1993

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THE LEGAL RHETORICAL STRUCTURE FOR THE CONVERSION OF DESEGREGATION LAWSUITS TO QUALITY EDUCATION LAWSUITS

Kevin Brown*

I. INTRODUCTION

Legal opinions are influenced by social and political struggles that exist outside of the legal system. These extra-legal considerations will often shape strategies and influence what particular plaintiffs request in the form of relief from the legal system. This is particularly true of public school de jure segregation litigation because it has important extra-legal political and social implications. If the understanding of legal opinions and strategies pursued by various litigants is limited to a focus on purely judicial considerations of a given issue, important extra-legal factors and considerations that serve to structure the litigation will be missed. Therefore, in order to fully understand the impact of legal opinions in school desegregation cases, it is necessary to situate those opinions in the broader social and political context which produce and structure the issues presented to the judicial system for resolution.

The Supreme Court's opinion in Freeman v. Pitts1 has the potential to set off a new round of debate, particularly in African-American communities around the country, about racially separate as opposed to integrated education.2 The Court's opinion in Freeman gives federal district courts

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* Professor of Law, Indiana University School of Law. The author would like to thank Professors Theodore Shaw and Brian Landsberg for their insightful and helpful comments. The author would also like to thank Cheryl Peebles for her exceptional research assistance and Krystie Herndon for her exceptional secretarial assistance. Finally, this author would like to dedicate this Article to the memory of the late Professor Dwight Greene of Hofstra Law School. Through numerous discussions and interactions over the past several years, Professor Greene has been an inspiration and a motivator to the author in forcing him to subject his ideas to a far more rigorous examination than he otherwise would have.


2 I want to define the following terms that will be used in this Article, in order to avoid confusion about them. I will use the term "segregation" to mean legally required racial separation. I will use the term "desegregation" to refer to court-ordered racial balancing of public schools. I will use the terms "racially separate" or "separate" to refer to the concept of voluntarily choosing racially separate public education. Finally, I will use the term "integrated" education to refer to bi-racial education of blacks and whites. The term "integration" can therefore encompass the term "desegregation."
broad discretion in determining whether partial withdrawal of court supervision over a formerly de jure segregated school system is warranted. The Court approved the district court's release of supervision over portions of the DeKalb County School System, including student assignments, while maintaining control over other aspects of the school system. It also approved the district court's order of specific remedial measures aimed at equalizing the quality of education provided to the existing de facto segregated black and white schools. *Freeman* sets up the possibility for African-American communities—acting through black plaintiffs and their lawyers—to ask a district court to terminate its control over student assignments, while maintaining control over other aspects of the school system. This can be done in order to assure, through court supervision, that existing and resulting racially imbalanced schools are provided with equal educational resources, including equal funding, even while retaining their racial imbalance. The effect of the Court's opinion in *Freeman*, therefore, was to convert a desegregation lawsuit into a quality education lawsuit. In the aftermath of *Freeman v. Pitts*, many African-American communities will once again revisit the question of whether the educational interest of black school children is best served by separate as opposed to integrated education.

This Article will elucidate the rhetorical advantage in the African-American community for those groups who prefer to convert desegregation lawsuits into quality education lawsuits. In order to do that it is necessary to situate the debate about these potential conversions into their historical context. First, I will briefly discuss the issue of integrated as opposed to separate education as it has been debated by the African-American community throughout America's history. I will then discuss the Supreme Court's opinion in *Freeman v. Pitts* to illustrate its ability to spark a new debate about the sagacity of integrated as opposed to racially separate education under the guise of converting desegregation lawsuits into quality education lawsuits. I will then focus on the analytical framework erected by the Supreme Court to justify school desegregation as the primary remedy for de jure segregation. Legal justification for the continued maintenance of desegregation—as opposed to converting to quality education—must be carried out by lawyers whose arguments must be conducted within the limits of this analytical framework. I believe that proponents of

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* Id. at 1446.
separate education are now in a stronger rhetorical position than proponents of integrated education. The rhetorical advantage that exists for proponents of conversion to quality education rests in the structure of the Supreme Court’s analytical framework that led to ordering desegregation. I will therefore conclude this Article by highlighting that rhetorical advantage. The advantage stems from the fact that proponents of quality education are in a much stronger position to appeal to notions of racial pride and abilities of African-Americans to solve their own problems than proponents of continued desegregation.

II. The Historical Debate Regarding Separation as Opposed to Integration in Education

In the larger American society, African-Americans are a subgroup who share a distinctive phenotype. The historical domination and subordination of those with this distinctive phenotype has forged a separate subcultural group from a number of different black ethnic groups that were brought to America. Against the historical background of racial domination, African-Americans have forged a separate set of cultural ideas, attitudes, opinions, and beliefs regarding American society, how it works, and African-Americans’ place within it. In this cultural ideology, which has grown up alongside the dominant American cultural story about African-Americans, the African-American community has been active in a process of self-formation. This cultural ideology can be thought of as a counter discourse to dominant American culture. It conceptualizes the social world

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4 Lois Weis, in an ethnographic study of black students in an integrated community college, noted that for black students the relationship to education is paradoxical. African-Americans, she claims, do not consciously reject school and knowledge, but tend to behave in ways that make school success unlikely. While expressing a strong desire for education in order to escape poverty, they tend to be excessively tardy and to lack a serious attitude and perseverance toward their school work. In an effort to interpret this paradoxical situation, she has suggested that it may be that blacks have developed high educational aspirations as a result of their long history of collective struggle for equal education as a form of opposition against white people who denied them access to education and equal educational opportunity. Hence, the high educational aspirations are a result of the collective struggle against racial oppression. But African-Americans find that their collective struggle for equal education has not worked for them in the same way as it has for whites. Consequently, the behavior that undermines their success in school is a form of opposition in an effort to distance themselves from schooling. The oppositional nature of African-American culture can therefore account both for high educational aspirations and for behaviors that undermine the ability to achieve success in school. See John U. Ogbu, Class Stratification, Racial Stratification, and Schooling, in Class, Race & Gender in American Education 170-171 (Lois Weis ed., 1988) (discussing Lois Weis’ work).
primarily as a struggle by African-Americans against racial oppression and domination. This counter discourse holds the key for understanding a counter interpretation of the behaviors and attitudes expressed by African-Americans from that contained in the dominant American cultural belief system. Given the conception of the social world which this counter discourse is built upon, it is not surprising to find that one of its core beliefs is a high degree of skepticism and mistrust towards whites and the institutions which they control.

The debate over separate versus integrated education in the African-American community is part of this overall cultural narrative. As an issue for blacks, this debate did not commence in the 1950s with the prelude to Brown v. Board of Education. This debate is, in fact, almost as old as the American political union itself.

One of the first places where separate versus integrated education was debated by the black community was in Boston, Massachusetts. Shortly after the American Revolution, Boston began the process of organizing the first urban public school system in the nation. At a town meeting in 1789, three writing schools and three reading schools were established in Boston for the instruction of children between the ages of seven and fourteen. The early Boston school law did not exclude blacks from attendance at these community schools. Within one year, however, "vex and insult" had driven all but three or four black students from Boston's community schools. Hosea Easton, a black who had been enrolled in the Boston community schools, recalled that his former school teachers sent bad youngsters, white and black, to the so-called "nigger seat," telling them such things as they would be as poor or ignorant as a nigger, or have no

8 I am not trying to suggest that African-American culture is better or worse than the dominant cultural ideology in American society, only that it is different. Nor do I wish to suggest that there is one undifferentiated African-American culture. Certainly, African-American culture will vary based upon geographic, religious, class, color, and gender variations.

6 See Ogbu, supra note 4, at 172-78.


10 SCHULTZ, supra note 8, at 161.

It was in Boston, within the context of discrimination in integrated schools, that blacks made their first request for publicly funded separate education. The parents of Boston’s black school children wanted to satisfy their desire that their children receive a quality education, and also shield them from the prejudice they would be subjected to in integrated schools. In 1787, Prince Hall delivered a petition from Boston’s black community to the legislature of the Commonwealth of Massachusetts. The petition requested that the legislature order the Boston School Committee to establish a school for Boston’s black community. The petition was denied by the Massachusetts legislature. Despite this setback, the pursuit of separate schools for blacks in Boston continued.

In 1798, a school for “colored children” under the charge of Elisha Sylvester, a white man, was established in the house of Prince Hall. Two years later Boston’s black community presented a funding request for separate schools for blacks to the Boston School Committee. The citizens of Boston, in a special town meeting called to consider the question, refused to grant the request. In 1812, however, the School Committee agreed to take over funding and control of a private school started by blacks. By 1830, a completely segregated public school system for black children had developed, consisting of three primary schools.

Even as Boston moved towards its publicly funded separated school system, the seeds of discord regarding the sagacity of racially separate education had already been sown. Parents of the African-American children

12 Hosea Easton, A Treatise on the Intellectual Character and Civil and Political Conditions of the Colored People of the United States and the Prejudice Exercised Toward Them 40-43 (Boston, Knapp 1837); see also Schultz, supra note 8, at 160 (pointing to the fact that the lack of attendance at Boston schools by blacks was also a result of the deplorable economic condition of the black community in Boston).
13 Schultz, supra note 8, at 160.
14 Prince Hall et al., Petition to the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts Bay in General Court Assembled (Oct. 17, 1787), in 1 A Documentary History of the Negro People in the United States 19 (Herbert Aptheker ed., 1969).
15 C. G. Woodson, The Education of the Negro Prior to 1861, at 95 (1919). Woodson calls him Primus Hall, but he is also known as “Prince Hall.” See 1 A Documentary History of the Negro People in the United States, supra note 14, at 19.
16 Woodson, supra note 15, at 95.
17 Schultz, supra note 8, at 167.
attending the separate schools had complained about the education their children were receiving in them for some time. David Walker, for example, often criticized the separate schools, arguing that they did not provide adequate educational instruction for black children. In addition, there was no high school provided for the black children as there was for the white children. The reason given by white officials was simply that black children did not need to go to high school.

In 1833 an investigation of the Boston schools revealed the "obnoxious contrast between the low and confined room" in which blacks were educated and the convenient and healthful accommodations offered to white children. In addition, the teachers at the black school were often paid considerably less than those at the white schools. The separate black schools were systematically under-funded and many of the subjects offered in the white schools of the district were not offered in the schools attended by blacks. In effect, the black school children were being deprived of the resources necessary for effective education.

In 1844, Thomas Dalton led a group of seventy of his neighbors to demand that their children be allowed to attend the district schools for whites. This demand was rebuffed. This round of attempting to eliminate racial separation in the Boston schools eventually led to the case of Roberts v. Boston. There the Massachusetts Supreme Judicial Court upheld the authority of the Boston School Committee to segregate the schools. Success, however, finally came to the proponents of integrated schools when the Massachusetts General Legislature passed a law in 1855 making segregation illegal.

The debate over separate versus integrated education also arose during

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19 Schultz, supra note 8, at 166.
20 Id.
21 Id. at 166-69.
22 White, supra note 11, at 512.
23 59 Mass. (5 Cush.) 198 (1850). The United States Supreme Court, when it upheld the segregation statute presented to it in Plessy v. Ferguson, 163 U.S. 537, 544-45 (1896), cited Roberts v. Boston to show that the states had long legitimized de jure segregation.
24 White, supra note 11, at 513. For a recent reexamination of the contemporary Boston school desegregation litigation, see Ronald P. Formisano, Boston Against Busing: Race, Class, and Ethnicity in the 1960s and 1970s (1991).
the state constitutional conventions in the former Confederate states following the Civil War in 1867 and 1868. Prior to the Civil War there had been no general system of public education in the South. The first massive effort in the South at constructing a public education system was the result of reconstruction after the Civil War. Because of white resistance to integrated schools, however, the heated debates that occurred in nearly every state convention regarding the issue of public school segregation were to a large degree only theoretical. One commentator noted that the freed slaves who voiced their opinion in support of integrated education cared less for the higher principles involved, but were more concerned with practical considerations of quality and effectiveness. Separate schools would mean inferior schools in the sense that these schools would be underfunded. As long as the education was on a nonsegregated basis, though, the black students were not vulnerable to the systematic underfunding of their schools. Professor John Hope Franklin has noted that many white southern legislators during the segregation period were not adverse to reducing educational expenditures for both black and white students. Even so, they would go as far as possible in cutting the funds for the black schools before trimming the budgets of the white schools.

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25 Most of the state conventions avoided the issue of segregation by tabling motions either to mandate or to prohibit segregated schools. No state constitution required that schools be segregated, and only two—South Carolina and Louisiana—forbade segregation in public schools. In practice, however, desegregation prevailed only at the University of South Carolina and in several Louisiana elementary schools, mostly in New Orleans. The ability to successfully desegregate some schools in New Orleans resulted partially from its cosmopolitan ethnic heritage. Because of the spectrum of colors in New Orleans it was difficult to tell where black and white began and ended. Nevertheless, the efforts to integrate schools caused several thousand white children to transfer to private schools or to drop out all together. The admission of blacks to the University of South Carolina in 1873, too, was of dubious success. Nearly all the whites withdrew, so that by 1875, 90% of the students were black and the remaining few whites were mostly the sons of carpetbaggers or Northern missionaries. JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 537, 575-76 (1982).

27 Horace Mann Bond, Education of the Negro in the American Social Order 56 (Octagon 1966) (1934).

28 The expenditures per student for white schools even during the Reconstruction years of the 1870s was reported to be 30% to 40% higher than those at the black schools. MCPHERSON, supra note 25, at 577.

29 John Hope Franklin, Jim Crow Goes to School, 58 S. ATLANTIC Q. 225, 234-35 (1959). The segregation versus desegregation debate was also touched off when in 1863 Chicago passed the Black School Law mandating segregation for children attending school. The refusal of black parents to comply with the law helped lead to its repeal two years later. See PAUL E. PETERSON, THE POLITICS
As virtually everyone knows, the debate over segregated versus integrated schools raged again during the 1950s and 1960s in the prelude and aftermath of *Brown v. Board of Education* and *Green v. County School Board*. In short, the debate over the conversion of desegregation lawsuits into quality education lawsuits is just the latest chapter in a two hundred year old debate about the best educational interests of blacks. Arguments surrounding the issue of integrated as opposed to segregated schools within the African-American community have been articulated against a cultural backdrop of mistrust of dominant American society. Racially separate education controlled by the African-American community provides educators with the opportunity to tailor the educational programs of schools to the needs and interests of African-Americans. The historical downside of racially separate education, however, is that it leaves African-American children systematically vulnerable to hostile and insensitive treatment in the form of systematic deprivation of the educational resources needed to effectively educate their children. Integrated education increases the difficulty of systematically depriving African-American children access to sufficient educational resources. In racially mixed schools,
however, African-American children are often confronted with hostile and alienating learning environments, because these schools are typically geared towards the educational needs and interests of the white majority children.85

III. FREEMAN v. PITTS

The DeKalb County School System ("DCSS") is located in a suburban area outside Atlanta, Georgia. In 1968, African-American school children and their parents instituted a federal class action suit in the Northern District of Georgia challenging DCSS' de jure segregation.86 After the suit was filed, DCSS worked out a comprehensive desegregation plan with the Department of Health, Education, and Welfare. The district court approved the proposed plan and entered a consent order in June, 1969. Under the plan, all of the former de jure black schools in DCSS were closed and their students were reassigned to the remaining neighborhood schools. The district court found that DCSS was desegregated for a short period of time under this court-ordered plan.87

According to the Supreme Court, between 1969 and 1986 respondents sought only infrequent and limited judicial intervention.88 Between 1969 and 1986, however, the population in DeKalb County grew significantly. Whites migrated to the northern part of the county while African-Americans migrated to the southern part.89 In 1969, African-Americans made up only 5.6% of the student body of DCSS. By the 1986-87 school year, however, their percentage had increased to 47%. A significant amount of racial imbalance in student school assignments also existed in DCSS. Over half of the African-American students attended schools that

85 See RAYMOND C. RIST, THE INVISIBLE CHILDREN; SCHOOL INTEGRATION IN AMERICAN SOCIETY (1978). For one year, the author followed a group of young black children bused to an urban, middle-class, and largely white school. The principal applied a policy of treating all students alike, which in practice meant that the black children were expected to perform and behave no differently than did the white children from the comfortable suburbs. The result was disastrous for the black children. Id.; see also JAMES A. BANKS, MULTIETHNIC EDUCATION 161-64 (2d ed. 1988) (noting that even when schools assert that their educational program is multicultural it still retains its Anglo-centric orientation).
87 Id. at 1439.
88 Id. at 1437.
89 Id. at 1438.
were over 90% black and 62% of them attended schools where more than 67% of the students were black (20% more than the system-wide average). Of the white students enrolled in DCSS, 27% attended schools that were over 90% white and 59% attended schools where the percentage of white students exceeded by 20% the system-wide percentage of white students.40

Despite the amount of racial imbalance in the schools, in 1986 the School Board filed a motion for final dismissal of the litigation. In order to determine whether DCSS had eliminated the vestiges of its prior de jure conduct, the district court examined the "Green factors."41 Even though there was significant racial imbalance in student assignments, the district court found that DCSS was unitary not only with regard to student assignments, but also in the areas of transportation, physical facilities, and extracurricular activities.42 The district court concluded that the racial imbalance of the students was attributable to the rapid demographic shifts that had occurred in DeKalb County and to other factors, but not to the prior unconstitutional conduct of DCSS.43

Even though the district court concluded that the racial imbalance was not the result of prior unconstitutional conduct, the district court did not ignore the implications of a significant amount of racial imbalance. Because of the existence of such a large amount of racial imbalance, there were many schools in the system that were predominately black or predominately white. The district court specifically compared the quality of education DCSS provided to its students in its predominantly black schools with that provided to the students in the white schools. Not only did the district court examine resource allocation, but it also examined

40 Id.
41 In Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991), the Court stated that in considering whether the vestiges of de jure segregation have been eliminated as far as practicable, the district court should look not only at student assignments, but also to existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities (the "Green factors").
42 Freeman, 112 S. Ct. at 1440-42.
43 Id. at 1440. The district court examined the interaction between DCSS policy and the demographic changes in DeKalb County. Of the 170 changes made by DCSS, only three were found to have had a segregative effect, and that effect was considered minor. The district court concluded that DCSS had achieved maximum practical desegregation. It found that the existing segregation of students was attributable to demographic shifts that were inevitable as the result of suburbanization, the decline in the number of children born to white families, blockbusting of formerly white neighborhoods which led to a highly dynamic real estate market in DeKalb County, and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. Id.
measures of student achievement. The district court found that DCSS assigned experienced teachers and teachers with graduate degrees in a racially imbalanced manner. It also found that DCSS spent more money educating white students than it did on the education of black students.

The district court ordered DCSS to equalize per pupil expenditures and to assign experienced teachers and teachers with advanced degrees equally between the primarily black schools and the primarily white schools. The district court also concluded that vestiges of the dual segregated system remained in the areas of teacher and principal assignments (one of the Green factors). However, it rejected the notion that DCSS had not done enough to improve the educational performance of black students, specifically citing improvements by DCSS’ black students on the Iowa Tests of Basic Skills and on the Scholastic Aptitude Test.

On appeal, the Eleventh Circuit rejected the district court’s incremental approach to the elimination of vestiges of prior de jure conduct. It held that the district court erred in considering the six Green factors as separate categories. In order for a school system to achieve unitary status, the court said, it must satisfy all of the Green factors at the same time for at least three years. The Eleventh Circuit also held that a system that had once been segregated by law could not justify continued racial imbalance by pointing to demographic changes, at least until the system had eradicated all vestiges of segregation. Since DCSS had not done this, the Eleventh Circuit held that it bore the responsibility for the current racial imbalance and had to correct that imbalance.

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45 Freeman, 887 F.2d at 1442.
46 Id. at 1450.
47 The district court found that, while there had not been any intentional segregation, DCSS had not maintained a ratio of black to white teachers and administrators in each school proportional to the ratio of black to white teachers and administrators throughout the system. Black principals and administrators were overrepresented in schools with high percentages of black students and underrepresented in schools with low percentages of black students. In addition, teachers in white schools tended to be better educated and to have more experience than their counterparts in schools with disproportionately high percentages of black students. Moreover, per pupil expenditures in predominantly white schools exceeded those in predominantly black schools. Id. at 1441-42.
48 Freeman, 112 S. Ct. at 1441-42.
49 Freeman, 887 F.2d at 1446.
50 Id. at 1450.
51 Id. at 1449.
52 Id. at 1448.
In a majority opinion authored by Justice Kennedy, the Supreme Court agreed with the district court's conclusion that the Green factors could be considered separately and that partial relinquishment of supervision and control of a school system in an appropriate case does not offend the Constitution. Justice Kennedy's opinion emphasized that the decision to withdraw supervision lay in the sound discretion of the district court. The factors that should be considered by a district court in determining whether partial withdrawal is warranted include:

[W]hether there has been full and satisfactory compliance with the [court] decree in those aspects of the system where supervision is being withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

Justice Kennedy went on to note that in considering these factors a court should give particular attention to the school system's record of compliance, stating that "[a] school system is better positioned to demonstrate good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct."

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83 Justice Kennedy stated:
We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. ... [U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.

Freeman, 112 S. Ct. at 1445-46. Justice Kennedy's opinion was joined by Chief Justice Rehnquist and by Justices White, Souter, and Scalia. In addition to joining the opinion of the Court, Justices Scalia and Souter also wrote separate concurring opinions.

84 Id. at 1446.
85 Id.
86 Id.
Since both parties to the litigation agreed that quality of education was a legitimate subject of inquiry for the district court and neither party challenged the court's retention of supervision, the Court indicated that it was not necessary for it to examine this issue.\textsuperscript{57} The Court went on to note approvingly, however, that the district court's consideration of quality of education illustrated the fact that the \textit{Green} factors were not to be a rigid framework.\textsuperscript{58} Given the fact that the Supreme Court approved the inquiry into issues related to quality of education, it is certainly within the discretion of the district court to consider such factors in determining whether partial release of court supervision is warranted.

The Court's opinion in \textit{Freeman v. Pitts} has the potential to set off a new round of debates, particularly in many African-American communities around the country, about racially separate as opposed to integrated education. The Court's opinion in \textit{Freeman} gives district courts broad discretion in determining whether partial withdrawal of court supervision over a former de jure segregated school system is warranted.\textsuperscript{59} In substance, the Court approved the district court's release of supervision over student assignments, but it also approved the district court's decision to maintain control over other aspects of the school system in order to assure equity in the provision of educational resources. In effect, the Court approved the conversion of a school desegregation lawsuit into a quality education lawsuit.

The \textit{Freeman} opinion sets up the possibility for African-American communities—acting through black plaintiffs and their lawyers—to ask a district court to terminate its control over student assignments, and yet maintain control over other aspects of the school system. This can be done in order to assure that existing and resulting racially imbalanced schools are provided with equal educational resources, including equal funding. This raises the core issue of separate as opposed to integrated education for black school children.

\textsuperscript{57} \textit{Id.}.

\textsuperscript{58} \textit{Id.} at 1446-47.

\textsuperscript{59} \textit{Id.} at 1445-46.
IV. The Supreme Court's Analytical Framework for the Harm of De Jure Segregation

Our legal system consists of rules which define their proper sphere of application. These rules are structured around a certain conception of social reality. This conception of social reality is in turn validated by our legal system through its dictation of the kinds of arguments that are persuasive within legal institutions. In order to show why those advocating conversion of desegregation suits into quality education suits are in the stronger rhetorical position, it is necessary to explicate the Supreme Court's analytical framework for resolving de jure segregation in public schools. Legal arguments addressing the issue of continued desegregation or conversion to quality education lawsuits must take place within the confines of this framework. The handicap for advocates of continued desegregation is built into the analytical framework in which this issue will be argued.

In *Freeman v. Pitts*, the Supreme Court also stated that a school system eliminates the vestiges of an unconstitutional de jure system when the injuries and stigma inflicted upon the disfavored race are no longer present. This statement captures the paradoxical nature of the Supreme Court's analytical framework with which those seeking remedies for de jure segregation must contend. On the one hand, the Court indicates that the harm of de jure segregation was an amorphous one of stigma. On the other hand, the Court also states that the harms were tangible, manifesting themselves in some quantifiable way on African-Americans.

There is an important distinction between viewing the harm of de jure segregation as one of stigma and viewing the harm as tangible—psychological, emotional, associational, or educational. According to the former, the harm was the dissemination of the stigmatic message to the community at large that in some important ways African-Americans are "less than" Caucasians. Under this view of the harm, the belief that African-Americans were "less than" Caucasians is viewed as unfounded and irrational. The purpose of remedies for de jure segregation is to stop government from disseminating this message. According to the latter, however, segregation actually made African-Americans inferior to Cauca-
sians. Under this view, such beliefs are not irrational, though the deficit condition of African-Americans is presumed to be curable. Under this view the purpose of remedies for de jure segregation is therefore directed at improving African-Americans in hopes of bringing them up to the standard of whites.

As a result of this analytical framework, the process of curing the vestiges of de jure segregation involved two contradictory elements. On the one hand, public schools were dismantling de jure segregation with its concomitant message that African-Americans were second-class citizens. But at the same time, desegregation—the primary remedy for de jure segregation—was being invested with the same sort of meaning concerning the second-class nature of African-Americans. As a result, a new message about the second-class nature of African-Americans was being disseminated.

A. Stigma as a Harm of De Jure Segregation

In order to get a better handle on the Court’s school desegregation analysis, I would like to explicate the concept of stigma. The stigmatic harm of de jure segregation in public schools results from what has amounted to government dissemination of a message to the community at large that African-Americans are unworthy of respect.61

Issues of race discrimination are resolved by interpreting the Equal Protection Clause of the Fourteenth Amendment. The primary conception of social reality embodied by the Supreme Court’s interpretations of the Fourteenth Amendment generally envisions American society as a collection of individuals independently pursuing their own ends and employing the means to these ends which they find most appropriate.62 These “knowing individuals” of our society are viewed as autonomous, indepen-

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61 The idea that segregation is unconstitutional because it is racially insulting was first suggested in the legal academic literature by Professors Black and Cahn. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421 (1960); Edmond Cahn, Jurisprudence, 30 N.Y.U. L. REV. 150 (1955).

dent, self-directed, coherent, self-defining, and free-willed. Their social action is presumed to be controlled by their intent or preferences.

The conceptual structure of society as a collection of knowing individuals has its own rules for organizing and interpreting social events and for defining the role of government. The role of government is to determine the rights and responsibilities—as well as to settle the disputes that arise—among these knowing individuals in a manner that allows each individual to pursue their own desires, and to prevent them from unjustly interfering with the rights of other persons. The role of government is therefore envisioned as striving to achieve a sort of neutrality that respects equally every knowing individual's pursuit of their various objectives. Neutrality requires that the reasons motivating governmental decision-making must not be biased toward any particular individual or group. If a governmental entity makes its decisions based upon the interest of a particular group, as opposed to the interest of society at large, or fails to respect the dictates of individuality, then it is violating the constraint of neutrality.

The conceptual structure that governmental decisions should treat people as individuals carries with it an implied method in which government

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63 This view of the individual in society can be attributed to the demise of the medieval unitary world view. KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE 13 (1936); see also Pierre Schlag, Normative and Nowhere to Go, 43 STAN. L. REV. 167, 181 (1990); Seyla Benhabib, Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory, 11 CARDOZO L. REV. 1435 (1990).

64 For a fascinating case dealing with attempts by religious adherents to attack the law's vision of social reality as merely one of many competing world views, see Smith v. Board of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987). In this case the plaintiffs attempted to have 44 textbooks used in Mobile County Public Schools banned because the books advanced the religion of secular humanism. Id. at 686-88.

should treat differences involving characteristics which individuals do not choose, such as race, ethnicity, and gender. This conceptual structure leads inexorably to a standard whereby government should treat the individuals who compose our society as devoid of such characteristics as race, ethnicity, or gender. When government, for example, makes decisions motivated by racial considerations, it is treating people as members of a racial group rather than as individuals. This violates the fundamental individualist conception of society. This colorblind normative conception generally means that there is no distinction between governmental decisions which benefit a racial minority group and ones which harm that group, because taking into account a characteristic which individuals do not choose—race—is the violation. Rather than acknowledging any differences regarding race, government should—absent compelling justifications—ignore them in favor of treating people as individuals.

De jure segregation of public schools was a system of administrative rules and regulations founded upon the classification and separation of students based on race. The stigmatic harm of de jure segregation flowed from the symbolic message embodied in the practice. In retrospect, that message was clear—de jure segregation was based upon and symbolized the belief that blacks were not the equal of whites.

The dissemination of this message was not limited to the physical segregation of students and staff. Even though the Brown Court reasoned from the proposition that the physical facilities and other tangible factors of the black public schools were essentially equal to the white public schools, Professor Gotanda, arguing against colorblind decision-making, very convincingly points out that when we attempt to be racially colorblind, we really are not because we have already noticed race and then tried to ignore it. A truly colorblind person would never notice the difference in the first place. Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 STAN. L. REV. 1, 18-19 (1991); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

At the time that the school segregation cases began their climb through the lower courts, state constitutional provisions, state statutes, or local ordinances made segregated schools a requirement in 17 southern and border states and the District of Columbia. Four other states, Arizona, Kansas, New Mexico, and Wyoming had legislation that permitted the maintenance of segregated schools on an optional basis. ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., SEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 6 (2d ed. 1962).


in three of the four state cases the physical facilities and other tangible resources were not in fact equal.\textsuperscript{70} During the “separate but equal” epoch in American society, the “equal” part of this doctrine was generally ignored.\textsuperscript{71} The education of white children was generally considered more important than that of their black counterparts. Consequently, the schools that white children attended were better funded, with longer school terms, more highly paid teachers, and better physical facilities than those for blacks.\textsuperscript{72} The systematic undervaluing and underfunding of the education

\textsuperscript{70} In 1951, when the complaint in Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951), rev’d sub nom. Brown v. Board of Educ., 347 U.S. 483 (1954), was filed, Claredon County spent $43 on the education of each black student as compared to $166 for each white student. I.A. Newby, Challenge to the Court 29 (1967). A three-judge federal district court had denied relief in this case, but ordered the defendants to take steps to equalize the public schools promptly and to report back in six months. Briggs, 98 F. Supp. at 537-38. Subsequently, the three-judge district court found that the county was equalizing the schools “as rapidly as was humanly possible.” Briggs v. Elliott, 103 F. Supp. 920, 922 (E.D.S.C. 1952).


In Gebhart v. Belton, 91 A.2d 137 (Del. 1952), aff’d sub nom. Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court of Delaware affirmed a decision by the Court of Chancery that ordered the admission of black students to previously whites-only schools. 91 A.2d at 140. The court ordered the desegregation remedy because the schools attended by blacks were not physically equal to those attended by whites. Id. at 152. The court, however, implied that segregation laws might be enforced once the school facilities were equalized. Id.


\textsuperscript{71} The willful and flagrant violation of the equality portion of the Plessy principle has been extensively documented. See, e.g., Horace Mann Bond, The Education of the Negro in the American Social Order (1934); Horace Mann Bond, Negro Education in Alabama: A Study in Cotton and Steel (1939); Louis R. Harlan, Separate and Unequal (1958); Robert A. Margo, Disenfranchisement, School Finance, and the Economics of Segregated Schools in the United States South, 1890-1910 (1985); J. Morgan Kousser, Progressivism—For Middle-Class Whites Only: North Carolina Education, 1880-1910, 46 J. S. Hist. 169 (1980).

\textsuperscript{72} RAVITCH, supra note 33, at 121. For example, in 1945, South Carolina spent three times more per child for the education of white children than it did for black children. In 1930, South Carolina actually spent eight times as much for the education of whites as it did for the education of blacks. In the same year, Mississippi spent four and one-half times more per child on white schools than for black schools. In 1929, Mississippi spent as much as nine times more for the education of a white child than for a black child. Id.
of African-Americans stemmed from the same belief that produced segregated schools, and therefore were also complementary components of the stigmatic message disseminated by de jure segregation.73

Public schools that engaged in de jure segregation were therefore disseminating a stigmatic message to the community at large. By disseminating this stigmatic message, government was violating the neutrality principle. Government was engaged in conduct that not only failed to treat people as individuals, but was disseminating a stigmatizing message about African-Americans.

B. Tangible Harms Flowing from De Jure Segregation

According to the Court, the harm of de jure segregation was not limited to stigmatic harm, but included tangible harms as well. These tangible harms can be characterized as psychological, emotional, associational, or educational. The Court's most graphic elucidation of the tangible harms flowing from de jure segregation was in Brown v. Board of Education ("Brown I").74 In the search for a harm inflicted by segregation, the Court specifically pointed to the presumed impact of segregation on African-American school children.75 In one of the most quoted phrases from

73 Scientific racism had long been accepted to justify the Negro's place in the South. Before the Civil War, science provided a major justification for pro-slavery thinking. See, e.g., William Stanton, The Leopard's Spots: Scientific Attitudes Toward Race in America 1815-1859 (1960). Scientists such as Josiah Nott of Alabama, Samuel George Norton of Philadelphia, and Louis Agassiz of Harvard were convinced of the innate inferiority of the slaves. They were able to buttress their beliefs by drawing support from the latest research and most authoritative speculation in anthropology, anthropometry, phrenology, and egyptology. Newby, supra note 70, at 8-9. These scientific attitudes regarding the inferiority of blacks were not significantly altered by the Civil War or America's ensuing period of Reconstruction. The mainstream of scientific thought after 1865 continued to articulate a belief in racial inequality. See, e.g., Thomas F. Gossett, Race: The History of an Idea in America 253-86 (1963).

For a discussion of the views of segregationists regarding the inferiority of African-Americans, see James J. Kilpatrick, The Southern Case for School Segregation (1962); Newby, supra note 70.


75 The Court's analysis in Brown I begins with the assumption that the physical facilities and other tangible qualities of the public schools attended by black and white students were equal. Id. at 493.

The research by the psychologist purporting to show that African-Americans in public schools had lower self-esteem has been the subject of criticism recently in William E. Cross, Jr., Shades of Black: Diversity in African-American Identity (1990). He argues that the psychologist confused racial group preference with self-esteem, assuming that racial group preference would corre-
Brown I,\textsuperscript{76} the Court said, "[t]o separate [African-American youth] 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.\textsuperscript{77} The Court went on to quote approvingly from the district court in Kansas:

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 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[lly] integrated school system.\textsuperscript{78}

To begin with, the Court explicitly stated that segregation retarded the educational and mental development of black children. In addition to these tangible harms, the Court noted that African-American children in segregated schools with equal physical facilities and other tangible factors\textsuperscript{79} respond automatically with self-esteem.

\textsuperscript{76} Professor Derrick Bell has noted that proponents of integration quoted this phrase over and over to justify their belief that integration provides the proper route to equality. Derrick Bell, The Dialectics of School Desegregation, 32 Ala. L. Rev. 271, 285 (1981).

\textsuperscript{77} Brown I, 347 U.S. at 494. The social science evidence cited by the Court, id. at 494 n.11, was specifically intended to prove that segregation produced a psychological harm to African-Americans. Doubt has always been expressed as to whether the social science evidence cited in Brown I actually influenced the Justices. See Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157-58 & n.16 (1955); Ernest Van Den Haag, Prejudice About Prejudice, in The Fabric of Society (1957).

\textsuperscript{78} Brown I, 347 U.S. at 494 (quoting from the opinion of the district court in the Kansas case) (emphasis added). Justice Kennedy's opinion in Freeman quotes this passage from Brown I as well. See 112 S. Ct. at 1443. Two points from this passage should be highlighted. First, the Court notes that segregation in and of itself has a detrimental effect only upon the black children. When sanctioned by the law, this impact is only increased. And second, because the Court is eluding to the existence of a harm that is unlikely ever to be undone, the impact of this harm was not limited to children, but has also affected African-American adults, who obviously had already attended segregated schools themselves.'

\textsuperscript{79} Brown I, 347 U.S. at 492. The Court noted that [i]n the Kansas case, the court below found substantial equality. . . . In the South Carolina case, the court below found that the defendants were proceeding 'promptly and in good faith to comply with the court's decree' . . . . [T]he Virginia Attorney General's brief on reargument [indicated] that the [equalization] program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way.
were nevertheless deprived of the intangible benefits of a racially integrated school. If one begins with an assumption of equality of physical facilities and other tangible factors, then it becomes apparent that the intangible difference between the white schools and the black schools is the absence of whites in the latter. The valuable "intangibles" lacking in the black schools, therefore, were attributes which must have been endemic only to white teachers and students.

Finally, the Supreme Court has never justified any of its decisions in the school desegregation cases by pointing to the benefits that white children could derive from a racially integrated education. It is true that the plaintiffs in most school desegregation cases were identified as black school children, rather than school children. Nevertheless, to presume that African-American students, and not whites, would be the only ones who profited from integrated education leads to the inescapable conclusion that Caucasians are better than African-Americans.

The Court also based its opinion approving certain recommended educational programs on the belief that segregation inflicted some tangible harms on African-Americans. In *Milliken v. Bradley* ("Milliken II") the Court affirmed a district court order approving remedial educational components as part of the remedy for de jure segregation of the Detroit Public Schools. The educational components proposed by the Detroit

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*Id.* at 492 n.9.

*Id.* at 494.

This point was also made in the late 1960s by Black Nationalists referring to integration: 'Integration'... is based on complete acceptance of the fact that in order to have a decent house or education, black people must move into a white neighborhood or send their children to a white school. This reinforces, among both black and white, the idea that 'white' is automatically superior and 'black' is by definition inferior. See CARMICHAEL & HAMILTON, supra note 30, at 55.

As indicated earlier, see supra note 69 and accompanying text, the Supreme Court's opinion in *Brown I* started with the assumption that physical facilities and other tangible factors were equal. This substantive equality was of course not always the case during the de jure segregation era. Consequently, another conceivable tangible harm flowing from the de jure segregation era was the lack of equal resources. However, the Supreme Court's opinion precluded the recognition of such a harm. I have therefore not included it as one of the tangible harms recognized by the Court.


This case reached the Court because the State of Michigan objected to being made partially responsible for funding this part of the remedy. The district court determined that Michigan was just as responsible for the segregation of Detroit's public schools as the school system. Consequently, the district court assigned responsibility for half of the cost of the educational components of the desegregation plan to the Detroit Public School System and the other half to the State of Michigan. *Id.* at 277.
School Board and approved by the district court fell into four categories: reading, in-service training for teachers and administrators, revised testing procedures, and counseling and career guidance. To justify the *Milliken II* remedies, the Court once again focused on the presumed negative impact of de jure segregation on African-American children. The Court, in reference to the African-American school children who would continue to attend segregated schools, stated that "[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger . . . ."

In the above passages from *Brown I* and *Milliken II* it is evident that the Court views the harm of de jure segregation as more than just stigmatic, but also as retarding the cognitive, psychological, and emotional development of African-Americans. It is also important to note that the explicit acceptance of the defective condition of African-Americans in *Brown I* was not limited to their children. According to the Court, the harm was one that was unlikely ever to be undone. Since African-American adults had previously attended segregated schools, that experience would continue to affect them long after they had left the educational system.

Certainly the temptation exists to run to the aid of the Court's de jure segregation opinions, especially Chief Justice Warren's opinion in *Brown I*, and talk about the need to obtain unanimity or the need to write a politically acceptable opinion in order to facilitate the coming desegregation of public schools. In *Freeman*, however, Justice Kennedy specifically quotes the above passages from *Brown I* in order to elucidate the principal wrongs of de jure segregation. This reflects the fact that the current Court still views these statements as ones that articulated the harm of de jure segregation.

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84 Id. at 276.
85 Id. at 287.
86 For a discussion of Justice Kennedy's opinion, see supra notes 53-58 and accompanying text.
C. Justifications for Racial Balancing as the Primary Remedy

Through maintaining de jure segregation, the state was disseminating a stigmatic message about African-Americans. The stigmatic harm would have been eliminated if government had ceased the conduct that disseminated the discriminatory message. This would have taken the state out of the position of intentionally and affirmatively endorsing the belief in African-American inferiority.

The ordering of racial balancing as a remedy for de jure segregation requires that government treat people as members of a group rather than as individuals. Therefore, the basic individualist principle of the legal system appears to be violated by a race-based remedy. Elsewhere I have argued that virtually all of the remedies that the Supreme Court ordered or approved for de jure segregation in public schools, including desegregation, could have been justified as a means of eliminating an additional facet of the stigmatic harm of de jure segregation that was unique to public schools.87 Public schools are social institutions that cultivate America's youth. They inculcate cultural values, including political and social attitudes, opinions, and beliefs to the next generation of American adults.88 In the context of public schools, the stigmatic message carried with it the additional harm of distorting the socializing process of public schools and thereby inculcating this stigmatic belief into school children.

The Supreme Court, however, did not base its justification for ordering desegregation on the elimination of this additional facet of the stigmatic harm. This section will elucidate the justifications which the Supreme Court relied upon to order desegregation as the primary remedy for de jure segregation. It will also reveal the limited scope of the arguments that proponents of continued desegregation are forced to advocate in order to prevent conversion of quality education lawsuits.

In order to find out what the Supreme Court based its principal rem-

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edy, desegregation, upon it is necessary to start with an examination of Green v. County School Board.\textsuperscript{89} The Court's opinion in Brown \textit{II} \textsuperscript{90} required public schools to effectuate a transition to a "racially nondiscriminatory school system."\textsuperscript{91} The precise parameters of what was meant by a racially nondiscriminatory school system were originally left to the discretion of school authorities who had the primary responsibility for assessing and solving this problem. Many states and school systems employed various methods to avoid compliance with the constitutional duty.\textsuperscript{92} By 1964, only 2.14% of the black students in seven of the eleven states in the deep South attended desegregated schools.\textsuperscript{93} Measures used by southern states to thwart efforts to desegregate schools included the denial of state funds to schools attended by pupils of different races, threats to close the public schools in the event they were integrated, delegation of control of the public schools to the governor or the state legislature in hopes of frustrating federal court orders, abolition of compulsory schooling, tuition grants for those who did not wish to attend integrated schools, criminal penalties for teaching in or attending an integrated school, and firing of teachers who advocated desegregation.\textsuperscript{94}

The Virginia Constitution, for example, was amended in 1956 to authorize the General Assembly and local governing bodies to appropriate funds to assist students who would rather go to nonsectarian private schools over public schools. The General Assembly also met in special session and enacted legislation to close any public schools where white and black children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools, and to extend state retirement benefits to teachers in newly created private schools.

\textsuperscript{89} 391 U.S. 430 (1968).
\textsuperscript{91} \textit{Id.} at 301.
\textsuperscript{92} See Griffin \textit{v. County Sch. Bd.}, 377 U.S. 218 (1964) (invalidating a scheme by Prince Edward County in which the county closed its public schools and at the same time contributed grants of public funds to white children to attend private schools); Goss \textit{v. Board of Educ.}, 373 U.S. 683, 688 (1963) (invalidating a procedure which allowed students to transfer from a school where their race was in the minority to a school where their race was in the majority).
Even though the Virginia Supreme Court ruled in 1959 that the legislation closing racially mixed schools and cutting off funds to such schools violated Virginia's Constitution, the pupil scholarship program continued to operate.96

Arkansas was another state where resistance to the Court's opinions in the Brown cases was particularly strong. The state legislature passed several statutes in an effort to maintain school segregation.97 In Cooper v. Aaron98 the Supreme Court rejected a request by the Little Rock School Board for a two and one-half year delay in implementing a court-ordered desegregation program. The school board had sought the delay because of "extreme public hostility" towards desegregation engendered by the Governor of Arkansas, who dispatched units of the Arkansas National Guard to block the school board's planned desegregation of a local high school.

Against the background of continuing massive resistance to the desegregation of public schools, the Supreme Court rendered its 1968 opinion in Green v. County School Board.99 The Court rejected the argument of the New Kent County School Board that the Fourteenth Amendment did not require compulsory integration.100 Animating the Court's decision to order racial balancing was the resistance that the Brown opinions had encountered.101 The Court's explicit response to the school board, however, was

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97 For a discussion of several statutes the Arkansas legislature adopted to maintain school segregation, see Raymond T. Diamond, Confrontation as Rejoinder to the Compromise: Reflections of the Little Rock Desegregation Crisis, 11 NAT'L BLACK L.J. 151, 155-56 (1989).
100 Id. at 437. Under the "freedom-of-choice" plan, no whites had enrolled in the black school and only 15% of blacks had enrolled in the white school. Id. at 441. The Court noted that "transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." Id. at 436.

One of the provisions included in the Civil Rights Act of 1964 prohibited federal financial assistance from being given to programs or activities engaged in discrimination. The Department of Health, Education and Welfare issued regulations addressing racial discrimination in federally aided school systems as directed by 42 U.S.C. § 2000d-1, and in the statement of policies or guidelines, the Department's Office of Education established standards for eligibility for federal funds of school systems in the process of desegregation. 45 C.F.R. §§ 80.1-80.13, 181.1-181.76 (1967). "Freedom of choice" plans were seen as acceptable under these regulations. See Green, 391 U.S. at 433-34 n.2; see also Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools (1976).

101 For example, the Court noted that the school board had not taken the first step to comply
that "the constitutional rights of Negro school children articulated in Brown I permit no less than this; and it was to this end that Brown II commanded school boards to bend their efforts." Thus the duty to desegregate public schools was born.

From the Court's opinion in Green there are two justifications for ordering integration. First is the widespread resistance to compliance with the Court's Brown opinions by state, local, and educational officials. The second justification for racial balancing is to be found in the passages of the Court's opinion in Brown I. I have already pointed to the passages in Brown I that articulated the tangible harms of de jure segregation. Desegregation was therefore also justified as a means to remedy the cognitive, psychological, educational, and emotional harm inflicted by segregation on African-Americans, which is to say, it is a means to remedy a perceived deficit condition of African-Americans.

It is obvious from the Court's opinion in Green that the Supreme Court also saw segregation as making African-Americans less than whites. If the Supreme Court had based desegregation on the firm belief that African-Americans were the equals of Caucasians, then both blacks and whites would have been considered as beneficiaries of the remedies. For the Court to have avoided replicating the message about the inferiority of African-Americans in desegregation, the Court would have also articulated how de jure segregation harmed Caucasians as well. The Court needed to recognize that both black and white school children were the beneficiaries of the interracial contact desegregation afforded. The Court, however, did not view interracial exposure of Caucasians to African-Americans as a benefit for white students. Thus, desegregation becomes necessary precisely because African-Americans are not the equals of Caucasians.

with the Court's order in the Brown cases until "11 years after Brown I was decided and 10 years after Brown II directed the making of a 'prompt and reasonable start.'" Green, 391 U.S. at 438. The Court also quotes from its opinion in Griffin, 377 U.S. at 234, stating "[t]he time for mere 'deliberate speed' has run out." Green, 391 U.S. at 438. Even though the Court specifically states that it does not adopt the views of the United States Commission on Civil Rights, it does note their conclusion that among the reasons freedom of choice plans may not work are both the fear and the reality of retaliation and hostility by the white community against Negro families who choose to attend formerly all-white schools. Id. at 440 n.5.

102 Id. at 437-38.

103 See supra notes 74-80 and accompanying text.

104 For an argument that justifies desegregation on the basis of eliminating the distortion in the socializing function of public schools, see Brown, supra note 68.
The use by the Supreme Court of a pejorative analytical framework to justify desegregation as the primary remedy for de jure segregation meant that the desegregation era was actually performing two apparently inconsistent functions. At the same time that the country was dismantling de jure segregation and its concomitant message of African-American inferiority, it was also constructing a policy of integration which carried its own message of African-American inferiority. The very remedies that were undertaken in an attempt to eliminate a belief in African-American inferiority were also—like segregation that had preceded it—standing as symbols for it.

V. CONCLUSION: WHY THE RHETORICAL POSITION OF THOSE SEEKING TO CONVERT DESSEGREGATION LAWSUITS TO QUALITY EDUCATION LAWSUITS IS STRONGER

The analytical framework utilized by the Supreme Court in desegregation cases to order school systems to desegregate has rested primarily upon two justifications. The first is the notion of African-American inferiority and the second is the widespread attempts by state, local and school officials to avoid complying with the Supreme Court’s opinion in Brown I and Brown II. Justice Kennedy’s Freeman opinion noted that partial withdrawal would not be granted unless there had been satisfactory compliance with the district court decree in those aspects of the system where partial withdrawal was being sought.106 Because of the restrictive nature of this framework, proponents of continuing desegregation are forced into a very narrow set of arguments which they can make for maintaining de jure segregation. Ultimately, their arguments for maintaining desegregation require the assertion of distrust of whites and a belief in notions of black inferiority.

As discussed earlier, the issue of converting desegregation lawsuits into quality education lawsuits is articulated against a cultural backdrop in which African-Americans have long been concerned about receiving fair treatment for their children in public schools. Skepticism regarding treatment at the hands of the dominant group has always been a part of the African-American deliberations about whether it is best to seek separate as opposed to integrated education for black school children. The principal

106 Freeman, 112 S. Ct. at 1446.
argument against racially separate schools has been the systematic vulnerability of black school children to inadequate funding. The principal argument against racially integrated schools has been the belief that those schools will be structured to cater to the educational interest of whites and relegate the educational interests of African-Americans to a secondary position.

When the discussion concerns conversion of desegregation lawsuits to quality education lawsuits, the issue of distrust of whites is diminished in importance. One of the primary benefits of integrated education from the perspective of the African-American community has been its ability to prevent the vulnerability of African-Americans to systematic funding deprivations. Prior to *Freeman v. Pitts*, advocates of racially separate education in the African-American community had a hard time rebutting the argument that separate education left black school children systematically vulnerable to the deprivation of educational resources. If federal district courts maintain partial supervision over a school system to assure equal quality of education, including equal funding, then not only is one of the primary justifications for integration attenuated, but also one of the primary criticisms of separate education is also eliminated.106

Even though many advocates of desegregation believe that it benefits all students, the Court's analytical framework does not provide for that as a basis for desegregation.107 Multicultural advocates who see the benefits to all students of cross-cultural education based on mutual respect and admiration by both racial groups will find little help in the Supreme Court's school desegregation jurisprudence.108 Proponents of continued desegregation are limited to legal arguments that require them to assert resistance to the district court's desegregation orders by governmental officials in the

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106 It is true that a further argument could be made that whites may be disinclined to continue to adequately fund the predominately black schools once all federal court supervision is finally released. The major force of that argument, however, would not be felt in an attempt to convert school desegregation lawsuits into quality education lawsuits. Rather it will be felt when termination of all, not just partial, federal court supervision is sought.


form of lack of good faith or notions that African-Americans have not been cured of their deficient condition. In fact, given the Supreme Court’s de jure segregation jurisprudence, if mutual respect and admiration by blacks and whites had existed at all, then the predicates for ordering desegregation would not have existed in the first place.

The Supreme Court’s analytical framework for desegregation forces its proponents to couch their position in notions of continued deficiencies of African-Americans which can only be cured by exposure to Caucasians. The Supreme Court’s analytical framework for ordering racial balancing presupposes the inability of African-Americans to resolve their own problems. On the other hand, proponents who argue for the conversion to quality education lawsuits are able to stress the abilities of African-Americans to obtain an adequate education in predominantly black schools. As a result, they can stress themes of black independence, black competence, and racial pride—arguments which proponents of continued desegregation are hard-pressed to make.

From the perspective of the African-American community, the rhetorical superiority of the pro-separatist position is clear. They can argue from a position of racial pride, while pro-integrationists are forced to frame their arguments by rejecting the ability of African-Americans to solve their own problems. This amounts to an inversion of the arguments regarding racial separation in public schools that existed before Brown v. Board of Education. Then proponents of separation were generally seen as those who supported the notion of African-American inferiority. The position of being able to argue both notions of mutual respect and African-American equality is now on the side of those whose arguments will increase racial separation of public school students.

109 For a discussion of issues surrounding the termination of de jure segregation decrees, see Kevin Brown, Recent Developments in the Termination of School Desegregation Decrees, 26 IND. L. REV. 867 (1993).

110 Brown, supra note 87, at 11-14.