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Still Standing in the Schoolhouse Door: Deconstructing *Brown*'s Bias and Reconstructing Its Remedy

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Introduction

I was born six years after the United States Supreme Court issued the *Brown v. Board of Education* decision, which declared *de jure* segregation in public schools violative of the Equal Protection Clause.[1] Many expected that monumental decision to reverse educational apartheid, and eventually, turn back several centuries of black caste in the United States. Such expectations have proven groundless.

Notwithstanding *Brown's* noble design, I attended several segregated primary and secondary schools during the 1960s and 1970s in Columbus, Ohio. I did not understand why many schools for white students in Columbus were measurably better than virtually all the schools for black students. Surely, the law did not require poorer schools for kids like me, but it just as clearly did not prohibit them. I had numerous questions about the inadequate and inequitable educational opportunity, but no real answers short of the oft-repeated phrase, "the white man keeps the colored man down," and that was simply insufficient. Surprisingly, despite my daily, firsthand experience with educational disparity and black caste, I still believed in the fairness of the law.

Now, I have lived in various parts of the country, including Ohio, North Carolina, and California, and I have visited most of the other states. Most recently, after over two decades in Alabama, living in the reflections of slavery and Jim Crow

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1. 347 U.S. 483, 495 (1954).

and the shadow of former Alabama governor George Wallace's infamous Stand in the Schoolhouse Door, I know that what I experienced as a child in Columbus reflects a far broader pattern throughout the country. I remain flummoxed by the persistent failure of law to remedy pervasive educational inequality. Educational disparities in American public schools still stand in the schoolhouse door. Moreover, by almost any relevant metric, racial caste persists throughout the United States.[2] Thus, even sixty years later, one can still ask: what happened to *Brown*'s promise, and why is there still so much educational inequality and black caste today?

For over two decades, I have re-examined *Brown*, celebrating the decision and seeking to promote from it at least two principles: first, when government provides education, it must do so on an equitable basis, and second, government has an affirmative duty to eliminate all educational caste, *de jure* and *de facto*.

I am persuaded that this idyllic view of *Brown* is naive. Notwithstanding *Brown*'s iconic status, its application in the courts has had deep flaws. The better view is that *Brown* has been deployed by the Supreme Court as a tool to advance the social, political, and economic interests of the nation's dominant groups—not to provide educational equality and not to eliminate racial caste. Too often legal institutions, structurally and functionally, reify the interests of the powerful against the interests of those without such power. I was one of those black kids from the other side of the tracks, an outsider in my own country, one of millions nearly left behind by inferior educational opportunities. I escaped. Unfortunately, millions of others do not escape and their lives are stunted by policies permitting broad disparities in educational opportunity. Here is the law's bias, which I illuminate by deconstructing the Court's language in *Brown* and its progeny, concluding that the Supreme Court itself is too often a chief agent of legal bias, not reform.

This bias arises for several reasons. The Court may disregard pertinent facts. It may ignore relevant history, it may adopt a remedy that provides no substantive relief, or it may conclude there is no violation of any fundamental interests. In the Court's application of *Brown*, it has done all of the above. Given that I have devoted my professional life to teaching law and studying the Court's work, this is not a happy conclusion. Additionally, if my critique is correct, the question remains: what can be done to counter law's intrinsic bias?

The purpose of this Article is to interrogate this central question in the context of the Supreme Court's school desegregation decisions. Is reforming legal bias simply folly? My brief answer is no, but reform is really difficult, counter-majoritarian work that requires a much broader conceptualization of the nature of the constitutional violation resulting from segregation, as well as a comprehensive remedial response to its effects. In brief, *Brown* was lost because the Court failed to

2. *See* Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal (2003). In his landmark work, Hacker describes the significant role of race in American life a half-century after the publication of Gunnar Myrdal's *An American Dilemma*.

frame accurately the extent of the constitutional violation and to empower the lower courts to adopt sufficiently broad remedies, leaving black caste, inside and outside of schools, largely intact.

In Part I, I situate this discussion in the context of widespread discrimination in Ohio, my native state, noting its longstanding color line. Like the color lines in many other states, the one in Ohio was devastating to all the opportunities open to blacks. Given Ohio's race history, it is not surprising that I attended intentionally segregated schools. What is surprising is that the Supreme Court has appeared reluctant to acknowledge the extent of the racial discrimination in this country, especially outside of the South. The Court's trope is that racial discrimination in the United States is the result of a few bad actors—not a core value of our society. This approach leaves much discrimination immune to real reform.

In Part II, I deconstruct *Brown*, laying bare its naked, intrinsic bias. I conclude that *Brown* has a dark side that heavily weights its function against the black children the Supreme Court might have aided. It seems clear that the Court has not done all that could be done to eliminate black caste.

In Part III, I reframe the Supreme Court's post-*Brown* discourse regarding constitutional violations and remedies, locating and deploying a broader construction and application of these principles in the writing of Justice Ruth Bader Ginsburg for the Court in *U.S. v. Virginia*, where she transformed the Court's remediation precedent into a sword for social justice, rather than a shield for social dominance.[3] Justice Ginsburg's approach persuades me that intractable legal bias is not invincible. Justice Ginsburg, for example, took down a great symbol of patriarchy. Those seeking to eliminate educational caste might look to her modern example for strategic guidance.

I. The Low Road to Educational Apartheid in Ohio

The purpose of this Part of the Article is to discuss the failure of the Supreme Court's decision in *Brown* to remedy racial disparities in educational opportunity in states like Ohio.[4] Although *Brown* is widely regarded as one of the most important cases of the twentieth century, its law has not dismantled educational inequality or racial caste in the United States—that important work remains unfinished.

In critiquing the impact of *Brown*, this Article recalls the educational color line and widespread segregation in Ohio's public schools.[5] Exploring this rich

3. 518 U.S. 515 (1996).

4. 347 U.S. at 496; *see also* Penick v. Columbus Bd. of Educ., 663 F.2d 24, 30 (6th Cir. 1981) (declaring the Columbus public schools intentionally and unconstitutionally segregated).

5. *See generally* Ohio Const. of 1802, art. VIII, § 25; Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (ordering system-wide desegregation in the state of Ohio, as the school board's conduct at the time of trial and before was animated by an unconstitutional segregative purpose

history supports the argument that *Brown* should have stood for more than simply requiring desegregation of public schools. It should have identified all aspects of the constitutional violation and it should have provided a remedy to meet the full scope of the violation. This was the road not taken in *Brown*.[6]

A. The Ohio Color Line

Consider, briefly, Ohio's early race and education history. Ohio delegates approved a new constitution in 1802, and in 1803 Ohio joined the Union as a non-

and had a segregative impact); *Brown*, 347 U.S. 483 (eliminating "separate but equal" doctrine in public schools); Bd. of Educ. v. State *ex rel*. Reese, 151 N.E. 39 (Ohio 1926) (ruling the Dayton Board of Education and superintendent of schools be ordered to admit black children to the schools of the city on equal terms with whites); Bd. of Educ. v. State *ex rel*. Gibson, 16 N.E. 373 (Ohio 1888) (ruling that the board of education cannot assign youth to specific school districts based on their race or skin color); State *ex rel*. Garnes v. McCann, 21 Ohio St. 198 (1871) (holding that a law authorizing classification according to color of children for school purposes and the establishment of separate schools is within the legislative power granted by the state constitution and does not violate the Fourteenth Amendment of the United States Constitution); Van Camp v. Bd. of Educ., 9 Ohio St. 406, 411, 420 (1859) (obliging towns to provide schools for both whites and blacks, to be construed as a law of classification and not a law of exclusion); Frank U. Quillin, The Color Line in Ohio: A History of Race Prejudice in a Typical Northern State (1913); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-*Brown *North,* 44 UCLA L. Rev. 677 (1997) [hereinafter Douglas, *Limits of Law*] (focusing on desegregation efforts in New Jersey, Pennsylvania, Ohio, and Illinois, broadening the conversation regarding law and racial change by examining the interplay between legal rules as manifest in both court decisions and statutes); Davison M. Douglas, *The Struggle for School Desegregation in Cincinnati Before 1954*, 71 U. Cin. L. Rev. 979 (2003) [hereinafter Douglas, *Struggle for School Desegregation*] (discussing the work of activists to achieve full equality for blacks in Cincinnati schools); Paul Finkelman, *Race, Slavery, and Law in Antebellum Ohio, in* The History of Ohio Law 748, 751 (Michael Les Benedict & John F. Winkler eds., 2004); J.S. Himes, Jr., *Forty Years of Negro Life in Columbus, Ohio*, 27 J. Negro Hist. 133 (1942); Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 Clev. St. L. Rev. 581, 590–93 (2004); *Black Laws of 1807*, Ohio Hist. Cent., http://www.ohiohistorycentral.org/w/Black_Laws_of_1807?rec=1505 (Dec. 13, 2013) (enacting legislation to discourage African American migration to the state); *see also* Adah Louise Ward, The African-American Struggle for Education in Columbus, Ohio: 1803-1913 (1993) (unpublished master's thesis, The Ohio State University) (on file with author) (researching the evolution of educational discrimination in mid-sized northern cities). Very little attention has been paid to school desegregation efforts taking place in the North, which were very different than those taking place in the South during the pre-*Brown* era. The North's greatest barrier to integrated schools was not legal in nature, but cultural. Most northern states prohibited segregation by statute in the nineteenth century, but significant elements in both the white and black community favored separate schools for black children. These anti-segregation statutes did not reflect a real commitment to school integration, but rather a combination of political expediency and the inefficiency of dual schools at a time when black enrollments were small.

6. *See* Douglas, *Limits of Law*, *supra* note 5, at 743.

slave state.[7] If one more delegate had voted for slavery, Ohio likely would have joined the Union as a slave state.[8] Despite its status as a free state, discrimination against colored Ohioans was part of the state's organic law.[9]

Shortly after ratification, Ohio's Black Laws were enacted.[10] Although the Black Laws did not directly deal with education, they provided the context for the exclusion of colored Ohioans from virtually all the rights afforded white Ohioans.[11] Aspects of these Black Laws formally remained until 1887 and their effects linger still.[12]

B. Early Public Schools and the Color Line

The first discussion of schools emerged in the Ohio Constitution of 1802, notably article VIII, section 25.[13] There was no reference in the state constitution regarding whether or not to prohibit blacks from attending public schools,[14] but by examining the development of school law in Ohio, one can follow the plan to create a two-caste system. The general assembly recognized the necessity of equal rights for "all men," but this notion included only white males.[15]

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7. *See* O'Brien & Woodrum, *supra* note 5, at 593; *Ohio Statehood*, Ohio Hist. Cent., http://www.ohiohistorycentral.org/w/Ohio_Statehood?rec=530 (Dec. 13, 2013).

8. *See Ohio Statehood*, *supra* note 7.

9. *See* Finkelman, *supra* note 5, at 750.

10. Ward, *supra* note 5, at 20–21 ("The Black Laws were analogous to the Jim Crow laws developed after the Reconstruction era. The Black Laws hindered the social, economic, political, and educational progress of free Africans who resided in Ohio.").

11. *Id*. at 22.

12. *Id*.

> And even in the North where slaves had been freed either immediately or gradually after the Revolutionary War, the widescale opportunities for education evaded African people. Northern states pursued one of three courses regarding education for blacks. Either they provided separate "colored" schools, or they had "mixed" schools, or they did not include African-American children in the public school law at all. . . . Until late in the nineteenth century in Ohio, a free state, educational law either excluded blacks or provided for their separate education. Such educational law were [sic] influenced by the Ohio Black Laws.

Id. at 20.

13. Ohio Const. of 1802, art. VIII, § 25 ("no law shall be passed to prevent the poor in several counties and townships, within this State, from an equal participation in the schools, academies, colleges and universities within this State").

14. *Id*.

15. *See* James Jesse Burns, Educational History of Ohio 195–96 (1905) ("It seems clear that in the eyes of those who formulated public thought and projected it into the future in Ohio's three constitutions . . . a 'black or mulatto person' was not an elector, a voter, or citizen. It would be logical to say farther that he was not included when they spoke of 'the people.'").

Article VIII, section 25 of the Ohio Constitution provided the foundation for the development of Ohio public schools, and the actual text does not directly prohibit the integration of schools. However, the legislative intent to restrict schools to white children seems unmistakable.[16] Some whites felt that education should be denied to blacks.[17]

In 1825, the Ohio General Assembly passed its first comprehensive public school accommodations law.[18] The law provided for the legislative authority to establish a county tax for the support of school funds.[19] The text of the 1825 law failed to explicitly prohibit the establishment of schools for blacks using the funds collected by taxes.[20] Some authors argue that because blacks were not directly mentioned that there is a possibility that the legislature did not intend for blacks to be prohibited from attending public schools.[21] As will be illustrated, the common school law improved as a whole through each succeeding provision. The central issue with many of the school acts and regulations stemmed from the disjointed attempts at collecting monies sufficient to support the school systems.[22]

C. Separate Schools for Colored Students

In 1829, a shift occurred. The Ohio General Assembly amended the law of 1825, explicitly prohibiting the collection of taxes from "black or mulatto persons."[23] The text of this act clearly asserted the goal of prohibiting "blacks or mulattos"[24] from attending the schools for the "youth of every class," which alone

16. *See* Finkelmen, *supra* note 5, at 760; O'Brien & Woodrum, *supra* note 5, at 582.

17. Ward, *supra* note 5, at 23. For example, an anonymous writer from the *Ohio State Journal* in 1827 argued:

> If we enlighten their [Blacks] [sic] minds by education, what a new world of misery does open to their view. Knowledge would open their eyes to their present degraded state - - their incapacity of enjoying the rights of citizenship, or of being received into the social interests of the whites as friends. They would be rendered uneasy with their condition, and, seeing no hopes of improvement, would harbor designs unfriendly to the peace and permanency of our institutions.

Id. at 23 (citation omitted).

18. Finkelman, *supra* note 5, at 760.

19. Act of Feb. 5, 1825, 1825 Ohio Laws 36, 37 ("to provide for the support and better regulation of common schools").

20. Finkelman, *supra* note 5, at 760.

21. *Id*.

22. Burns, *supra* note 15, at 74.

23. Act of Feb. 10, 1829, 1829 Ohio Laws 72, 72–73 ("to provide for the support and better regulation of Common Schools") (in relevant part: "*Providea*, That nothing in this act contained, shall be so construed as to permit black or mulatto persons to attend the schools hereby established, or compel them to pay any tax for the support of such schools . . . .").

24. There does not seem to be a definitive definition of "blacks" or "mulattos." In *Van*

prohibits integrated schools, but does not prevent schools of their own.[25] The law mandated that any taxes collected for education from black residents were to be returned to the black taxpayers or maintained in a fund established for the education of the black youth.[26]

In 1838 and 1839, more school legislation was passed in the same vein, excluding blacks and mulattos from tax schemes and providing public education for white children only.[27] Amendments followed, which discussed the specific age ranges for the admittance of "white youth" to common schools and added additional requirements regarding the county assessor's methods of recording the property belonging to a "black or mulatto."[28] Evidence suggests that some districts allowed blacks to pay tuition to attend integrated schools or to support black private schools.[29]

A law passed in 1848 moved closer to the full realization of a state-wide system of institutional public education for blacks, recognizing the likelihood of integration with the increasing numbers of black and mulatto residents.[30] The

Camp v. Board of Education, the court opined that the dictionary "defines 'colored people' to be 'black people, Africans, or their descendants, *mixed or unmixed*.'" 9 Ohio St. 406, 411 (1859). Justice Sutliff's dissent states that "[t]he word 'black' is well understood to mean the negro; and the word 'mulatto' is equally well understood to denote the offspring of a white person and a negro and as not expressive of any other class of persons." *Id*. at 419 (Sutliff, J., dissenting).

25. Act of Feb. 10, 1829, at 72–73.

26. Ward, *supra* note 5, at 23.

27. Act of Mar. 7, 1838, 1838 Ohio Laws 21 ("for the support and better regulation of common schools, and to create permanently the office of superintendent") (in relevant part: "That in all cases during the periods when the public money is applied for the support of the schools, said schools shall be free for all the white children in the district . . . .").

28. Act of Mar. 16, 1839, 1839 Ohio Laws 61, 62, 65 ("to amend an act entitled An act for the support and better regulation of common schools, and to create permanently the office of superintendent") (in relevant part: "That it shall be the duty of the county assessors when taking a list of taxable property of the county, when he takes in the property of a black or mulatto person, to note the fact opposite to his or her name in the abstracts he makes out for the county auditor.").

29. Finkelman, *supra* note 5, at 762–63.

> In Cleveland the city council had 'helped subsidize a private school for black children' in the 1840s, but 'by the end of that decade' the city's 'public education system had been completely integrated. . . . The 1839 school act provided that school officials could charge tuition for children who were not eligible to attend the district schools.

Id. at 762.

30. Act of Feb. 24, 1848, 1848 Ohio Laws 81, 81–82 ("to provide for the establishment of Common Schools for the education of the children of black and mulatto persons, and to amend the act entitled 'An act for the support and better regulation of Common Schools, and to create permanently the office of Superintendent'"). Section 1 in relevant part states:

> That all such property belonging to black or colored persons, as is liable to taxation when owned by white persons, be taxed for school purposes . . . and

previous school acts existed under the 1802 Constitution's sovereign grant of public education under section 25.[31]

In May 1850, delegates gathered in Columbus to discuss provisions of the new constitution for the state of Ohio.[32] Recognizing the inefficiencies and limitations to the school system, each report introduced by the Standing Committee on Education included provisions calling for a "thorough and efficient system of common schools."[33] Discussions intensified when delegates addressed the methods of taxation and the terminology used in including or excluding blacks from accessing Ohio public education.[34] One particular delegate advocated against allowing only white children access to education saying, "[E]xperience of the past has shown that morality and virtue keep pace with education and that degradation and vice are the inevitable results of ignorance."[35] The delegates did not ultimately specify that education was limited only to white children; article VI, sections 1 and 2 provided the right to education in rather vague text.[36]

> shall be paid out for the support of schools for black or colored persons in any district in which the children of black or colored persons are permitted to attend the common schools with the children of white persons . . . .

Id. at 81. Section 2 in relevant part states:

> That every city, incorporated town or village, seat of justice, or organized township in this State, containing twenty or more black or colored children, of any age, and desirous of attending school, shall constitute a school district for such children; and it shall be lawful for colored persons residing in such school district as aforesaid, to assemble and organize said district . . . and in all respects, for such purposes only, to possess the same powers, and enjoy the same benefits that are possessed and enjoyed by white persons . . . .

Id. at 81. Section 7 in relevant part states:

> That when any black or colored person or persons, residing in any school district within this State, where there are less than twenty black or colored children of any age, desirous of attending the common schools in said district or districts, shall have paid a tax for school purposes, it shall be the duty of the county auditor . . . on application of such black or colored person or persons . . . to draw an order in favor of such black or colored person or persons . . . [p]rovided, in all cases, that the white inhabitants will not permit such black or colored children to have the benefit of the common schools in said districts, upon the same terms, and enjoy the same privileges . . . .

Id. at 82.

31. Ohio Const. of 1802, art. VIII, § 25.
32. O'Brien & Woodrum, *supra* note 5, at 612.
33. *Id*. at 612–13.
34. *Id*. at 615.
35. *Id*.
36. Ohio Const. art. VI, §§ 1, 2. "The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . . ." *Id*. at § 2.

D. Educational Caste in Ohio

Much of the Ohio school law leading up to 1853 existed as disjointed fragments.[37] Disagreement existed within the general assembly regarding the place of blacks in the newly formed, constantly changing Ohio legal structure.[38] Before the law of 1853, there existed no law on the books that required creation of separate schools for blacks in Ohio.[39] In relevant part section 31 of the law of 1853 declared:

> The township boards of education in this State, in their respective townships, and the several other boards of education, and the trustees, visitors, and directors of schools, or other officers having authority in the premises, of each city or incorporated village, shall be, and they are hereby authorized and required to establish within their respective jurisdictions, one or more separate schools for colored children, when the whole number by enumeration exceeds thirty, so as to afford them, as far as practicable under all circumstances, the advantages and privileges of a common school education . . . .[40]

For the first time, the law imposed a duty on school officials to establish schools, albeit separately for "colored" children, to receive the "advantages and privileges of a common school education."[41] The intent of the legislature seemed clear: to provide a useful and efficient common school education system for black children, separate from that of white children.[42] It should also be noted that in section 17 of the Act of 1853, black-owned property could be taxed, but the support of the separate black common school system did not depend solely on those funds.[43]

Contemporaneous reports revealed that the number of black school-aged

37. Burns, *supra* note 15, at 74.

38. *See id*. at 195–200.

39. *See* Van Camp v. Bd. of Educ., 9 Ohio St. 406, 409 (1859) ("The law of . . . 1853 . . . conceived in a more liberal and patriotic spirit . . . provides for the education of colored children and imposes the duty of organizing separate schools for them . . . .").

40. Act of Mar. 14, 1853, 1853 Ohio Laws 429, 441 ("to provide for the reorganization, supervision and maintenance of Common Schools.").

41. Burns, *supra* note 15, at 197.

42. *Van Camp*, 9 Ohio St. at 411 ("Three objects seem to have been especially in view. To divide all the youth of the state, for educational purposes, in two classes, to provide more effectually for the education of both classes, and to require both classes to be separately instructed.").

43. Act of Apr. 8, 1856, 1856 Ohio Laws 117, 117–18 ("to amend an act entitled 'an act to amend the act to provide for the maintenance and better regulation of common school in the city of Cincinnati,' passed January 27, 1853, and April 18, 1854") ("The words 'colored persons' and 'colored children,' as used in this act, and the act to which this is an amendment, shall be deemed and held to mean those are reputed to be in whole or in part of African descent.").

children attending school increased over the next twenty-five years.[44] The Ohio General Assembly passed an act in 1873 intended to repeal all of the law of 1853 except section 31 (which, as noted above, provided the duty to establish separate schools for black children).[45] In 1878, the general assembly amended section 50 of the Act of 1873 and repealed section 31 of the Act of March 1853.[46] Section 1 of the Act of 1878 revised section 50 of the Act of 1873 to read, in relevant part:

> Each board of education shall establish a sufficient number of schools to provide for the free education of the youth of school age within the district, at such places as will be most convenient for the attendance of the largest number of such youth, and where in their judgment it may be for the advantage of the district to do so, they may organize separate schools for colored children . . . .[47]

The above provision that prescribes the establishment of separate schools became section 4008 of the Revised Statutes.[48] There has been a suggestion that the Black Laws were codified by the general assembly in 1804 and 1807 to discourage black migration to Ohio and to provide the authority for officials to constitutionally segregate Ohio's school children based upon race.[49] Because the Black Laws were repealed in 1887, school officials, through the text of section 4013, attempted to make assignments of students in particular districts in order to maintain separate schools.[50] In February 1887, the legislature passed an act repealing section 4008 and other sections related to limiting the rights of blacks.[51]

Public support of education for blacks did not come until after they had

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44. *See* Burns, *supra* note 15, at 198; Finkelman, *supra* note 5, at 763.

45. Burns, *supra* note 15, at 198.

46. Act of May 11, 1878, 1878 Ohio Laws 513, 513–14 ("to amend section fifty of an act entitled 'an act for the reorganization and maintenance of common schools,' passed May 1, 1873, and to repeal section thirty-one of an act entitled 'an act to amend and supplementary to an act entitled an act to provide for the organization, supervision, and maintenance of common schools,' passed March 14, 1853").

47. *Id*. at 513.

48. Burns, *supra* note 15, at 198.

49. *See id*. *See generally Black Laws of 1807*, *supra* note 5 (stating Black Laws were partially repealed in 1849).

50. Burns, *supra* note 15, at 199.

51. *See* State *ex rel*. Gibson v. Bd. of Educ., 2 Ohio C.C. 557, 559 (1877) (addressing whether, with the repeal of section 4008, school officials could legally maintain separate schools for school children based upon race). "[T]he Supreme Court of Ohio held that Boards of Education could not maintain separate schools for black and white students." Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 235 (S.D. Ohio 1977) (citing Bd. of Educ. v. State, 16 N.E. 373 (1888)).

started their own schools.[52] Blacks founded two kinds of schools, both of which were private and supported either by the black community through tuition and donations or through church funds.[53] Further, "[d]uring the 1870s and early 1880s, many African Americans sought to enroll their children in white schools through school board petitions and lawsuits."[54]

In the 1880s, both the Democratic and Republican parties supported desegregation efforts.[55] This was largely an attempt to acquire the black vote, rather than a belief that segregation was an unjust practice.

> In 1887, the long struggle against school segregation came to fruition as the state legislature repealed the earlier legislation that had required segregated schools. The support for the statute was largely regional: Northeast Ohio—settled in large measure by New Englanders—tended to support the anti-segregation legislation; much of southern Ohio—settled by southerners—voted in opposition.[56]

E. The Rise of Modern School Segregation in Ohio

An early twentieth-century race relations study of Ohio appropriately noted that "legal provisions intended to establish racial equality are either observed or ignored according to what the white element in the several communities may determine."[57] In some Ohio communities, whites vigorously resisted mixed schools with violence or economic retaliation towards the families of those children who chose to exercise their right to enter a white school.

School segregation in Ohio increased again in the first four decades of the twentieth century. Larger Ohio cities such as Cincinnati, Columbus, and Cleveland, started to reverse their support for integrated schools.[58] The push towards increased

52. *See* Laura D. Commodore, *African Americans in Columbus City Schools: A Historical Perspective* 3, Ohio St. Univ., (2010), http://people.ehe.osu.edu/bgordon/files/2012/06/Laura-commodore.pdf.
53. *Id*. at 3–4.
54. Douglas, *Limits of Law, supra* note 5, at 694.
55. *Id*.
56. *Id*. at 694–95.
57. *Id*. at 695 (citing Quillin, *supra* note 5, at 125.
58. For example:
> The Columbus Board of Education, which had desegregated its schools and used racially mixed faculties in the 1880s, resegregated many of its schools during the first half of the twentieth century through racially gerrymandered school district lines and the assignment of teachers on a racial basis. School district lines would remain gerrymandered and no black teacher would teach white children in Columbus until the 1950s. . . . During the 1930s, the Dayton School Board went further, establishing separate junior and senior high

school segregation can be partially attributed to the mass influx of southern blacks to the North both during and after World War I.[59] Many white school officials argued that these new black school children were not prepared to attend school with white school children, requiring segregation.[60]

Despite a split among the black community on the issue of whether segregated schools were best for its children, desegregation efforts in Ohio expanded in the 1920s and 1930s, largely because of the encouragement of local branches of the National Association for the Advancement of Colored People (NAACP).[61] According to Professor Davison M. Douglas, this long anticipated merging between "legal rule and social reality" stemmed from two conditions:

> First, enhanced black political power led to significant state governmental support for school integration. Second, the national office of the NAACP embarked in the 1940s on an extensive effort to win support in the northern black community for its integrationist vision coupled with an aggressive litigation and political pressure campaign.[62]

Simultaneously, "burgeoning racial tensions and fears of black radicalism motivated many whites to support civil rights initiatives, as did the wartime hypocrisy of fighting Nazi racism in Europe while preserving racial segregation at home."[63]

> schools for black children. Dayton continued to operate segregated schools and to exclude black teachers from teaching white children pursuant to an explicit 'segregation policy' until the early 1950s.

Douglas, *Limits of Law, supra* note 5, at 707–08; *see also* Brinkman v. Gilligan, 503 F.2d 684, 697 (6th Cir. 1974). Similarly, in Cincinnati, although the school board had eliminated many separate black schools after the enactment of the 1887 anti-segregation legislation, the board reestablished several black schools during the first two decades of the twentieth century. The Cincinnati School Board would continue to exclude several black elementary schools, designated 'separate schools,' from the city's general geographic assignment plan until the early 1950s. *See* Michael Harlan Washington, The Black Struggle for Desegregated Quality Education: Cincinnati, Ohio 1954-1974, at 45–47 (1984) (unpublished D. Ed. thesis, University of Cincinnati) (on file with the Cincinnati History Library and Archives).

59. *See* Douglas, *Limits of Law, supra* note 5, at 710.
60. *Id*. at 710–11.
61. *Id*. at 718.
62. *Id*. at 719.
63. *Id*. at 719–20 ("As a result, during the 1940s, white-black political coalitions successfully secured the enactment of antisegregation [sic] statutes and ordinances in many northern states and cities that barred racial discrimination in public accommodations, employment, education, and housing. Many of the new statutes provided for enforcement through administrative agency as opposed to private lawsuit, greatly enhancing their effectiveness. In particular, legislation providing for the withholding of state education funds from recalcitrant school districts afforded a powerful new weapon in the campaign against school segregation.").

The NAACP, spurred by tremendous wartime increases in membership, entered the northern school integration movement.[64] Following the significant work of Charles Hamilton Houston, NAACP Legal Defense Fund legal director Thurgood Marshall announced in 1947 that his office would disburse extensive resources challenging northern school segregation.[65]

The NAACP's fight for northern school desegregation was much different than it was in the South.[66] In the North, the laws and favorable judicial precedents were already in place; therefore, "much of the organization's efforts focused on changing attitudes within the black community concerning segregation, encouraging blacks to demand their legal right to an integrated education."[67] However, officially sanctioned school segregation persisted in a number of Ohio school districts until the early 1950s and in some instances until after the *Brown* decision.[68]

If, as Justice Oliver Wendell Holmes wrote, "a page of history is worth a volume of logic,"[69] then these pages on the history of educational discrimination in Ohio should be worth volumes. There is no doubt that Ohio deployed its laws broadly to establish an invidious color line.[70] Absent such history, one can never know what blacks in Ohio might have achieved, but there is no reason to assume so many would live in caste. With full educational opportunity, I would expect that many would have achieved success similar to that achieved by whites that attended better schools.

One wonders if Ohio's example was the model in other states, such as Indiana, Illinois, Pennsylvania, or others in the region. Professor Douglas's work suggests that Ohio was not alone.[71] Nonetheless, the Court would not proscribe such discrimination in cities such as Columbus and Dayton until the late 1970s, over two decades after *Brown*.[72] In the next two Parts, I explain why those sanctions failed to eliminate educational caste.

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64. *Id*. at 720.

65. *See id*. "In spite of state statutes designed to prevent discrimination or segregation of the races in its school systems, these vicious practices are put into effect in far too many Northern states, and the NAACP shall concentrate within the next few years on breaking down such practices." *Id*. at 720–21 (citation omitted).

66. *Id*. at 721.

67. *Id*.

68. By the early 1950s, officially sanctioned school segregation continued in Chagrin Falls, Cincinnati, Columbus, Dayton, Hamilton, Hillsboro, Middletown, and Oxford. Penick v. Columbus Bd. of Educ., 663 F.2d 24, 28 (6th Cir. 1981); Brinkman v. Gilligan, 583 F.2d 243, 249 (6th Cir. 1978); Clemons v. Bd. of Educ., 228 F.2d 853, 855 (6th Cir. 1956).

69. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

70. The most comprehensive work I have found on the Ohio color line is Frank U. Quillin's *The Color Line in Ohio*. Quillin, *supra* note 5.

71. *See* Douglas, *Limits of Law*, *supra* note 5, at 681–82.

72. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

II. *Brown* as Icon

Each time I return to the Court's language in *Brown*, I am at once hopeful and distressed.[73] On the one hand, I know the decision was formally transformative, ending the equal but separate fantasy of *Plessy*. On the other hand, I know the Court could have done more through *Brown* and that ending segregation has been insufficient to remedy all of its lingering effects. For better or worse, I am a school integrationist, believing it could benefit minorities.[74] However, I also remember the sage admonition from W.E.B. Du Bois who wrote that black children did not need separate schools or mixed schools; they needed education.[75] Instead of establishing

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73. I have published several previous articles on discrimination in education. *See generally* Bryan K. Fair, *Intersectionality Theory, the Anticaste Principle, and the Future of Brown*, 60 Ala. L. Rev. 1111 (2009); Bryan K. Fair, *Re(caste)ing Equality Theory: Will* Grutter *Survive Itself By 2028?,* 7 U. Pa. J. Const. L. 721 (2005); Bryan K. Fair, *Taking Educational Caste Seriously: Why* Grutter *Will Help Very Little,* 78 Tul. L. Rev. 1843 (2004); Bryan K. Fair, *The Darker Face of* Brown*: The Promise and Reality of the Decision Remain Reconciled*, 88 Judicature 80 (2004); Bryan K. Fair, *The Anatomy of American Caste,* 18 St. Louis U. Pub. L. Rev. 381 (1999); Bryan K. Fair, *Been in the Storm Too Long, Without Redemption: What We Must Do Next,* 25 S.U. L. Rev. 121 (1997); Bryan K. Fair, *Rethinking the Colorblindness Model*, 13 Nat'l Black L.J. 1 (1993); Bryan K. Fair, *America's Equality Promise: Can You Tell Me Where It's Gone?,* 18 J. Am. Ethnic Hist. 167 (1999) (reviewing Civil Rights and Social Wrongs: Black-White Relations Since World War II (John Higham ed., 1997)); Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution,* 28 U.S.F. L. Rev. 343 (1994) (reviewing Andrew Kull, The Color-Blind Constitution (1992)); Bryan K. Fair, *How Far We Have to Go,* 10 Nat'l Black L.J. 318 (1988) (reviewing Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1989)).

74. *See* Karl A. Cole-Frieman, *The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation*, Kan. J.L. & Pub. Pol'y 23, 37 (1996) (asserting "researchers have concluded that 'northern desegregation has "a substantial positive effect on black students' achievement."' For example, desegregation has had a positive impact on improving black students' achievement test scores, as well as decreasing school dropout rates, teenage pregnancy, and delinquency rates. Desegregation has also been shown to increase the likelihood that black students will attend and succeed at college, secure employment in predominantly white job settings, obtain higher salary levels, and live in integrated neighborhoods as adults.").

75. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. Negro Educ. 328, 335 (1935):

> [T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. . . . A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in

educationally effective schools and eliminating educational caste over the past six decades, I believe Jonathan Kozol is correct: we are in the midst of extending educational apartheid in American schools.[76] If this is correct, then *Brown's* promises have been hollow for two more generations of children. Next, I turn to the Court's words.

A. The Janus Faces of Brown

Here, I reference, in pertinent parts, the opinions in *Brown I* and *II*. I read these cases together. They were aspects of one case, and the language of the Court had tremendous possibility.

In *Brown I*, the Court wrote unanimously:

> In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment.[77]
>
> . . . The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws.[78]. . . .
>
> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally

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> that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

Id.

76. *See generally* JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005). For more information on the resegregation of American schools, see the important work of Gary Orfield and his colleagues at Harvard University and the University of California, Los Angeles.

77. Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

78. *Id*. at 487–88.

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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[79]

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[80]

In *Sweatt v. Painter* . . . in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents* . . . the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." . . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[81]

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal

79. *Id*. at 493.
80. *Id*. at 493.
81. *Id*. at 493–94 (third, fifth, and sixth alteration in original) (citation omitted).

> protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[82]
>
> . . . In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[83]

B. The Road Not Taken

Where did the Court go wrong?[84] In retrospect, *Brown I* has at least two significant aspects. First, the decision delivered a victory in eradicating the formal separate but equal doctrine upheld under *Plessy v. Ferguson*.[85] Second, however, less has been written about how the Court squandered its opportunity to frame the constitutional violation broadly. Segregation was a system that affected every aspect of black life. Persistent educational inequality caused cumulative black caste: low educational attainment; low income and wealth attainment; low employment; low political participation; poor health; poverty; and other disadvantages resulting from centuries of invidious undereducation and racial oppression. Moreover, by focusing solely on the stigma of colored children, the Court also missed the chance to acknowledge the inter-generational, cumulative educational, and other advantages segregation produced for whites, which were likely the chief aim of segregation policies. Additionally, by ignoring relevant history, especially outside the South, the Court also failed to give colored children in places like Ohio relief from broad policies producing educational caste. As Professor Mark Tushnet has eloquently written:

> *Brown* was two decisions, one on the merits and the other on the remedy. The two decisions, taken together, were suffused with a tension between two competing visions. In one, the Constitution required only that government decisions be taken without regard to race. For example, when Thurgood Marshall was asked about the purported problems that would arise because of differences in ability

82. *Id*. at 495.

83. *Brown*, 347 U.S. at 495.

84. Many commentators have written their views regarding what the *Brown* Court should have said. *See, e.g.*, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001) (collection of essays by leading constitutional authors).

85. *Brown*, 345 U.S. at 494-95 ("separate but equal" doctrine from *Plessy v. Ferguson*, 163 U.S. 537 (1896) eradicated).

> between African-American and White children, he responded, "Simple. Put the dumb Colored children in with the dumb White children, and put the smart Colored children with the smart White kids." That is, using test performance to assign students to schools would not violate the Constitution—even, presumably, if some of the classrooms that resulted were not racially balanced. According to the Court, this side of *Brown* required only desegregation, not integration. The most significant consequence of this vision in the long run was the validation of neighborhood school policies in circumstances of residential segregation.[86]

Tushnet also noted how:

> Prior to *Brown*, the Court routinely treated constitutional rights as "present and personal." A litigant who established injury from a constitutional violation was entitled to a remedy offering relief from the injury, such as damages, or, of more relevance here, an injunction immediately ameliorating the unconstitutional injury. The Court invoked that "present and personal" concept when it held segregation in universities unconstitutional. I believe most of the Justices understood that invalidating university segregation would start them down the road leading to the invalidation of segregation of elementary and secondary schools, as they did in *Brown*. Justice Tom Clark, for example, concluded a memorandum to his colleagues by explaining his vote against segregation at the University of Texas: "How will I vote when the . . . grammar school cases arise? I do not know. . . . [But, if] some say this undermines *Plessy* [*v. Ferguson*] then let it fall as have many Nineteenth Century oracles."[87]

Professor Bryan Adamson put it slightly different:

> It might be said that *Brown* was supposed to do two things: 1) provide immediate relief to the litigants and the school districts, and 2) provide a directive steeped in constitutional doctrine to eliminate all vestiges of segregation and discrimination in not only those schools directly involved in the litigation, but public school systems nationwide. However, it quickly became clear that *Brown* could not "simply" be about *school* segregation and discrimination. To be an unmitigated success, *Brown* would have to address the

86. Mark V. Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23, 23 (1992) (footnotes omitted).

87. *Id*. at 25 (alterations in original) (footnotes omitted) (citation omitted).

> segregation and discrimination that infected virtually every aspect of our country.[88]

For me, the critical weakness of the Court's decision was its failure to capture the scope of the violation. The government's denial of educational opportunity through segregation policies altered the trajectory of the lives of black people across the United States. The Court should have acknowledged how segregation created black caste.

C. A Narrow Remedy for a Narrow Violation

In *Brown II*, the Court began to frame the constitutional remedy narrowly, writing:

> . . . School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.[89]
>
> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.[90]
>
> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws

88. Bryan L. Adamson, *A Thousand Humiliations: What* Brown *Could Not Do*, 9 SCHOLAR 187, 189 (2007) (alterations in original) (footnotes omitted).

89. Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955).

90. *Id*. at 300 (footnotes omitted).

> and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.[91]
>
> The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.[92]

As in *Brown I*, in *Brown II* the language of the Court is partly majestic and full of promise. The Court imposed on the government a duty to dismantle dual systems of education, one for whites and one for blacks. However, the Court stopped there—at segregation. The remedial cure was ending segregation. The Court did not order the government to remedy all that segregation caused, namely, black caste.

Professor James Pfander has examined commentaries on the Court's failure:

> Many observers have commented upon the Court's failure to secure school integration in the wake of its *Brown* decisions. Some view the Court's failure as evidence that the Supreme Court cannot implement significant social change through a judicial decree. On this account, only a change in society itself, perhaps buttressed with the support of the legislative branch, can make a significant difference on large questions of social policy. Others view the Court's failure as one of will. Believers in this analysis think that *Brown I* was rightly decided, stating that an enduring principle of equality, but that the Court declined to do the hard work necessary to deliver on that promise. For these observers, the Court betrayed the promise of *Brown I* by failing to insist on Southern compliance;

91. *Id*. at 300–01.
92. *Id*. at 301.

> by failing to address de facto segregation in the North; by treating the suburbs and cities as distinct polities for integration purposes; by failing to deal with the enormous financial disparities between school districts; and by winking at these failures in recent decisions to approve the termination of federal judicial oversight. In the end, both groups of observers agree that the Court did not deliver the goods.[93]

I agree with such critiques, but go further to illuminate the Court's bias. Because the Court poorly framed the constitutional violation, it also poorly constructed a remedy for black caste.

D. Brown*'s Bias*

Brown's intrinsic bias has multiple dimensions. The Court failed to acknowledge the cumulative educational benefits for white children from segregation. The Court also failed to denote the cumulative educational disadvantages for black children from segregation. Beyond stigma, school segregation extended a legacy of denying blacks equal chances to learn to read and write, to accumulate skills, to earn degrees, to gain better employment, to earn better wages, to attain wealth, to acquire property, and so on. The Court failed to reveal that segregation was a legal tool to keep black people in their subordinate place, not just in the South, but throughout the country. Moreover, the Court failed to guarantee minority children equal educational opportunities in the future. The Court refused to declare a federal constitutional right to education, a most basic right. Additionally, the Court failed to force any state to provide every person an adequate and equitable education, leaving most minority children subject to myriad forms of educational discrimination, including racialized tracking, racial isolation, impoverished schools, and racialized curricular offerings.

What the Court failed to discuss and deal with in *Brown* is its legacy of bias. That legacy reveals how the Court almost always advances the interests of the powerful, not the powerless. *Brown* was a political compromise, negotiated over several years by the justices then serving on the Court.[94] Much was sacrificed to

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93. James E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 Law & Ineq. 47, 49–50 (2006) (footnotes omitted).

94. '[Chief Justice] Vinson was worried that the costs of the remedy might outweigh the benefit of declaring the right, even if he could see his way to doing so.' Schwartz does not even believe that Vinson would have 'seen his way to doing so,' writing that 'Vinson indicated in fact that he was leaning toward affirming the lower-court decisions—which meant a vote in favor of upholding the constitutionality of segregation.'
Mark V. Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91

achieve a unanimous decision.

Notwithstanding its important failings, *Brown* matters because it was the principal vehicle for the destruction of formal American apartheid.[95] It was the embodiment of the Court's repudiation of *Plessy*'s sixty-year endorsement of Jim Crow. The *Brown* Court rejected state-sponsored racial separateness, a key pillar of the American racial caste system. *Brown*'s majesty was its assault on white supremacy as national policy. However, *Brown* did not cast out all aspects of legal bias. The law after *Brown* served the interests of the powerful, not—to use Peter Irons' title—the children of *Brown*.[96] National practice has continued to advance educational disparities and racial castes.[97]

III. Reconstructing *Brown's* Remedial Principles to Overcome Legal Bias

At various times, the Court has declared that the purpose of a constitutional remedy is to put the plaintiff in the position he or she would have been in absent the constitutional violation.[98] The Court has also said the scope of the remedy depends on the nature and scope of the violation.[99]

A. When Remedial Principles Fail

Consider the Court's language in *Swann*:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would

Colum. L. Rev. 1867, 1871–72 (1991).

95. In a series of per curiam opinions, the Court extended *Brown* beyond schools to all areas of public life. *See, e.g.*, State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (per curiam) (boxing); New Orleans City Park Improvement Ass'n v. DeTiege, 358 U.S. 54 (1958) (per curiam) (city parks); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches).

96. *See generally* Peter Irons, Jim Crow's Children: The Broken Promise of the *Brown* Decision (2002) (proposing that the lack of federal judicial backing in the integration of African Americans has led to a contemporary, unequal distribution of civil rights).

97. *See generally* Hacker, *supra* note 2; Irons, *supra* note 96; Kozol, *supra* note 76.

98. *See, e.g.*, Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 280–81 (1977).

99. *See, e.g.*, Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974).

> be eliminated root and branch."[100]
>
> . . . Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.[101]
>
> . . . However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.[102]
>
> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.[103]
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.[104]

The Court made similar statements in *Milliken I*:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing

100. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (citation omitted).
101. *Id*. at 15.
102. *Id*. at 15–16.
103. *Id*. at 16.
104. *Id*. at 16.

> a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. . . . Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.[105]
>
> . . . .
>
> The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit district to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so.[106]

In *Milliken II*, the Court sustained a broad remedial plan, explaining:

> We granted certiorari in this case to consider two questions concerning the remedial powers of federal district courts in school desegregation cases, namely, whether a District Court can, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation . . . .[107]
>
> . . . .
>
> . . . In the first case concerning federal courts' remedial powers in eliminating *de jure* school segregation, the Court laid down the basic rule which governs to this day: "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles."[108]
>
> Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional

105. Milliken I, 418 U.S. 717, 744–45 (1974) (citing *Swann*, 402 U.S. at 16.
106. *Id*. at 746–47.
107. Milliken II, 433 U.S. 267, 269 (1977).
108. *Id*. at 279–80 (alteration in original) (citing Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)).

violation. The remedy must therefore be related to "the *condition* alleged to offend the Constitution . . . ." Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.[109]

. . . .

The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . .[110]

The "condition" offending the Constitution is Detroit's *de jure* segregated school system, which was so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations by both state and local officials. These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.[111]

. . . .

. . . In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.[112]

. . . .

Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences

109. *Id*. at 280–81 (alterations in original) (footnotes omitted) (citations omitted).
110. *Id*. at 281–82 (citation omitted).
111. *Id*. at 282.
112. *Id*. at 283.

> linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.[113]
>
> . . . .
>
> These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*. Rather, by the nature of the antecedent violation, which on this record caused significant deficiencies in communications skills—reading and speaking—the victims of Detroit's *de jure* segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.[114]

B. Restoring Victims to the Position They Would Have Held

Other commentators have shown that "[t]he justices agree[d] that remedies for unconstitutional discrimination should 'restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"[115] Had the Court framed the constitutional violation more broadly, it could then have applied the same equity principles to place the victims of racial discrimination in the position they would have occupied absent such invidious conduct. In my view, this means eliminating not only segregation, but also its consequences. I have no reason to believe that black people would be mired in caste today if not for slavery, segregation, and related discrimination. Thus, the Court has not applied its remedial principles fully or adequately. I agree with Wendy Parker that to resolve the plaintiffs' disadvantage in school desegregation cases, "judges should define more precisely plaintiffs' rights, focus more particularly on the prospective aspects of the remedy, and recognize their own remedial discretion."[116]

113. *Id*. at 287–88.

114. *Id*. at 290 (alterations in original) (footnotes omitted).

115. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65, 77 (2008).

116. Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas*

Recently, Justice Ginsburg deployed these principles to take down sexual Jim Crow at the Virginia Military Institute (VMI). In *United States v. Virginia*, the Court had before it Virginia's "incomparable military college," VMI.[117] The federal government argued that the equal protection guarantee of the Constitution barred Virginia from reserving solely to men the exclusive educational opportunities VMI provides. The Court agreed. Its analysis is instructive:

> The issue . . . is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.[118]
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> . . . .
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> A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." The constitutional violation in this suit is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future."[119]

Ginsburg's framing is broader. The constitutional obligation is to eliminate the discriminatory effects of the past and to bar discrimination in the future.

> Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly address[ed] and relate[d] to" the violation, *i.e.*, the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers.[120]

By leaving in place the exclusionary policy, the state failed to meet its constitutional duty. However, the Court did not stop there. It declared the remedy was deficient:

Cities, 50 HASTINGS L.J. 475, 479–80 (1999).

117. 518 U.S. 515, 519 (1996).
118. *Id*. at 542 (citation omitted).
119. *Id*. at 547 (citations omitted).
120. *Id*. at 547–48 (alterations in original) (citation omitted).

> Virginia's Virginia Women's Institute for Leadership (VWIL) solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African-Americans could not be denied a legal education at a state facility. Reluctant to admit African-Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas."[121]
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> . . . .
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> When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed women denied the VMI advantage in "the position they would have occupied in the absence of [discrimination]."[122]

C. Remedying Educational Inequality and Black Caste

Justice Ginsburg found a constitutional violation in the denial of equal educational opportunity for any woman who desired to enroll at VMI. She also rejected as inadequate the state's constitutional remedy, an inferior educational opportunity at VWIL. By defining this constitutional violation in broad terms, Justice Ginsburg could then frame the constitutional remedy in equally broad terms, and so long as the remedy left women in caste, the remedy was constitutionally defective.

I see in Justice Ginsburg's opinion a glimmer of opportunity to reduce institutionalized legal bias. Advocates fighting continuing inferior educational opportunities for minorities could use Justice Ginsburg's approach.

Conclusion

As time passes, it is increasingly difficult to show a causal connection between current black caste and prior caste-producing policies.[123] Additionally, it appears that many on the Court are prepared to place a burden of proof to establish

121. *Id*. at 553 (citations omitted).

122. *Id*. at 554 (alteration in original) (citation omitted).

123. *See* Dora W. Klein, *Beyond* Brown v. Board of Education*: The Need to Remedy the Achievement Gap*, 31 J.L. & Educ. 431, 434 (2002).

such causal links on the plaintiffs seeking to eliminate black caste.[124] I continue to believe that such a burden should be placed on the government to show that it has done nothing to produce current black caste.

Suppose the Court had defined the constitutional violation not as segregation, but rather the systematic and ongoing denial of adequate and equitable educational opportunity for black children over several generations, with the resulting consequences of widespread poverty and disadvantage. What if the Court linked segregation's exclusion of blacks to the creation of their political, economic, and social caste? The Court could next have written that the purpose of a constitutional remedy is "to place the plaintiffs in the position they would have been in absent the constitutional violation"—that is, absent the systematic and ongoing denial of adequate and equitable educational opportunity. The Court might then have held that the proper remedy was not simply unitary schools or school assignments on a non-segregated basis. The proper constitutional remedy would have been much more: to place black people in the position they would have been in absent the violation, that is, in schools that are adequate and equitable, schools that would not leave black people in a permanent American caste.

124. As one commentator put it:

> When deciding whether a particular racial inequality violates equal protection under *Brown*, courts first consider whether the inequality involves one of the six factors identified in *Green v. County School Board* (students, faculty, staff, transportation, extracurricular activities or facilities) or involves a factor that a particular desegregation decree has identified as a vestige of *de jure* segregation. If the disparity does involve one of these factors, a court typically will presume the disparity is causally related to the prior system of *de jure* segregation and therefore is a continuing violation of the Fourteenth Amendment. The party claiming the disparity is not a vestige of prior constitutional violations then bears the burden of proving the cause of the disparity is either nondiscriminatory policies or practices of the school district, or conditions beyond the control of the school district. If, however, the disparity does not involve one of these factors, a court typically will not presume the disparity is a vestige of *de jure* segregation. The party claiming the disparity is a vestige of *de jure* segregation then bears the burden of proving the cause of the disparity is prior constitutional violations by the school district.

Id. at 438–39 (footnotes omitted).