impediment to opportunity.[83] Consistent with, and perhaps a reason for, the desegregation mandate's demise, however, has been a reversion to traditional perceptual norms. Refusal to recalibrate the desegregation principle so that it would account for demographic change, for instance, reflects a perception of population redistribution as a "quite normal pattern of human migration."[84] This dismissal of any constitutional significance with respect to population resettlement following court-ordered desegregation is reminiscent of the *Plessy* Court's deference to distinctions "in the nature of things."[85] Similarly evidencing a sense of invariability, and thus acceptability, is the view that "[e]ven if the Constitution required it, and it were possible for the federal courts to do it, no equitable decree can fashion an 'Emerald City' where all the races, ethnic groups, and persons of various income levels live side by side . . . ."[86] Such a perception is akin to the denial of relief for racially motivated deprivation of voting rights at the turn of this century because, given dominant attitudes of the time and place, judicial intervention would be "pointless."[87]

The limiting principles which diminished the operation and significance of the desegregation mandate suggested that *Brown* itself was an exception to perceptual and analytical norms. Constrictive as they were, the decisions of the 1970s did not entirely enervate the desegregation principle. Even after those rulings, the Court found constitutional violations in the school systems of two northern cities[88] and struck down an antibusing initiative in a northern state.[89] Recent decisions have effectively relegated desegregation to a historical episode which now is largely past.

In *Board of Education v. Dowell*,[90] the Court emphasized that desegregation decrees are not supposed to operate in perpetuity and should be dissolved when local authorities have complied "with the commands of the Equal Protection Clause of the Fourteenth Amendment, and . . . it was unlikely that the school board would return to its former ways."[91] The Court thus rejected a standard that would have maintained judicial

83. Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (analyzing official segregation as "denoting the inferiority of the Negro Group").

84. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976).

85. *Plessy*, 163 U.S. at 544.

86. Cleveland Bd. of Educ. v. Reed, 445 U.S. 935, 938 (1980) (Rehnquist, J., dissenting).

87. Giles v. Harris, 189 U.S. 475, 482 (1903).

88. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

89. Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982).

90. 111 S. Ct. 630 (1991).

91. *Id.* at 636-37.

supervision, barring a showing of "grievous wrong evoked by new and unforeseen conditions."[92] It expressed the sense, moreover, that federal oversight was permissible only so long as necessary to aid in transition to a unitary system.[93] Once that end was realized, and schools had operated in compliance with the desegregation decree for a reasonable length of time, the Court determined that total authority should revert to local officials.[94]

As explained by the majority in *Dowell*, the school board responded to demographic change by adopting a student reassignment plan anticipating neighborhood schools through fourth grade beginning in 1985—thirteen years after the desegregation decree was entered and eight years after it was lifted.[95] The new policy contemplated that half of the schools would be racially mixed and the other half more than ninety per cent black or white.[96] The reemergence of racially identifiable schools, pursuant to official action, prompted arguments that the district court should reassert jurisdiction.[97] The Supreme Court, however, remanded the case for a determination of whether the school board "had complied in good faith with the desegregation decree . . . and whether the vestiges of past discrimination had been eliminated to the extent practicable."[98]

Justice Marshall, joined by Justices Blackmun and Stevens, criticized the majority for downplaying the reality and constitutional significance of the circumstances. For the dissenters, the case arose in a historical context of "nearly unflagging resistance by the Board to judicial efforts to dismantle the City's dual educational system."[99] Not only had Oklahoma required segregation since it became a state in 1907,[100] but its response to the *Brown* decision had been evasive and unresponsive. Even after a desegregation action was commenced against the school board in 1961, its policy was calculated to fortify rather than defeat segregation.[101] School siting decisions and attendance zones, for instance, reinforced patterns of residential segregation that had once been

92. *Id.* at 636 (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)).

93. *Id.* at 637 (finding federal supervision of local schools is temporary measure pending transition to system free of racial discrimination).

94. *Id.* (emphasizing interest in reverting to local control of schools).

95. *See id.* at 633-34.

96. *Id.* at 634.

97. *See id.* at 633-34.

98. *Id.* at 638.

99. *Id.* at 639 (Marshall, J., dissenting).

100. *See id.* (Marshall, J., dissenting) (stating racial segregation in public schools required by original state constitution).

101. *See id.* at 640 (Marshall, J., dissenting) (finding construction of schools served primarily white zones and pupil assignments "preserved and augmented existing residential segregation").

established by law.[102] In 1972, officials attributed the absence of a workable plan to the public's anti-desegregation sentiment.[103] Consequent judicial intervention was prompted by what the trial court perceived as "the unpardonable recalcitrance of the . . . Board."[104] Only three years later, the Board moved to close the case on the grounds that it had eliminated all vestiges of discrimination. In 1977, its motion was granted.[105]

The disagreement between the majority and the dissenters focused not on whether an injunction should be dissolved when its purposes have been achieved, but instead on what constitutes sufficient evidence of that achievement. Because the *Brown* decision was centrally concerned with stigmatic harm, the dissenters maintained that school boards were obligated to avoid the recurrence of such injury.[106] It was their understanding "that the *effects* of past discrimination remain chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated."[107]

The dissenters would have displaced the challenged student assignment plan because the history of state-sponsored segregation and persistence of racially identifiable schools continued to radiate a message of inferiority.[108] Minimizing the relevance of context, the Court discounted the linkage between residential and school segregation. The majority intimated that judicial supervision was inapt if "residential segregation . . . was the result of private decisionmaking and economics . . . and [thus] . . . too attenuated to be a vestige of former school segregation."[109] Lost in that relatively narrow focus was the historical reality that through the 1960s, the school board had used neighborhood schools to reinforce segregated housing patterns.[110] To regard present demographics as an exclusive function of personal preference required conscious neglect of how state and local action had contributed to "self-perpetuating patterns of

102. *See id* (Marshall, J., dissenting).

103. *See id.* (Marshall, J., dissenting) (The school board "rationalize[d] its intransigence on the constitutionally unsound basis that public opinion [was] opposed to any further desegregation.").

104. *Id.* (Marshall, J., dissenting) (quoting Dowell v. Board of Educ., 338 F. Supp. 1256, 1271 (W.D. Okla. 1972)).

105. *See id.* at 641 (Marshall, J., dissenting).

106. *See id.* at 642 (Marshall, J., dissenting) (urging the Court to invest in standards that "avoid[] the recurrence of . . . stigmatizing injury").

107. *Id.* at 644 (Marshall, J., dissenting).

108. *Id.* at 648 (Marshall, J., dissenting) (describing contested plan as a " 'vestige' of state-sponsored segregation").

109. *Id.* at 638 n.2 (majority opinion).

110. *Id.* at 646 (Marshall, J., dissenting) (noting how school board's neighborhood schools plan destroyed integrated neighborhoods and reinforced residential segregation).

residential segregation."[111] To the dissenters, the Court's decision to terminate judicial interest without accounting for such realities suggested that it was abandoning constitutional responsibility for ensuring that the work of *Brown* was fully completed and that stigmatic injury would not recur.[112] For the majority, however, the greater danger was the condemnation of school districts to "judicial tutelage for the indefinite future."[113]

The *Dowell* decision indicated that constitutional responsibilities depended upon the causes of segregation and judicial monitoring was not to be indefinite. A year later, in *Freeman v. Pitts*,[114] the Court amplified its account of what did and did not qualify as constitutionally significant segregative factors and reiterated its view on the limited and finite function of the judiciary. At issue in *Freeman* was the district court's decision that the school system in DeKalb County, Georgia had largely achieved unitary status.[115] Because the system had eliminated biracial division with respect to student assignments, transportation, physical facilities, and extracurricular activities, the lower court ruled that it would provide "no further relief" in those areas.[116] It retained jurisdiction, however, over faculty assignments and resource allocation on the grounds that constitutional violations pertinent there to had not been satisfactorily redressed.[117] Upon review, the court of appeals reversed and asserted that (1) the district court must exercise full remedial authority until unitary status has been demonstrated for several years, and (2) demographic changes complicating achievement of unitary status did not diminish the duty of fully dismantling a biracial school system.[118]

While noting that it traditionally had required school districts to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch,"[119] the Supreme Court unanimously determined that achievement of a unitary system was required only to the "extent practicable."[120] Expounding upon its reluctance to define "unitary" in concrete or absolute terms, the Court noted that "[t]he term 'unitary' does not confine the discretion and authority of the District Court in a way that departs from traditional

111. *Id.* (Marshall, J., dissenting).
112. *See id.* at 638 (majority opinion).
113. *Id.*
114. 112 S. Ct. 1430 (1992).
115. *Id.* at 1439.
116. *Id.* at 1442.
117. *Id.*
118. *Id.*
119. *Id.* at 1443 (quoting Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968)).
120. *Id.* at 1446 (quoting Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991).

equitable principles."[121] Considerations of flexibility and customized response, which inspired the *Brown* Court's approach to undoing segregation,[122] thus were adapted to excuse the judiciary's removal of itself from that process. "[I]ncremental or partial withdrawal of . . . supervision and control," which the district court proposed, was endorsed as an exercise congruent with the premise that remedial attention may be no broader than the wrong itself.[123]

As depicted by the Court, "the ultimate objective" of remediation was not desegregation as a lasting achievement, but the "return [of] school districts to the control of local authorities."[124] Such reversion was made contingent upon equitable considerations that include full and satisfactory compliance with the decree, the need for further oversight to assure compliance, and evidence of good faith commitment to satisfying constitutional demands.[125] Citing specifically to *Dowell*, the Court said that the primary issues were " 'compli[ance] 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.' "[126]

The Court found persuasive evidence of the school system's good faith effort to conform to constitutional demands in the system's seventeen year record of "successes . . . and its dedication to providing a quality education for all students."[127] Despite those efforts, unitary status was achieved only briefly and proved elusive over the long run. After the first year of desegregation, major demographic changes unsettled residential patterns and racial balance in the schools.[128] In accordance with *Dowell*, the Court based its response to that reality on its understanding of causation. As the Court put it:

> [W]here resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision of schools districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial

121. *Id.* at 1444.
122. Brown v. Board of Educ., 349 U.S. 294, 299-300 (1955).
123. *Freeman*, 112 S. Ct. at 1445.
124. *Id.*
125. *Id.* at 1446.
126. *Id.* (quoting Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991)).
127. *Id.* at 1450.
128. *Id.* at 1439, 1447-48.

remedies.[129]

The Court acknowledged that vestiges of racial discrimination "remain in our society and in our schools," but affirmed limits upon the extent of constitutional responsibility.[130] It concluded that even if contemporary consequences of segregation are "subtle and intangible," they still "must be so real that they have a causal link to the *de jure* violation being remedied."[131] Population resettlement by itself was found to have no "real and substantial relationship to a *de jure* violation."[132] As a function of private demographics rather than state action, the Court determined that persisting segregation was constitutionally insignificant and not a basis for further judicial attention.[133]

Unlike the recalcitrant officials in *Dowell*, the school board in the *Freeman* case had demonstrated an extensive history of efforts to achieve a unitary system.[134] Despite that point of factual distinction, the dissenters' concern in *Dowell* relating to continuing stigmatic harm[135] still seems apt. The Court's emphasis upon education as a local function and its interest in minimizing federal judicial oversight[136] seems selective, especially when examined in a broader equal protection context. In determining that race-conscious affirmative action policies are at odds with the Fourteenth Amendment, the Court has stressed the federal interest in constitutional color-blindness.[137] Historically, as *Freeman* most recently discloses, the primacy of state policy and interest has served equally well to blunt the Fourteenth Amendment potential for racially significant change.

Decisions before and after *Brown* have acknowledged society's racial hierarchy,[138] but have accommodated it for constitutional purposes. The *Brown* Court fashioned doctrine that largely ignored or underestimated the significance of the cultural factors it sought to contain. It may have assumed that it could overcome resistance or indifference. Subsequent jurisprudence and results have disclosed a fundamental miscalculation.

129. *Id.* at 1448.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1450. The absence of any dissent in *Freeman* may evince the impact of Justice Marshall's resignation from the Court. It also represents completion of a line from unanimous support for desegregation in 1954 to unanimous foreclosure of it in 1991.
135. Board of Educ. v. Dowell, 111 S. Ct. 630, 642-44 (1991) (Marshall, J., dissenting).
136. *Freeman*, 112 S. Ct. at 1445.
137. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-500 (1989).
138. *See, e.g., id.* at 493 (noting society's "sorry history" of racial discrimination); Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (upholding separate but equal doctrine as basis for maintaining established societal order).

The desegregation era commenced with a principle that responded to the existence and consequences of racial discrimination and has waned with results that are incomplete and fleeting. Addressing the reality and consequences of discrimination and disadvantage thus remains a challenge, rather than achievement, of the past four decades.

III. Desegregation and Assimilative Premises: The Consequences of Miscalculation

As the nation courses into its third century and toward the centennial of the separate but equal doctrine, desegregation has been consigned to a unique but brief role in over 200 years of racially significant constitutional law. Justice Thurgood Marshall, in response to the limiting principles prefacing the era's foreclosure, observed that "[d]esegregation is not and was never expected to be an easy task."[139] The *Brown* Court itself sensed some possibility that its transformation of the Fourteenth Amendment represented a perilous constitutional undertaking. Its invitation of state and local participation in the framing of relief represented an effort to defuse resistance that backfired.[140] Later insistence upon relief that "works now" marked the desegregation mandate's peak assertiveness.[141] Whether legal demands actually might have reshaped reality beyond what was achieved is at least dubious, given the prevalence of tracking, dual standards of discipline, and other race-dependent phenomena that have internalized duality in formally desegregated environments.[142] The question, however, is largely academic. Given personnel turnover and ideological change on the Court, its demand for effective desegregation merely prefaced the circumscription and eventual demise of the *Brown* mandate.

The prohibition of official segregation represents an irreversible achievement of the *Brown* Court.[143] As noted previously,[144] qualifying

139. Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

140. Dismantling of official segregation has not been fully achieved, as evidenced by the persistence of racially identifiable schools throughout the nation including the region most affected by the *Brown* mandate. Moreover, schools have become resegregated in some communities after the desegregation process has been completed. *See, e.g., Freeman*, 112 S. Ct. at 1447-48, discussed *supra* notes 114-138 and accompanying text.

141. *See* Green v. County Sch. Bd., 391 U.S. 430, 439 (1969).

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

143. After *Brown*, the Court summarily invalidated official segregation in public venues. *See* New Orleans City Park Improvement Ass'n. v. Detiege, 358 U.S. 54, *reh'g denied*, 358 U.S. 913 (1958) (parks); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

144. *See supra* notes 59-78 and accompanying text.

principles have precluded animation of the Fourteenth Amendment in response to modern variants of discrimination that may be as effective and even more insidious than their overt antecedents. Despite modern consensus that official segregation was constitutionally inimical, and the disengagement of *Brown* from contemporary realities of subtle or unconscious racism, the decision continues to elicit criticism as an exercise in judicial overreaching. Some detractors maintain that acceleration of the law beyond the state of moral development of society, and beyond what the political branches had provided, was an anti-democratic exercise destined to fail and cause more damage than it repaired.[145] Other critics have been reluctant to challenge the premise of *Brown*, but have complained about a methodology of review that they consider unprincipled.[146] Alternative theories for reaching the same result, however, are notable primarily for their inadequacy.[147]

The *Brown* decision as an exercise in constitutional jurisprudence is defensible, even in arguably originalist terms. The evolution of public education into a significant determinant of opportunity for material self-development provided a legitimate nexus to the Framers' original concerns and sufficiently justified the Court's redefinition of the Fourteenth Amendment. Despite prolonged intransigence and reservations about desegregation's potential reach, the citizenry as a whole, and even Court decisions limiting the *Brown* mandate, have ratified the principle that officially prescribed segregation is not consonant with equal protection under the Constitution.[148] If nothing else, the intellectual gymnastics of theorists, still seeking to square the results of 1954 with pet precepts of review, or to avoid a position that would undermine the marketability of their general ideology of the judicial function, confirm widespread acceptance of the notion that official segregation is constitutionally offensive. Still, the net result of the desegregation mandate, as qualified, has reduced the Fourteenth Amendment to a demand for formal equality that is largely irrelevant to modern racial circumstances.[149] Specifically, modern constitutional standards leave undisturbed the subtle, disguised, or unconscious discrimination that has supplanted overt prejudice and

145. *See, e.g.*, LINO A. GRAGLIA, DISASTER BY DECREE (1976).

146. Bork's theory that the Court could invest in the anti-discrimination principle as a proper alternative to eviscerating the Fourteenth Amendment altogether. *See* BORK, *supra* note 31, at 82-83, ignores the imperatives of original intent that he generally argues the judiciary must honor.

147. Wechsler's argument based on freedom of association can easily be turned against compulsory racial mixing. Wechsler, *supra* note 47, at 34.

148. *See, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430, 1440 (1992).

149. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1133-34 (1989).

descends directly from it.[150]

Seldom acknowledged in the undoing of desegregation requirements, and criticism thereof, is *Brown*'s own contribution to racial stigmatization. Such results are not surprising given certain misperceptions and miscalculations by the *Brown* Court. Although recognizing that official segregation connoted inferiority, the Court's understanding of harm was somewhat misplaced. Implicit in its derogation of the separate but equal doctrine was the sense that black children were psychologically deprived by not having the opportunity to mix with white children. The real source of injury in a society that prioritizes personal liberty, autonomy, and determination, however, was a policy that denied choice concerning matters of self-development including where and with whom to attend school. By wrongly assuming the source and nature of harm, the *Brown* Court offered doctrine intimating that blacks needed whites to obtain a proper education and thereby reinforced traditional assumptions of racial superiority and inferiority. By concluding that racially separate education was inherently unequal, without attention to circumstance or alternative, it underestimated the abiding reality of racism that, until addressed, would undermine any constitutional principle or mandate. Demands for societal change, linking destigmatization and opportunity to compulsory mixing, compromised not only the remedy, but its objective as well.

Post-*Brown* case law has delimited the possibilities for desegregation and diminished the predicates for constitutional attention to discriminatory or segregative conditions. The Court in 1954 emphasized the Fourteenth Amendment significance of official action that was racially stigmatizing[151] and that impaired equal educational opportunity.[152] The attempt to remedy such action has been confounded by standards that require proof of discriminatory purpose rather than consideration of injury or persisting disadvantage.[153] Despite well-established case law to the effect that the Fourteenth Amendment requires elimination of dual schools and attainment of unitary status, the Court now notes that "it is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution."[154] The observation is technically accurate, but it applies with equal force to discriminatory purpose standards

150. The nature and effect of subtle and unconscious racism are discussed in Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

151. *See supra* note 15 and accompanying text.

152. *See supra* note 16 and accompanying text.

153. *See supra* notes 59-78 and accompanying text.

154. Board of Educ. v. Dowell, 111 S. Ct. 630, 636 (1991).

that are selectively enshrined in modern equal protection analysis.[155] In 1954, the Court intimated that education was a liberty interest protected by the Fourteenth Amendment.[156] Twenty years later, at the same time the Court was limiting the reach of desegregation, it held that access to education was not a fundamental right.[157] Except to the extent that overt discrimination is provable, and notwithstanding claims of stigmatic harm or linkage to a segregative past, the net result is prohibition of formal segregation and discrimination but tolerance of their legacy and even reversion to their functional likenesses.

The defensibility of *Brown* as a legitimate exercise of constitutional review does not afford it immunity from criticism with respect to its wisdom and foresight. Taken by itself, *Brown* expanded dramatically the national demands of constitutional equality. The ruling may have been a catalyst for enforcement action by the political branches that for decades had evinced limited interest in civil rights.[158] In 1957, President Eisenhower dispatched federal troops to enforce the desegregation mandate despite his own reservations.[159] A decade after *Brown*, Congress enacted comprehensive civil rights and voting rights legislation. The Civil Rights Act of 1964 prohibited discrimination in employment, housing, public accommodations and facilities, and in federally supported programs.[160] The Voting Rights Act of 1965 barred schemes and devices that excluded minorities from the political system.[161] Whether Congress would have acted sooner or later, or more or less effectively, absent *Brown*, is entirely speculative. What is certain is that, given widespread resistance to and evasion of the Court's edict, it was not until Congress intervened with appropriate legislation that substantial desegregative progress was realized.[162] It is equally evident that, soon after the Supreme Court fortified the desegregation principle with demands for remedies that "work

155. Motive-based inquiry, for instance, has been rejected in the freedom of speech context on grounds that the constitutional stakes there "are sufficiently high". *See* United States v. O'Brien, 391 U.S. 367, 383-84 (1968).

156. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that unreasonable federal interference with educational opportunity constitutes "deprivation of . . . liberty").

157. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-37 (1973).

158. Typifying federal interest in the post-Reconstruction era was the Court's determination that relief from racially motivated deprivation of voting rights would be pointless. Giles v. Harris, 189 U.S. 475, 488 (1903).

159. Federal intervention was prompted when the Governor of Arkansas called up the National Guard to preclude desegregation of a high school in Little Rock. *See* Cooper v. Aaron, 358 U.S. 1, 11-12 (1958).

160. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-e.

161. Voting Rights Act of 1965, 42 U.S.C. §§ 1971a-p.

162. *See supra* note 20 and accompanying text.

now,"[163] it began announcing limiting principles that curbed and eventually eviscerated the *Brown* mandate. The federal interest in civil rights waned, as it did a century ago, at the end of the Reconstruction era. The post-Reconstruction Court expressed fears of developing a federally inspired "code of municipal law."[164] It consequently invalidated civil rights legislation and deferred to official segregation.[165] Similarly, the modern Court emphasizes that education is a normatively local function and that the federal interest is essentially aberrational and transitory.[166]

Given *Brown*'s achievement in dispatching formal segregation, but its subsequent limitations and failures, the ultimate question is whether *Brown* rates as a success or failure. Doctrinal wisdom is ultimately a function not only of the quality of the Court's analysis, but also of its durability and acceptance. In enunciating the desegregation mandate as the future wave of equal protection, the *Brown* Court was at an especially significant disadvantage since mid-twentieth century society was on the brink of extensive change that would complicate its implementation. The Court could not have anticipated how increased personal mobility, emerging transportation networks, and suburban development would facilitate the reconfiguration of community life and demographic patterns. By the 1970s, such changes presented a substantially reconstituted Court with the opportunity to distinguish current conditions from the relatively static social order which was considered in 1954.[167]

Although the precise societal changes and the curtailment of doctrinal potential that ensued may have been unforeseeable, the *Brown* Court legitimately may be second-guessed for its sensitivity to a historical record characterized by sporadic and aborted attention to racial justice, vacillating concern with discrimination, competing priorities, and the risk that such factors would influence future doctrinal development. It also is subject to questions regarding its appreciation of deep seated racial antagonism and discomfort, how such realities would foil efforts to equalize educational opportunity, and how the dynamics of racial stigmatization operate. The *Brown* Court assumed that a redefined equal protection guarantee would account more effectively over the long run for interests

163. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

164. The Civil Rights Cases, 109 U.S. 3, 13 (1883) (striking down the Civil Rights Act of 1875 as an impermissible federalized "code of municipal law").

165. Plessy v. Ferguson, 163 U.S. 537, 547 (1896) (warning of the danger of extending the federal interest under Fourteenth Amendment as a basis for "code of municipal law").

166. Board of Educ. v. Dowell, 111 S. Ct. 630, 637 (1991), discussed *supra* at notes 90-113 and accompanying text.

167. Thus, the Court articulated the distinction between de jure and de facto segregation which, as discussed *supra* notes 62-63 and accompanying text, is primarily a principle of convenience.

which had been slighted by its analytical predecessor. It recognized the possibility of resistance to its mandate but took the chance that it could make the new constitutional formula work. What the Court in 1954 apparently did not anticipate was the relatively quick demise of the desegregation mandate in a way that ensured "the same separate and inherently unequal education in the future as . . . ha[s] been unconstitutionally afforded in the past."[168] Had it possessed the vision to foresee that resistance, decreased interest, and diminished commitment would permit the substitution of functional for formal segregation, the Court may not have announced the desegregation decision as it did or when it did.[169] What *Brown* thus may be primarily faulted for are too predictable consequences of underachievement and backlash when the judiciary fast-forwards the law beyond the society's moral development or capacity. The aftermath of *Brown* suggests that the nation was ready to disown formal segregation but not prepared to accept broad-spectrum integration or policies designed to rectify past injustice on a broad scale. Lost in doctrinal calculus now is any constitutional formula that might meaningfully account for persisting group separation and disadvantage.

Even if not directly responsible for the actual glosses that cramped development of its work, the *Brown* Court nonetheless assumed the risk that the desegregation principle, like any jurisprudential precept, would be distinguished, curtailed, or abandoned. Considering the desegregation mandate in historical context, the prospects for an unhappy ending should have seemed at least a distinct possibility. The history of the Fourteenth Amendment is dominated by resistance to its goals and perversion of its central meaning.[170] Intransigence and evasion defined southern reaction to the desegregation mandate; hostility to its possible expansion characterized northern and western response to it. To some extent, the Court factored in the possibility of societal opposition to desegregation, as evidenced by its efforts to involve state and local communities in framing and effectuating relief. What it seems not to have anticipated was the long-term efficacy of resistance, as desegregation became a determinative issue in national politics, and the potential for in-

168. Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).

169. Chief Justice Warren was concerned that, in enunciating the desegregation mandate, the Court should have a united front. *See* BERNARD SCHWARTZ, SUPERCHIEF 87-90 (1983). Some Justices expressed reservations that judicially mandated desegregation would be counterproductive. Justice Clark, for instance, was willing to support a decision against segregation provided it was "done carefully [as not to] do more harm than good" and was not a "fiat or anything that looks like a fiat." *Id.* at 89. The consequences of *Brown*, over the years may validate the pertinence of such reservations.

170. *See supra* notes 14, 80-81 and accompanying text.

terpretive translation of the *Brown* mandate into a relatively short-lived phenomenon.

Because such a response had been so historically typical,[171] the *Brown* Court also might be criticized for failing to establish a constitutional safety net in the event the new doctrine failed. As it has devolved, the desegregation mandate seldom demands real desegregation[172] and has established no lasting obligation.[173] Its limited significance for modern circumstances warrants attention to whether other alternatives might have worked better under the conditions that largely foiled *Brown*'s potential.

One alternative to desegregation was enhanced attention to equalization, a proposition forcefully urged by states where official segregation was being challenged. To ward off the possibility of desegregation, states affected by the *Brown* decision promised a more meaningful accounting for the equality requirements of the separate but equal doctrine.[174] The Court already had noted that such a policy was limited in its potential, because it could reckon only with tangible but not intangible inequalities.[175] Nearly four decades later, the *Brown* mandate has succeeded in effectively addressing neither desegregation nor equality interests. Given the indisputably racist premises of official segregation,[176] elimination of the separate but equal doctrine was unquestionably correct. As a singular remedy, however, desegregation afforded no effective relief in school systems that were resistant to change and provided no methodology to account for equalization in the event desegregation failed. To the extent it suggested that dignity and esteem were dependent upon mixing with whites, rather than a function of full opportunity and choice, the *Brown* decision also displaced one stigmatizing assumption in favor of another.

In different but nonetheless pertinent circumstances, Justice Harlan observed that animation of the Fourteenth Amendment requires close

171. *See id.*

172. The reality is most poignantly evident in urban areas where, as some Justices have noted, students would not be in a segregated educational environment absent past segregative acts and policies. Milliken v. Bradley, 418 U.S. at 799, 805-06 (Marshall, J., dissenting). *See supra* notes 66-70 and accompanying text.

173. *See supra* notes 71-75, 97-98, 130-33 and accompanying text.

174. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 633 (1950) (state pledged to equalize separate education at all levels); Briggs v. Elliott, 98 F. Supp. 529, 531 (E.D.S.C. 1951) (state promised to upgrade separate but equal schools), *rev'd sub nom.* Brown v. Board of Educ., 347 U.S. 483 (1954).

175. *See Sweatt*, 339 U.S. at 634 (noting that intangible factors such as faculty reputation, alumni connections, institutional status and professional opportunities are "incapable of objective measurement").

176. *See supra* note 82 and accompanying text.

attention to the nation's history and values.[177] Careful consideration of risks to the desegregation mandate's future, given the Fourteenth Amendment's jurisprudential record, favored at least some means of reckoning with societal traditions and tendencies that were certain not to vanish or abate merely because constitutional doctrine changed. In deciding upon remedial methodology, the Court invested in the dismantling of dual school systems "with all deliberate speed."[178] An alternative, repudiated by the Court for two decades until allowing for a reversion to functional segregation, was that desegregation did not necessarily require integration.[179] Such an option, advanced initially by southern courts in response to the *Brown* mandate, accepted elimination of prescriptive racial separation but would have minimized judicial restructuring of the established social order.[180] Given the intransigence that confronted the desegregation mandate,[181] investment in the less demanding alternative probably would not have accomplished less than what ultimately was achieved. Meaningful desegregative progress was not realized until after the Civil Rights Act of 1964 was passed and significant leverage became available for the federal government to compel compliance.[182] Soon thereafter, the Court's relaxed Fourteenth Amendment standards limited desegregation's potential and permitted resegregation. Still unrealized is a durable constitutional means of reckoning with a persisting legacy of discrimination, stigmatization, and impaired educational opportunity.

To the extent stigmatization is a function of racial separation, no real difference exists with respect to whether segregation is characterized as de jure or de facto. For a student attending a racially identifiable school, as critics and some courts have noted, it makes no difference what segregation's proximate cause is.[183] The distinction is more convenient than principled, and does not obscure the reality of how modern segregation is connected to an unconstitutional past.[184] The Court has

177. Poe v. Ullman, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting).

178. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

179. The notion that desegregation and integration were not coextensive was asserted in *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (arguing that the Constitution, even if forbidding official discrimination, "does not require integration").

180. *See id.*

181. *See supra* notes 19, 52-57 and accompanying text.

182. Congress eventually conditioned federal funding upon the undoing of segregated schools and enabled the Department of Justice to initiate desegregation suits. *See supra* note 20 and accompanying text.

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

184. *See* Board of Educ. v. Dowell, 111 S. Ct. 630, 640, 646 (1991) (Marshall, J., dissenting). *See also supra* note 62 and accompanying text.

rejected the notion that modern segregation, as a consequence of what it characterizes as private decision-making, is stigmatizing and constitutionally significant.[185] The consequence is that modern disparities in educational opportunity are subject neither to desegregation nor equalization demands. Although the *Brown* Court did not prematurely prohibit segregation, it too hastily may have forsaken the second half of the separate but equal doctrine as a premise for post-desegregation demands.

While the *Brown* Court may not be culpable for the gutting of its work, it is chargeable with a misunderstanding of history and underestimation of the possibility that future courts would be less amenable toward the doctrinal development necessary to confront predictable impediments to long-term realization of its goals. Within approximately the same amount of time that it took for the desegregation mandate to unwind in the face of established resistance and mounting public distress, post-Reconstruction efforts to vitalize the Fourteenth Amendment also had evaporated.[186] Given the vigorous defense of segregation and warnings against invalidating the established order, clear signals existed that history might repeat itself. For desegregation to have been successful, the Court would have had to implement it as a pervasive, unqualified, and lasting requirement. Even then, the Court would have had to assume the risk of doctrinal and institutional irrelevancy experienced a century ago when it upheld slavery in the face of deep division and resistance.[187] In choosing desegregation as a means of actualizing the Fourteenth Amendment, the Court accepted the danger that subsequent decisions would condition, limit, and largely negate it.

The Court possibly could have achieved more meaningful long-term results and immediate relief by insisting upon desegregation, while making the political branches primarily responsible for implementing it. The reality was that the desegregation effort would have dissipated even sooner if Congress had not joined in the pursuit of new constitutional objectives. No incentive or leverage existed for meaningful change until federal law authorized the Justice Department to commence desegregation suits and federal funds could be terminated for noncomplying school systems.[188] Until then, challenges to the established order were a function of individualized and underfinanced litigative initiative. Given such

185. *See Dowell*, 111 S. Ct. at 637-38.

186. The Civil Rights Act of 1875 was struck down by the Court fifteen years after the Fourteenth Amendment was ratified. The Civil Rights Cases, 109 U.S. 3 (1883).

187. Resistance to, evasion, and eventual repudiation of the Court's endorsement of slavery is detailed in FEHRENBACHER, *supra* note 6, at 417-18.

188. *See supra* note 20 and accompanying text.

circumstances, the Court at least might have insisted successfully upon enhanced quality of education during the transition from racially identifiable to unitary schools by capitalizing upon commitments to equalization and acceptance of nonsegregation, if not actual integration.[189] The clash over busing further evidenced such a possibility. The controversy was characterized by passionate resistance to the methodology—even though it was the only practicable means of achieving racially mixed schools—coupled with a counteroffer by its opponents of a social investment in quality education. Such a demand not only would have afforded some relief, which delay and evasion had denied entirely to early litigants, but would have set a floor for future doctrinal qualification or regression.

Even if it were to dismiss stigmatization arguments, modern review might have retained and expanded constitutional requirements of equal educational opportunity. If it had prohibited segregation but left the dismantling process to the political branches of the government, the Court inevitably would have been called upon to determine the constitutionality of effectuating legislation.[190] Instead, the *Brown* Court wound up in the position of the *Dred Scott* Court a century ago which, in upholding slavery, created rather than ratified policy and compounded rather than resolved the controversy.[191] By forbidding segregation but leaving its undoing to the political process, the Court at least would have disarmed detractors of the argument that its function was anti-democratic and thus illegitimate. It also might not have sacrificed other premises for insisting upon continuing attention to equal educational opportunity and reckoning with racially identifiable disadvantage that persists in public education. Nor would it have perpetuated the stigma regenerated by assumptions that personal opportunity, development, and dignity are dependent upon assimilation into and approval by the dominant culture.

The *Brown* decision presents a major challenge to critics who support its repudiation of official segregation, agree with its general aims, and recognize that it was inspired by a constitutional wrong more profound than any miscalculation in response. As the Court's mandate

189. *See supra* notes 179-182 and accompanying text.

190. *See* United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1963) (rejecting challenge to desegregation guidelines and conditions for receiving federal funding).

191. Critics of the *Dred Scott* decision formulated various reasons why it should be ignored and resisted. The Republican Party advanced the argument that the affirmance of slavery was merely "obiter dicta" and thus entitled to no respect. *See* FEHRENBACHER, *supra* note 6, at 339. Abraham Lincoln advanced the theory that even if the decision was fully binding on the parties it did not become controlling until settled. *Id.* at 442-43. At least one northern state court defied the Supreme Court in a subsequent case concerning fugitive slaves and prompted an opinion emphasizing federal court immunity from state challenges. *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858) (Wisconsin).

evolved, however, acceleration of the law beyond its moral base created a disincentive for society to directly confront and meaningfully examine a compounding legacy of racial discrimination. Achievement of formal equality and insistence on constitutional colorblindness for all purposes are the work of decisions that have elicited much public attention but not necessarily extensive public reflection. The resultant imagery of judicially defined standards implies that the business of the Fourteenth Amendment, at least with respect to accounting for discrimination against racial minorities, has been successfully completed. Such a consequence is reminiscent of the conclusion a century ago that, despite historical disadvantage and a brief remedial interlude, victims of discrimination must "cease[ ] to be the special favorite of the laws."[192] That sense is as misplaced now as it was then, insofar as the work of the Fourteenth Amendment remains unfinished. A dominant modern impression, evidenced by the waning of the desegregation mandate and resistance to affirmative action, seems to be that further efforts to account for accumulated racial disadvantage are unwarranted and excessive. Such a condition may owe to an appearance of achievement that surpasses actual progress but nonetheless defines popular understanding. The tragedy of *Brown* may be that in attempting to advance both the law and morality, it ended up retarding both.

IV. Conclusion

For its uniqueness and brevity, the desegregation interval is rich with instruction. The defusing of the *Brown* mandate, from insistence upon elimination of segregation "root and branch"[193] to allowance of its regrowth or persistence, illustrates how radical constitutional redirection was translated eventually into limited achievements conserving much of the legacy it sought to change. *Brown* also demonstrates the risks of recontouring constitutional law in anticipation of significant cultural progress without doctrinal insurance for unexpected consequences. Critical response that excuses *Brown* from interpretive standards, vigorously pressed in other areas of constitutional doctrine, demonstrates how race continues to be a profoundly distorting factor in the law's development. Even more poignant is how the Court, in attempting to defeat racial stigma, contributed to it.

To expect more from the desegregation experience may disregard an especially pertinent lesson of *Brown* and its progeny. The central point,

192. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

193. Green v. County Sch. Bd., 391 U.S. 430, 438 (1968).

reinforced by two centuries of historical reality, is that the judiciary is more likely to accommodate than contest racial hierarchy in the established social order. Evidence of that tendency is gleaned not only from endorsement of slavery,[194] allowance of "[m]ere discriminations,"[195] and support for official segregation,[196] but also from the recent circumscription of remedial policies calculated to repudiate and remedy an acknowledged "sorry history."[197]

In its early incarnation, the *Brown* decision heralded the possibility of constitutional litigation as a cost-efficient methodology for effecting social change. Standards that prohibit official segregation and formal discrimination have made a meaningful contribution to the pool of thoughts and ideas from which collective moral and legal principles emerge. Long-term jurisprudential performance evidences that law is an extension of moral development, however, and assumptions of a converse relationship may result in expectations that are unrealistic, in part because the process diverts attention from the necessary groundwork for real and lasting progress. The desegregation era's achievements are not insignificant. Their place in the broader stream of history, however, is notable also for relaxing anti-discrimination standards,[198] confounding initiatives for reckoning with the nation's discriminatory legacy,[199] and transforming constitutional obligations into a policy option.[200]

194. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407-09, 449-51 (1856).

195. The Civil Rights Cases, 109 U.S. at 25.

196. Plessy v. Ferguson, 163 U.S. 537, 549-50 (1896).

197. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

198. *See supra* notes 64-75 and accompanying text.

199. *See Croson*, 488 U.S. at 494 (finding racially preferential policy accounting for societal discrimination suspect and invalidating it pursuant to strict scrutiny).

200. Although school districts are not obligated to rectify persisting segregation or resegregation which would be characterized as de facto, the Court has not foreclosed the possibility of integration as a legislative policy choice.