

Fulfilling *Brown's* Legacy: Bearing the Costs of Realizing Equality

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Thank you for inviting me to participate in your observance of the fiftieth anniversary of *Brown v. Board of Education*.¹ I am honored to deliver the Foulston-Siefkin Lecture. As we are all aware, the United States Supreme Court held in *Brown* that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”²

I am exquisitely aware of *Brown's* impact on my life. Quite simply, were it not for that decision and the events set in motion thereby, I would almost certainly *not* have had the personal and professional experiences that I have, in fact, enjoyed. As such, I feel a special responsibility to contribute to the ongoing efforts to fully realize the promise of equality that resonates in *Brown*.

I. PERSONAL REFLECTIONS**

This fiftieth anniversary is a time of personal reflection for me.³ You see, I recall very clearly May 17, 1954. I was nine years old and a fourth grader in the Berkley County Training School in Moncks Corner, South Carolina. The Berkley County Training School served all of the Negro school children of that county. My father was the principal of that school.

My classmates and I were enjoying the sunshine during recess when my father emerged from his office. He stood on the little hill that was just outside of his door, ringing a handbell. He regularly used the bell to signal the beginning of the school day and, to our daily dismay, the end of recess. As the bell rang, we started toward our

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

2. *Id.* at 495.

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3. The anecdotes and essays referred to or included in this address are drawn from an unpublished manuscript, VOICES OF THE BROWN GENERATION: MEMORIES AND REFLECTIONS OF LAW PROFESSORS, presently being completed by the speaker and her co-editor Professor Richard Bonnie also of the University of Virginia School of Law. Professors Bonnie and Robinson reserve all rights in VOICES OF THE BROWN GENERATION.

classrooms but then realized he was signaling for us to come to him. We did. He announced with great excitement that the Supreme Court of the United States had just decided segregated schools were unconstitutional. There were no longer to be separate schools for white and colored children. The case was *Brown v. Board of Education*—the 1954 decision of the United States Supreme Court, which held that state-mandated segregation in public elementary and secondary education was unconstitutional. *Brown* struck down *de jure* segregation in the states in which it was then the law.⁴ South Carolina was one of those states. We laughed and tumbled about with excitement. As children, we did not, of course, understand all of the ramifications of the decision. We could not know of the costs that desegregation would ultimately exact from the black community. We certainly sensed, however, that at that moment in time a great wrong had been righted.

I shared that memory with my colleague and friend, Professor Richard Bonnie, who recalled his own experiences while growing up in Norfolk, Virginia. Professor Bonnie and I believed that others of our generation, without regard to race or gender, also have stories to share. In order to further explore that belief, he and I have surveyed legal academicians presently teaching in the nation's law schools with birth years between 1937 and 1954. The surveys were mailed to approximately 4800 of our colleagues—slightly more than half of those of academic rank in 2000-2001.⁵ We received almost one thousand responses to our survey. In addition, fifty of those who responded subsequently shared remembrances or insights through essays or letters. In our forthcoming book, *Voices of the Brown Generation: Memories and Reflections of Law Professors*, we will describe our project in detail and share that collected body of work.⁶ I will, of course, share with you a few highlights of what we have learned in today's lecture.

One year later, the United States Supreme Court said that schools were to be desegregated “with all deliberate speed.”⁷ This

4. The STATISTICAL ABSTRACT OF THE UNITED STATES 1957, lists seventeen such states in table number 144. They are Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 120.

In 1950, four additional states mandated segregated schools: Arizona, *Kansas*, New Mexico, and Wyoming. PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 14 n.47 (1954).

Desegregation of the public schools in the District of Columbia was mandated in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown* decided under the Fifth Amendment.

5. Richard A. White, Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 2000-2001, <http://www.aals.org/statistics/20002001.html>.

6. See also Mildred Wigfall Robinson, Symposium Proceedings: 50 Years Later, *Brown* in the Appellate Courts: *Voices of the Brown Generation: Description of a Project*, 6 J. APP. PRAC. & PROCESS 39 (2004).

7. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

mandate was fiercely resisted in the South both in the courts⁸ and in the streets. Deep societal divisions became undeniably obvious. The stories shared by our colleagues presently serving on faculties in law schools all over the country tell of a *nation* divided not only by race but also by ethnicity, class, and to some extent, religious beliefs. The state-mandated public school segregation struck down by *Brown* in the affected states was the most explicit legal manifestation of what was a deeply-rooted cultural divide. The separation was absolute and affected every phase of public education, directly and indirectly. For example, one responder wrote of “brown” children who sometimes used one end of her school playground, though those children were not allowed to play with the white children and “certainly did not attend class with [them].” When she asked her grandparent what was wrong with the “brown children,” her grandparent replied that the children were fine; rather, the problem was with the adults. Another respondent described in detail initial resistance to the desegregation of his state’s separate schools for the blind. Finally, one remembrance comes from a professor who lived in Kansas during the early 1950s. He wrote the following:

My father was the high school basketball coach and integrated the basketball team. That player encountered hostility when he played at the seriously segregated places like Kansas City and Wichita. In Kansas City, the white high school students threw pennies on the floor whenever he came on the court or made a basket. . . . [There were] a number of incidents in hotels and restaurants with the team. At one post-game steak dinner, the proprietors initially asked the player to leave but relented when ‘Dad had the whole team get up and start for the door.’

Segregation was no less real in many of the remaining states in spite of the absence of legal sanction. Professors who were students in the public schools of New York, New Jersey, Ohio, and Michigan report that their academic classes remained segregated because of tracking—separation by perceived intellectual ability; this practice all too often resulted in classes defined disproportionately along racial lines.⁹ Other responders from this set of states reported that schools remained racially segregated because attendance zones accommodated neighborhoods that were themselves racially segregated—the result of

8. Among works that discuss this period in legal history are DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988); JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT’S BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981); BENJAMIN MUSE, *TEN YEARS OF PRELUDE* (1964); J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* (1979).

9. TOM LOVELESS, *THE TRACKING WARS: STATE REFORM MEETS SCHOOL POLICY 1* (1999) (defining tracking as “the practice of grouping students into classes by ability and organizing curriculum by its level of difficulty.”); see also Maureen T. Hallinan, *Tracking: From Theory to Practice*, 67 *SOC. EDUC.* 79 (1994).

discriminatory housing practices. Indeed, several respondents wrote of the life-changing realization that discrimination was not always defined in terms of black and white. Those who suffered were Latinos in Denver and Sicilians in New Jersey who had the misfortune of being both immigrants and Catholic. The following comment may best capture the impact of that realization:

I wonder where you account for people like me who grew up in what later became the 'rust belt.' My town had about 75,000 – 80,000 residents virtually none of whom were black or brown. Ethnicity meant Polish, Hungarian, Czech, etc. We all learned how to discriminate against others – just didn't associate it with *color*!! Imagine the shock of confronting that mindset – it's like being a Martian.

The discord was unquestioningly evident in the legal academy. Scholars lined up on both sides of the debate over the constitutional soundness of the case.¹⁰ Even presently, while *Brown*'s constitutionality is generally accepted, legal academicians differ in explaining why this is so.¹¹ Professor Akil Amar, the 2000 Foulston & Siefkin lecturer, elegantly premised *Brown*'s constitutional legitimacy upon an

10. One of the most notable early defenses of *Brown* found the opinion's citations to social science unnecessary to its constitutional soundness. See Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1959) (arguing that segregation came "down in apostolic succession from slavery," and therefore, its violation of the Fourteenth Amendment's requirement of equality was so patent so as not even to require judicial notice). For another defense of *Brown* against its early detractors, see Charles Fairman, *The Supreme Court 1955 Term – Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956). An early defense of *Brown* was also offered by one of Justice Felix Frankfurter's clerks, presenting an historical analysis prepared by the clerk at Justice Frankfurter's request. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1959).

The foremost scholarly critic of *Brown*'s constitutional soundness was Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (questioning whether in "a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, [there is] a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail"). Wechsler's criticism was itself the subject of criticism. See Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

The use of social science in the *Brown* opinion was also the target of academic criticism. See, e.g., Edward Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-58 (1955) ("I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records."); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases – A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1961).

For a representative example of the criticism of judicial activism, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 123-25, 245 (1977) (arguing that Justice Earl Warren "did not merely 'shape' the law, he upended it; he revised the Fourteenth Amendment to mean exactly the opposite of what its [F]ramers designed it to mean").

11. See, e.g., Thomas B. McAfee, *Symposium: Brown v. Board of Education: Brown and the Doctrine of Precedent: A Concurring Opinion*, 20 S. ILL. L.J. 99 (1995) (arguing that application of precedent supports the *Brown* decision); Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that a review of the legislative history of the Civil Rights Act of 1875 leads to the conclusion that *Brown* is consistent with the original meaning of the Fourteenth Amendment, thus leading to criticism of the Warren opinion for erroneously giving the impression that it conflicted with historical understanding); Michael McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1996).

expansive construction of the Constitution.¹² I will participate in that phase of the debate only by sharing with you a comment made by my co-editor, Professor Bonnie, in his keynote address to the annual state conference of the Virginia Council of Social Studies in 1984. He said:

The undeniable accomplishment of *Brown* was that it declared segregation to be wrong and put those who said it was right on the other side of the law. . . . It is, in my opinion, one of the most important decisions in our constitutional history.¹³

II. FROM SEGREGATION TO DESEGREGATION (INTEGRATION?) AND RESEGREGATION

In the first decade after 1954, the *Brown* mandate was honored most often in its breach.¹⁴ Ten years later, the vast majority of southern schoolchildren remained in segregated schools.¹⁵ Progress has been made in the fifty years since the Court decided *Brown*. Change did not begin to take place in earnest, however, until after the passage of the Civil Rights Act of 1964 and related legislation. At that point, overt barriers truly began to be dismantled. As attorneys, we attribute progress toward a desegregated society, both in the schools and more broadly, to Congressional action, rather than to the decision itself.

One recent volume of particular note challenged nine constitutional scholars to rewrite the *Brown* opinion, using only materials available in 1954. JACK M. BALKIN, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (2001). Eight of the opinions concurred in the judgment that segregated schools were unconstitutional but the opinions offered eight different theories justifying the constitutional soundness of the judgment. Bruce Ackerman relied on *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), to find that education was a fundamental right. *Id.* at 111-14. In a Fifth Amendment analysis of the District of Columbia schools involved in *Brown*'s companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), Cass Sunstein found that Congress had no rational basis for ordering school segregation. *Id.* at 135-42. John Hart Ely argued that in the wake of *Korematsu v. United States*, 323 U.S. 214 (1944), racial classifications are subject to strict scrutiny and therefore school segregation is presumptively unconstitutional. *Id.* at 77-91. The lone dissenting opinion is the work of Derrick Bell, who argued that strictly enforcing *Plessy v. Ferguson*, 163 U.S. 537 (1896), and requiring genuine equalization would have forced school districts to eliminate their dual school systems because of budgetary pressures rather than judicial mandate. *Id.* at 185-200.

12. See generally, Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1 (2000).

13. Richard J. Bonnie, *Brown v. Board of Education: Righting an Unconstitutional Wrong*, VA. L. REP., 18 (1985).

14. The remedy provided by the Court in *Brown II*, 349 U.S. 294, 301 (1955), a mandate that segregated schools be dismantled "with all deliberate speed," under the direction of federal district courts contributed directly to this result. In the 10 years following *Brown*, the Federal Courts of Appeal in the southern circuit acted only to bar segregation and did not mandate integration.

15. Data from 1964 estimate that only 2.3% of the black children in eleven southern states attended desegregated schools. Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 322 (1967).

Signs of progress in the larger society abound. The Secretary of State is African-American,¹⁶ as is the president of Brown University,¹⁷ a former poet laureate,¹⁸ many university professors,¹⁹ and CEOs of Fortune 500 companies.²⁰ African-Americans are an expanded presence in the American middle class.²¹

Yet, as has been noted in numerous prior *Brown* anniversary observances, the task of affording every child access to an adequate, effective education in the nation's public schools remains incomplete.²² Fulfilling *Brown's* promise remains unfinished business. Even as we acknowledge and celebrate progress, we face the task of preserving the extent of change, and we lament the daunting challenges of reaching out to those left behind.

In recent years, frustration and avoidance have all too often come to characterize ongoing efforts to maintain and further desegregation in public schools in the South and in the nation. Indeed, school resegregation has become the norm. A recent Harvard study²³ reported that from 1964 to 1988 the percentage of black students in the South in desegregated schools rose to 43.5% from 2.3%;²⁴ yet in the 1990s the proportion of blacks attending majority-white schools de-

16. In 2001, Colin Powell became the 65th Secretary of State and the first African-American to hold the office. Prior to becoming Secretary of State, Powell served as National Security Advisor and as Chairman of the Joint Chiefs of Staff.

17. Ruth J. Simmons served as President of Smith College from 1995–2000 when she became the first African-American woman to serve as president of an Ivy League school (Brown University—Providence, Rhode Island). She continues to serve in that position.

18. From 1993 to 1995, Rita Dove served as Poet Laureate of the United States and Consultant to the Library of Congress. She currently holds the title of Commonwealth Professor of English at the University of Virginia.

19. According to a study for the year 2002 conducted by the JOURNAL OF BLACKS IN HIGHER EDUCATION, there were at that time 1466 full-time faculty at the nation's highest-ranked universities. *A JBHE Report Card on the Progress of Blacks on the Faculties of the Nation's Highest-Ranked Colleges and Universities*, J. BLACKS HIGHER EDUC., http://www.jbhe.com/news_views/34_blackfaculty.html (last visited Oct. 31, 2004).

20. In 1999, Franklin D. Raines of Fannie Mae became the first African-American CEO of a major Fortune 500 Corporation. Other African-American CEOs of Fortune 500 companies currently include Ken Chenault of American Express and Richard Parsons of AOL Time Warner. Stanley O'Neal serves as COO of Merrill Lynch. *See Most Powerful Black Executives*, FORTUNE (July 22, 2002), <http://www.fortune.com/fortune/blackpower/f500/0,15298,,00.html>.

21. In 1997, about 40% of African-American households belonged to the middle class, or twice as many as in 1960. Comparatively, about 60% of white households belonged to the middle class. Robert L. Harris, Jr., *The Rise of the Black Middle Class*, WORLD & I, Feb. 1999, at 40.

22. *See, e.g.,* Davison M. Douglas, *Symposium: Brown v. Board of Education After 40 Years: Confronting the Promise: The Promise of Brown Forty Years Later: Introduction*, 36 WM. & MARY L. REV. 337, 340-41 (1995) ("Although school integration significantly increased in the late 1960s and early 1970s . . . [t]oday, more than two thirds of African-American students attend schools with a majority-minority population—the highest figure since 1968."). *See also* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996); Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (1969); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Finis Welch & Audrey Light, *New Evidence on School Desegregation* (1987).

23. Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?* (Jan. 2004), <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

24. *Id.* at 19.

clined thirteen percentage points reaching the lowest level since 1968.²⁵ The most segregated group of students is white; they attend schools, on average, where 80% of the student body is white.²⁶ Black students, on average, attend a school that is 54% black; likewise, Latinos attend schools that are 54% Latino.²⁷ The study continues the recitation of these dreary statistics by noting that Native-American students typically attend schools in which they constitute approximately one-third of the student population.²⁸ Asian students fare best. These students are most integrated and are likely to be in schools that are not more than 22% Asian.²⁹ The nation's largest city school systems account for a shrinking share of the total enrollment and are, almost without exception, overwhelmingly nonwhite and increasingly segregated internally.³⁰ Many of the most rapidly resegregating school systems since the mid-1980s are suburban in spite of modest increases in residential desegregation.³¹ The South remains the nation's most integrated region for both blacks and whites but is rapidly going backwards as the courts terminate many major and successful desegregation orders.³² In short, resegregation in public education is presently an accelerating national tragedy.

The barriers to desegregation are no longer the result of positive law. Rather, according to the Harvard report, the trends that have contributed to the resegregation of schools include: a growing residential separation by race and income levels, a heavy reliance on neighborhood schools, lower immigration and birth rates for whites, and courts and policy-makers who oppose race-conscious decisions.³³

A second concern of equal import is the persistent gap in comparative subgroup educational achievement. Data compiled from National Assessment of Education Progress Tests irrefutably establish this gap. It is not of recent origin.³⁴ While subgroup performance has improved over the past several decades, this improvement must be considered in context. Data from 1971 to 1996 show an initial significant narrowing of the gap in the mid 1980s.³⁵ After the 1980s, how-

25. *Id.*

26. *Id.* at 16-17.

27. *Id.* at 17.

28. *Id.*

29. *Id.*

30. *Id.* at 33-34.

31. *Id.* at 4. Orfield notes that the patterns of black and Latino migration into the suburbs create newly segregated schools that can and have become unequal.

32. *Id.* at 16, 18.

33. *Id.* at 14.

34. See STATISTICAL ABSTRACT OF THE UNITED STATES 2003, tbl.266 (2003) [hereinafter STATISTICAL ABSTRACT]. White students consistently outscored black and Hispanic students over a twenty-four year period for all age groups. Areas examined included reading, writing, mathematics, science, history, geography, and civics. *Id.*

35. See LOVELESS, *supra* note 9, at 23-27.

ever, that trend toward narrowing reversed and the achievement gap began widening once again. In short, though the overall performance of minority children has improved, the performance of white children has similarly improved.³⁶ The difference in levels of performance persists through high school; the gap remains upon completion of the secondary level of education.³⁷ Students of Asian/Pacific Island origin are an exception to this comparative pattern of performance; the performance of white children is eclipsed by that of Asian/Pacific Island students.³⁸ With the exception of Asian/Pacific Island students, the overall academic performance of students of color continue to lag significantly below that of white students. The enormous personal and societal cost of this persistent difference cannot be overemphasized.³⁹

The fundamental importance of an adequate *qua* education is implicit in the *Brown* decision. After characterizing education as “perhaps the most important function of state and local governments,”⁴⁰ Chief Justice Earl Warren wrote the following:

[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.⁴¹

Brown itself was chosen as the lead case in the 1954 litigation precisely because of the absence of glaring structural and financial inequalities between black and white schools in Kansas.⁴² The Legal

36. See U.S. DEP'T OF EDUC., Nat'l Ctr for Educ. Statistics [hereinafter NCES], The Nation's Report Card, *Average Mathematics Scale Scores, by Race/Ethnicity, Grades 4 and 8: 1990-2003*, <http://nces.ed.gov/nationsreportcard/mathematics/results2003/raceethnicity.asp> (last updated Oct. 20, 2003); *id.* at <http://nces.ed.gov/nationsreportcard/reading/results2002/raceethnicity.asp> (last updated June 13, 2003) (*Average Reading Scale Scores, by Race/Ethnicity, Grades 4, 8, and 12: 1992-2002*).

37. See *id.* at <http://nces.ed.gov/nationsreportcard> (last updated Dec. 22, 2004). Refer to NAEP Data tables for assessments for subject area mastery in civics, geography, mathematics, reading, science, U.S. history, and writing for 12th graders for the years noted. The data are presented by race or ethnicity. Note that the student race/ethnicity data in the tables are based on school records for each of the subject areas except for civics and science which are based on student responses.

38. *Id.*

39. Available data reliably establish that males who have no more than a “high school diploma or a General Educational Development Certificate” can expect to earn only about 60% of the amount earned by counterparts who hold a bachelor's degree. See generally *id.* at 66-67, <http://nces.ed.gov/pubs2002/2002025.pdf> (*The Condition of Educ. 2002*, NCES 2002-025, (2002)). Further, the amount earned varies among those with the same level of education. Persons with relatively weaker academic credentials will earn less than those whose performance has been stronger.

40. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In 2002, expenditures for elementary and secondary public education were the single largest budget item for all states. Such expenditures accounted for 21.6% of state total spending and 35.4% of general funding expenditures. State Medicaid spending was second. NAT'L ASS'N OF STATE BUDGET OFFICERS, 2002 STATE EXPENDITURE REPORT, at 2 (2002), <http://www.nasbo.org/Publications/2002ExpendReport.pdf>.

41. *Brown*, 347 U.S. at 493.

42. The facts of the case limited the issue to desegregation rather than equalization. MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, 142 (1987) (“In Kansas the facilities were nearly enough equal to make it futile to focus the

Defense team strategy was to focus on the fact of racial segregation, all other things being equal.⁴³ This strategy was thought to insure an “equal education.”⁴⁴ *Brown*'s important addition to the measure of an education that is constitutional in all respects was to make racial segregation in otherwise adequate publicly supported elementary and secondary education unconstitutional. The proponents theorized that if segregation were declared unconstitutional, black children throughout the South would be availed of the range of financial and other resources then available to white children.

III. INTERIM STRATEGIES

A. *Segregated Schools as a Present Reality—Providing an Adequate Education*

The present accelerating resegregation brings with it the certainty that yet another generation of schoolchildren will be denied the opportunity to have a common, shared educational experience. The magnitude of this missed opportunity is staggering. Approximately 90% of all school-aged American children are enrolled in public schools.⁴⁵ According to data available from the National Center for Education Statistics, in 2001-2002, 58.9% of all students enrolled in an elementary or secondary public school were non-Hispanic white, black students accounted for 16.9%, Hispanic/Latino students accounted for 18.5%, and Asian/Pacific Island students accounted for 4.4% of all students.⁴⁶

litigation on material inequality.”). See also PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION*, 129 (2002) (“The lack of differences, in fact, added strength to the claim that the real harm of segregation was the lesson it gave black children that there was something bad about black skin, something wrong about letting them sit next to white children in school.”).

43. Judge Robert Carter, one of the NAACP attorneys involved in the *Brown* litigation explained in a 1979 article that the *Brown* litigation was the next logical step after a progression of cases that had previously culminated in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Robert L. Carter, *Reexamining Brown Twenty-five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L.L. REV. 615 (1979). *McLaurin*, a black (then Negro) law student at the University of Oklahoma, was afforded access to all of the books, supplies, and facilities available to his white cohorts but was required to use a designated seat in all of those facilities. *Id.* at 617. Judge Carter observed that in that case the Legal Defense Fund successfully argued against “pure segregation” all else being equal. *Id.* He continued by saying that “[w]e adopted the same approach in the attack on the dual public school system in *Brown*.” *Id.*

44. *Id.* at 616-17.

45. See STATISTICAL ABSTRACT, *supra* note 34, at tbl.217. These data show that from 1965-2000, private schools enrolled on average from 12% to 15% of all students. Projections in that table suggest that those approximate respective enrollments are expected to characterize school enrollments up to and including 2012. The Center for Education Reform, K-12 *Facts* reported that of the 51,610,806 students enrolled in grades K-12, 46,534,678 or 90.2% attended public schools. See <http://www.edreform.com/index.cfm?fuseAction=section&psectionID=15&cSectionID=97> (last visited Oct. 31, 2004).

46. NCES, *supra* note 36, at http://nces.ed.gov/pubs2003/100_largest/discussion.asp#r9 (last visited Oct. 31, 2004).

At present, white students tend to be most segregated.⁴⁷ Sheer demographics prevent an integrated experience for a significant number of these children. A number of American states remain relatively homogeneous⁴⁸ and, as has been noted, this homogeneity is likely to be particularly characteristic of suburban and rural residential patterns.⁴⁹ As a result, suburban schools will not be naturally desegregated because of the relative absence of minority students. Further, as my colleague James Ryan has pointed out, suburban school boards enjoy a “suburban veto,” which effectively gives them the power to limit any education reform that would interfere with suburban autonomy.⁵⁰ These school districts are unlikely to endorse any proposal that would involve busing.⁵¹ Finally, court-mandated desegregation combining urban schools with suburban schools is foreclosed by United States Supreme Court decision.

Many urban areas, including those in states otherwise quite homogeneous, report significant minority populations. This is the result of minorities, usually those who are below the poverty line, relocating into cities and, as a result, white flight from the cities into adjacent suburbs. For example, data for 2000 report the following non-white populations for the cities indicated: Milwaukee, Wisconsin (50%), Indianapolis, Indiana (50%), Louisville, Kentucky (38%), Minneapolis, Minnesota (35%), St. Paul, Minnesota (34%), and Wichita, Kansas (25%).⁵² The one hundred largest school districts in the country, which include all of the preceding cities, account for 23% of all school-children.⁵³ In spite of the fact that three of every six students nationally are white, these students constitute only about 30% of all students enrolled in this subset of school districts. African-American children account for 28.7% of these students, Hispanic/Latino children account for 32.5%, and Asian/Pacific Islanders comprise 7% of all students in

47. See *supra* note 23.

48. In 2002, there were fifteen states in which non-Hispanic whites constituted 85% or more of the population. The states ranged from Maine, most homogeneous with a 96.4% non-Hispanic white population, to Indiana at 85.4%. The other thirteen states were Vermont (96.1%), New Hampshire (94.9%), West Virginia (94.5%), Iowa (92.1%), North Dakota (91.5%), Montana (89.3%), Kentucky (89.0%), Wyoming (88.6%), South Dakota (87.7%), Minnesota (87.6%), Idaho (87.5%), Wisconsin (86.8%), and Nebraska (86.6%). See KENDRA A. HOVEY & HAROLD A. HOVEY, CQ'S STATE FACT FINDER 2004, tbl.A-14, 31.

49. See *supra* note 31; see also discussion of urban racial demographics *infra* note 52.

50. James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1646 (2004).

51. *Id.* at 1644.

52. See STATISTICAL ABSTRACT, *supra* note 34, at tbl.32. Indeed, African-Americans constitute the majority of citizens in many of the other cities with populations of 250,000 or more. *Id.* Such cities include Atlanta, Georgia; Cleveland, Ohio; Detroit, Michigan; Memphis, Tennessee; New Orleans, Louisiana; and Washington, D.C. *Id.* Finally, in several other cities of this size, minorities in the aggregate constitute a majority of all residents. *Id.* This group includes Dallas, Texas; Los Angeles, California; and Philadelphia, Pennsylvania. *Id.*

53. NCES, *supra* note 36, at http://nces.ed.gov/pubs2003/100_largest/discussion.asp#r9 (last visited Oct. 31, 2004).

this subset of schools.⁵⁴ Consequently, urban schools often cannot be meaningfully desegregated because of the relative absence of white students. Again, court-mandated desegregation that combines urban schools with suburban schools is foreclosed by Court decision.⁵⁵

Urban racial segregation is complicated by economics. These racial concentrations are in part the result of the mass exodus of middle-class families, both black and white, from cities in the last fifty years. This exodus from city to suburb resulted in the departure of taxpayers⁵⁶ as well as employment opportunities as employers followed middle-income earners to suburban locales. Those who remained behind frequently lacked the skills necessary to meet urban employer demands and the means to seek suburban employment opportunities. As a result, central cities have become enclaves characterized not only by racial segregation but also by poverty and unequal opportunity.⁵⁷

Public schools in many cities reflect these racial and economic demographic realities. A study published in 2003, *The Condition of Education*, reports that 24% of public school children between the ages of 5 and 17 who live in poverty reside in large, central cities. Twenty percent live in small towns and 19% live in large towns.⁵⁸

All of this is of critical importance to the quality of available public education for a large number of school children. Financial support for schools remains largely the responsibility of localities that are, in turn, dependent upon the local property tax for financial support.⁵⁹

54. *Id.*

55. *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that federal courts lack the power to impose interdistrict desegregation remedies).

56. *See infra* note 83 (discussing the financial effect of this primarily white flight).

57. *See* ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

As early as 1973, it was clear that central cities were confronted with population loss, increasing concentrations of poor, nonwhite, and elderly residents, an inventory of increasingly obsolete housing and above average crime rates. A COMMISSION REPORT *CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION*, 151 (1973). From 1970 to 1990, the percentage of office space in the United States located in suburbs increased from 25% to 57%. Robert Fishman, *America's New City: Megalopolis Unbound*, 14 *WILSON QUARTERLY* 25, 27 (1990). In 1993, Henry R. Richmond observed that following decades of urban sprawl and suburbanization, the central city is no longer "the location of most employers, [shopping,] office space, and housing." Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 *PACE L. REV.* 327, 331 (1993).

58. NCES, *supra* note 36, at <http://nces.ed.gov/programs/coe/2003/section1/indicator02.asp> (last visited Oct. 31, 2004).

59. *See* Todd A. Wyatt, Note, *State Lotteries: Regressive Taxes in Disguise*, 44 *TAX LAW.* 867 (1991). The tax on local property, upon which most public schools in the United States depend for initial funding, is the decisive force in shaping inequality.

Data for 2001-2002 as compared to data for earlier years reflect increasing state participation in public school funding. *See* HOVEY, *supra* note 48, at 220 tbl.H-17. At that point, Nevada ranked first among the fifty states in terms of funding from local sources; local jurisdictions provided 66% of all school funds. *Id.* Hawaii ranked number fifty with local jurisdictions providing only 1.7% of school funds. *Id.*

Compare data for 1995-1996. KENDRA A. HOVEY & HAROLD A. HOVEY, *CQ'S STATE FACT FINDER 206* (1998). The data show that during that year New Hampshire ranked first among the fifty states in terms of funding from local sources; local jurisdictions provided 90% of

There also exists a direct correlation between school district wealth⁶⁰ and student performance.⁶¹ Simply put, the more affluent the school district, the more likely it is that students in that district's schools perform well when level of achievement is determined in accordance with traditional measures.

Less financially-able school districts serve a disproportionate number of minority children.⁶² For children enrolled in such districts, an adequate education is not a reality *per se*; home districts lack the financial resources requisite for making this so. Further, white flight from the cities with its attendant residential resegregation forecloses the possibility of intra-district diversity. Finally, access to more affluent geographically proximate school districts pursuant to judicial mandate is foreclosed by United States Supreme Court decision. An adequate education that is also racially diverse is, thus, simply not an option.

This reality cannot, however, end the debate. Recognition and discharge of the continuing responsibility to give every child an education that is pedagogically adequate is not lessened by the present difficulty of doing so in an integrated setting. This reality dictates the necessary interim strategy. An adequate education must be made available to minority students through their neighborhood schools.⁶³

school funds. (Currently, New Hampshire schools rely on local sources for approximately 45% of funding.)

State participation does not necessarily equate with equivalent per pupil expenditures for each child in that state's public school system irrespective of location. *Compare* HOVEY, *supra* note 48, at 218 tbl.H-15, *with id.*, at 221 tbl.H-18. Rather, generally states seek to establish a level of spending below which no pupil is to fall. *Id.*

60. See Mildred W. Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 486-89 (1998) (showing how reliance on the property tax can result in differential funding).

61. Orfield & Lee, *supra* note 23 at 21-22. Orfield made this point in his 2004 report linking concentrated poverty with both compromised school opportunities and less robust achievement levels. *Id.* Children in schools serving impoverished areas, he argued, are likely to be less healthy and less prepared for school and more likely to come from single parent homes. *Id.* The schools serving these children are likely to have weak curricula and higher teacher turnover. Such schools are also likely to be deteriorated and to lack operational support in general. *Id.*

62. See *id.* at 2-3. (reporting that "[c]entral cities of large metropolitan areas are the epicenter of segregation . . ." and that "[t]he vast majority of intensely segregated minority schools face conditions of concentrated poverty").

See also JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991) (classic narrative about poverty run amuck in urban schools located in New York, Washington, D.C., Newark, Boston, and other cities and describing the educational opportunities available to children in such circumstances).

63. In his remarkably (and unhappily) prescient 1979 article, Judge Carter made the following comment:

[W]hile the pre-*[Brown]* thesis that equal education and integrated education are synonymous has never had a fair test, its chance of being afforded a just demonstration in the foreseeable future seems quite unlikely. Whether our views about the necessity of school integration were correct is really beside the point. Current public intransigence makes clear that we cannot allow ourselves to become the prisoners of dogma. While integration must remain the long-range goal, we must search for alternatives, because the reality is that hundreds of thousands of black children are attending all black or predominantly black schools in the urban North and South. These schools are woefully inadequate and proved no tools which will enable poor blacks to become a part of the mainstream of the social, economic, and political life of the country.

Through *Brown's* corrective lens, we were compelled to acknowledge that national, pervasive racial separation tainted every aspect of American life. Badges of separation were obvious: separate schools; signs identifying white and colored restrooms, water fountains, and entryways; segregated beaches and parks; "colored" days at museums, fairs, parks, and local zoos. Moreover, that which was obvious was reinforced through, for example, discriminatory practices and policies in housing and employment. Schools that were identified as "black" were not so categorized simply because of the race of the children attending them. These schools were also in many states less well-financially supported in every phase of operation, from infrastructure investment through all manner of operational support.⁶⁴ Financial shortfalls suffered by those schools could not be offset by consumer contribution—through bake sales sponsored by the Parent Teacher Association, for example. The insular black community, made such through legally sanctioned housing discrimination, generally suffered from the same financial discrimination and resultant economic deprivation that plagued the schools. Such schools were and remain separate and unequal. Disparate infrastructure and operational investment in combination with economically disadvantaged backgrounds create barriers to enjoying the full benefits of citizenship that can and have had a very long half-life.⁶⁵

Carter, *supra* note 43, at 621. Twenty-five years later, his words are no less true and are equally compelling.

64. See, e.g., *id.* at 616 ("In the South, black children were openly shortchanged in per capita pupil allocations and in every other educational resource. We knew of no publicly financed segregated black school that could be conceivably be considered the equivalent of its white counterpart.")

See also IRONS, *supra* note 42, at 33 (In South Carolina, per student expenditures in white schools were more than ten times that in black schools.). Here are examples of the funding discrepancies then existing:

School funding in the deep South in 1930:

	Per black student	Per white student
Alabama	\$7	\$37
Georgia	\$7	\$32
Mississippi	\$6	\$31
South Carolina	\$5	\$53

Id.

In the deep South, the average monthly salary of black teachers was 60% of the white teachers' average. *Id.* Average monthly teacher's salary in the deep South in 1930:

Black teachers:	\$73
White teachers	\$118

Furthermore, the school year in most white schools was two months longer than in black schools, making the difference in annual salary even greater. *Id.*

When *Briggs v. Elliott*, one of the companion cases to *Brown*, began in Clarendon County, South Carolina, the school board was spending \$179 for every white student in the county compared to only \$43 for every black student. *Id.* at 51.

65. See ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* (1998) (comparing life expectancy rates for African-Americans and whites); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987) (discussing the social plight of and public policy approaches toward the ghetto underclass). See also Avner Ahituv et al., *Transition From School to Work: Black, Hispanic, and White Men in the 1980s*, in *BACK TO SHARED PROSPERITY: THE GROWING INEQUALITY OF WEALTH AND INCOME IN AMERICA* 250, 253 (Ray Marshall ed., 2000) ("Nearly 75 percent of young white males, but only 65 percent of

B. *Inherent Additional Financial Challenges for Presently Segregated Schools*

The financial investment essential to effectively obviate segregation's cumulative negative effect, whether *de jure* or *de facto*, upon the enjoyment of the benefits of citizenship cannot be individually borne. Public investment through the maintenance and enhancement of infrastructure, adequate schools, and appropriated services is essential. There remains a pressing need for continued public investment in both infrastructure and human capital at levels that serve, rather than compromise, individual educational achievement. Public schools that serve a predominantly poor and often racially isolated student population all too often remain inadequately financed and ill-housed. As has been noted, these conditions can have a devastating impact upon the children's educational opportunities.⁶⁶ Substantial financial investment for these schools is imperative.⁶⁷

C. *The Continuing Challenge Facing Desegregated Schools*

Even in the face of accelerating public school resegregation, a number of children continue to attend desegregated schools. Resegregation has not, after all, been absolute. The Harvard study⁶⁸ measures the present extent of desegregation by relying on an "exposure index," defined as the proportion of a particular group present in the school of the average member of another racial group.⁶⁹ These data show that while marked regional differences in levels of desegregation exist, desegregation remains the norm in a significant number of public schools.⁷⁰ Desegregation does not necessarily mean that classrooms are truly integrated. In my view, there is a critically important qualitative difference between desegregation and integration. To desegregate is to abolish racial segregation in schools and other institutions. To integrate is to bring racially or culturally differentiated peoples into equal membership of a society or system. Given this nuanced reading, it is clearly possible to *desegregate*—bring down ra-

Hispanics and 61 percent of blacks, are employed full time or are in the military at age 25."); Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 Am. Soc. Rev. 542, 563 (2001) (finding that African-American men are more likely than White men to be in low-paying, low status occupations).

66. *Id.*

67. Carter, *supra* note 43 at 622. ("*Brown* surely must require the abandonment of all state educational policies and practices that result in a disparate allocation of public educational resources between blacks and whites.")

68. See Orfield & Lee, *supra* note 23.

69. *Id.* at 11.

70. See *id.* at 35, tbl.19.

cial barriers—without *integrating*—treating those on whose behalf barriers were struck down as integral participants in the enterprise.⁷¹

Resegregation may be manifest within ostensibly integrated schools, schools that are merely desegregated, in a variety of ways. Tracking is one such manifestation. In theory, tracking allows teachers to match instruction level with students' abilities. In practice, tracking all too often separates children by color.⁷² That same observation holds for special programs including, for example, programs for the gifted,⁷³ for those with learning

71. Compare *id.* at 10 (defining "segregation" as "the degree to which students of different racial groups attend separate schools" for purpose of the study) with *id.* at 2 (where the study fails to carefully delineate "desegregation" and "integration" and, rather, uses the terms interchangeably, stating in one instance "it is intriguing that three of the four cases show considerable long-term success in realizing *desegregated* education;" and in another instance, "[r]ural and small town school districts are, on average, the nation's most *integrated* for both African Americans and Latinos") (emphasis added).

72. See, e.g., JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* xiii-xv (1985).

Current data reporting definitive racially explicit data on tracking is difficult to find. That may be because the many permutations of tracking make it by its very nature difficult if not impossible to quantify. Loveless makes the following observation:

[T]oday's tracking systems function differently [from earlier practices]. Grouping takes place within each subject, not across an entire regimen of academic courses. Track assignments are guided by successful completion of prerequisite courses, prior achievement, and teacher recommendations, not IQ tests. Students move from track to track based on their grades and performance. Permanent track assignment is a thing of the past, and almost all schools allow parents to overrule and change students' placements.

THOMAS LOVELESS, *THE TRACKING WARS: STATE REFORM MEETS SCHOOL POLICY*, 1 (1999).

See also *BEYOND TRACKING: FINDING SUCCESS IN INCLUSIVE SCHOOLS* (Harbison Pool & Jane A. Page eds., 1995) [hereinafter *BEYOND TRACKING*] (critique of tracking in general); BARBARA HEYNS & DAVID K. COHEN, *CURRICULUM ASSIGNMENT AND TRACKING POLICIES IN FORTY-EIGHT URBAN PUBLIC HIGH SCHOOLS* (1971) (early assessment of tracking and its relationship to race, class, and segregation in urban schools); LOVELESS, *supra* at 27 (assessment of the politics of tracking at the state level noting that tracking began in the late 1890s); Jane A. Page & Fred M. Page, *Tracking and its Effect on African-Americans in the Field of Education*, in *BEYOND TRACKING*, *supra*, at 71-77 (Regardless of its genesis, an additional perverse effect of tracking may be its long-term effect on the likelihood of achieving and maintaining a diverse corps of teachers. A small case study suggests that tracking African-American students in the early grades tends to lead to later concentration in coursework that rarely prepares them for college or other postsecondary academic pursuits. Thus, tracking could result in fewer African-American candidates for teaching positions.)

73. Gifted programs have been a feature in American education for most of the last century. These programs are intended to provide exceptionally talented "students with an accelerated curriculum two or three years above grade level." LOVELESS, *supra* note 72, at 3. While not free from politics or ideology, such programs have generally been viewed as necessary in order to train those who will become leaders of society. See generally Thomas R. McDaniel, *Education of the Gifted and the Excellence-Equity Debate: Lessons from History* in *CRITICAL ISSUES IN GIFTED EDUCATION: PROGRAMS FOR THE GIFTED IN REGULAR CLASSES 6-16* (C. June Maker & Diane Orzechowski-Harland eds., 1993).

Minority students remain underrepresented in gifted program by a factor of at least 50% according to one study. Donna Y. Ford, *Equity and Excellence: Culturally Diverse Students in Gifted Education*, *HANDBOOK OF GIFTED EDUCATION* 506 (Nicholas Colangelo & Gary A. Davis eds., 3d ed. 2003). At that time (1993), black children accounted for 16% of the student population in general but only 8% of gifted learners; Hispanics accounted for 9% of the student population but only 5% of gifted learners. *Id.*

For a recent article exploring the range of racially charged issues presently swirling around gifted programs see Daniel Golden, *Boosting Minorities in Gifted Programs Poses Dilemmas*, *WALL ST. J.*, Apr. 7, 2004, at A1.

challenges,⁷⁴ and for those for whom English is a second language.⁷⁵

As has been noted, gifted education and its counterpart, education for those with learning challenges, remain fundamentally a discussion about democracy in the classroom.⁷⁶ Realistically, identical offerings across all classes cannot be the norm; children, after all, have widely ranging intellectual abilities. Gifted programs, however, are *disproportionately* white,⁷⁷ and those for children with learning challenges are *disproportionately* black and brown. In short, schools may be desegregated without being integrated. Children who pass each other in the hallways or stare at each other in school cafeterias without sharing classroom life on a day-to-day basis remain strangers to each other. I submit that this daily intra-school separation perpetuates stereotypes no less damaging than the extant symbols of separation seen fifty years ago. The tragedy is compounded where controversial practices may continue, as much as anything, through oversight or inertia.⁷⁸

74. See generally, RACIAL INEQUALITY IN SPECIAL EDUCATION, (Daniel J. Losen & Gary Orfield eds., 2002).

Since the early 1970s, national surveys by the Office for Civil Rights (OCR) of the U.S. Department of Education have revealed persistent overrepresentation of minority children in certain disability categories. The most pronounced disparities then were black children who, while only 16% of the total school enrollment, represented 38% of the students in classes for the educationally mentally retarded. After more than twenty years, black children constitute 17% of the total school enrollment and 33% of those labeled mentally retarded—only a marginal improvement. During this same period, however, disproportionality in the area of emotional disturbance (ED) and the rate of identification for both ED and specific learning disabilities (SLD) grew significantly for blacks.

Id. at xv-xvi.

75. The number of five to seventeen-year-olds who spoke a language other than English at home increased by 118% from 1979 to 1999. See NCES, *supra* note 36, at <http://nces.ed.gov/programs/coe/2003/section1/indicator02.asp> (last visited Oct. 31, 2004). Of these, the number speaking English “with difficulty” increased by 110%. *Id.* Many of these are younger children. *Id.*

The increase in minority enrollments in the nation’s public schools is attributable in large part to the growth in the proportion of Hispanic students. See *id.* at 45, <http://nces.ed.gov/pubs2002/2002025.pdf>. From 1972 to 2000, the percentage of Hispanic students increased from 6% of all students to 17 % of all students. *Id.*

Finally, the *Wall Street Journal* recently reported the Census Bureau’s finding that “the number of Hispanics and Asians rose four times faster from 2000 through 2003 than the population as a whole.” WALL ST. J., June 15, 2004, at A1. This suggests that the challenges posed by language incompatibility in schools serving these populations is likely to become even more acute.

School districts have responded in varying ways to the challenge of educating children for whom English is a second language. As is true with other specialty programs, the advantages and disadvantages of separate remediation versus immersion must be weighed with the compelling need for inclusiveness.

76. McDaniel, *supra* note 73, at 6-18.

77. See Golden, *supra* note 73.

78. *C.f.* OAKES, *supra* note 72. Oakes said:

What happened to educational equality? Perhaps, in the decades following *Brown v. Board of Education*, we were naive enough to think that *wanting* schools to make things right was enough. It was not. . . . Programs failed. . . . We looked for sources of educational failure in their homes, their neighborhoods, their language, their cultures, even in their genes. In all our searching we almost entirely overlooked the possibility

D. Financial Considerations Generally

Whatever the pedagogical challenges faced by schools, financial support must be provided. Through our taxing systems, we generate the money necessary to meet all the financial challenges inherent in providing the most effective public school education possible to all American children. We of course understand that, in the words of Justice Harlan Fiske Stone, “[t]axation . . . is . . . a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.”⁷⁹ How does this work in the narrow context of public school education?

Public education has historically been financially supported primarily by local government through the property tax.⁸⁰ The property tax is generally viewed as having a regressive effect.⁸¹ To characterize a tax or system of charges as regressive is to say that the levy exacts more, relatively speaking, from those having less from which to pay the tax. A simple example may be helpful. Assume that we have two individual taxpayers. Taxpayers A and B are both domiciled in the State of Bliss. Both are required to pay 10% of incomes received during the calendar year to the State of Bliss. Taxpayer A has \$10,000 in taxable income from which to pay the tax, and taxpayer B has \$45,000. Taxpayer A’s tax bill of \$1,000 imposes a much greater real cost to A than will be true for Taxpayer B, whose \$4,500 liability is higher but who also has more disposable resources from which to pay the levy.⁸²

In recent years, two major factors have undermined the economic viability of the property tax and thus contributed to the financial woes of urban school districts in particular. The first factor is the erosion of

that what happens *within* schools might contribute to unequal educational opportunities and outcomes. We neglected to examine the content and processes of schooling itself for the ways they might contribute to school failure.

Id. at xiii-xiv.

79. *Welch v. Henry*, 305 U.S. 134, 146 (1938).

80. See STATISTICAL ABSTRACT, *supra* note 34, at 169 tbl.255.

81. George E. Peterson, *The Issues of Property Tax Reform*, in PROPERTY TAX REFORM 5 (George E. Peterson ed., 1973) [hereinafter PROPERTY TAX REFORM]. “There is considerable agreement among the authors that the property tax as administered today, with all the variations of property tax rates that actually occur among jurisdictions, and with the flaws of assessment, is a regressive tax . . .” *Id.* But see generally HENRY J. AARON, WHO PAYS THE PROPERTY TAX? A NEW VIEW, (1975) (arguing that the property tax is not regressive). The consensus view is that the property tax is mildly regressive. RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE THEORY AND PRACTICE 268 (3d. ed. 1980).

82. See George E. Peterson, *The Property Tax and Low-Income Housing Markets*, in PROPERTY TAX REFORM, *supra* note 81, at 107-10 (“A considerable amount of evidence has been accumulated, showing that residential properties in low-income neighborhoods tend to be assessed at a higher proportion of their market value than properties in more affluent neighborhoods. This, of course, is equivalent to levying a higher tax *rate* on blighted neighborhood properties.”). In urban areas in particular, this regressive effect may be manifest in the property tax in two additional ways: (1) renters may bear a higher percentage of property tax cost than homeowners, and (2) those who own less expensive homes may, in fact, pay relatively more in property tax. The latter effect results from administrative practices that have been found to set assessment values for less expensive properties closer to 100% of fair market value than would be true for properties having a higher fair market value. See *id.* at 107-24.

the tax base itself. The erosion has occurred as residents and jobs depart cities for suburban locations,⁸³ making diminished collections from the property tax inevitable.⁸⁴ The eroding tax base and correspondingly diminished collections potentially widen the achievement gap between more and less affluent school districts.⁸⁵ The second factor relates to the recent dynamics of the tax-making process itself. Legislative debate on the use of the state and local taxing power in the last three decades has all too often had at its heart one question: how can taxes be cut?⁸⁶ A frequent target for taxpayer relief has been the property tax.⁸⁷ Thus, the productivity of the tax has been limited even as school districts face new and potentially more expensive demands.

As “property tax relief” has been provided and collections from the property tax have stagnated or declined, school districts have turned to the states for financial assistance. States have responded; the percentage of support to public education provided by states has increased in recent years.⁸⁸

Most states rely upon either the retail sales tax⁸⁹ or individual income tax⁹⁰ or some combination thereof for a significant share of revenue generated.⁹¹ A variety of targeted taxes, fees, and user

83. See *supra* note 56 and accompanying text.

84. See, e.g., Howard Chernick & Andrew Reschovsky, *Lost in the Balance: How State Policies Affect the Fiscal Health of Cities* (Mar. 2001), <http://www.brookings.edu/dybdocroot/es/urban/chernick/chernick.pdf>. The paper “examine[d] the factors that have led to fiscal distress in central cities . . . in three states[.] California, New York and Wisconsin. *Id.* at 2. The authors identify four factors contributing to the fiscal maladies of cities: “(1) relatively low revenue-raising capacities in many cities, due to both population shifts and relative property values and income levels, (2) growing service responsibilities, (3) higher uncontrollable costs in cities relative to their suburbs, and (4) policies of higher level governments.” *Id.* at 6-7.

85. See *supra* note 59 and accompanying text.

86. See, e.g., Steven Hayward, *The Tax Revolt Turns 20*, POL’Y REV., July-Aug. 1998 at 9 (“Within two years [of the adoption of California’s Proposition 13], 43 states implemented some kind of property-tax limitation or relief, 15 states lowered their income-tax rates, and 10 states indexed their state income taxes for inflation.”). In recent years, the pace of tax cutting has slowed as most states, feeling the economic effects of the sluggish national economy, grappled with budgetary shortfalls.

87. Empirical evidence suggests that, ironically, this relief does not accrue to the benefit of the least affluent in a given locale. See MUSGRAVE & MUSGRAVE, *supra* note 31 (explaining that property tax distribution is “mildly aggressive” assuming that renter’s tax is allocated according to rental payments, and business property tax is allocated half to consumption and half to capital income). Allocations for rental property may vary from this norm to the detriment of renters. Thus, for renters, who are likely to be a significant presence in urban centers, the tax’s regressive effect continues unabated.

88. See *supra* note 59.

89. See STATISTICAL ABSTRACT, *supra* note 34, at 297-98, tbl.455. All states except Alaska, Delaware, Montana, New Hampshire, and Oregon collect sales taxes. *Id.*

90. *Id.* at 299. A total of forty-three states impose an income tax. *Id.* Seven states do not tax personal income. *Id.*

See also TAX FOUNDATION, STATE FINANCE REPORT (last visited Aug. 30, 2004), <http://www.taxfoundation.org/statefinance.html> (last visited Nov. 3, 2004) [hereinafter TAX FOUNDATION]. Between fiscal year 1992 and fiscal year 2002, this was the fastest growing source of revenue for states. *Id.*

91. See TAX FOUNDATION, *supra* note 90. The sales tax and individual income tax provide the majority of state tax collections. *Id.* In fiscal year 2002, “general sales taxes provided 33.5 percent of all collections, and individual income taxes provided 34.7 percent.” *Id.*

charges are also in place and have been of increasing importance in recent years.⁹² The last group of items is quite regressive in effect. These levies are either explicitly excise taxes or are the functional equivalent thereof. The hallmark of an excise tax (or user charge or fee) is its imposition on a transactional basis. Every transaction is an independent event for purposes of the levy. Because it also is an excise tax, the retail sales tax, too, is regressive, though exemptions may ease the tax's regressive effect.⁹³ Even if legislative bodies elect not to build exemptions into the retail sale tax, it is still more broadly borne than a property tax would be. By its nature, every participant in a transaction reached by this tax becomes a taxpayer. Individual income taxes have the greatest potential for progressive effect.⁹⁴

Tax specialists believe that in apportioning public costs, taxpayers must be treated as fairly as possible. This is generally seen to require that a tax be equitable, efficient, and neutral.⁹⁵ Further, modern notions of the contours of "equity" make appropriate consideration of ability to pay in determining liability.⁹⁶

To this point, when questions of fairness are raised with regard to the allocation of tax burden on the state level, the Legislature has generally focused solely on the tax being debated. In defraying the infrastructure and operational costs attendant to providing an adequate education for all children, state lawmakers should avoid using the taxing power to demand relatively more from those who are least financially able to bear such costs. This can best be done by striving for equity *across* the sources of revenue.

In this context, I believe that as a normative matter, funding *packages* for financing education should be structured to treat taxpayers across the income continuum as equitably as possible. Thus, for example, a preferred funding package would be one that combines property tax proceeds with the proceeds of either an income tax or a

92. Included here are levies such as amusement sales taxes, pari-mutuel sales taxes, documentary and stock transfer taxes, gasoline taxes, and sin taxes (on alcohol and tobacco) in addition to a wide variety of user fees and charges. Substantial revenue is being collected from these sources. These sources presently provide approximately roughly 33% of all revenues collected. See *id.* at <http://www.taxfoundation.org/collectionsbytype10years.html> (last visited Nov. 3, 2004).

93. Most states exempt prescription drugs from sales taxes. Some also exempt food and clothing purchases, and a few also exempt non-prescription drugs.

94. See, e.g., WILLIAM A. KLEIN, JOSEPH BANKMAN, & DANIEL N. SHAVIRO, *FEDERAL INCOME TAXATION* 13 (2003). The federal income tax is a progressive tax in that it is characterized by rates that rise as income rises. *Id.* More affluent taxpayers not only pay more in absolute amount but also as a proportion of income. *Id.* State income tax systems are piggy-backed onto the federal system and are similarly progressive though the extent of progression may be restricted somewhat through the use of fewer marginal rates or tighter rate tables.

95. See, e.g., *id.* at 39. Where the challenges inherent in addressing the "competing dictates of fairness, efficiency, and practicality" are discussed in the context of crafting a strategy for the treatment of non-cash benefits. *Id.*

96. *Id.* at 6-7. For example, for federal income tax purposes, the combination of the standard deduction and the personal exemption available to individuals for the purpose of determining tax liability insures that those with incomes below a certain level pay no tax at all. *Id.*

state retail sales tax. The tendency toward regression in the property tax would be corrected somewhat by the progression in an income tax or by more broadly spreading cost through a retail sales tax. In either case, this strategy is likely to more fairly apportion the cost of providing education among taxpayers.

Contrast that outcome with the effect of drawing supplementary funds from some subset of the other excise taxes, such as those on cigarettes or alcohol, and the complex web of user charges, fees, and state-managed gaming proceeds presently in place in many states.⁹⁷ As has been noted, each of these latter sources of revenue is decidedly regressive in effect. Reliance on a funding package bearing these characteristics would, in short, exaggerate rather than mitigate overall regressive effect. Thus, if this latter strategy is adopted—property tax plus “other” revenues—the potential exists for a relatively higher tax burden on less affluent taxpayers. It would be ironic to have in place a system that guarantees only that all will bear the burden of paying for public education—indeed possibly a disproportionate share of that burden—with no assurance that their children will receive the intended benefit of meaningful access to an adequate education. State fiscal policy should be sensitive to the cumulative tax burden imposed by its chosen financial strategies.

This discussion would not be complete without noting the effect of the deductibility of property taxes for federal tax purposes.⁹⁸ Individual taxpayers must itemize in order to take this deduction.⁹⁹ Taxpayers who itemize are invariably those who have the highest income.¹⁰⁰

97. See *supra* note 92 and accompanying text.

98. I.R.C. § 164. (2000) (“Taxes. (a) General rule. [T]he following taxes shall be allowed as a deduction for the taxable year within which paid or accrued: (1) State and local . . . real property taxes.”)

99. See *id.* at §§ 63(e), 161.

100. *Percent of filers itemizing by Adjusted Gross Income in 2000.*

<i>AGI (in thousands of \$)</i>	<i>Percent Itemizing</i>
\$0-15	3.86%
\$15-30	15.18%
\$30-50	37.50%
\$50-100	68.85%
\$100-200	89.69%
\$200-500	93.38%
\$500-1 mil	91.28%
\$1-1.5 mil	89.47%
\$1.5-2 mil	91.29%
\$2-5 mil	92.40%
\$5-10 mil	94.53%
Over \$10 mil	97.08%

THOMSON RIA, AVERAGE ITEMIZED DEDUCTIONS AND OTHER FACTS ABOUT YEAR 2000 RETURNS HAVE BEEN RELEASED BASED ON FINALS IRS DATA (Jan. 2, 2003), <http://www.riahome.com/about/pressroom/pr010403.asp>.

Percent of filers itemizing by Adjusted Gross Income in 2001 (based on preliminary statistical data)

Moreover, the deduction for property tax expense paid as a part of rent is not available to renters even if they should itemize.¹⁰¹ Taxpayers who live in urban centers are likely to be lower-income, non-itemizers¹⁰² and are much more likely to be renters.¹⁰³ As such, they will be unable to deduct that portion of rent paid as property tax liability. This is quite perverse; the indirect federal subsidy favoring home ownership inherent in deduction for the tax is denied to the relatively more needy taxpayers.¹⁰⁴

Finally, it is important to consider the impact of a regressive tax burden in the overall context of taxpayer financial fortunes. A recent study showed that the “average” American middle-class family presently faces financial pressures that are proving overwhelming in an

<i>AGI (in thousands of \$)</i>	<i>Percent itemizing</i>
\$0-15	4.5%
\$15-30	16.0%
\$30-50	37.8%
\$50-100	70.0%
\$100-200	91.1%
\$200 and up	94.0%

THOMSON RIA, INCOME ON 2001 RETURNS REFLECTED BEAR MARKET AND ECONOMIC DOWNTURN (Apr. 28, 2003), <http://ria.thomson.com/about/pressroom/pr042803.asp>.

101. The deduction for property taxes paid can only be taken by the person who owns the property or owns an interest in the property. *Cramer v. Comm'r.*, 55 T.C. 1125, 1130 (1971); Rev. Rul. 67-21, 1967-1 C.B. 45. The amounts paid as rent are, of course, nondeductible under IRC section 262.

102. See Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389, 1413 (2004) (“Although the IRS does not publish itemization rates for cities, counties or other political subdivisions of states, it is possible to get some sense of the variation by examining itemization rates by zip code.”).

Using the same 1998 tax year zip code tables from the IRS as Professor Stark used, the itemization rate was 33.3% for the ten most populous zip codes in Kansas City, (129,179 people filed from those zip codes in 1998, but only 43,006 filed Schedule A). The ten zip codes are 64114, 64118, 64119, 64130, 64131, 64133, 64134, 64138, 64151, and 64152. INTERNAL REVENUE SERVICE, INDIVIDUAL TAX STATISTICS – ZIP CODE DATA – SOI, <http://www.irs.gov/pub/irs-soi/98zp17ks.xls> (last visited Nov. 3, 2004).

103. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2001, tbl.2-1 (last revised Aug. 12, 2004), http://www.census.gov/hhes/www/housing/ahs/ahs01_2000wts/tab21.html [hereinafter U.S. CENSUS BUREAU].

In Metropolitan Statistical Areas

In Central Cities:	53.1% of occupied housing units are owner occupied 46.9% of occupied housing units are renter occupied
In Suburbs:	73.6% of occupied housing units are owner occupied 26.4% of occupied housing units are renter occupied

104. This is not to suggest that such a deduction should be made available. My intent is solely to signal the absence of a subsidy (here for homeownership) — albeit indirect — for those who are relatively less affluent. The question of whether the subsidy effect in personal deduction is warranted under any circumstances is, of course, a complex one and is quite beyond the scope of this essay. See generally William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN. L. REV. 831 (1979); William J. Turnier, *Evaluating Personal Deductions in an Income Tax – The Ideal*, 66 CORNELL L. REV. 262 (1981).

increasing number of cases.¹⁰⁵ The difficulty in achieving financial balance is resulting in a record number of personal bankruptcies. Though not mentioned in the study, taxes are an element of this expense.¹⁰⁶ If unchecked, and in combination with decreased public social service spending generally, an increasingly regressive tax burden would further undermine economic stability for these families at financial risk. An avoidably regressive system should not be a part of the problem. I submit that equality that exists only as to bearing the burdens of citizenship is ultimately an empty right.

IV. THE KANSAS CITY EXPERIENCE

The Midwest has seen an approach taken that, however incidentally, is very much like the interim approach described. Like many other cities, in the late 1970s the Kansas City metropolitan area included areas characterized by segregated housing and overcrowded, ill-performing, segregated schools.¹⁰⁷ Reports from the early 1970s describe a school system in Kansas City, Missouri that had “literally rotted away.”¹⁰⁸ Beginning in 1969, the year in which black students outnumbered whites for the first time, “Kansas City voters refused eight times in seventeen years to approve an increase in the school-tax levy.”¹⁰⁹ “White flight, race riots, and a teachers’ strike” had contrib-

105. See generally Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401 (2004). See also Suein Hwang, *New Group Swells Bankruptcy Court: The Middle-Aged*, WALL ST. J., Aug. 6, 2004, at A1.

106. See TAX FOUNDATION, *supra* note 90, at <http://www.taxfoundation.org/taxfreedomday.html> (last visited Nov. 3, 2004). The Tax Freedom Day analysis is undertaken annually by the Tax Foundation. *Id.* The Tax Foundation defines that day as “the day when Americans will finally have earned enough money to pay off their total tax bill for the year.” *Id.* The analysis includes every payment considered a tax. The Tax Foundation deems this analysis to be the easiest way in which to measure total tax burden “over time and by state.” *Id.*

April 11 was Tax Freedom Day in 2004, according to the Foundation’s analysis. *Id.* This was the earliest that the date had come in thirty-seven years. *Id.* The forecast is that Tax Freedom Day will come later and later over the next decade. *Id.*

In comparing the number of days that Americans work to pay taxes compared to the number of days worked to support themselves, the report states that “Despite the dramatically lower tax burden in 2004 [due largely to federal tax cuts], Americans will still spend more on taxes than they spend on food, clothing and medical care combined . . .” *Id.*

107. See Theodore M. Shaw, *Missouri v. Jenkins: Are We Really a Desegregated Society?*, 61 FORDHAM L. R. 57, 58 (1992).

In 1990, 1.1 million whites and almost 200,000 African-Americans lived in the Kansas City metropolitan area. See Kevin Fox Gotham, *Blind Faith in the Free Market: Urban Poverty, Residential Segregation, and Federal Housing Retrenchment, 1970-1995*, 68 SOC. INQUIRY 1, 6. Most of the black population was concentrated in the urban core of the city that had, beginning in the 1960s, lost its manufacturing base and the income that went along with it. *Id.* at 6, 9. Further, discriminatory misuse of Section 8 housing kept blacks segregated in predominantly black neighborhoods in the core of Kansas City. *Id.* at 11.

108. See, e.g., Rick Atkinson, *Kansas City’s High-Stakes Education Gamble; Enterprising Magnet Plan Seeks to Lure White, Suburban Students*, WASH. POST, May 13, 1990 at A1. See also Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 477 (1999) (This article points out that though school desegregation cases were brought in both Kansas City, Kansas and Kansas City, Missouri, only the latter gained notoriety. This was because of “the expansiveness (and expensiveness) of the school desegregation remedy for Kansas City, Missouri.”).

109. Atkinson, *supra* note 108.

uted to the decline.¹¹⁰ In 1977, the Kansas City, Missouri school district joined in suing on behalf of its students. In the ensuing litigation, District Court Judge Russell G. Clark rejected Boston-style busing. Of the sixty-eight schools in the Kansas City, Missouri school district (KCMSD), twenty-five “had enrollments of 90% or more black students.”¹¹¹ However, Judge Clark “refused to order additional mandatory student reassignments because they would ‘increase the instability of the KCMSD and reduce the potential for desegregation.’”¹¹² Instead, “he set out to rebuild the district from the playground up.”¹¹³

In fashioning this remedy, Judge Clark did not seek to resurrect separate but equal schools. Rather, he viewed this approach as necessary if meaningfully desegregated schools were to become a reality in Kansas City. His vision was expansive and had twin objectives: achieving an improved education for students then enrolled in the Kansas City schools and promoting integration in the Kansas City schools by reversing white flight and making schools attractive to white students both within and outside of the district.¹¹⁴ Increased spending for both capital improvements and operational support was mandated.¹¹⁵ Over the next thirteen years, the taxpayers of Missouri, state and local, spent two billion dollars¹¹⁶ on the Kansas City schools, a staggering amount by any measure.

In 1995, the United States Supreme Court ended judicial oversight of the Kansas City schools.¹¹⁷ In doing so, Chief Justice William H. Rehnquist, writing for the majority, commented on the elusive nature of “desegregation attractiveness” and “suburban comparability.”¹¹⁸ Both of these were ultimately rejected with “desegregation attractiveness” said to result “in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools . . . that we believe it is beyond the admittedly broad discretion of the District Court.”¹¹⁹ In short, this objective was “constitu-

110. *Id.*

111. *Missouri v. Jenkins*, 495 U.S. 33, 75 (1990) [hereinafter *Jenkins II*]. The first *Jenkins* case was *Missouri v. Jenkins*, 491 U.S. 274 (1989).

112. *Jenkins II*, *supra* note 111, at 76. Boston-style busing would have meant cross-town busing to the extent necessary to achieve desegregation of neighborhood schools. Any possibility of inter-district busing between Kansas City and surrounding suburban areas was, of course, foreclosed by *Milliken v. Bradley*, 418 U.S. 717 (1974).

113. Atkinson, *supra* note 108.

114. *See Jenkins II*, *supra* note 111.

115. *Id.*

116. Parker, *supra* note 108 at 477.

117. *Missouri v. Jenkins*, 515 U.S. 70 (1995) [hereinafter *Jenkins III*].

118. *Id.* at 98.

119. *Id.* at 100.

tionally flawed.”¹²⁰ It seems much was lost as a result of that decision. The Court denied the school district the discretionary latitude that might have permitted school officials to indirectly attempt to achieve desegregation by attracting intra- or inter-district white school children into the system. Further, suburban schools were not to be used as a standard by which “educational equality” could be mentioned.

Nevertheless, I submit that this experience was important in several ways. First, though those on whose behalf this litigation was undertaken, the school children in Kansas City, had no guarantee of influence in shaping the remedy,¹²¹ the remedy was one that benefited these children in a unique way. They were not required to leave homes and neighborhoods—indeed, the city in which they lived. Instead, the schools that had served them continued to serve them, but did so much more effectively.¹²² Second, and without comment on the level of expense, the significant costs of this undeniably ambitious and critically important undertaking were shared by the city from property tax revenue and by the state from resources available to it. Increased property tax rates in Kansas City generated approximately one-quarter of the amounts expended.¹²³ The balance, approximately three-fourths of the bill for this school desegregation experiment, in accordance with the court’s decree was borne by the state. Even though the allocation was made in accordance with tort principles rather than pursuant to considerations of tax equity, by sharing additional costs in this manner the burden of providing an adequate education to children with wide-ranging needs was more easily met. These needs ranged from those of children who lacked basic school-readiness skills to those whose special gifts merited more challenging programs. Finally, the question of whether and how the children had benefited from these enormous expenditures was left unanswered. Whether and how improvements in quality in education programs could be constitutionally mandated and then measured was left unresolved.¹²⁴

120. See Patricia A. Brannan, *Missouri v. Jenkins: The Supreme Court Reconsiders School Desegregation in Kansas City, Criteria for Unitary Status, and Remedies Reaching Beyond School District Lines*, 39 *How. L.J.* 781, 788 (1996).

121. Parker, *supra* note 108, at 479 (“[In the] Kansas City cases, the district courts exercised very little direction and control, and the plaintiffs had an effective voice only to the extent allowed by defendants.”).

122. Atkinson, *supra* note 108.

123. Parker, *supra* note 108 at 497 (noting that the most controversial part of the ruling involved the local property tax levy). In a split decision, Justice Byron White writing for the majority said that federal judges could instruct local officials to raise taxes in order to further desegregation. *Jenkins II*, 495 U.S. 33, 33 (1990). At least one commentator has argued that this “judicial taxation” is wholly inappropriate. See Christopher W. Nelson, *Missouri v. Jenkins: Judicial Taxation and the Funding of School Desegregation*, 26 *NEW ENG. L. REV.* 529, 531 (1991). Taxpayers can, of course, elect to assume an additional tax burden for this purpose should a majority of those voting choose to do so.

124. See Brannan, *supra* note 120 at 795.

V. BEYOND KANSAS CITY

By 1995, when the United States Supreme Court ended judicial oversight of the operation of Kansas City public schools, the school district had arguably made some progress in improving the quality of education.¹²⁵ There seems to have been general agreement that the Kansas City schools improved academically during this thirteen year period.¹²⁶ White flight had been halted and more than sixteen hundred white children had transferred voluntarily from suburban and private city schools to the Kansas City public schools.¹²⁷

Attracting white students in meaningful numbers proved more difficult than rebuilding schools. Sixteen hundred students represent progress but hardly established a significant presence. Justice David H. Souter was correct when he observed that the enduring “attitudes” of segregation had to be addressed, saying, “[I]t takes time to change.”¹²⁸ Old attitudes remain evident in questions such as these. Why send suburban white children into Kansas City schools when doing so would expose “kids to unnecessary dangers and problems?”¹²⁹ From one white parent to another: “Why would you want to send your kids into a school where there’s more black than white?”¹³⁰ Racially hardened attitudes exist on both sides of the color line. From a black community activist: “Why should we transfer to suburban, white-dominated schools and let white private and suburban students take our places?”¹³¹

VI. FROM DESEGREGATION TO INTEGRATION

“Why” indeed? I offer this response. In doing so, I am being indirectly autobiographical. What I now share with you was written in

125. See Shaw, *supra* note 107, at 59. “As a result of the remedy implemented in *Missouri v. Jenkins*, the system is better off than it was before the suit was filed.” *Id.*

126. Atkinson, *supra* note 108.

127. *Id.*

128. Transcript of Oral Argument, *Jenkins III*, *supra* note 117 (No. 93-1823), available in 1995 WL 61093, at *26 (Jan. 11, 1995) (argument on behalf of Petitioners). I think that Justice Ruth Bader Ginsburg’s comments in her separate dissent nicely emphasize Justice Souter’s point about timing.

[Thirty] years after *Brown*, the District Court found that “the inferior education indigen-
ous of the state-compelled dual school system has *lingering effects* in the Kansas City,
Missouri School District.” . . . Just ten years ago, in June 1985, the District Court issued
its first remedial order. Today, the Court declares illegitimate the goal of attracting
nonminority students to the Kansas City, Missouri[] School District, and thus stop the
District Court’s efforts to integrate a school district that was, in the 1984/1985 school
year, sorely in need and 68.3% black. *Given the deep, inglorious history of segregation
in Missouri, to curtail desegregation at this time and in this manner is an action at once
too swift and too soon.*

Jenkins III, *supra* note 117, at 176 (Ginsburg, J. dissenting) (citations and parenthetical omitted).

129. Atkinson, *supra* note 108.

130. *Id.*

131. *Id.*

1999 by my eldest daughter. She was required to prepare an essay as a part of an admission process. I use this with her permission.

[O]ur legal system has proven itself capable of fostering generalized social change over the long-term and for this reason I will always be in awe of its power. Growing up and living in Charlottesville, I have been sheltered from a great deal of racism. However, Charlottesville's history tells a very different story. In the years following *Brown v. Board*, Charlottesville public schools were closed for roughly one year to avoid integration. Some of my friends' parents were unable to graduate from Charlottesville's public high schools because the school system was shut down. The reaction of local city and state officials evidenced the widespread hostility that the Supreme Court's decision encountered in the South. And what local officials fought against vehemently then, my friends and I, both black and white, can still only look back [upon] in disbelief. It is this disbelief that I love. With regard to race relations, we differ so radically from our parents that we are unable to truly understand or appreciate the events of their lifetimes. And these differences run far deeper than a simple generation gap. *Brown v Board* not only represented a legal change but for many residents of Charlottesville it catalyzed a social metamorphosis that has come of age in my generation. That is awe inspiring.

“*Brown* . . . catalyzed a social metamorphosis that has come of age in my generation.” That was one young person's view at a moment in time forty-five years after the *Brown* decision was handed down. This is, I submit, compelling evidence of the power that decision and a definitive response to “why?” Sharing life day by day in the nation's schools can absolutely dispel mystery and build community in successive generations.

In light of present demographic realities, it is clear that for the foreseeable future, an adequate education for far too many American schoolchildren will not also be a diverse education. An education that is adequate in *all* respects—and this includes diversity as a characteristic—must remain the ultimate national goal.

Segregation and its mirror image, resegregation, exact an additional high cost from children. Consider for a moment the range of emotions recalled by our contributors when they learned of the decision: approval, elation, anger, fear, defiance, anxiety, and even sanctimony. Interest in change and curiosity are also recalled: what happens next?, what will happen to my school?, will I be with my friends?, what will it be like to be in an integrated classroom? The widespread public intransigence, (Professor Bonnie speaks of “real lawlessness”), of the first decade after *Brown* denied to most of us schoolchildren who remained in segregated schools, a supportive, desegregated environment in which to deal constructively with those emotions and to formulate responses to those questions. Nevertheless, several of our responders were among the relatively few children

attending desegregated schools in the first years after *Brown* was decided. They spoke of the important ways in which students themselves were occasionally able to identify and cooperatively address inevitable, sometimes difficult, transitional issues. In retrospect, sub-optimal outcomes realized through their efforts were deemed less important than the opportunity to learn of and from each other. Without exception, these experiences were characterized as important lessons for life. Of equal importance is the frequency with which the denial of opportunity for interchange is deemed to be a significant cost of this era. Professor John Boger of the University of North Carolina Law School spoke of this in an article published in 2000:

[W]e risk a rapid return to a time when each school child could, and did, identify 'white schools' and 'black schools' simply by reference to the predominant race of the children attending them. . . . I grew up in such a time. It worked a terrible evil. Although I cannot speak for my African-American neighbors, since segregation foreclosed my opportunity ever to know them, it was a psychologically damaging and educationally destructive experience for my white friends and myself and, I venture, for millions of other children. It has taken literally decades for my generation to begin to shed the unconscious, but pernicious, grip of the segregated environments in which we were brought up, with all of the fears, suspicions, and misunderstandings that they created.¹³²

Brown, of course, did not address segregation's possible harm to white children. It is not surprising, however, that a system denying personhood to African-American children left scars on white-American children who were also its victims.

There is also an intriguing subtext here. Professor Boger's observation, as well as comments from many of our contributors both black and white, share a common aspiration—that children who come together as equals to learn in a supportive environment will almost naturally create a community.

The factors thwarting current efforts to desegregate public school education range from remediable with effort (intra-school separation) through difficult (segregated housing patterns) to intractable (lower white birth rates). Nevertheless, the effort to continue to respect and serve each child's right to an equal education is not only fulfillment of the *Brown* mandate; it is also in this nation's interest. While a black-white racial divide continues to exist in this country, the face of the "other" is much less easily racially categorized than was the case fifty years ago. The United States has larger and more diverse sub-groups of people of color today. Americans of color presently include African-Americans, Asian-Americans, Latin or Hispanic-Americans, Na-

132. John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1794 (2000).

tive Americans and “others.” Further, census trackers estimate that while non-Hispanic whites will remain the largest subgroup, by 2050 that group will constitute only slightly more than one-half of all Americans, down from approximately 70% in 2000.¹³³ Americans presently range across the spectrum of human complexion and human cultural experience. Education, a public school education universally available and adequate by every measure, is crucial to providing a common denominator and maintaining a sense of common destiny for all Americans.

Brown, fully realized, removes the final impediment to a complete education for all children. Professor Boger spoke further to the power of an interactive daily school life:

As the world grows more racially and ethnically interdependent every year, reasonable educators might well conclude that every child has a compelling interest in learning more about children of other racial and ethnic backgrounds. From that exposure, children can see for themselves the role that racial background plays (or very often, does not play) in prompting a child to respond to good literature, to think about civic issues, to work in groups, and to create new solutions for contemporary problems. Indeed, the pedagogical objective in assuring racially diverse classrooms seems founded not upon some chimerical stereotype about what African-American children think or how Latino children behave, but on precisely the opposite view—that all children share many more things in common than they do differences and that the best device for overcoming lingering racial suspicions or prejudices is exposure, not separation.¹³⁴

I personally cannot imagine from whence this commitment to this common American enterprise, extending across all that can divide, might otherwise come. Nor do I wish to think of the prospects for our future as a nation should we fail to fulfill this responsibility as the United States becomes ever more racially diverse.

For moral authority to meet the continuing challenge to make my daughter’s experience a common one for American schoolchildren, we turn still to *Brown*. I can tell you that the shared remembrances of our contributors speak of the unquestionable morality of the decision.

133. According to 2004 population data published by the U.S. Census Bureau, the United States population in 2000 was 282 million people of whom approximately 69% were non-Hispanic white. The black and Latino/Hispanic populations were 12.6% each though then as now Latinos/Hispanics outnumbered blacks numerically. Asians accounted for 4% of the population in 2000. By 2050, census trackers estimate that whites will account for slightly more than 50% of the 419 million people living in the United States. By contrast, Latinos/Hispanics will experience the most rapid increase in numbers and will account for 25% of the overall population. The African-American population will have increased from 12 to 15% and the Asian-American population will have increased from 4 to 8%. All “other races” (including Americans of mixed race) will have increased from approximately 2.5 to 5%. U.S. CENSUS BUREAU, *supra* note 103, (internet release date Mar. 18, 2004), at <http://www.census.gov/ipc/www/usinterimproj/nat-projtab01a.pdf>.

134. See Boger, *supra* note 132 at 1765–66.

Its constitutionality is not debated. Our contributors view that decision just as we children did immediately in South Carolina; it was one that righted a great wrong. Fifty years later, the American body politic has come to accept the indefensibility of segregation in education¹³⁵ and remains as a matter of public policy committed to achieving a desegregated society.¹³⁶ That fact, more than anything, vindicates the underlying moral soundness of the decision and gives it enduring power. In the face of resegregation of the nation's schools, *Brown's* message remains relevant and compelling. A final quote from a contributor: "anyone who wants to go back cannot know how bad things were."

Every child must have the right to an adequate education,¹³⁷ complete in all respects.¹³⁸ That right must be vindicated. In the meantime, the needs of children at educational risk must be recognized and addressed.¹³⁹ In the same vein, we must act to protect and nurture the fragile, emergent consensus among *Brown's* benefi-

135. See, e.g., Will Lester, *Associated Press-IpsosAP Poll: Most Believe Integration has Improved Education of Black Students* (Apr. 29, 2004), (on file with author). Based upon the responses received, the pollster concluded that most Americans believe that school integration has improved education for black students and prefer to have their children in schools with an ethnic and racial mix. *Id.* Of note, the same poll reports that a majority oppose sending their children out of their communities in order to achieve racial balance. *Id.* See also *New National Poll on Diversity: 75% of Americans Say: 'Allow Colleges to Achieve Student Diversity'* (Aug. 13, 2004), (on file with author) (finding overwhelming public belief that having students of different races, cultures, and backgrounds is important to elementary and secondary education).

136. One poll reports that segregation has been strongly rejected but leaves unresolved the question of how to achieve integration. See, e.g., Will Lester, *Poll: Public Split on Affirmative Action* (Mar. 8, 2003), http://www.icrsurvey.com/icrinthenews/ap_affirmact.html (only a slight majority of whites think affirmative action programs are still necessary, while a strong majority of blacks see a continuing need for such a program). This question remains a controversial one. Notwithstanding the belief that a diverse education should be the norm, a strong preference for neighborhood schools currently exists. Similarly, "affirmative action" continues to be strongly criticized. *Id.* Of note, there seems substantial support for diversity in higher education. See *New National Poll on Diversity: 75% of Americans Say: 'Allow Colleges to Achieve Student Diversity'* (Aug. 13, 2004), (on file with author).

Also, a poll focusing solely on 18–29-year-old cohorts and reporting that a slim majority (reported as down from earlier polls) of those polled expressed no discomfort with the idea of "separate but equal." THE ARTHUR LEVITT PUBLIC AFFAIRS CENTER AT HAMILTON COLLEGE, *RACIAL ATTITUDES OF 18-29 YEAR OLDS* (Aug. 1999), <http://www.hamilton.edu/news/polls/racesurvey/> [hereinafter *RACIAL ATTITUDES*].

137. In an earlier article, I suggested that an "adequate education" is of necessity more than the avoidance of illiteracy. Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 496 (1998). An adequate education by today's standards must insure that a child is *functionally* literate. *Id.* The test should be whether the child is educationally equipped to live productively in a modern society. *Id.*

138. The Court in *Brown* struck down state-sanctioned racial segregation in public schools. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In writing for the Court majority in *Grutter v. Bollinger*, Justice Sandra Day O'Connor spoke to the personal and national importance of diversity in education. "[N]umerous studies show that student body diversity promotes [better] learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" 539 U.S. 306, 330 (2003) (quoting Brief of the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)). Though that case dealt with diversity in higher education, the sentiment expressed is no less true for elementary and secondary education.

139. It is entirely appropriate to again cite Judge Carter's words:

ciaries.¹⁴⁰ Those who are the beneficiaries of what has been achieved must be able to live those lessons. Their inability to do so would compound the looming national resegregation tragedy.

Finally, as we continue efforts to realize true equality, let us not forget good will in addition to continued, imaginative, informed effort. Let us also be respectful of the need for constructive national conversation, civil interaction, and a fair apportionment of the burdens of citizenship even as we seek to realize the full benefits of citizenship for all Americans.

[W]hile the pre-*Brown* thesis that equal education and integrated education are synonymous has never had a fair test, its chance of being afforded a just demonstration in the foreseeable future seems quite unlikely. Whether our views about the necessity of school integration were correct is really beside the point. Current public intransigence makes clear that we cannot allow ourselves to become the prisoners of dogma. While integration must remain the long-range goal, we must search for alternatives, because the reality is that hundreds of thousands of black children are attending all black or predominantly black schools in the urban North and South. These schools are woefully inadequate and provide no tools which will enable poor blacks to become a part of the mainstream of the social, economic, and political life of the country.

Carter, *supra* note 43, at 621.

140. A 1999 survey undertook to examine racial attitudes in the first American generation to be born after the modern civil rights movement. As such, young Americans between the ages of eighteen and twenty-nine were polled. The results expressed reflected strong levels of support on many race-related issues but clearly shows that much remains to be done. Based on survey results, two policy prescriptions were recommended:

[P]olicymakers should not assume that the battle for racial equality has been won . . . [W]hile young Americans give rhetorical support to notions of racial equality, their day to day experiences and behavior don't always back this up . . . [T]he support given for the idea of "separate but equal" indicates that [many] young Americans are comfortable with the notion of a segregated society. . . . Young Americans strongly believe in the value of multicultural education and reject the notion that it will only lead to greater racial divisions. Given this, educators should consider expanding their efforts in this area. Young Americans seem eager to educate themselves about the new multicultural America and perhaps in this way they might overcome the differences that remain between the races.

RACIAL ATTITUDES, *supra* note 136. See also Philip Klinkner, *The Unsteady March: The Rise and Decline of Racial Equality in America*, (1999).