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Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?

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HAS THE SUPREME COURT ALLOWED THE CURE FOR DE JURE SEGREGATION TO REPLICATE THE DISEASE?

Kevin Brown†

Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>4</td>
</tr>
<tr>
<td>I. HOW DE JURE SEGREGATION INCULCATED A BELIEF IN THE INFERIORITY OF AFRICAN-AMERICANS</td>
<td>7</td>
</tr>
<tr>
<td>A. The Socializing Function of Public Schools</td>
<td>7</td>
</tr>
<tr>
<td>B. The Harm Resulting From De Jure Segregation From the Perspective of the Value-Inculcating Function of Public Schools</td>
<td>11</td>
</tr>
<tr>
<td>1. <em>The Meaning Behind Racial Separation in Public Schools</em></td>
<td>11</td>
</tr>
<tr>
<td>2. <em>The Meaning Behind the Systematic Underfunding of Schools Attended by African-Americans</em></td>
<td>14</td>
</tr>
<tr>
<td>C. The Harm to the Socializing Process of Public Schools is an Institutional Harm</td>
<td>17</td>
</tr>
<tr>
<td>II. THE COURT’S RECENT SCHOOL DESEGREGATION DECISIONS—WHAT IT MEANS TO ERADICATE THE VESTIGES OF THE PRIOR DE JURE SEGREGATION</td>
<td>20</td>
</tr>
<tr>
<td>A. Board of Education v. Dowell</td>
<td>21</td>
</tr>
<tr>
<td>B. <em>Freeman v. Pitts</em></td>
<td>25</td>
</tr>
<tr>
<td>C. Implications of <em>Dowell</em> and <em>Freeman</em></td>
<td>30</td>
</tr>
<tr>
<td>III. THE PURPOSE OF REMEDIES FOR DE JURE SEGREGATION</td>
<td>35</td>
</tr>
</tbody>
</table>

† Associate Professor of Law, Indiana University School of Law. B.S. 1978, Indiana University; J.D. 1982, Yale University. The author would like to acknowledge and express his appreciation to the many colleagues and friends whose support and suggestions have been so valuable to this Article. Special thanks to Professors John Baker, Wendy Brown, Lynne Henderson, Alan Mathewson, Martha McCarthy, Michael Middleton, John Scanlan, Theodore Shaw, Leland Ware and Stephanie Jones for their insightful and helpful comments. Earlier drafts of this article were delivered at the Midwestern People of Color Legal Research Conference in March 1991, Critical Race Theory Workshop in June 1991, and University of Texas School of Law Faculty Colloquium Works in Progress in April, 1992. The author would like to thank the participants at those presentations for their helpful suggestions. The author would also like to acknowledge the exceptional contribution received from Scott Gilchrist for his research assistance and Krystie Herndon for her outstanding secretarial support. Finally, the author would like to thank Danielle Brown for her tireless support, without which this article would not have been possible.
A. Desegregation as the Principal Means to Remedy the Harm ............................................ 36
B. Educational Improvements as a Means of Remediying the Harm .................................... 37
C. Sui Generis Nature of the Remedy for De Jure Segregation in the Context of Public Schools ... 40
   1. Bazemore v. Friday—The Remedial Obligation to Eradicate the Vestiges of De Jure Segregation for Children Outside of the Public School Context ................. 41
   2. United States v. Fordice—Remedial Obligation to Eradicate the Vestigies of the De Jure Segregation in the Educational Context that Does Not Involve Children ........ 43
   3. Sui Generis Remedy for Public Schools ................................................................. 48
D. Comparison of the Invidious Value Inculcation Theory and Justice Marshall’s Stigmatic Harm Theory ................................................................. 49

IV. The Court’s Ideological Framework Employed to Justify Remedies for De Jure Segregation ........ 52
   A. The Ideological Framework that Approved Desegregation as a Means to Remedy the Harm Resulting from De Jure Segregation .................................................. 53
      1. The Negative Impact of Segregation on African-Americans ........................................ 54
      2. Segregated Public Schools that African-Americans Attended Lacked “Intangibles” .......... 57
      3. Desegregation as a Vindication of the Rights of African-American School Children ..... 60
   B. The Ideological Framework that Approved Milliken II Remedies ................................ 63
   C. The Impact of Remedies for De Jure Segregation on the Socializing Process of Public Schools .......... 64
      1. The Distinction Between Public Schools Inculcating African-American Inferiority and Assuming African-American Inferiority .............................................. 64
      2. The Supreme Court Opinions Possess the Meaning Behind the Remedies for De Jure Segregation ..... 66
   D. How Remedies for De Jure Segregation Replicate the Same Disease They Should be Curing .......... 67
   E. How The Court’s Ideological Framework Could Continue to Impact Issues Related to Termination of Court Decrees ................................................................. 69

V. The Impact of the Supreme Court’s Ideological Framework on Educators .......................... 73
At the end of the summer of 1965, I was about to enter the fifth grade of Public School #43, an all black elementary school in Indianapolis, Indiana. Within six years, the courts ruled that Indianapolis Public Schools practiced de jure segregation. Yet, by my parents’ account, my education at PS #43 had been excellent and my African-American teachers were all first-rate. Both of my parents were public school teachers in the Indianapolis public school system, so they understood the importance of a good education. I had already met the woman scheduled to be my fifth grade teacher. Mrs. McNeese was a warm-hearted person who was robust, both in terms of personality and appearance. Even before classes started, she had managed to make me feel welcome by telling me how much she was looking forward to having me in her class in the fall.

Shortly before school began, my parents called their three sons into the living room for an important announcement. The family was going to move from our cramped, two-bedroom home in the inner-city of Indianapolis, to a new spacious three-bedroom house in one of Indianapolis suburban areas. We would be changing schools. My parents cited the traditional reasons for moving: the family was too large for the small house where we currently resided and the new house had a much nicer yard.

My parents also indicated that our new school, where most of the students and all of the teachers were white, would provide us with the opportunity for a much better education than we were currently receiving at PS #43. Even to a fifth grader, who was used to the world not making sense, this statement challenged my beliefs. After all, hadn’t I heard my parents often comment on the talents possessed by my African-American teachers at PS #43? I could not comprehend the notion that I would receive a better education in a suburban school system than in my own community. Innocently, I responded by asking, “Why will I receive a better education in a school just because there are whites in it?” The question was one my parents could not answer.

2 This Article is in part autobiographical. The experiences revolving from my transition from de jure segregated inner-city public school to a desegregated suburban school have haunted me for the past twenty-five years. The need to comprehend those experiences has been the inspiration for this Article. I do not believe that this frank
Supreme Court opinions, like *Brown v. Board of Education* ("*Brown I*")\(^3\), reveal their consequences and yield their secrets only through the perspective of time and the evolution of American society. The Supreme Court candidly recognized this point seventeen years after that opinion.\(^4\) Almost two generations have passed since the Court decided *Brown I*. That passage of time allows us to put into perspective a reexamination of the Supreme Court’s opinions regarding de jure segregation of public schools.\(^5\)

Reexamination is particularly appropriate at this time. In the last two terms, the Supreme Court has issued two major opinions—*Board of Education of Oklahoma City v. Dowell*\(^6\) and *Freeman v. Pitts*\(^7\)—addressing de jure segregation of public schools. With these opinions, the Court entered the final phase of its efforts to eradicate the vestiges of de jure segregation from American public education. In this phase the Supreme Court has turned its attention to defining what a school system must accomplish to free itself from federal court supervision. This phase will herald the end of an epic chapter in American legal history.

The Supreme Court has approved a number of means to remedy the harm resulting from de jure segregation, with desegregation as the principal means.\(^8\) Yet the Court has never supplied a satisfactory justification for the remedies it has approved. Now that the Court may be ready to close this chapter in its legal history, we may possess all of the Court’s insight into its analysis of the harm of de jure segregation and the purposes of its remedies. At this stage, Court-ordered remedies for de jure segregation, including desegregation, admission of my personal history is dangerous to scholarly objectivity, for reality is never absolute, but rather depends upon one’s personal experiences. See, e.g., Robert W. Gordon, *Critical Legal Studies*, 10 LEGAL STUD. F. 335, 339 (1986); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 517 (1986); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430-31 (1987). As these experiences and others like it have shaped my consciousness, the lack of such experiences has no doubt shaped the conscience of others.

\(^3\) 347 U.S. 483 (1954).

\(^4\) “Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then” in the effort to eradicate the vestiges of de jure segregation in public schools. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13 (1971).

\(^5\) The terms “public school” and “public education” refer to public elementary and secondary schools or public elementary and secondary education, respectively. When I refer to public college and public post graduate institutions, I will specifically note that in the context of such discussion.


\(^7\) 112 S. Ct. 1430 (1992).

\(^8\) I use the term “desegregation” to mean racial balancing, which contemplates some form of integration between blacks and whites.
DE JURE SEGREGATION

9  Therefore, I do not take a position on whether the remedies ordered for de jure segregation were the most appropriate ones. Rather, I seek to demonstrate the new harm that flows from the Court's ideological framework which justified these remedies.

In *Freeman*, the Court noted 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 contradictory nature of the Supreme Court's de jure segregation jurisprudence: on the one hand, the Court suggests the harm is an amorphous stigma; and, on the other, the Court suggests the harm is tangible. I will argue that the Supreme Court's de jure segregation jurisprudence is generally consistent with these two notions about the harms resulting from de jure segregation. When, as the Court has done, these two distinct notions are put together, then the remedies for de jure segregation replicate the very disease they should have been intended to cure.

More recently, Supreme Court cases addressing issues in public education have embraced the notion that public schools are cultural institutions engaged in socializing America's children. As a result, the objectives of public education are the inculcation of fundamental American values. In this Article, I will argue that the results, not the rationale, of the Court's opinions addressing de jure segregation are consistent with recognizing the importance of the socializing process of public schools. Viewing de jure segregation from this perspective, its principal harm is stigmatic. In the public education context, this stigmatic harm functions differently than it does in any other area because the state is engaged in socializing students. Dejure segregated public schools are inculcating a belief—the inferiority of African-Americans—to students that is inconsistent with the

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9  If I were writing tabula rasa, I might be inclined to suggest remedies in addition to those accepted by the Court. However, I do not find myself in that position. See Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 939 (1990). As a result, I am not addressing the propriety of the remedies that the Court ordered or approved. Rather, I seek to provide an alternative justification for the remedies ordered by the Court and to demonstrate the harm flowing from the Court's failure to provide this alternative justification.

10  *Freeman*, 112 S. Ct. at 1443.

values enshrined by the Constitution. The remedial purpose for the inculcation of "the invidious value" should be directed towards its elimination. Consequently, the primary beneficiary of these remedies is either the socializing process of public schools or all public school students, not only African-American school children.

The Court's ideological framework in this area, however, leads to a different conclusion about both the harm resulting from de jure segregation and its remedial purpose. The Court's ideological framework proceeds from an assumption that racial isolation retarded the intellectual and psychological development of only African-Americans. Thus, the purpose of de jure segregation remedies is to rectify some manifested deficiency of African-American students.

Both the Court's interpretations of the harm of de jure segregation and its resulting remedial purpose make the Supreme Court's de jure segregation jurisprudence suspect. On the one hand, the harm of de jure segregation is inculcating the notion of black inferiority to public school children. Yet, on the other hand, the reason that remedies are necessary is because segregation actually retarded the development of African-Americans, thus making them inferior to Caucasians. As a result, remedies for de jure segregation are based upon an assumption of African-American inferiority—the same assumption that pervaded the constitutional violation of de jure segregation. Just as past segregation distorted the socializing process of public schools, remedies for de jure segregation have done and are doing the same because of the Court's analysis of de jure segregation of public schools.12

In Part I, I will present a theory that views the harm resulting from de jure segregation from the perspective of the socializing function of public schools. In Part II, I will discuss the implications of two Supreme Court desegregation-termination cases, Dowell and Freeman, and will show that these cases are consistent with the harm of de jure segregation. In Part III, I will discuss what the purpose of the remedies for de jure segregation should be. I will also contrast the harm of de jure segregation of public schools in other contexts, including higher education, in order to show why desegregation was required for public schools. In Part IV, I will discuss the Supreme Court's ideological framework that its de jure segregation jurisprudence is built upon. I will also show that this framework for de jure segregation has led to a situation where the remedies for de jure segregation are inculcating the invidious value and thereby replicating the very disease they should be attempting to cure.

12 But see discussion of the Milliken II remedies, infra part IV.D.
Because Supreme Court opinions are viewed by many as objective truth, the opinions can function as powerful "symbolic declarations to guide, influence and endorse" policies made outside of a strictly judicial forum. In Part V, I will discuss the impact that the Court's ideological framework had on educators who addressed public education reform after desegregation.

I

HOW DE JURE SEGREGATION INCULCATED A BELIEF IN THE INFERIORITY OF AFRICAN-AMERICANS

A. The Socializing Function of Public Schools

Public schools are the "most vital civic institution for the preservation of a democratic system of government." Education has been considered necessary to preserve American democratic institutions. Thomas Jefferson wrote, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." One commentator called the American system of public education the fourth democratic institution in our system of checks and balances.

Public schools perform a number of functions for American society. The two most important overlap: value inculcation and academic training. Public schools are social institutions that cultivate America's youth. They inculcate cultural values, including political and social attitudes, opinions and beliefs. For example, schools foster such values as respect for our country, tolerance for political and religious diversity, commitment to self-sufficiency, and commitment to discharge faithfully the duties imposed by citizenship. Schools teach these values by selecting and excluding the materials that teachers present to students. They also instill values through a

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17 For a discussion of how the invidious value inculcation theory addresses academic remedies, see infra notes 148-164, 217-273 and accompanying text.
myriad of administrative rules and regulations governing student and teacher conduct.  

The Supreme Court’s education jurisprudence has long recognized the importance of education’s socializing function. Many of the Court’s recent opinions involving public schooling embrace value-inculcation as the primary role of public education. For example, in Ambach v. Norwick the Court was forced to determine whether teaching in public schools constitutes a governmental function intimately tied to the operation of the state as a governmental entity. Addressing this issue, the Court stated that “[p]ublic edu-

20 See Mitchell, supra note 19, at 684. For example, rules prohibiting fighting on school premises attempt to inculcate a belief that violence is not a legitimate means to resolve a dispute. Rules requiring all students to attend the same classes and to start school at the same time attempt to produce favorable attitudes toward dependability and punctuality. Rules requiring students to commence their academic day by reciting the pledge of allegiance to the flag attempt to produce patriotic sentiment. See, e.g., West Va. v. Barnette, 319 U.S. 624 (1943) (holding that children cannot be compelled to salute the flag or recite the pledge of allegiance in public schools).

21 Brown, supra note 9, at 1115-20; see, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923). Prior to Brown I, the Court had not addressed issues relating to public elementary and secondary schools enough to develop an understanding of the primary role of public education. In Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), the Supreme Court upheld a requirement that children of Jehovah’s Witnesses participate in the flag salute, even though the requirement violated their religious convictions. The Court expressed little apprehension in asserting that public elementary and secondary schools may socialize students, even if the process is contrary to the wishes of the students’ parents. Although the Court reversed its holding in Gobitis three years later, West Virginia v. Barnette, 319 U.S. 624 (1943), the Court reaffirmed the importance of the socializing function of public elementary and secondary schools by upholding schools’ authority to foster national unity. The Court indicated that national unity was an end that school officials could foster, but objected to compelling the fostering of national unity with the flag salute. Id. at 640-42.

Since Brown I, the Court has rendered numerous opinions centering primarily on the socializing aspect of public education. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a state statute that proscribed teaching evolution in public schools); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating a state statute requiring Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (holding that a state may not require the reading of an official state prayer in public schools even if pupils who wish to remain silent or be excused may do so); see also Kuhlmeier, 484 U.S. at 260 (upholding the authority of public school officials to censor a student newspaper); Fraser, 478 U.S. at 675 (upholding the authority of public school officials to discipline a student for the content of a vulgar speech delivered at a student assembly); Board of Educ. v. Pico, 457 U.S. 853 (1982) (limiting school board’s discretion to remove books from the school libraries); Ambach v. Norwick, 441 U.S. 68 (1979) (holding that a New York statute forbidding permanent certification as a public school teacher to any person who is not a United States citizen violates Equal Protection Clause).

22 See Kuhlmeier, 484 U.S. at 278; Fraser, 478 U.S. at 68; Pico, 457 U.S. at 864; Plyler, 457 U.S. at 222 n.20; Ambach, 441 U.S. at 76-78. For an extended discussion of the Supreme Court's recognition of the value inculcating function in these cases, see Brown, supra note 9, 1117-20.

23 441 U.S. at 68.

24 Id. at 74-75. The case involved an Equal Protection challenge to a New York law that forbade certification as a public school teacher to any person who was not a citizen
DE JURE SEGREGATION

cation, like the police function, fulfills a most fundamental obligation of government to its constituency. The importance of public schools . . . in the preservation of the values on which our society rests, long has been recognized by our decisions.”

In *Bethel School District v. Fraser*, the Court upheld, against a free speech challenge, the authority of school officials to discipline a student for delivering an address at a student assembly in which he used vulgar and offensive language. The Court rested its opinion on the importance of the socializing function of public schools:

The role and purpose of the American public school system were well described by two historians, who stated: “[P]ublic education must prepare pupils for citizenship . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”

In *Board of Education v. Pico*, Justice Brennan, writing for a three-justice plurality, wrote “[the Court has] acknowledged that public schools are vitally important . . . vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’” In a concurring opinion, Justice Blackmun wrote “[T]he Court has acknowledged the importance of the public schools ‘in the . . . preservation of values on which our society rests.’ Because of the essential socializing function of schools, local education officials may attempt . . . to . . . ‘awaken’ the child to cultural values.” Justice Rehnquist, in his dissenting opinion, ar-

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of the United States, unless that person manifested an intention to apply for citizenship. The appellees, both foreign-born individuals who were otherwise qualified to teach, challenged the law on the grounds that it violated the Equal Protection Clause because it employed a classification based on alienage. Although classifications based on alienage are normally inherently suspect, there are exceptions for state functions that are intimately tied to the operation of the state as a governmental entity. *Id.*

25 *Id.* at 76 (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).
27 *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).
28 *457 U.S. 853* (1982). In this case, school officials removed controversial books from a public school library. Justice Brennan, writing for the plurality, held that students possess a right to receive information, and whenever school officials remove books from school libraries, they deny students access to ideas. *Id.* at 870-71.
29 *Id.* at 864 (quoting *Ambach v. Norwich*, 441 U.S. 68, 76-77 (1979)).
gued that the very nature of public education entails "the selective conveyance of ideas."\(^\text{31}\)

As one commentator notes, "the choice of values to be transmitted [in public schools normally] lies ... with the political majority or interest group in charge of the school system."\(^\text{32}\) Historically, because education has been primarily a local and state matter, schools are concerned with the inculcation of local community values.\(^\text{33}\) While there is broad agreement about fundamental values in

\(^{31}\) _Id._ at 914. Justice Rehnquist's opinion was joined by Chief Justice Burger and Justice Powell. In criticizing Justice Brennan's assertion that students have a right to read books that their school disapproves of, Justice Rehnquist wrote:

> [t]he idea that ... students have a right to access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education. ... Education consists of the selective presentation and explanation of ideas. ... Thus, Justice Brennan cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas.

_Id._ at 914-15 (emphasis added).

In Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), the Court addressed content-based censorship by a school principal of articles that were to appear in a student newspaper. In upholding the principal's decision to censor the articles, Justice White, writing for the majority, repeatedly noted the importance of public elementary and secondary schools in awakening children to cultural values. _Id._ at 272. In dissent, Justice Brennan noted that "[public elementary and secondary schools inculcate] in tomorrow's leaders the fundamental values necessary to the maintenance of a democratic political system. ... All the while, the public educator nurtures the students' social and moral development by transmitting to the man the official dogma of community values." _Id._ at 278 (citations omitted).

The Court also noted the importance of the value-inculcating function of public schools. Plyler v. Doe, 457 U.S. 202, 221 (1982). In _Plyler_, the Court noted "the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained." _Id._ at 222 n.20.


> Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes.

_Id._ at 113-14 (citations omitted).

\(^{32}\) Stephen Arons & Charles Lawrence III, _The Manipulation of Consciousness: A First Amendment Critique of Schooling_, 15 HARV. C.R.-C.L. L. REV. 309, 316 (1980). As noted by Professors Arons and Lawrence, this problem was also perceived by John Stuart Mill:

> [S]tate-sponsored education ... is a mere contrivance for moulding people to be exactly like one another; and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind ....

_Id._ at 316 n.22 (quoting _JOHN STUART MILL_, _ON LIBERTY_ 190-91 (1859)).

the abstract, when applied to concrete situations, that broad agreement often breaks down. When the Supreme Court accepts some decisions by politicians and school officials and rejects others, it is essentially choosing one value over another. From the perspective of the socializing function of public schools, the Court, in approaching public education issues, should be concerned about public schools inculcating the "proper" values.

B. The Harm Resulting From De Jure Segregation From the Perspective of the Value-Inculcating Function of Public Schools

The harm resulting from de jure segregation was its impact on the socializing process of public schools. De jure segregation of students, teachers, staff and administrators amounted to administrative rules that inculcated the invidious value—a belief in the inferiority of African-Americans.

1. The Meaning Behind Racial Separation in Public Schools

In order to determine if there was a distortion of the socializing process produced by racial imbalance, we must focus on the values that were instilled by racial imbalance. Not all racial separation in public schools can be equated to the invidious value. The values being socialized by the racial imbalance derive from the beliefs that led to the separation of black and white school children. In the 1973 case of Keyes v. School District No. 1, the Court ruled that de jure segregation and not de facto segregation violated the Constitution. Unlike de facto segregation, which could be established by showing racial concentration of students in the public schools, de jure segregation was defined as a "current condition of segregation resulting from the willful and intentional action of the school board."
resulting from intentional state action directed specifically to [segregate schools].”

In segregationist states, which were primarily the border states and the states of the old Confederacy, segregation was accomplished through state statutes. The system of segregation in the pre-\textit{Brown} South represented three hundred years of racial oppression. Statutory segregation in southern public schools was merely a part of a larger segregation system. The assumption that generated statutory segregation of public school students is unmistakably clear and deeply rooted in the history of the South: African-Americans are inferior to whites. Segregation was designed to perpetuate this assumption. It was the product of the prevailing and historical belief in the inferiority of African-Americans.

\begin{itemize}
\item \textit{Keyes}, 413 U.S. at 205-06. Woodward and Armstrong present the justices’ private deliberations about \textit{Keyes} as regarding the limitations of desegregation remedies. \textsc{Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court} 260-68 (1979). While the \textit{Keyes} Court rejected de facto segregation as the basis of the constitutional harm, it also adopted a procedural rule that made proving de jure segregation easier. If plaintiffs establish intentional segregation in a portion of the school system, the Court will presume that unlawful segregation exists throughout the school system. 413 U.S. at 208-09. This presumption alleviates plaintiffs of an enormous burden in proving unlawful segregation for each school in the system in order to establish a system-wide remedy. I do not deny that \textit{Keyes} can be viewed as a political compromise by the Court regarding the limitation on the desegregation remedy. By rejecting de facto segregation, however, the Court also rejected the notion that the constitutional harm fell solely on African-American school children.

\item Topeka, Kansas was not in a segregationist state, but rather in one of the four states with legislation that merely permitted but did not require school segregation. My analysis of \textit{Brown I} indicates that the Court treated those school systems that were segregated pursuant to permissible state authority similarly to the treatment afforded segregation in the segregationist states.

\item In \textit{Brown I}, the brief filed by the United States urged the Court “to bear in mind that school segregation was not an isolated phenomenon but ‘part of a larger social pattern of racial relationship.’” \textsc{Richard Kluger, Simple Justice} 726 (1975).

\item The institutionalized racial apartheid was the paradigmatic practice of racism. \textsc{See, e.g., George M. Frederickson, White Supremacy} 239 (1981); \textsc{David R. Goldfield, Black, White, and Southern: Race Relations and Southern Culture 1940 to the Present} 12 (1990); \textsc{Gunner Myrdal, An American Dilemma} 640 (1944); \textsc{C. Vann Woodward, The Strange Career of Jim Crow} (3d. ed. 1974); \textsc{Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J.} 431, 439-41 (1990).

\item In most of the segregationist states, statutory segregation came down “in apostolic succession from slavery and the \textit{Dred Scott} case. . . . [S]egregation was an integral part of the movement to maintain and further ‘white supremacy’ . . .” \textsc{Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J.} 421, 424-25 (1960). Historian C. Vann Woodward has argued that segregation became necessary only after the demise of slavery. There was a virtual absence of segregation in the antebellum South. Segregation would have been inconvenient and an obstruction to the efficient functioning of slavery. The mere policing of the slaves and the exaction of involuntary labor required more or less constant scrutiny. \textsc{Woodward, supra} note 40, at 12.

\item According to several social scientists, “historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.”
\end{itemize}
When de facto segregation of black and white school children that was not pursuant to statutory authority existed, the racial separation was normally not complete. The courts were faced with determining the meaning attached to this racial imbalance. Courts ruled that this racial imbalance violated the Equal Protection Clause only when it was the result of invidious intent. By focusing on the intent of school officials, the courts could assess the meaning attached to racial imbalance of school children in a local community. School officials are either elected by the local majoritarian political process or appointed by locally elected officials. If their views are too far removed from those of the community, the political process

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Floyd H. Allport et al., *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 432-33 (1953). As Justice Harlan stated in his dissenting opinion in Plessy v. Ferguson, segregation “proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.” 163 U.S. 537, 560 (1896). According to one scholar, Chief Justice Warren noted as much when he opened the Supreme Court’s conference on Brown I by stating that the “Court’s precedents sustaining segregation could rest only on a theory that [African-Americans] were inferior.” KENNETH L. KARST, BELONGING TO AMERICA 17 (1989).

The racial segregation in the public schools challenged in Keyes did not arise in an area of the country that shared the segregationists states’ history of racism. At the time of the Civil War, approximately 92% of all blacks lived in states with legalized slavery. According to the United States Department of Commerce, Bureau of the Census, the “South” today is comprised of the states of the Old Confederacy as well as Delaware, the District of Columbia, Kentucky, Maryland, Oklahoma, and West Virginia. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, SER. P-23, NO. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, 254 (1979) [hereinafter HISTORICAL VIEW]. For most northern and western states, there was very little historical African-American presence. As late as 1910, 89% of African-Americans still resided in the South. Even as late as 1940, fourteen years before Brown I, 77% of African-Americans still resided in the states of the Old Confederacy or the border states. *Id.* at 13.

Nevertheless, it does appear that racial segregation was more of a northern doctrine than a southern one, and that government action was as important in establishing segregation in the North as it was in the South. *Id.* at 22. See generally LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATE (1961) (presenting an authoritative account of the treatment of African-Americans north of the Mason-Dixon Line). Nevertheless, few would argue that blacks were historically subjected to more discriminatory treatment in the South than the North.

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. These states are listed infra note 235. 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 C. FERGUSON, JR., DESEGREGATION AND THE LAW 6 (2d ed. 1962).

The Keyes Court also noted that to determine whether a school was segregated required more than a focus limited to the racial and ethnic composition of faculty and staff, but additionally required that “community and administration attitudes” toward the schools be taken into account. Keyes, 413 U.S. at 196 (emphasis added). The primary focus of determining whether or not de jure segregation existed, however, was on the intent of school officials. *Id.* at 201-03.
provides a remedy for the incongruence. Therefore, school officials’ decisions, including those related to student, teacher, administrative, and staff assignments, tend to embody local consensus values. Proving invidious intent by school officials to segregate students is central to establishing the meaning behind the racial imbalance of black and white children and to determining the values being socialized by such racial imbalance. Establishing invidious intent is tantamount to proving that the meaning attached to the separation of blacks and whites in schools was a belief in the inferiority of African-Americans.\textsuperscript{45} If the racial imbalance was not the result of invidious intent, then it did not distort the socializing process of public schools.

2. The Meaning Behind the Systematic Underfunding of Schools Attended by African-Americans

Schools do more than socialize students, they also perform an important academic role. Schools disseminate information, teach basic academic skills, provide students with vocational skills,\textsuperscript{46} and assist in the cognitive development of children.\textsuperscript{47} While courts should not view the harm of de jure segregation from the perspec-

\textsuperscript{45} This theory should not be taken as an endorsement of the intent test as a preferred means for addressing issues related to discrimination outside the context of public schools. For critiques of the intent test, see, e.g., Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987); David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935 (1989). This theory merely suggests that discovering the intent of school officials seems to be the best method for determining the message attached to certain administrative rules used by public schools. It is the belief supporting the administrative rules that determines the values being inculcated by such rules in public schools. As a result, in the context of public education, the intent test is actually transformed into an effects-oriented approach because intent best reflects the primary effects of the socializing process of public schools.

\textsuperscript{46} The vocational skills function is placed under the academic function. Skills learned in public schools that make students more employable are often viewed as basic academic skills: primarily reading, writing, and math. For example, in Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 856 (Cal. Ct. App. 1976), the plaintiff sued his school district claiming educational malpractice because the school system failed to teach him basic academic skills. He sought damages for loss of earnings capacity because his inability to read and write limited his employment opportunities. \textit{Id.} at 856-57. In Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979), the plaintiff also claimed educational malpractice. The thrust of the plaintiff’s complaint was that, “notwithstanding his receipt of a certificate of graduation, he lack[ed] even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment.” \textit{Id.} at 1353; see Hunter v. Board of Educ. of Montgomery County., 439 A.2d 582 (Md. 1982); Hoffman v. Board of Educ. of New York, 400 N.E.2d 317 (N.Y. 1979).

\textsuperscript{47} William B. Senhauser, Note, Education and the Court: The Supreme Court’s Educational Ideology, 40 Vand. L. Rev. 939, 942 (1987).
tive of the academic function of public schools, academics is not irrelevant to defining that harm. Rather, the academic role of public schools must be examined with regard to its impact on their socializing function.

In *Brown I*, the Court did suggest that an academic harm flowed from de jure segregation. The academic harm, however, was seen as a derivative harm of the psychological harm: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . [T]he 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." *Brown I*, 347 U.S. at 494 (quoting *Brown v. Board of Educ. of Topeka*, 98 F. Supp. 797 (D. Kan. 1951), rev'd on other grounds, 347 U.S. 483 (1954)).

At the time the Court rendered its opinion in *Brown I*, it may have expected that significant academic benefits would accrue to African-American students by attending schools with Caucasian children. The possibility that psychological relief would increase academic performance was also implicit in the report filed by a group of social scientists working in the area of race relations. The report was attached as an appendix to the appellant's briefs filed in *Brown I*. See Allport et al., *supra* note 42, at 430. The social science evidence cited by the Court also implied that increased academic performance would be the result. *See Brown I*, 347 U.S. at 494 n.11. For a full explanation of why the Court should not view remedies for de jure segregation from the perspective of the academic function, see *Brown*, *supra* note 9, at 1141-46.

In *Ambach v. Norwich*, 441 U.S. 68 (1979), *see supra* notes 21-24 and accompanying text, the Court had an opportunity to resolve the equal protection challenge posed by the appellees by focusing on the academic function of public schools. If the Supreme Court views the academic function of public schools as its primary function, then the categorical prohibition of aliens from teaching in public schools, which was the issue in *Ambach*, would not make constitutional sense. This point was made by Justice Blackmun in his dissent, joined by Justices Brennan, Marshall and Stevens. Blackmun asserted that "[t]he equality of public education requires that Frenchmen may teach French or, indeed, an English woman may not teach the grammar of the English language." *Id.* at 84. Blackmun also posed two rhetorical questions which indicated that he was primarily viewing public schools from the perspective of their academic function as opposed to their value-inculcating function:

Is it better to employ a poor citizen teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America?

*Id.* at 87.

The answer, to Blackmun's rhetorical questions depend upon the Court's view of the primary function of public education. If the primary function is the academic function, then the answer to both questions is an emphatic "NO!!" From the perspective of the academic function the primary consideration would be the ability of resident aliens, vis-a-vis American citizens, to teach basic skills and to disseminate useful information to students. Obviously some resident aliens in certain subjects will be better equipped to perform that task than some American citizens.

If, however, the primary mission of public education is proper socialization, then the answer is not so clear. The Court is presuming that the loyalties of American citizens to this country will be stronger than those of resident aliens, especially aliens who have chosen not to apply for citizenship. If one is more concerned about properly instilling students with fundamental American values as opposed to teaching them to speak Spanish, then constitutionally it may be better to have an American citizen who has never seen Spain or Latin America teach Spanish rather than a resident alien who has lived in Spain or Latin America for over 20 years.
Even though the Brown I Court reasoned that physical facilities and other tangible resources of the black public schools were essentially equal to the white public schools,\(^{50}\) in three of the four state cases the physical facilities and other tangible resources were not equal.\(^{51}\) During the Plessy period of "separate but equal," black public schools were seldom equal.\(^{52}\) Powerful southerners considered the education of white children more important than the education of black children. White public schools were better funded, with longer school terms, more highly paid teachers and better physical facilities than black public schools.\(^{53}\) For example, in 1945 South Carolina spent three times more per child for the education of white children than it did for black children.\(^{54}\) In the same year,

\(^{50}\) Brown I, 347 U.S. at 492.

\(^{51}\) In 1951, when the complaint in Briggs v. Elliot, 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, Clarendon 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: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966 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. Id. at 537-38. Subsequently, the court found that the county was equalizing the schools "as rapidly as was humanly possible." Briggs v. Elliot, 103 F. Supp. 920, 922 (E.D.S.C. 1952), rev'd sub nom. Brown v. Board of Educ., 349 U.S. 294 (1955).

In Davis v. County School Board, 103 F. Supp. 337 (E.D. Va. 1952), rev'd sub nom. Brown v. Board of Educ., 347 U.S. 483 (1954), a three-judge district court admitted the inadequacy of the Negro school in Prince Edward County, Virginia. Id. at 340. The panel simply ordered the School Board to "pursue with diligence and dispatch" the building program it had already commenced. Id. at 341.

In Gebhart v. Belton, 91 A.2d 137 (Del. 1952), aff'd sub nom. Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court of Delaware affirmed a decision by the Court of Chancery that ordered the admission of Negro students to previously white-only schools. 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 Supreme Court of Delaware, however, implied that segregation laws might be enforced once the school facilities were equalized. Id.


\(^{52}\) The willful and flagrant violation of the equality portion of the Plessy principle has been extensively documented. See, e.g., HORACE M. BOND, NEGRO EDUCATION IN ALABAMA (1939); HORACE M. BOND, THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER (1934); 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 (Stuart Brady ed., 1985); J. MORGAN KOUSser, PROGRESSIVISM—FOR MIDDLE-CLASS WHITES ONLY: North Carolina Education, 1880-1910, 46 J. SOC. HIST. 169 (1980).


\(^{54}\) Id. In 1930, South Carolina actually spent eight times as much for the education of whites than it did for the education of blacks.
Mississippi spent four and one-half times more per child on white schools than on black schools.\textsuperscript{55}

The systematic undervaluing and underfunding of the education of African-Americans stemmed from the same assumption that produced segregated schools. The education of African-Americans was undervalued and underfunded because African-American school children were not perceived as equals of Caucasian school children.\textsuperscript{56}

C. The Harm to the Socializing Process of Public Schools is an Institutional Harm

The harm resulting from de jure segregation is an institutional harm that can be conceptualized in two ways. One way is to view harms relating to a distortion of the socializing process as harms affecting the rights of all students in public schools. The right that students possess in public schools is not the right to a socializing process where the values instilled by public schools are consistent with their own belief. Rather, it is the right to be subjected to a socializing process that imparts values consistent with the Constitution, regardless of the students' (or their parents') personal predilections for various value choices. A second way to conceptualize the institutional harm of de jure segregation is to view the Constitution as prohibiting public schools from inculcating certain values. Unlike the former, this conceptualization is not centered on the rights of students but focuses on the limitations of the state's role as educator.\textsuperscript{57}

\textsuperscript{55} Id. In 1929, Mississippi spent as much as nine times more for the education of a white child than for a black child.

\textsuperscript{56} 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 proslavery 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 51, 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, e.g., JAMES J. KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION (1962); NEWBY, supra note 51.

\textsuperscript{57} The existence of this dichotomy can be seen in the difference between the plurality opinion of Justice Brennan and the concurring opinion of Justice Blackman in Board of Educ. v. Pico, 457 U.S. 853 (1982). For Brennan, whether the removal of the books from the library violated the Constitution rested on whether the students' right to receive information was abridged. Id. at 866-68 (plurality opinion). Therefore, he viewed
The concept of institutional harm, with its primary emphasis on the rights of students, is illustrated in Supreme Court cases that address religious socialization in public schools. For example, some students would not object to starting their school day with Bible reading or voluntary school prayer. Despite this fact, the rights of all students are harmed by such practices because all students are subjected to a distorted socializing process. Even those children who would not object to religious socialization are harmed because their rights are to a socializing process in public schools where the values being inculcated do not violate the Establishment Clause.

Reconceptualizing the right to receive information, which was recognized by Justice Brennan in Board of Education v. Pico, pro-

the issue from the notion that students’ would be harmed by such a removal. Id. Blackmun, on the other hand, placed his emphasis on limitations placed on public schools. For Blackmun, the issue was not whether students’ rights were abridged by officials’ decisions, but rather whether school officials exceeded their authority by suppressing thought. Id. at 876-80 (Blackmun, J., concurring in part and concurring in the judgment).

See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating statute providing for a moment of silence or voluntary prayer); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating a state statute requiring Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (holding that a state may not require the reading of an official state prayer in public schools even if pupils who wish to remain silent or be excused may do so).

See, e.g., T. Lahaye, The Battle for the Public Schools 241 (1983)

The reverential awe of the Lord is the beginning or foundation of wisdom. If the educational foundation is in error, the education itself will be in error. The only exception lies in areas like math, linguistics, meteorology, and a few others where exacting material facts are required. But the more philosophical a course, the more vulnerable its conclusions to humanist error. Why do you think all humanists with one accord vigorously oppose permitting little children to bow their heads and offer a voluntary prayer? It isn’t the prayer they object to—it is the fact that the public schools would be acknowledging there is someone up there to whom our children would be praying. Since these educational atheists control our schools, they will not permit it.

This may perhaps explain Justice Brennan’s position in Edwards v. Aguillard, 482 U.S. 578 (1987), where he states: “Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” Id. at 584. Justice Brennan may be trying to say that it does not matter whether or not this religious socialization is consistent with the belief of some parents, but simply that it is an activity that schools should not engage in at all.

457 U.S. 853 (1982). Justice Brennan’s view on the “right to receive information” applied only when school officials were removing books from the school library as a result of improper motives. Id. at 870-72 (plurality opinion). The right to receive information has been criticized because of conceptual problems. See, e.g., Stanley Ingber, Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in Public Schools, 1987 U. ILL. L. Rev. 15, 54-59 (1987); see also Pico, 457 U.S. at 910-20 (Rehnquist, J., dissenting).

I believe that many of the flaws in Justice Brennan’s theory of the right to receive information rest upon the view that the right flows from the academic function of public
DE JURE SEGREGATION

vides another illustration. In *Pico*, the Court ruled that school officials violated students’ right to receive information when the officials removed controversial books from the school library. To illustrate more clearly when this right to receive information is violated, Brennan described a situation in which a Democratic school board, motivated by party affiliation, orders the removal of all books written by or in favor of Republicans. Not all students would object to the removal of these books. Some would consider such a situation not only to be in their own personal interest, but would argue that it was also in the best interest of all students. The removal of such books, however, violates the rights of all students. The motives of the Democratic school board in singling out these books for removal have corrupted the socializing process. The school is instilling a belief that the Democratic Party is better than the Republican party. Regardless of the fact that some students may actually share the school board’s convictions, the value consistency between these students’ beliefs and that of the Democratic school board is irrelevant. The value that the Democratic school board is attempting to inculcate harms all students because all students are subjected to a distorted socializing process.

Conceputalizing de jure segregation in this manner accepts the assertion that all students, white and black, were harmed by de jure segregation. The fact that many Caucasian students, like the religious students or the Democratic students, might not object to the values being inculcated by the public schools is irrelevant. The rights of students are not to a socializing process in which the values instilled are consistent with their beliefs, but rather to a socializing process in which the values inculcated are consistent with the Constitution. In de jure segregation, when the inculcated values are inconsistent with the Constitution, the rights of all students, including Caucasian students, are violated.

A second way of conceptualizing the institutional harm related to distortions of the socializing process of public schools is to view the Constitution as embodying a prohibition on the inculcation of certain values by local school districts. As indicated earlier, when

Schools. Brennan appears to see the right as the required exposure to a certain body of information. If the right is reconceptualized to focus not on the academic function of public schools, but on the socializing function of public schools, then it would make more sense. The right would therefore be seen as a right to non-biased value inculcating education.

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63 *Id.* at 870-71. Justice Rehnquist’s dissent, while sharply critical of Brennan’s opinion, agreed that such political censorship would violate the Constitution. *Id.* at 907 (Rehnquist, J. dissenting).
the Supreme Court accepts some decisions by politicians and school officials and rejects others, it is essentially choosing one value over another. When values that local governments wish to advance, in their role as educators, are inconsistent with values enshrined in the Constitution, the local values must give way. Pursuant to this view, religious socialization—struck down by the Court—is simply in conflict with the value of religious neutrality enshrined by the Religious Clauses of the First Amendment. The Constitution also prohibits public schools from inculcating partisan political beliefs, because doing so would have an adverse impact on the future of our political process.

It does not matter what impact the inculcation of the substantive values advocated by the public schools has upon various subgroups of students. The harm to those students who disagree with the value being advanced by the public schools, as well as the benefit derived from those who agree, is simply irrelevant. Government cannot engage in this type of socialization, irrespective of whether groups of students can or cannot demonstrate a given harm. In the context of de jure segregation, whether African-American students were harmed is also irrelevant. The Equal Protection Clause rests upon the value of racial equality, and public schools cannot attempt to instill a contrary belief.

II

THE COURT'S RECENT SCHOOL DESSEGREGATION DECISIONS—WHAT IT MEANS TO ERADICATE THE VESTIGES OF THE PRIOR DE JURE SEGREGATION

In the last two terms the Supreme Court issued three major opinions addressing the issue of de jure segregation in public schools and public colleges. The first two cases, Board of Education v. Dowell and Freeman v. Pitts, addressed issues relating to the termination of all or part of an existing court decree for public school systems that attempt to eradicate the vestigies of prior de jure con-

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64 See supra note 34 and accompanying text.
65 See Ingber, supra note 61, at 68-71. Professor Tussman has talked about government's role when acting as educator as exercising its inherent teaching power. JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 51-85 (1977); see also Pico, 457 U.S. at 910 (Rehnquist, J., dissenting) (arguing that government as educator is subject to fewer limitations than when operating as sovereign).
duct. The third decision, *United States v. Fordice*, addressed, for the first time, the standards to apply in determining whether the affirmative obligation to dismantle a prior de jure segregated school system in the university context had been met. I will discuss *Dowell* and *Freeman* in this Part.

### A. Board of Education v. Dowell

In *Dowell*, the Supreme Court was faced with its first opportunity to address issues relating to the termination of school desegregation decrees. The Oklahoma City school desegregation case commenced in 1961 with the filing of a complaint by African-American students and their parents against the Board of Education of Oklahoma City. In the ensuing years, the parties struggled through the difficult task of formulating a desegregation plan. This process culminated in 1972 when the district court imposed a desegregation plan known as the Finger Plan. In 1977 the district court, pursuant to a motion by the Board, terminated case supervision and found that the Finger Plan achieved the court’s objectives and that the school system was therefore “unitary.” Although the

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70 Dowell, 111 S. Ct. at 633. In 1963, the District Court found that Oklahoma City was operating a dual school system and had intentionally segregated schools in the past. *Dowell v. School Bd. of Okla. City*, 219 F. Supp. 427 (W.D. Okla. 1963).

71 Dowell v. Board of Educ. of Okla. City, 338 F. Supp. 1256, aff’d 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041 (1972). In 1972, the district court ordered the Board to adopt a desegregation plan known as the “Finger Plan.” Under the Finger Plan, kindergartners would be assigned to neighborhood schools unless their parents wished otherwise. African-American children in grades one to four would attend formerly all-white schools. Children in grade five would attend formerly all-black schools. Thus, the African-American children were to be transported from grades one through four and the white children were transported only for grade five. Students in the upper grades would be bussed to various areas to maintain integrated schools. In integrated neighborhoods, there would be stand alone schools for all grades. *Dowell*, 111 S. Ct. at 633.

72 The Supreme Court noted that the meaning of the word “unitary,” as used by the district court, was unclear. *Dowell*, 111 S. Ct. at 635. The Court also noted that lower courts had been inconsistent with their use of the term “unitary.” *Id.* “Some [courts] have used [unitary] to identify a school district that has completely remedied all vestiges of past discrimination and therefore accomplished its constitutional obligation...” *Id.; see, e.g., United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987); Riddick v. School Bd. of Norfolk, 784 F.2d 521, 533-34 (4th Cir. 1986), cert. denied, 979 U.S. 938 (1986); Vaughns v. Board of Educ. of Prince George’s County, 758 F.2d 983, 988 (4th Cir. 1985).* Other courts, however, have used “unitary” to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan...
motion was contested, the district court's order was not appealed. The Board, however, did not seek to change the Finger Plan until 1984.

In 1984 the Board of Education adopted a student reassignment plan ("SRP") for the 1985-86 school year. Unlike the Finger Plan, the SRP relied on neighborhood school assignments for students in grades Kindergarten through 4. The Board argued that changes in demographics made the increased travel distance that young African-Americans were bussed too burdensome. In addition, the Board asserted its desire to increase parental involvement in the schools. The Board felt that parental involvement was necessary for quality education and that neighborhood school assignments would increase such involvement. The result of the SRP, however, was to increase significantly the racial imbalance of stu-

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Dowell, 111 S. Ct. at 636. The Court found that "[t]he District Court's 1977 order was unclear with respect to what was meant by unitary and the necessary result of that finding." Id. This contradicted the Court's holding in Pasadena Bd. of Education v. Spangler, 427 U.S. 424 (1976), requiring a precise statement to the school board of its obligations under a desegregation decree. See also Freeman, 112 S. Ct. at 1443-44 (advising caution with regards to the use of the term "unitary").

After the Finger Plan was implemented, the Board of Education moved, in June 1975, to close the case on the ground that it had eliminated all vestiges of state imposed racial discrimination in its school system and that it was operating a unitary school system. Although the motion was contested, the district court in 1977 terminated active supervision of the case because it found the desegregation plan had achieved its objective. The district court held in its "Order Terminating Case":

The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not forsee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court.


73 When the Board adopted its new plan, it was convinced that parental involvement was essential to student academic achievement and quality education. In 1969 there were 95 parent-teacher associations in Oklahoma City School District with a total membership of 26,528. When the Board implemented the SRP, there were only 15 PTAs with a total membership of 1,377. After the SRP had been in operation for just two years, the number of PTA organizations had increased by 200% and membership had increased by 144%. Open house attendance was up 5,167. 3,745 more parents attended parent/teacher conferences in 1986-87 than in the year preceding the implementation of the SRP. See Dowell v. Oklahoma City Pub. Sch., 677 F. Supp. 1503, 1516-17 (W.D. Okla. 1987).
students in the school system's elementary schools. In February, 1985, the plaintiffs sought to reopen the case. The district court eventually found that demographic changes made the Finger Plan unworkable and that the school district had bussed students for more than a decade in good-faith compliance with the court's orders. The district court also found that the Board did not promote residential segregation and that the present residential segregation in Oklahoma City was the result of private decisionmaking and economics. It was, therefore, too attenuated to be a vestige of former school segregation. The district court further held that the previous injunctive decree should be vacated and the school district returned completely to local control.

The Tenth Circuit reversed, holding that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate." Relying on United States v. Swift & Co., the Tenth Circuit held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions [and] dramatic changes in conditions unforeseen at the time of the decree that... impose extreme and unexpectedly oppressive hardships on the obligor." The court held that the Board of Education failed to meet this burden; therefore the desegregation decree remained in effect.

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74 Under the SRP, at least 96.9% of the students in 11 of the 64 elementary schools would be black. This amounted to 44% of the African-American children in grades K through four. Dowell, 111 S. Ct. at 641 (Marshall, J. dissenting). At least 90% of the students in 22 other schools would be non-African-Americans. The remaining 31 schools would be racially mixed. Id. The SRP did not affect faculty and staff integration. Id. at 634.

75 The district court concluded that the principles of res judicata and collateral estoppel prohibited the plaintiffs from challenging the district court's 1977 findings that the school system was "unitary." Dowell, 606 F. Supp. at 1548. Since unitariness had been achieved, the district court concluded that court-ordered desegregation should come to an end. The Tenth Circuit reversed. Dowell, 795 F. 2d 1516, cert. den. 479 U.S. 938 (1986). It held that nothing in the 1977 order indicated that the 1972 injunction itself was terminated, even though the order's unitary finding was binding upon the parties. The Tenth Circuit reasoned that the finding that the system was "unitary" merely ended the district court's active supervision of the case. Since the school district was still subject to the desegregation decree, the respondents could challenge the SRP. The case was remanded to the district court to determine if the desegregation decree should be lifted or modified.


77 Id. at 1512-13.

78 890 F. 2d 1483, 1490 (10th. Cir. 1989) (citation omitted).

79 Id. at 1486.

80 286 U.S. 106 (1932).

81 890 F. 2d at 1490 (citations omitted).
In the majority opinion, written by Chief Justice Rehnquist, the Supreme Court held that the Tenth Circuit's reliance on *Swift* was mistaken.\(^8^2\) The Court noted that the test given by the court of appeals would subject a school district to judicial supervision for an indefinite future. Such a draconian result could not be justified by the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause. The Court emphasized that a school desegregation decree is warranted only as a temporary measure. The decree is intended to displace local decisionmaking authority until transition to a unitary nonracial system of public education is achieved.\(^8^3\)

[A] finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved.\(^8^4\)

The Court also indicated that a desegregation decree is dissolved after the local authorities have operated in compliance with it for a reasonable period of time.\(^8^5\)

The Court remanded the case to the district court, with instructions for the District Court to determine:

whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the injunction to be dissolved. The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.\(^8^6\)

To provide further direction, as to what factors lower courts should consider in determining whether or not a school system has

\(^8^2\) *Dowell*, 111 S. Ct. at 636-37. Justice Marshall wrote a vigorous dissent in which Justices Stevens and Blackmun joined. For a discussion of Justice Marshall's dissent, see *infra* notes 131 to 135 and accompanying text.

\(^8^3\) *Dowell*, 111 S. Ct. at 637.

\(^8^4\) *Id.* at 636-37 (emphasis added).

\(^8^5\) *Id.* at 637.

\(^8^6\) On remand, the district court held: (1) that the school board had complied in good faith with initial desegregation decree from time it was entered until adoption of neighborhood school plan; (2) that there was no indication that school board would return to system of de jure segregation in the future; (3) that the vestiges of past discrimination had been eliminated to the extent practicable; (4) that the Board was entitled to complete dissolution of the initial decree; and (5) that the neighborhood school system was adopted for legitimate, nondiscriminatory reasons in compliance with applicable equal protection principles. *Dowell v. Board of Educ. of Okla. City Pub. Schs.*, 778 F. Supp. 1144 (1991).
eliminated the vestiges of de jure segregation, the Supreme Court cited its 1968 opinion in *Green v. New Kent County School Board*. In considering whether the vestiges of de jure segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations'... 'existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities and facilities' are 'among the most important indicia of a segregated system' (the "Green Factors").

The respondents also contended that the appellate court held that the district court's finding that residential segregation in Oklahoma City was the result of private decisionmaking and economics and too attenuated to be a vestige of the former school segregation was clearly erroneous. The Court concluded, however, that the Tenth Circuit's finding on this point is at least ambiguous. To dispel any doubt, the Court directed that the district court and the appellate court treat this issue as res nova.

Finally, the Court stated that once a school system had eliminated the vestiges of de jure segregation, the school system no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students. Challenges to subsequent actions by school boards, including those related to student reassignments, should be evaluated by the equal protection principles articulated in *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.*

**B. Freeman v. Pitts**

In *Dowell*, the district court had relinquished all remedial control over the Oklahoma City School System. By contrast, in *Freeman v. Pitts*, the district court had determined that control could be relinquished only over those aspects of the system in which the vestiges of the prior discriminatory conduct had been eradicated. The district court retained supervisory authority over the aspects of the school system that were not in full compliance. Dekalb County School System ("DCSS") is located in a suburban area outside of Atlanta, Georgia. In 1968, African-American school children and their parents instituted a class action. After the suit was filed, DCSS worked out a comprehensive desegregation plan with the Depart-

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87 391 U.S. 430 (1968).
88 Dowell, 111 S. Ct. at 638 (quoting Green, 391 U.S. at 435).
89 Id. at 638 n.2.
90 Id. at 638.
91 426 U.S. 229 (1976).
ment of Health, Education, and Welfare ("HEW"). 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.

According to the Court, between 1969-86, respondents sought infrequent and limited judicial intervention.93 In 1969, African-Americans consisted of only 5.6% of the student body of DCSS. By 1986, however, their percentage had increased to 47%. The population in Dekalb County grew significantly between 1969 and 1986. Whites migrated to the northern part of the county while African-Americans migrated to the southern part. By the 1986-87 school year, a significant amount of racial imbalance in student school assignments existed in DCSS. Over half of the African-American students attended schools that were over 90% black and 62% of them attended schools where more than 67% of the students were black (20% more than the systemwide average). Of the white students enrolled in DCSS, 27% attended schools that were over 90% white and 59% of them attended schools where the percentage of white students exceeded 20% of the systemwide average of white students.

Despite this amount of racial imbalance in the schools, in 1986 the School Board filed a motion for final dismissal of the litigation. The district court examined whether DCSS had complied with the Green Factors. In addition to the Green Factors, the district court also considered whether the quality of education being offered to white and black students was equal. 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.94 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 other factors. The court did not attribute the imbalance to the prior unconstitutional conduct of DCSS.95 The district court, however, concluded that

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93 Freeman, 112 S. Ct. at 1437. They did not request significant changes in student attendance zones or student assignment policies. In 1976, DCSS was ordered to expand its majority to minority ("M-to-M") plan, to establish a biracial committee to oversee the transfer program, and to reassign teachers so that the ratio of black and white teachers would be similar in each school. Id.

94 Id. at 1442.

95 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,
vestiges of the dual system remained in the areas of teacher and principal assignments, resource allocation, and quality of education. Further relief was ordered in these areas.

The appellate court rejected the district court's incremental approach to eliminating vestiges of prior de jure conduct. It held that the district court had erred in considering the six Green Factors as separate categories. In order for a school system to achieve unitary status it must satisfy all of the Green Factors for several years. Since DCSS had not done this, the court of appeals held that DCSS was responsible for the current racial imbalance and had to correct that imbalance.

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:

only 3 were found to have had a partial segregative effect, and that effect was considered minor. The district court concluded that DCSS achieved the maximum practical desegregation. It found that the existing segregation of students 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 lead to selling and buying of real estate in the DeKalb area on a highly dynamic basis, and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. Id. at 1440.

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 approximate to the ratio of black to white teachers and administrators throughout the system. Black principals and administrators were over represented 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 have more experience than their counterparts in schools with disproportionately high percentages of black students. Moreover, per pupil expenditures in majority white schools exceeded those in majority black schools. Id. at 1441.

Justice Kennedy's opinion was joined by Chief Justice Rehnquist and by Justices White, Souter, and Scalia. Justices Scalia and Souter wrote separate concurring opinions. For a discussion of Scalia's concurrence, see infra note 119.

Justice Souter notes that the opinion of the Court indicated that judicial control of student and faculty assignments may still be necessary to remedy the persisting vestiges of a dual system. He writes separately, however, to note two additional situations in which continued judicial control may be necessary. The first situation is when the demographic change toward segregated residential patterns is itself caused by past school segregation. The second situation occurs after the district relinquishes supervision over a remedied aspect, and future imbalance in that remedied aspect is caused by remaining vestiges of the dual system. In other words, the vestige of discrimination in one aspect becomes the incubator for resegregation in others. Justice Souter discusses the potential that segregated faculties could send whites and blacks into schools based on faculty race and, as a result, increase segregation along those lines. Therefore, even though the student assignment problem has been remedied, it is possible that segregation of stu-
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. . . . Upon 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.101

The Court noted a number of factors that are to be considered in determining whether partial withdrawal is warranted. First, whether there has been full and satisfactory compliance with the court decree in those aspects of the system where supervision is being withdrawn.102 Second, whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system.103 Finally, 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

dents could be the result of people being moved to the schools where the faculty were segregated. Consequently, before a district court ends its supervision of student assignments, it should make a finding that there is no immediate threat of unremedied Green-type factors causing population or student enrollment changes that, in turn, may imbalance student composition. Freeman, 112 S. Ct. at 1454-55 (Souter, J., concurring).

In his concurrence, Blackmun agreed with what he considered to be the holding of the Court, that in some circumstances a district court need not interfere with a particular portion of a school system while retaining jurisdiction over the entire system. He also agreed that the good faith of the school board is relevant when inquiring about the elimination of the vestiges of state imposed segregation. Finally he agreed that DCSS must balance student assignments if an imbalance is traceable to unlawful state policy and if such an order is necessary to fashion an effective remedy.

He wrote separately to address three issues: to explain what it means for the district court to retain jurisdiction over a part of the case while relinquishing supervision and control over a subpart of the school system; to elaborate on the factors the District Court should consider in determining whether racial imbalance is traceable to the board actions; and to indicate where it failed to apply these standards. According to Blackmun, DCSS simply cannot assert that demographic changes caused racial identifiability of the schools. It must establish that its own policies did not contribute to racial imbalance. According to Blackmun, the available evidence suggests that this would be a difficult burden for DCSS to meet. Id. at 1455-60 (Blackmun, J., concurring in judgment).

101 Id. at 1445-46. Kennedy notes that this position was the actual position the Court took in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).
102 Freeman, 112 S. Ct. at 1446.
103 Id.
court's decree and to those provisions of the law and constitution that were the predicate for judicial intervention in the first place.\textsuperscript{104} The major issue in this case was whether the district court was correct in releasing its control over student assignments. The Court notes:

rational balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. . . .\textsuperscript{105}

Much of the remaining discussion in the Court's opinion relates to whether existing student segregation could be attributable either to private decisionmaking or to the original constitutional violation and subsequent action by the state.\textsuperscript{106} The Court's analysis turns on the belief that the existing student segregation is the result of residential segregation.\textsuperscript{107} As a result, it is necessary to inquire into the basis of residential segregation. If the residential segregation can be traced to factors other than the state's attempt to fix or alter demographic patterns, then the residential segregation is not traceable to state action.

The Court notes that our society is very mobile.\textsuperscript{108} Given the disparate preferences between blacks and whites with respect to the racial mix of neighborhoods, it is unlikely that racially stable neighborhoods will emerge.\textsuperscript{109} Where resegregation is the product of private choices, the Court concludes that it does not have constitutional implications.

It is beyond the authority and beyond the practical ability of federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once \textit{de jure} segregated.\textsuperscript{110}

\textsuperscript{104} Id.
\textsuperscript{105} Id. at 1447. The Court quotes from its opinion in \textit{Swann}. In the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns affecting the racial composition of the schools, further intervention by a district court should not be necessary. \textit{Id.} (quoting \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1, 31-32 (1971)).
\textsuperscript{106} Id. at 1447-50.
\textsuperscript{107} Id. at 1448.
\textsuperscript{108} "In one year (from 1987 to 1988) over 40 million Americans, or 17.6\% of the total population, moved households. Over a third of those people moved to a different county and over six million migrated between States." \textit{Id.} at 1447-48 (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 19, table 25 (11th ed. 1991)).
\textsuperscript{109} According to court evidence, African-Americans prefer a 50\%—50\% neighborhood racial mix, while whites prefer a mix of 80\% white and 20\% black. \textit{Id.} at 1448.
\textsuperscript{110} Id.
As time is put between the original violation and the present, these demographic changes intervene, and hence, a new justification emerges for the continued separation of blacks and whites in public schools.

The Court’s opinion also considered whether judicial control over student attendance was necessary to achieve compliance with other facets of the school system.\textsuperscript{111} Racial balancing of student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation. The Court notes that there was no showing that racial balancing was an appropriate mechanism to cure those aspects of the school system not in compliance at the time the district court released supervision of student assignments.\textsuperscript{112} The case was remanded so that the district court could make specific findings on whether it was necessary to retain control over student assignments in order to accomplish compliance in the areas.\textsuperscript{113} The Court noted that the district court did not address the Dowell issue regarding the good faith compliance by the school district with court order over a reasonable period of time.

A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new de jure violation and enables the district court to accept the school board’s representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.\textsuperscript{114}

The case was also remanded for the district court to determine whether the school district complied, in good faith, with the entirety of the desegregation plan.\textsuperscript{115}

C. \textit{Implications of Dowell and Freeman}

For purposes of determining the elimination of all or part of the vestiges of the prior de jure conduct, the Court requires lower courts to examine the \textit{Green} Factors, which represent observable racial balance. Both \textit{Dowell} and \textit{Freeman}, however, suggest that racial imbalance may not be the primary consideration. In \textit{Dowell}, the Court accepted the possibility that, after a desegregation decree is dissolved, current residential segregation can justify subsequent resegregation of students. In \textit{Freeman}, the Court accepted the possibility that the vestiges of prior de jure conduct can be eliminated.

\textsuperscript{111} \textit{Id.} at 1449.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 1449-50.
\textsuperscript{115} \textit{Id.} at 1450.
even if a significant amount of student racial imbalance exists at the
time of such a determination.

As a result, what may be more important than the existence of
racial imbalance are the intangible considerations related to deter-
mining the meaning behind that racial imbalance. The Court re-
quires lower courts to examine the conduct of school officials during
the desegregation process and to attach a meaning to residential
segregation. It appears to be the meaning attached to racial imbal-
ance, rather than its existence, that is dispositive of the issue regard-
ing the continued existence of the vestiges of the prior conduct.

In both cases, the Court noted that, as a prerequisite to the ter-
mination of all or part of court supervision, school districts should
comply in good faith with the court decree for a reasonable period
of time. The Court also noted the importance of determining if a
school system will return to engaging in intentionally discriminatory
practices. Good faith compliance and assurances that the school
system will not return to its former discriminatory ways are actually
examinations that are directed towards interpreting the sincerity of
the school district in eradicating de jure segregation. The Court is
asking the school district to show that its attitude towards African-
Americans, and hence the meaning attached to its actions affecting
them, has changed. In other words, the district must prove that it is
no longer acting under an assumption that African-Americans are
inferior when it formulates its policies and programs.

Perhaps the most complex issue in determining whether court
supervision should be released, in whole or in part, is the existence
of current residential segregation. Prior to Dowell, the Supreme
Court had not addressed whether residential segregation could be
considered a vestige of operating a dual school system. Both
Dowell and Freeman require an examination into the causes of current
residential segregation in order to determine whether it is the result
of private decision making or state action. “The principal cause of
racial and ethnic imbalance in . . . public schools across the coun-
try—North and South—is the imbalance in residential patterns.”

116 Id. at 1446, 1449-50; Dowell, 111 S. Ct. at 637-38. In his concurring opinion in
Freeman, Justice Blackmun also agreed that the good faith of the school board is relevant
in inquiries about eliminating vestiges of state-imposed segregation. 112 S. Ct. at 1455.
117 Freeman, 112 S. Ct. at 1446; Dowell, 111 S. Ct. at 636-37.
118 See Drew S. Days III, School Desegregation Law in the 1980’s: Why Isn’t Anybody
Laughing?, 95 YALE L.J. 1737, 1761 (1986) (reviewing PAUL R. DIMOND, BEYOND BUSING:
INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985) (stating that Dimond’s book pro-
vides a compelling rebuttal to those who claim that residential segregation is the result
of purely advantageous events)).
119 Freeman, 112 S. Ct. at 1451 (quoting Austin Indep. Sch. Dist. v. United States,
429 U.S. 990, 994 (1976) (Powell J., concurring)). In addition to joining the opinion of
the Court, Justice Scalia wrote a separate concurring opinion. Scalia criticized the
Residential segregation is a way of life in the United States and is likely to remain so for sometime. Hence, the Court's resolution, of how to treat current residential segregation, is likely to have profound implications for the termination of existing school desegregation decrees.

Residential segregation is the result of many diverse influences. Discrimination by private parties, as well as private individuals acting upon their own social and economic reasons, contributes to residential segregation. Residential segregation is also, in part, the result of discriminatory activities by nonschool governmental authorities at the federal, state, and local level. Prior actions by governmental authorities have obviously impacted on the amount of residential segregation that exists in the United States today. In the past, local authorities often prohibited integrated neighborhoods

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Court because it did not articulate an easily applicable test to determine whether residential segregation is the result of public or private action. He notes that racially imbalanced schools resulting from residential segregation are the result of a blend of public and private actions. As a result, it is impossible to separate what part is public and what part is private. The attempt to do so is only guesswork. He argues for a standard to residential segregation that if school boards adopt plans allowing for neighborhood schools and for free choice of other schools (transportation paid), then the constitutional violation with respect to students should be considered remedied. Whatever racial imbalances such a free-choice system might produce would be the product of private forces. Id. at 1452 (Scalia, J., concurring).


According to evidence in Freeman, African-Americans prefer a 50%-50% neighborhood racial mix, while whites prefer a mix of 80% white and 20% black. Freeman, 112 S. Ct. at 1448. As a result, the natural tendency of each group seeking to live in integrated housing, which they define as preferable, will invariably pull in the direction of resegregation.

121 In Keyes v. Denver Sch. Dist. No. 1, Justice Powell said that housing separation of the races resulted from purely natural and neutral nonstate causes. 413 U.S. 189, 249 (1973) (Powell, J., concurring in part and dissenting in part). Presumably what Powell meant was that housing segregation was the result of private choices. Former Chief Justice Burger and current Chief Justice Rehnquist concurred with Powell in Austin, where Powell wrote, "[e]conomic pressures and voluntary preferences are the primary determinants of residential patterns." Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 (1976).

See also W. A. V. Clark, Residential Segregation in American Cities: A Review and Interpretation, 5 POPULATION RES. & POL’Y REV. 95-127 (1986). The United States Commission on Civil Rights appointed Dr. Clark to conduct a study and present his findings on the causes of residential segregation. He concluded that the following factors influence residential segregation today: (1) economics and housing affordability; (2) personal preferences and social relationships; (3) urban structure; and (4) private discrimination.
through the use of city ordinances,\textsuperscript{122} zoning practices,\textsuperscript{123} and segregated public housing.\textsuperscript{124} Racial discrimination by state authorities existed in the enforcement of racially restrictive covenants.\textsuperscript{125} Federal authorities contributed to segregated housing by requiring that houses qualifying for federal mortgage insurance programs have racially restrictive covenants.\textsuperscript{126}

Residential segregation is also, in part, a product of the operation of a dual school system.\textsuperscript{127} Over twenty years ago, Chief Justice Burger noted that people gravitate toward school facilities. Just as schools are located in response to the needs of people, the location of schools may also influence residential patterns.\textsuperscript{128} Moreover, school officials may have engaged in such deliberate acts as racial assignments of students, faculty, and staff, and of drawing school boundaries in an effort to increase racial polarization in the neighborhoods.

As the Court approached the issue of how to treat residential segregation, it was given the opportunity of choosing between Justice Marshall’s position in his dissent in \textit{Dowell},\textsuperscript{129} and Justice Scalia’s position in his concurring opinion in \textit{Freeman}.\textsuperscript{130} These positions represent the extremes of regarding how to treat residential segregation. Marshall’s opinion notes the role that the State, local officials, and the Board of Education played in creating the self-

\textsuperscript{123} See, e.g., Buchanan v. Warley, 245 U.S. 60 (1917).
\textsuperscript{125} It was not until 1948 that the Supreme Court struck down racially restrictive covenants in Shelley v. Kraemer, 334 U.S. 1 (1948).
\textsuperscript{126} The Federal Housing Administration required the assertion of racially restricted covenants in all properties which received FHA insurance until 1949. DIMOND, supra note 124, at 184.
\textsuperscript{127} The Supreme Court noted the interrelationship and possibility, in Swann v. Charlotte-Mecklenburg Bd. of Educ., that the location of schools may influence the pattern of residential development of a metropolitan area and have an important impact on the composition of inner-city neighborhoods. 402 U.S. 1, 20-21 (1971); see Columbus Bd. of Educ. v. Renick, 443 U.S. 449, 465, n.13 (1979); DIMOND, supra note 124, at 56-59 (arguing that school boards' actions help create segregated neighborhoods because families tend to move near the schools that their school age children attend).
\textsuperscript{128} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971). The Court also notes that discriminatory school assignment polices ‘may well promote segregated residential patterns which, when combined with ‘neighborhood zoning,’ further lock the school system into the mold of separation of the races.” \textit{Id.} at 21.
\textsuperscript{129} 111 S. Ct. at 689-48 (Marshall, J., dissenting).
\textsuperscript{130} 112 S. Ct. at 1450-54 (Scalia, J., concurring).
perpetuating patterns of residential segregation. In the Dowell case on remand, for example, the district court noted that residential segregation in Oklahoma City was originally enforced by an Oklahoma City ordinance that specified the areas in which blacks and whites were to live. African-Americans today are still the primary residents in the areas originally ceded to them, even though the Oklahoma Supreme court declared the ordinance unconstitutional in 1935. Marshall, therefore, took the position that current residential segregation was a vestige of prior de jure conduct because state action resulted in self-perpetuating patterns of residential segregation. For Marshall, desegregation decrees would remain in effect when it was clear that their removal would result in a significant number of racially identifiable schools due to residential segregation that could otherwise be prevented. By contrast, Scalia, in Freeman, argued that it is impossible to determine what part of residential segregation is traceable to public action and what part is private. Moreover, the attempt to do so is only guesswork. To address residential segregation, Scalia proposed that if school boards adopt plans that allow for neighborhood schools and for free choice of other schools (transportation paid), then the vestiges of the prior discriminatory conduct with respect to students should be considered remedied. Whatever racial imbalances that a free-choice system might produce would be deemed the product of private forces. In Freeman, the Court rejected both of these positions and instead sought a middle ground. The Court’s treatment of the residential segregation issue once again shows the importance that the Court places not upon the existence of segregation, but rather upon the meaning attached to it. The Court, in effect, is forcing lower

131 Dowell, 111 S. Ct. at 646 (Marshall, J., dissenting). As I understand the use of the term “self-perpetuating patterns of residential segregation,” Justice Marshall is referring to residential segregation. It does not matter whether the character of segregated neighborhoods was created recently with the movement of one racial group out of a given area and the movement of another racial group into that area, or whether the segregated neighborhood is one of long standing duration. What is important is the existence of segregated residential patterns.


135 Dowell, 111 S. Ct. at 644 (Marshall, J., dissenting).

136 Freeman, 112 S. Ct. at 1452 (Scalia, J., concurring).

137 Id.

138 Such a position is consistent with the Court’s opinion in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). The Spangler Court held that, once a school district implements a racially neutral attendance plan for students, a district court cannot require continued adjustments to maintain a certain amount of desegregation. Id. at 434-35. The Court concluded that the subsequent resegregation of students was not
courts to put a meaning on existing residential segregation. If they determine that residential segregation is not caused by intentional governmental action, then the existence of segregated schools that results from residential segregation conveys a different meaning, and hence inculcates a different message about the racial imbalance that exists in public schools.

Racially imbalanced neighborhood schools that are the product of private residential decision making are not based upon de jure segregation’s assumption of African-American inferiority. Such schools are based upon legitimate educational and community benefits derived from neighborhood schools. Neighborhood schools minimize the safety hazards to children in traveling to school, reduce the cost of transporting students, ease pupil placement and administrative costs through easily determined student assignment policies, and increase communication between the family and the school. The School Board of Oklahoma City specifically argued that its primary reasons for adopting the SRP were to increase parental involvement and to increase the level of community involvement and support in the schools. By achieving greater parental involvement, neighborhood schools improve the academic environment for students in those schools.

III

THE PURPOSE OF REMEDIES FOR DE JURE SEGREGATION

The Court’s termination cases show that it is not the elimination of racial imbalance that is the determining factor in eradicating the vestiges of de jure segregation. Just as a school system could have de facto segregation and not be in violation of the Constitution, a school system can eliminate the vestiges of its prior discriminatory conduct, even though racial imbalance or the potential for a significant increase in racial imbalance exists at the time that the determination is made. The Court has determined that the meaning behind the separation of black and white school children is the most important element, both in determining a constitutional violation and its remedy. By understanding this, we can now put the remedies that the Supreme Court has approved for the harm of de jure segregation into proper perspective.

I do not wish to suggest that this is an easy distinction to make. See, e.g., Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 60 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).
Measures approved by the Supreme Court to remedy the harm resulting from de jure segregation in public schools include remedial reading, in-service teacher training, testing programs, and counseling and career guidance programs.\textsuperscript{141} School desegregation has been the principal means approved by the Supreme Court to remedy the harm resulting from de jure segregation.\textsuperscript{142} It is my contention that what the Supreme Court \textit{did} in its de jure segregation opinions—as opposed to what it \textit{said} in those opinions—is consistent with recognizing the primary harm of de jure segregation as allowing the socializing process of public schools to inculcate the invidious value.

A. Desegregation as the Principal Means to Remedy the Harm

The Court has pursued school desegregation at times vigorously and at times cautiously.\textsuperscript{143} A number of remedies have been used to accomplish desegregation, including student reassignment, redrawing attendance zones, funding academic improvement programs at various schools, and the use of magnet schools. Yet, desegregation is, no doubt, thought to address concerns that go far beyond the mere racial composition of public elementary and secondary schools.\textsuperscript{144}

While the meaning attached to segregation is the invidious value, the physical separation of children is its most visible component. The only method to eliminate this distortion of the socializing process is to dismantle the dual school system.\textsuperscript{145} Absent such a step, the original meaning that led to the racial separation of students will continue to exist.

The remedy for de jure segregation of public education therefore differs from the remedy for segregation of other public facilities or services because, in a constitutional sense, the harm is different. In most contexts, the primary harm of segregation is stigma. In public elementary and secondary education, however, the inculcation of invidious values is the primary harm. While desegregation is

\begin{itemize}
  \item \textsuperscript{141} See Milliken v. Bradley (Milliken II), 433 U.S. 267, 275-76 (1977).
  \item \textsuperscript{144} In Keyes v. Sch. Dist. No. 1, 895 F.2d 659, 666 (10th Cir. 1990), the Tenth Circuit stated that "[i]n so defining 'unitariness,' we recognize that racial balance in the schools is no more the goal to be attained than is racial imbalance the evil to be remedied."
  \item \textsuperscript{145} Dismantling of the dual school system is an important aspect in the goal of remedying de jure segregation of public schools. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Swann, 402 U.S. at 1; Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968).
\end{itemize}
not necessary to eliminate the stigmatic effects of segregation in other contexts,\textsuperscript{146} it is necessary in the context of public elementary and secondary education. Since public elementary and secondary schools are transmitters of societal values to the young, remedies for de jure segregation therein become \textit{sui generis} in anti-discrimination law.

Just as the physical separation of students was not the harm resulting from de jure segregation, mere physical integration in public elementary and secondary schools is not the remedy.\textsuperscript{147} The primary harm was allowing the socializing process of schools to instill a belief in the inferiority of African-Americans. The remedy is therefore the elimination of this invidious value inculcation.

B. Educational Improvements as a Means of Remedying the Harm

Measures requiring educational improvements have been incorporated into many desegregation decrees.\textsuperscript{148} Court-ordered academic programs are consistent with eliminating invidious value inculcation if they serve one of three overlapping purposes: (1) eliminating historic underfunding in schools that continue to be racially identifiable; (2) promoting desegregation; or (3) specifically addressing invidious value inculcation within the traditional educational program. If the academic program, however, serves only academic purposes, then such remedies would fall outside of the ambit of the theory articulated in this Article.

As noted above, part of the original harm of de jure segregation in most jurisdictions included the systematic underfunding of public schools attended by African-Americans. When courts are able to desegregate a school district, the individual schools lose their racial identity, thus making academic measures unnecessary as a means for remedying systematic underfunding of African-American schools.\textsuperscript{149}

\textsuperscript{146} Professor Yudof has pointed out this criticism. \textit{See} Yudof, supra note 19, at 106.

\textsuperscript{147} Mark G. Yudof, \textit{Implementing Desegregation Decrees}, in \textit{Effective School Desegregation} 245 (Willis D. Hawley ed., 1981); \textit{see also} Keys, 895 F.2d. at 666.


\textsuperscript{149} 68.3% of the students attending Kansas City public schools were African-American when the district court approved the massive \textit{Milliken II} educational programs. \textit{See} Jenkins v. Missouri, 639 F. Supp. 19, 36 (W.D. Mo. 1985), \textit{aff’d}, 807 F.2d 657 (8th Cir. 1986), \textit{cert. denied}, 484 U.S. 816 (1987). The court also found that the qualitative
In situations where courts find it difficult to desegregate all of the schools in a district,\(^\text{150}\) funding of academic measures, which are aimed at equalizing resources for all schools in a given school district, is a reasonable means to alleviate this aspect of invidious value inculcation.\(^\text{151}\) Ordering the most extensive academic remedies, the district court in *Jenkins v. Missouri*\(^\text{152}\) noted that it was not possible to desegregate successfully Kansas City’s schools.\(^\text{153}\) In ordering massive capital expenditures, the district court said that the school buildings and physical facilities in the Kansas City Metropolitan School District had “literally rotted.”\(^\text{154}\) A portion of the academic

and quantitative ratings of the other schools in the surrounding metropolitan area were higher than those of Kansas City. *Id.* at 26.


\(^\text{151}\) In Atlanta, for example, the demographics prevented substantial desegregation because there were not enough white students for desegregation to become a reality. In 1973, a compromise gave African-Americans control of the predominantly African-American Atlanta school district. The school district received both financial backing to implement an ambitious educational enrichment program and the power to set its own tax rate without having to resort to a public referendum. See Roy Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 881, 952 n.306 (1988).

\(^\text{152}\) See *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), modified on other grounds, 855 F.2d 1295 (8th Cir. 1988), aff’d on other grounds 495 U.S. 33 (1990) (The Supreme Court reviewed only on the power of federal courts to increase local and state taxes in order to fund the remedy). As one judge stated, the remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court’s order—the large number of magnet schools and the quantity of capital renovations and new construction—are conceded without parallel in any other school district in the country. 855 F.2d at 1318-19 (Bowman, J., dissenting from denial of rehearing en banc).

\(^\text{153}\) The record indicated that in 1985, 68.3% of the students in the Kansas City Missouri School of District (“KCMSD”) were black. The district court found that the preponderance of black students in KCMSD was due to the State of Missouri and KCMSD’s constitutional violations, which caused “white flight.” Without regaining those students who have already fled, the court of appeals noted that any meaningful integration was not possible. The court of appeals took notice of the census figures regarding the percentage of children in Kansas City, even though its boundaries were not coterminous with the KCMSD. But according to 1980 census figures, blacks accounted for only 37% of the children between the ages of 5 and 18 in Kansas City. *Id.* at 1302.


The district court ordered a number of expensive educational programs. One was a magnet schools program, which provided by 1991-92 every high school and middle school in Kansas City, Missouri School District and half of the elementary schools would become magnet schools, with one or more distinctive themes, such as foreign languages, performing arts, and math and science. According to the district court, the costs of the principal orders instituting the magnet schools plan were $12,972,727 for the June 16, 1986 order and $142,736,025 for the November 12, 1986 order. 855 F.2d at 1301. The district court also ordered a capital improvements program totaling some $260 million. This program called for the closing of 18 school facilities, the construction of 17 new facilities, and renovation of others. *Id.* at 1301. The district court found that the capital improvement program was necessary in part because the unconstitutional segregation was in part responsible for the decay of KCMSD’s buildings. *Id.* at 1304-05. There is a
remedies ordered by the *Jenkins* court can be understood in terms of alleviating both the historic underfunding of the education of African-Americans and the invidious values it instills.

The underfunding aspect of invidious value inculcation is likely to become extremely relevant as school systems attempt to terminate their school desegregation decrees. The district court in *Freeman* found itself faced with terminating student assignments even though a substantial number of racially identifiable schools existed in DeKalb County. The *Freeman* court concluded that the racial imbalance in those schools was not the result of invidious intent by public authorities. Therefore, such segregation did not inculcate the invidious value. In addition to the *Green* Factors, the district court also determined that the quality of education was one of the issues in determining whether DCSS had eliminated the vestiges of its prior de jure conduct. The district court found that DCSS was not in compliance in this area and ordered further relief.

Even though the existence of racial imbalance may be explainable without reference to the invidious value, that value can nevertheless still be inculcated when the educational quality of schools attended by African-Americans is inferior to that of schools attended by whites. For a district court to terminate its supervision in a situation where the quality of education to African-American students is not equal to that provided to Caucasian students clearly means that invidious value inculcation continues to exist. Unlike residential segregation, inequities in school quality are completely under the control of the school district; therefore, explanations that do not rest upon an assumption of African-American inferiority will be difficult to make.

In addition to academic remedies ordered to alleviate systemic underfunding, many lower courts have ordered the design and implementation of magnet schools as a means of furthering desegregation. This method has been approved by the the Supreme

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1992]  

DE JURE SEGREGATION  

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*Freeman*, 112 S. Ct. at 1441.

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The district court found that teachers in schools with disproportionately high percentages of white students tended to be better educated and have more experience than their counterparts in schools with disproportionately high percentages of African-American students. *Freeman*, 112 S. Ct. at 1442. In addition, the court found that per pupil expenditures in majority white schools exceeded per pupil expenditures in majority black schools. The district court ordered the school district to equalize spending and remedy these problems. *Id.*

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Magnet school programs often require the initiation of expensive programs to strengthen the academic curriculum of a few schools. So long as the purpose of such programs is to further desegregation, they serve to disestablish invidious value inculcation.\footnote{159}

Funding for some educational components are aimed directly at the value-inculcating process.\footnote{160} These include programs designed to eliminate racial bias in testing procedures, to counsel students undergoing desegregation, and to train teachers.\footnote{161} Such programs typically address elements of racial bias that exist within the traditional educational program.

Finally, some courts have approved remedies that serve a purely academic role. In \textit{Milliken II}, the Supreme Court gave its approval to such remedies when they are at the behest of local educational officials.\footnote{162} The sole purpose of these remedies is to improve the academic performance of African-American children. The problem with these programs is that they are directed toward alleviating a defective condition of African-American students.\footnote{163} While one of the above justifications could explain the need for a given academic program, merely singling out African-Americans for remedial care (as opposed to changing the values being inculcated) is inconsistent with the theory of this Article, which views the harm of de jure segregation as an institutional one.\footnote{164}

C. Sui Generis Nature of the Remedy for De Jure Segregation in the Context of Public Schools

Mandatory racial balancing of students as the principal means to remedy the harm of de jure segregation in public schools represents a significant departure from the Court’s remedies for de jure segregation.

\footnote{158}Urban school districts that had instituted desegregation plans, 80\% had used magnet programs for desegregation purposes. Only half of those districts were implementing mandatory busing plans. \textit{Desegregation Strategies Currently Used by Urban Districts, Educ. Daily}, Feb. 15, 1990, at 4.


\footnote{159}Missouri v. Jenkins, 110 S. Ct. 1651, 1667 (1990) (Kennedy, J., concurring in part and concurring in the judgment) (citing \textit{Milliken II}, 433 U.S. at 272).

\footnote{160}See supra notes 148-59.


\footnote{162}\textit{Milliken II}, 433 U.S. at 279.

\footnote{163}My criticism of remedies for de jure segregation stems from this very notion. See infra part IV.

\footnote{164}See supra notes 35 to 56.
DE JURE SEGREGATION

1992

segregation in other contexts. When confronted with de jure segregation in public parks, \(^{165}\) beaches, \(^{166}\) golf courses, \(^{167}\) transportation, \(^{168}\) and other public facilities, \(^{169}\) the Court concluded only that mandatory racial separation was impermissible. This departure cannot be attributed solely to the remedial duty imposed to eliminate de jure segregation when the rights of students as opposed to adults are involved. For example, in Bazemore v. Friday, \(^{170}\) the Court rejected the argument that mandatory racial mixing of children was necessary to eliminate the harm resulting from segregated 4-H clubs that the state sponsored for children. Nor can this departure be attributed solely to the operation of an education system by the state. In United States v. Fordice, \(^{171}\) the Court imposed a different remedial duty for eradicating the harm of de jure segregation at the university level than it did at the public school level.

The reason the remedies for de jure segregation of public education—primarily desegregation—differ from the remedy for segregation of other public facilities or services is because of the unique purpose of public schools as compared to other governmental services. Desegregation is necessary because it eliminates the most visible means in which to socialize the invidious value. While desegregation is not necessary to eliminate the stigmatic effect of segregation in other contexts, \(^{172}\) it is necessary in the context of public education, whose primary purpose is to transmit societal values to children. \(^{173}\) Remedies for de jure segregation in public elementary and secondary schools become sui generis in antidiscrimination law.

1. Bazemore v. Friday—The Remedial Obligation to Eradicate the Vestiges of De Jure Segregation for Children Outside of the Public School Context

In Bazemore, the Supreme Court articulated the method for eradicating the vestiges of de jure segregation involving the rights

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\(^{165}\) New Orleans City Park Improvement Ass'n v. Dettiege 358 U.S. 54 (1958) (per curiam).

\(^{166}\) Mayor of Baltimore v. Dawson 350 U.S. 877 (1955) (per curiam).

\(^{167}\) Holmes v. Atlanta 350 U.S. 879 (1955) (per curiam).


\(^{172}\) Professor Yudof has pointed out this criticism. See Mark G. Yudof, Nondiscrimination and Beyond: The Search for Principle in Supreme Court Desegregation Decisions, in SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 97, 106 (Walter G. Stephan & Joe R. Feagin eds., 1980).

\(^{173}\) See supra notes 14 to 34 and accompanying text.
of children outside of the context of public schools. Prior to 1965 an agency of North Carolina had maintained segregated 4-H clubs. Even though the mandatory segregation policy was abandoned in 1965, fifteen years later 39% of the clubs remained all-white, and 880 single race clubs (entirely black, white, or native American) existed in racially mixed communities (a decline of 1.3% from 1972). The Court held that it was not necessary to integrate black and white children in 4-H clubs in order to eliminate the harm produced by the prior de jure segregation of those clubs.

The Court rejected the notion, based on Green, that mandatory racial mixing of children was necessary to eliminate the vestiges of the harm resulting from the operation of segregated 4-H clubs sponsored by the state. The Court argued that the choice to join a 4-H club is voluntary, while attendance at public schools is not. As I have argued, the Court's distinction between 4-H clubs and public schools in Bazemore is best explained by the distinction between the primary purposes of each institution. Unlike education in public schools, the purpose of these clubs was to

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174 Bazemore, 478 U.S. at 340 (Brennan, J., joined by all other members of the Court, concurring in part). The State of North Carolina administered agricultural extension programs through the North Carolina Agricultural Extension Service. Id. at 388. One of the activities sponsored by the Extension Service was the operation of 4-H clubs for children and homemaker clubs for women, which were also segregated prior to 1965. See Bazemore v. Friday, 751 F.2d 662, 665, 668 (4th Cir. 1984), aff'd in part and vacated in part, 478 U.S. 385 (1986). In response to the adoption of the Civil Rights Act of 1964, the Extension Service discontinued its mandatory segregated club policy. Bazemore, 478 U.S. at 390-91 (Brennan, J., concurring). The Extension Service subsequently adopted a number of measures designed to encourage voluntary desegregation of the clubs. Id. at 407 (White, J., joined by four other justices, concurring).

175 Id. at 410-11 (Brennan, J., dissenting in part). As of 1972, the last year such statistics were kept, 98.8% of the homemaker clubs were all black or all white. Id. at 411.

176 Id. at 408 (White, J., joined by four other justices, concurring).

177 Brown, supra note 9 at 1157-62.

178 [The Court's] reasoning, however, is unpersuasive. As in Green, there is little evidence that segregated 4-H and homemaker clubs were dismantled as a result of voluntary desegregation. Green rested in part upon the notion that if voluntary choice does not lead to racial mixing of children, then it cannot eliminate the effects of de jure segregation in public schools. It is true that because of compulsory school attendance statutes, students have to attend some school. Students, however, have always had a choice between attending public schools or private schools. [See Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)]. In Green, students (or their parents) were given a choice as to which public school to attend. In addition, most state compulsory school attendance statutes only mandate attendance by children up to age 16 and in some states only to age 14. The choice of a student to attend school beyond the compulsory school attendance age is therefore as voluntary as the choice of a child to join a particular 4-H or homemaker club. Yet the Supreme Court has never suggested that court decrees ordering school desegregation should exclude students that exceed the compulsory school attendance age.

Id. at 1159-60.
disseminate useful and practical information on subjects relating to agriculture and home economics.\textsuperscript{179} The primary purpose of public schools is to inculcate values. As a consequence, the inculcation of fundamental values is not nearly as strong outside of public schools as it is within public schools. Racial imbalance has less importance in an institute charged with disseminating useful information, but it is extremely relevant to an institution whose primary objective is the inculcation of fundamental values.

2. United States v. Fordice—Remedial Obligation to Eradicate the Vestiges of De Jure Segregation in the Educational Context that Does Not Involve Children

In its recent opinion in \textit{United States v. Fordice},\textsuperscript{180} the Court, for the first time, addressed the obligation of a state to eradicate the vestiges of operating a dual school system at the university level. Over several years, the Mississippi established eight universities. It established five for white students and three for black students.\textsuperscript{181} As late as the mid 1980s, more than ninety-nine percent of the white students were enrolled in one of the five historically white universities. At the same time, ninety-two to ninety-nine percent of black students attended the historically black colleges.\textsuperscript{182} This constitutes seventy-one percent of the black students enrolled in Mississippi’s universities.

In 1975, a group of African-American citizens brought a class action suit against the State of Mississippi, claiming that Mississippi had maintained the racial segregation through its prior dual system of higher education.\textsuperscript{183} The United States intervened as a plaintiff.\textsuperscript{184} After attempting to settle this dispute for twelve years, the parties concluded that they could not agree on whether Mississippi had taken sufficient affirmative steps to dismantle the effects of past

\textsuperscript{179} Bazemore, 478 U.S. at 388-89 (Brennan J., joined by all other members of the Court, concurring in part).

\textsuperscript{180} 112 S. Ct. 2727.

\textsuperscript{181} The three universities established for blacks were Jackson State University, Alcorn State University, and Mississippi Valley State University. The five universities established for whites were University of Mississippi, Mississippi State University, Mississippi University for Women, University of Southern Mississippi, and Delta State University. \textit{Id.} at 2732.

\textsuperscript{182} \textit{Id.} at 2734. In addition to student racial imbalance, there was also considerable faculty racial imbalance. In 1986, less than five percent of the faculty at any of the historically white institutions was African-American, and yet their percentage exceeded two-thirds at the three historically black institutions. Ayers v. Allain, 893 F.2d at 735 (5th Cir.), \textit{vacated en banc}, 914 F.2d 676 (5th Cir. 1990), \textit{vacated sub nom.}, United States v. Fordice, 112 S. Ct. 2727 (1992).

\textsuperscript{183} \textit{Id.} at 733.

\textsuperscript{184} \textit{Id.}
de jure segregation in its university system.\textsuperscript{185} Mississippi argued that it had fulfilled its duty by implementing and maintaining good-faith, nondiscriminatory policies in student admissions, faculty hiring, and operations.\textsuperscript{186}

The district court concluded that, in the higher education context, the affirmative duty to dismantle a racially dual system places greater emphasis "on current state higher education policies and practices in order to insure that such policies and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions."\textsuperscript{187} When the district court applied this standard to the Mississippi university system, it found that there was no current violation of federal law.\textsuperscript{188}

The court of appeals affirmed.\textsuperscript{189} While the court of appeals agreed that "Mississippi was . . . constitutionally required to eliminate invidious racial distinctions and dismantle its dual system,"\textsuperscript{190} it found that Mississippi had done so by adopting and implementing race neutral policies for operating its colleges and universities.\textsuperscript{191} Because all students possessed freedom of choice to attend the college or university they wished, there was no constitutional violation.\textsuperscript{192}

The Supreme Court vacated the decision and remanded the case. The Court specifically noted the applicability of its decisions in public school cases to the context of higher education.\textsuperscript{193} However, the Court went on to note that the difference between the state university system and public schools is that attendance at higher education is a matter of choice and that public universities are not

\textsuperscript{185} Fordice, 112 S. Ct. at 2733.
\textsuperscript{186} Id. at 2734.
\textsuperscript{188} Id. at 1564.
\textsuperscript{189} Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc), vacated sub nom., United States v. Fordice, 112 S. Ct. 2727 (1992). The decision by the district court was originally addressed by a three judge panel of the Fifth Circuit. Ayers v. Allain, 893 F.2d 732 (5th Cir.), vacated en banc, 914 F.2d 676 (5th Cir. 1990), vacated sub nom., United States v. Fordice, 112 S. Ct. 2727 (1992). Over the dissent of Justice Duhe, the majority reversed and remanded the case to the district court, concluding that the badge of inferiority that marked the historically black institutions had not been removed, and thus the racial stigma remained. The majority indicated that the district court should seek the assistance of experts from other disciplines, such as psychologists, sociologists, economists, engineers and doctors, in order to formulate a definite plan for achieving unitary status.
\textsuperscript{190} Ayers, 914 F.2d at 682.
\textsuperscript{191} Id. at 687.
\textsuperscript{192} Id. at 688-89.
\textsuperscript{193} Fordice, 112 S. Ct. at 2735.
DE JURE SEGREGATION

fungible—each university has been designated to perform certain missions.\textsuperscript{194}

The remedial duty that the Supreme Court imposed upon the state in \textit{Fordice} focuses on specific policies and practices of the state’s university system.

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.\textsuperscript{195}

In \textit{Fordice}, the Court did not accept the formula for eradicating de jure segregation that it applied in \textit{Bazemore}.\textsuperscript{196} Nor did the Court—as it did in \textit{Green}—instruct lower courts to focus on the existence of racial imbalance as means to determine the continued existence of the vestiges of de jure segregation.\textsuperscript{197} Rather, the Court required the examination into specific policies and practices of a state’s university system that produces racial imbalance rather than the racial imbalance itself.\textsuperscript{198}

There are similarities and differences between the Court’s treatment of de jure segregation in public schools and de jure segregation in universities. In the university context, the duty imposed by the Court is to eliminate discriminatory policies and practices, as distinguished from the public school context, in which the duty is to pursue affirmatively racial balancing.\textsuperscript{199} This difference in the scope of duty entails that, in the public school context, once de jure segregation is found to exist, the principal means of remedying the resulting harm is to eliminate racial imbalance; whereas, in the university

\textsuperscript{194} \textit{Id.} at 2736.

\textsuperscript{195} \textit{Id.} at 2737.

\textsuperscript{196} \textit{Id.} Officially, the Court attempted to reconcile the two cases, distinguishing \textit{Bazemore} on its facts. This attempt, however, is unpersuasive. The district court in \textit{Bazemore} had concluded that no evidence existed of any lingering discrimination in either the services or membership of the clubs and that racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals. \textit{Id.} Because there was evidence of lingering discrimination in \textit{Fordice}, the Court argued, \textit{Bazemore} did not require or justify the conclusion of the en banc panel. \textit{Id.} In \textit{Fordice}, however, unlike in \textit{Bazemore}, the Court examined unnecessary duplication one of the issues in determining whether the vestiges of prior de jure conduct had been eliminated. \textit{Id.} at 2742-43. This was not required in \textit{Bazemore}. Had such an inquiry been made, it would seem inevitable that substantial duplication existed in North Carolina’s 4-H clubs.

\textsuperscript{197} \textit{Fordice}, 112 S. Ct. at 2737.

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} As noted in the prior discussion regarding \textit{Dowell} and \textit{Freeman}, see supra notes 67 to 140 and accompanying text, the racial balancing obligation relates only to the racial imbalance that resulted from de jure segregation.
context, even after a finding of de jure segregation, proof of racial imbalance is insufficient. Thus, in the university context, the remedies are not directed towards racial imbalance per se but towards the policies and practices alleged to have produced and continued to maintain it. According to the Court’s opinion in *Fordice*, the vestiges of prior de jure conduct can be eliminated without ever removing racial imbalance.\(^{200}\)

As in the context of public schools, the Court is requiring that the rationale attached to continuing racial identifiability of universities be tracable to nondiscriminatory explanations. If a given policy or practice was motivated by sound educational policy that cannot practically be eliminated, then the justification for racial imbalance is not discriminatory.\(^{201}\)

One of the major distinctions between the Court’s treatment of segregation in the university context and in the public school context relates to the student’s individual choice regarding which school to attend. In *Fordice*, the Court noted that racial balancing could not be pursued directly because university students were free to choose which school they wished to attend.\(^{202}\) Individual choice, however, is not an acceptable explanation for the maintenance of racial imbalance in public schools if that racial imbalance has never been eliminated.

\(^{200}\) *Fordice*, 112 S. Ct. at 2743. As a practical matter, whether this obligation ultimately is determined to be different than the obligation placed on public schools will depend in large measure on the reasons accepted as “sound educational policy.” *See id.* at 2748-49 (Scalia, J., concurring in judgment in part and dissenting in part) (arguing that “the Court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in *Green*”).

\(^{201}\) From the opinions written by the Justices in *Fordice* it is difficult to tell how much segregative effect can hide behind sound educational policy. An examination of the separate concurring opinions of Justices Thomas and O’Connor, both of whom joined the Court’s opinion, can illustrate the uncertainty behind the implications of the majority opinion. Justice Thomas, for example, wrote separately to emphasize that the Court’s opinion had not foreclosed “the possibility that there exists ‘sound educational justification’ for maintaining historically black colleges *as such*.” *Id.* at 2746 (emphasis in original). Thomas noted that a state should be able to “operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another.” *Id.*. Thomas’ opinion, therefore, seems to accept the possibility that the continued existence of one or more of the historically black colleges could be justified by designating its purpose accordingly.\(^{202}\)

Justice O’Connor, on the other hand, wrote separately “to emphasize that it is Mississippi’s burden to prove that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to de jure segregation that has segregative effects are narrow.” *Id.* at 2743. She also noted that “[w]here the State can accomplish legitimate educational objectives through less segregative means, the courts may infer lack of good faith.” *Id.* at 2744. This would appear to foreclose the operation of “historically black colleges *as such*.”
Individual choice plays a different role in the context of universities and public schools. At the university level, choices about which institutions to attend are made by adults, whose primary concern is pursuit of self-defined, individual interests. In contrast, when the \textit{Green} Court ordered racial balancing for the public schools, it actually rejected parental choice as a justification for the continued existence of racial imbalance. Hence, the issue raised in \textit{Green} did not relate to students' choices about their education, which might not be given much weight because of their youth\textsuperscript{203} but rather to choices that parents wished to make for their children. Articulating this distinction allows us to frame properly the question from the perspective of the value inculcating theory. The issue is whether racial imbalance that resulted from parents choosing the schools their children attended was a sufficient justification for the conclusion that the discriminatory meaning attached to the operation of a dual school system had not been eliminated.

The Supreme Court has recognized that parents have a fundamental right to raise their children. That right is violated if the state mandates that all children attend public schools.\textsuperscript{204} That right, however, has not been extended to give parents the right to choose which public school their children will attend or which classes their children can be excused from taking.\textsuperscript{205} In fact, the implicit assumption behind compulsory school attendance statutes is that parents should not be trusted with the sole authority to determine the up-

\textsuperscript{203} Even though the Supreme Court has held that children are persons for purposes of interpreting the Constitution, it has also noted that the constitutional rights of children differ from those of adults. Belotti v. Baird, 443 U.S. 622 (1979). Children are not born with developed cognitive faculties and also lack the experience, maturity, and judgment of adults. In addition, children are not generally self-sufficient. Unlike adults, children are not considered independent and autonomous, with externally constituted goals, preferences, and objectives that must be respected. While our legal system sees adults as choosers, it sees children as learners. Racial imbalance in public schools could never be justified on the basis of a child's freedom of choice regarding which schools to attend because choices by minors are not accorded the same weight as choices by adults. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a law making it a crime for a girl under 18 to sell any newspapers, periodicals, or merchandise in public places, despite the fact that a child of the Jehovah's Witnesses faith believed that it was a religious duty to perform this work). See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (stating that it was not necessary to determine the feelings of Amish children when it held that the right of Amish parents to direct the religious upbringing of their children allowed them to exempt their children from Wisconsin's compulsory attendance statutes); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), \textit{cert. denied}, 484 U.S. 1066 (1988) (rejecting a free exercise challenge requiring that students learn critical reading from Holt, Rinehart & Winston basic reading series). But see Mary Michelle U. Hirschoff, \textit{Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?}, 50 S. CAL. L. REV. 871 (1977) (arguing that there should be a right for parents to control the exposure of their children to objectionable materials).
bringing of their children. While children must be taught to decide for themselves what is in their best interest, government also has an interest in restricting those choices so that these students learn to respect and tolerate the right of others to decide for themselves as well. Regulating private schools and operating public schools is the way that the state advances that interest. By inculcating appropriate values, public schools advance the collective interest of society in assuring that future generations of adult citizens are properly acculturated.

The state cannot rely on parents to fulfill its interest in the proper inculcation of values, because the parents' influence will often be what the state is attempting to counteract. The inculcation of values by public schools is, therefore, not intended to be an extension of the family socializing process. When there is a dispute about which values are appropriate, this process will be at odds with the parents' wishes. When the racial imbalance has its genesis in the operation of the dual school system, justifying its continued existence by pointing to the wishes of parents is not compelling. To accept that the continued racial imbalance is justified because of parental belief about African-Americans, which may have also been a reflection of their acceptance of the invidious value, is a continuation of the prior harm, rather than a remedy for it.

3. Sui Generis Remedy for Public Schools

The Bazemore Court rejected the need to integrate 4-H clubs in order to eliminate the harm resulting from de jure segregation. In doing so, the Court rejected classifying and treating minors outside of the educational context as members of racial and ethnic groups for purposes of eradicating the harm of de jure segregation. In Fordice, the Court rejected the need to assign students to universities in order to obtain guaranteed racial balancing by eliminating the operation of a dual university school system and, thereby, refused to

206 Pierce, 268 U.S. at 510, upholds the right of the state to compel attendance by children at some school, even if such attendance is against their parents' wishes.
208 The establishment of public schools and concomitant compulsory school attendance statutes reflect, in part, the exercise by a state of its police power to assure the public health, safety, welfare, and morality. See, e.g., State v. Hoyt, 146 A. 170 (N.H. 1929); State v. Bailey, 61 N.E. 730 (Ind. 1901).
209 See Mozert, 827 F.2d at 1058 (rejecting parents free exercise challenge to the Holt, Rinehart, and Winston basic reading series). But see Wisconsin v. Yoder, 406 U.S. at 205 (upholding the right of Amish parents to exempt their children from compulsory school attendance statutes when attendance violated their religious beliefs).
210 But see, e.g., LINO GRALIA, DISASTER BY DECREES (1976) (arguing that the Court did not have sufficient reason to order racial balancing in Green v. New Kent County).
treat students as members of a racial group in order to eliminate the harm of de jure segregation.

The use of racial balancing to eliminate the harm of de jure segregation in public schools required the state to differentiate between students on the basis of their membership in a racial group. In other words, employing racial balancing as the remedy for de jure segregation requires, in most school systems, that the state classify and assign students to schools, not as students, but as black students and white students. The Supreme Court has also indicated that public school officials, implementing educational policy, could prescribe racial balancing if they believed it necessary to prepare students to live in a pluralistic society.\footnote{211} This would also permit public school officials to treat students as members of racial and ethnic groups, not as individuals. The Court's apparent approval of public officials' right to treat students as members of racial and ethnic groups to remedy de jure segregation reflects the uniqueness of public education. Allowing school officials to treat students as members of racial and ethnic groups is consistent with the view of public education as a value inculcating institution. It is not the actions by state officials that are important; rather, it is the meaning attributed to such actions. The motivations that generated the use of racial classifications are the primary consideration because these motivations impart meaning to the governmental act, and therefore determine the values being socialized.

D. Comparison of the Invidious Value Inculcation Theory and Justice Marshall's Stigmatic Harm Theory

Justice Marshall's dissent in Board of Education of Oklahoma City v. Dowell, joined by Justices Stevens and Blackmun, presents a stigmatic harm theory to explain the Supreme Court's de jure segregation jurisprudence.\footnote{212} Marshall argued that "a desegregation decree cannot be lifted so long as conditions likely to inflict the stig-}

212 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 Black, supra note 41, at 426; Cahn, infra note 215, at 150; see also Ronald Dworkin, Social Sciences and Constitutional Rights—The Consequences of Uncertainty, in EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS 27 (Ray C. Rish & Ronald J. Anson eds., 1977); Lawrence, supra note 401, at 439-40.
 Professor Yudof has suggested a theory to limit government speech that parallels, to some extent, the invidious value inculcation theory. He notes that governments communicate through a multitude of acts disseminating information and withholding information. These acts or omissions have an important impact by influencing the attitudes and opinions of the populace. Yudof asserts that certain governmental communications should be considered ultra vires in the sense that there are certain messages beyond the power of the government to disseminate. YUDOF, supra note 19, at 296-306 (1983).}
matic injury condemned in Brown I persist and there remain feasible methods of eliminating such conditions."

Our pointed focus in Brown I upon the stigmatic injury caused by segregated schools explains our unflagging insistence that formerly de jure segregated school districts extinguish all vestiges of school segregation. The concept of stigma also gives us guidance as to what conditions must be eliminated before a decree can be deemed to have served its purpose.\textsuperscript{214}

The stigmatic theory, articulated by Justice Marshall, assumes that de jure segregation produced an abstract harm that is distinct from any observable harm.\textsuperscript{215} The theory articulated in this Article also views the harm resulting from de jure segregation as an abstract harm.\textsuperscript{216} Both theories, therefore, see the harm as an interpretative harm resulting from the meaning attached to segregation.

Justice Marshall's theory, however, is about racial discrimination harm applied in the context of public education. My theory is about an educational harm applied to race discrimination. Unlike Justice Marshall's theory, which grounds the harm of de jure segregation in its stigmatic impact on African-American children, the invidious value inculcation theory grounds the harm in the context of the socializing function of public schools. Where Marshall sees the harm of de jure segregation as stigmatizing African-American school children, thereby singling out African-Americans as the victims,\textsuperscript{217} I see the harm as distorting the value inculcating process of public schools. I therefore view remedies for de jure segregation not as benefiting solely African-Americans, but rather as benefiting the socializing function of public schools. As a result, the interests of all students are implicated in the harm of, and remedies for, de jure segregation.

\begin{itemize}
\item \textsuperscript{213} Dowell, 111 S. Ct. at 639 (Marshall, J., dissenting).
\item \textsuperscript{214} Id. at 642 (Marshall, J., dissenting).
\item \textsuperscript{215} De jure segregation is a "public symbol of the inferior position" of African-Americans. Charles R. Lawrence III, Segregation "Misunderstood": The Milliken Decision Revisited, 12 U.S.F. L. Rev. 15, 26 (1977). As such a symbol, racial segregation in public schools violates the Constitution because such segregation is an "invidious labeling device." Id. at 24. Through segregation, government insults or offends the dignity of the minority against whom the prejudice is directed. See Larry G. Simon, Racially Prjudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 San Diego L. Rev. 1041, 1047 (1978). There is no need for evidence to support the proposition that segregation is an insult to African-Americans, [s]egregation does involve stigma; "the community knows it does." Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 158 (1955).
\item \textsuperscript{216} See supra note 215.
\item \textsuperscript{217} Much of my criticism of remedies for de jure segregation stems from the very fact that these remedies proceed from the notion that African-Americans were the ones damaged by de jure segregation. See infra notes 225-65.
\end{itemize}
DE JURE SEGREGATION

Stigmatic theories typically proceed from an assertion that the harm of de jure segregation results from governmental decisions based upon an intent to stigmatize. One weakness of stigmatic theories like Justice Marshall's, in the context of de jure segregation of public schools, is that such theories do not provide an adequate initial justification for desegregation as the principal means to remedy the harm they identify. The harm is presumed to flow from governmental action taken with the intent to stigmatize. If the governmental action would nevertheless have been taken absent the stigmatizing motives, then the stigmatic harm would not exist. Courts could eradicate stigma by ensuring that government decisions are made on a racially neutral basis. Therefore, under a stigmatic theory, neighborhood school assignments could eradicate the stigmatic injury, a position Marshall would surely dispute. Marshall would certainly agree that, originally, desegregation was necessary to eliminate the harm of de jure segregation. While I do not disagree with Justice Marshall's position that desegregation was a proper remedy, I simply argue that Marshall's theory may not support the remedy.

My theory asserts that the state's stigmatic designation operates differently within the context of public schools than in other governmental contexts because, as Justice Rehnquist pointed out, public education is "the one public institution which, by its very nature, is a place for the selective conveyance of ideas." Once de jure segregation is found to exist, the use of race-neutral means to make school assignments does not eliminate the inculcation of the invidious value if racial mixing does not occur. The race-neutral assignments that perpetuate racial segregation in public schools, which flows from invidious state motivations, reflects the established patterns of belief about African-Americans that are rooted in the invidious value. Racial imbalance rooted in this motive has to be disestablished before schools can eliminate invidious value inculcation. Therefore, racial mixing is a required part of the remedy.

Finally, unlike Justice Marshall, I do not see the continued existence of segregated residential patterns as a vestige of school au-

218 Yudof, supra note 36, at 106.

219 The district court, in Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955), captured the essence of the remedy for the stigmatic approach when it stated that "[t]he Constitution . . . does not require integration. It merely forbids discrimination." Id. at 777. The forbiding of discrimination would eliminate the harm flowing from governmental action taken with the intent to stigmatize.

220 Dowell, 111 S. Ct. at 645 (Marshall, J., dissenting) (arguing that, against the backdrop of former state-sponsored single-race schools, any persistence of such schools perpetuates a message of inferiority).

According to the theory I have articulated, the harm of de jure segregation was based upon the assumption that African-Americans were not equal to Caucasians. Once a school system has implemented an effective desegregation plan and operated that plan for a reasonable period of time, the original assumptions that led to the segregation of black and white school children will be eliminated. Because it is difficult to estimate how much time will be sufficient, such an estimation should depend upon the differing circumstances in each individual school district.

If a school system that has disestablished its dual school system for a reasonable period of time institutes a neighborhood school assignment policy, the motives of school officials must be assessed in order to determine the meaning, and thereby the values, being socialized by this practice. Segregated schools that are the product of private residential decision making might not inculcate the invidious value simply because they are racially identifiable. They might instead reflect the belief articulated in Dowell: that neighborhood schools allow for greater parental involvement and thereby improve the academic environment for children.

IV
THE COURT'S IDEOLOGICAL FRAMEWORK EMPLOYED TO JUSTIFY REMEDIES FOR DE JURE SEGREGATION

The Supreme Court's de jure segregation jurisprudence can be thought of as the best example of the Court giving life to the requirement of racial equality enshrined in the Equal Protection Clause. Few would doubt that the Court's desire, in Brown I, was to correct the historic injustice of de jure segregation. If remedies for de jure segregation, however, are to embody a belief in racial equality, those remedies must explicitly proceed from an uncompromised and unqualified fundamental premise that blacks are equal to whites. Yet, an examination of the rationale that led to the remedies for de jure segregation illustrates that the Supreme Court did not base the remedies on an assumption of true equality. Rather, the Court justified its decisions implicitly, and in some instances explicitly, on the inferiority of African-Americans.

This Part discusses the Court's ideological framework that led to the ordering of remedies for de jure segregation. In Brown I and Green v. New Kent County,224 the Court sanctioned court-ordered inte-
DE JURE SEGREGATION

gration of schools as the primary means to remedy the harm resulting from de jure segregation. In Milliken II, the Court also approved the use of certain educational programs as the means to remedy harm caused by de jure segregation.225 In all of those cases, the Court is proceding from an ideological framework that accepts the notion that segregation retarded the cognitive psychological and emotional development of only African-Americans. According to the Court’s opinion, remedies for de jure segregation benefit only African-American school children because segregation actually made them inferior.226

A. The Ideological Framework that Approved Desegregation as a Means to Remedy the Harm Resulting From De Jure Segregation

To be effective, ideologies must connect to real problems and real life experiences.227 Three aspects of the Court’s reasoning, in justifying integration as the principal means to remedy the harm of de jure segregation, suggest that the Court believed that segregation made African-Americans inferior to Caucasians. First, in searching for a harm, the Court only pointed to the presumed impact of segregation on African-American school children.228 Second, the Court in Brown I noted that, even in situations where the physical facilities and other tangible factors were equal, the schools attended by African-Americans were nevertheless inferior because their schools lacked the “intangibles.”229 Finally, because of the assumption that African-Americans only benefit from desegregation,230 the Court has always viewed desegregation as necessary to vindicate only the rights of African-American school children.231

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225 See supra notes 266-73 and accompanying text.
226 See supra notes 288-93 and accompanying text.
228 112 S. Ct. at 1443. 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 CROSS, SHADES OF BLACK (1990) (arguing that the psychologist confused racial group preference with self-esteem, assuming that racial group preference would automatically correspond with self-esteem). For a more complete discussion of Cross’s theory, see infra note 305.
229 Brown I, 347 U.S. at 493.
231 See infra notes 264-65 and accompanying text.
1. The Negative Impact of Segregation on African-Americans

Before *Brown I*, the NAACP had orchestrated a constitutional attack on segregation in graduate and professional schools.\(^2\) Prior to the NAACP’s campaign, African-Americans experienced numerous disadvantages in seeking higher educational opportunities.\(^3\) Black public colleges were unequal to white public colleges in numbers, facilities, faculty training, and breadth and depth of curriculum.\(^4\) This inequality was most apparent at the graduate and professional school level. In 1940, while all seventeen segregationist states\(^5\) had white public colleges with extensive graduate and professional school programs, only three states—Virginia, Texas and North Carolina—had instituted graduate instruction at their black public colleges.\(^6\) In 1940, only two of the approximately thirty black public colleges in the segregationist states had professional schools,\(^7\) and none offered programs leading to a

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\(^3\) In the 1930s, a white student desiring to attend college had five times as many colleges to choose from as his African-American counterpart. Those colleges also offered the white student with a richer and more diverse curriculum. Ravitch, *supra* note 53, at 121. In 1956, the Supreme Court confirmed that *Brown I* applied to colleges and universities. Board of Trustees v. Frasier 350 U.S. 979 (1956) (per curiam), aff’d 134 F. Supp. 589 (M.D.N.C. 1955).


\(^5\) The states referred to throughout this Article as the segregationist states are the 17 states and the District of Columbia that maintained a rigid system of segregation in public education during the separate but equal era. These states are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia.

\(^6\) Kujovich, *supra* note 233, at 113. Graduate schools are different from professional schools, which include law, medicine, and dentistry.

\(^7\) The black professional schools were North Carolina College for Negroes School of Law and Library Science and Lincoln University Law School in Missouri. Kujovich, *supra* note 233, at 113. The law school at Lincoln University was actually the result of the NAACP’s litigation success in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). The all-white University of Missouri Law School had refused to admit Lloyd Lionel Gaines because of his race. The State of Missouri offered to pay Gaines’ extra expenses for a legal education in an out-of-state law school or, alternatively, to build a law school for African-Americans at Lincoln University, the black public college. The Missouri Supreme Court found that the scholarship program was substantially equal to the opportunity offered white students at the University of Missouri and rejected Gaines’ challenge. State *ex rel.* Gaines v. Canada, 113 S.W.2d 783 (Mo. 1937), rev’d, 305 U.S. 337 (1938).

In reversing, the Supreme Court noted that the validity of segregation laws “rest[ed] wholly upon the equality of the privileges which the laws give to the separated groups within the State.” Gaines, 305 U.S. at 349. While law schools in other states
While all of the segregationist states provided for graduate training in engineering for white students, no such training was available at any of the black institutions.\textsuperscript{238} When the Court addressed segregation in the graduate and professional school cases,\textsuperscript{240} it was not necessary to overturn the "separate but equal" doctrine announced in \textit{Plessy v. Ferguson}\textsuperscript{241} in order to grant the African-American plaintiffs relief.\textsuperscript{242} The harm resulting from segregation in the graduate and professional school cases was the denial to African-Americans of opportunities for professional training equal to those provided to Caucasian students. The "separate" provided by the Southern states in the graduate and professional context did not approach objectively measurable equality, so the NAACP had little trouble showing the denial of equal-

might have been every bit as good as that of the University of Missouri, the relevant question was what kind of opportunity the state of Missouri provide for the two racial groups. \textit{Id.} Missouri had given a privilege to whites, that of attending the University of Missouri Law School within the state, that it had not given to African-Americans. The Supreme Court ruled that Gaines "was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State." \textit{Id.} at 352.

Gaines never actually enrolled in the University of Missouri Law School. RAVITICH, \textit{supra} note 53, at 122. Therefore, we do not know what reaction his enrollment would have provoked. After the decision by the U.S. Supreme Court, the Missouri legislature established a law school for African-Americans at Lincoln University. \textit{Gaines}, 131 S.W.2d at 218-19. The Missouri Supreme Court ruled that as long as the facilities at Lincoln University were "substantially equivalent" to those at the University of Missouri, the absence of other and proper provision for Gaines had been redressed, thus he had no right to attend the University of Missouri. \textit{Id.} at 220. The NAACP was unable to locate Gaines in order to challenge this action by Missouri. See Lucile H. Bluford, \textit{The Lloyd Gaines Story}, 1958 J. LEGAL EDUC. Soc. 242-46 (1959). If they had, they could have challenged the establishment of the separate law schools to determine if the Court would have considered it sufficient to meet the dictates of separate but equal. Thus, the issue that the Court later addressed in Sweatt v. Painter, 339 U.S. 629 (1950), discussed \textit{infra} note 243, might have been addressed 10 years earlier.

\textsuperscript{238} RAVITICH, \textit{supra} note 53, at 121.

\textsuperscript{239} \textit{Id.} "The number of states with white public colleges offering different professional curricula were as follows: graduate engineering—17, law—16, medicine—15 . . . graduate commerce and business—15, pharmacy—14, library science—11, social service—9, and dentistry—4." Kujovich, \textit{supra} note 233, at 113 n.303.

\textsuperscript{240} The Supreme Court cases addressing segregation in graduate and professional schools was actually preceded by Pearson v. Murray, 169 Md. 478, 182 A. 590 (Md. 1936). Donald Murray, an African-American graduate of Amherst College, applied to the University of Maryland Law School, who denied him admission because of his race. \textit{Id.} at 590. While Maryland did not provide any legal training for African-Americans, it quickly appropriated $10,000 to fund an out-of-state scholarship program. \textit{Id.} at 593. The Maryland Court of Appeals ruled that the program was insufficient to provide Murray with equal educational opportunities. \textit{Id.}

\textsuperscript{241} \textit{163 U.S. 537} (1896).

ity. The Court did not need to consider whether segregation per se had a negative impact on African-Americans or on the educational process of those institutions.

The Court’s analysis in *Brown I* begins with the assumption that the physical facilities and other tangible factors of the public schools attended by black and white students were equal. Given the objectively measurable equality of segregation in this context, the Court was forced to identify another harm resulting from segregation. The Court could have focused on the impact of segregation on the socializing process in all public schools attended by whites or blacks. Instead, the Court focused on the presumed impact that segregation had on African-American children. *Brown I* stands as the basis of the Court’s theory that segregating public schools adversely affects African-Americans only.

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243 In *Brown I*, the Court mentioned that its decisions in *Sweatt* and *McLaurin* also rested on the recognition of intangibles. 347 U.S. at 493-94. Yet in *Sweatt*, the Court also focused on the objectively measurable differences between the University of Texas Law School and the Texas Law School for Negroes. 339 U.S. at 632-34. At the time *Sweatt* applied, no law school existed in Texas that admitted African-Americans. *Id.* at 631. While *Sweatt*’s appeal was pending, however, the Texas legislature appropriated enough money to establish a law school for African-Americans. *Id.* at 632; KLUGER, supra note 39, at 261. In comparing the newly-created Texas Law School of Negroes with the University of Texas Law School, the Court noted that the University of Texas Law School had a student body of 850 students, a library with over 65,000 volumes and a faculty of sixteen full-time and three part-time professors. *Sweatt*, 339 U.S. at 632. Also available at the University of Texas Law School were a “law review, moot court facilities . . . and the Order of the Coif affiliation.” *Id.* at 632-33. In contrast, by the time the case reached the Supreme Court, the law school for African-Americans had only 23 students, a faculty of five full-time professors, and a library of approximately 16,500 volumes. *Sweatt*, 339 U.S. at 633.

While George W. McLaurin was eventually admitted to the University of Oklahoma Graduate School, his admission was on a segregated basis. *McLaurin*, 339 U.S. at 639-40. Therefore, he was subject to “such rules and regulations as to segregation as the President of the University shall consider to afford . . . substantially equal educational opportunities as are afforded to other persons. . . .” *Id.* at 640. McLaurin was originally required to sit apart from the rest of his classmates at a designated desk. *Id.* Although he was allowed on the main floor of the library, he was restricted to his own table. *Id.* He also had to eat in the cafeteria at a segregated table. *Id.* With regard to McLaurin, the segregation regulations imposed upon him also had some very material and objectively unequal results.

244 *Brown I*, 347 U.S. at 492. “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.” *Id.* at 493.

245 “Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools . . . . We must look instead to the effect of segregation itself on public education.” *Id.* at 492.

246 See *id.* at 493-94.
In one of the most quoted phrases from *Brown I*, 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." 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. . . . [f]or 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 . . . .*

The Court, therefore, explicitly stated that segregation made African-American children inferior. Certainly the temptation exists to explain those quotations in *Brown I* as simply unfortunate passages that the Court no longer accepts. In *Freeman*, however, Justice Kennedy noted that the principal wrongs of the de jure system were the injuries and stigma inflicted upon the disfavored race. Justice Kennedy went on to quote the above passages, reiterating that the Court continues to perceive among the harms of de jure segregation to be not only stigma, but also tangible harms.

2. Segregated Public Schools that African-Americans Attended Lacked "Intangibles"

While the Court, in *Brown I*, assumed that the African-American children in segregated schools had equal physical facilities and other tangible factors, it declared that they were nevertheless deprived

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247 Professor Derrick Bell notes that proponents of integration quoted this phrase repeatedly, in order to justify their belief that integration provides the proper route to equality. *Bell*, *supra* note 230, at 285.

248 *Brown I*, 347 U.S. at 494. The social science evidence cited by the Court was specifically intended to prove that segregation produced a psychological harm to African-Americans. *Id.* at 494 n.11. For discussion of recent criticism of this statement, see *infra* note 319.


250 *Freeman*, 112 S. Ct. at 1443.

251 *Id.* at 492 n.4. The Court noted:

In 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" . . . *the Virginia Attorney General's brief on reargument* [indicated] that the [equalization] program has now been completed. In the
of some of the benefits they would receive in a racially integrated school system. Thus the segregated schools that African-Americans attended lacked certain “intangibles.”

The Court analogized these intangibles to those discussed in *Sweatt v. Painter*, when the Court addressed the differences between the University of Texas Law School and the Texas Law School for Negroes. The “intangibles” in *Sweatt* were very evident. It is not difficult to assume that the University of Texas provides better training for law students than the Texas Law School for Negroes. Any law school that, by law, excludes a race (whites) from which the overwhelming majority of judges and other attorneys will come, handicaps the ability of its students to develop those important personal contacts that are so essential for a law student’s future success in his or her chosen vocation as an attorney.

In comparison to law schools, the vocational function of elementary and secondary schools is minimal. Segregated schools, especially those with truly equivalent resources, can provide African-Americans with the basic skills that can be built upon for vocational purposes. In fact, social scientists, taking their cue from the Delaware case, the court below similarly noted that the state’s equalization program was well under way.

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*Id.* at 492 n.9.

252 *Id.* at 494. Justice Kennedy’s opinion in *Freeman* quotes this passage from *Brown I* as well. *Freeman*, 112 S. Ct. at 1443.


254 The Court stated:

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 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.” *Such considerations apply with added force to children in grade and high schools.*


255 The Court, however, did not actually require mandatory racial mixing as the principle means to remedy the harm of segregation in public elementary and secondary schools until *Green v. New Kent County*, 391 U.S. 430 (1968). Prior to *Green*, the results of the *Coleman Report* cast serious doubt on the ability of school desegregation to have much of an impact on the academic achievement of African-American youth. As part of the Civil Rights Act of 1964, Congress commissioned a study, commonly referred to as the “Coleman Report,” to determine the “lack of availability of equal educational opportunity” for individuals of different race, color, religion or national origin. *JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY* iii (1966). In the fall of 1965, a research team led by James Coleman of John Hopkins University and Ernest Campbell of Vanderbilt University surveyed some 4,000 public elementary and secondary schools. *Id.* at 1, 80. The research team not only scrutinized educational facilities, materials, curricula, and laboratories, but also analyzed educational achievement as determined by standardized tests. *Id.* at iii. After noting that tangible equality had been substantially
achieved between the public schools for African-Americans and the public schools for Caucasians, the Coleman Report concluded that African-American students in desegregated schools did only slightly better than African-Americans in segregated schools on standardized achievement test. In order to determine the effect of desegregation on student achievement, the Coleman Report compared the achievement levels of four groups of African-American students: (1) those in majority-white classes; (2) those in classes that were half black and half white; (3) those in majority-black classes; and (4) those in all black classes. *Id.* at 31-32. The Report stated that African-American students in the first group generally received the highest scores on standardized tests, although the differences from group to group were small. *Id.* at 29. Because there was no court-ordered busing when the *Coleman Report* was conducted in 1965, the African-Americans who attended majority-white schools presumably lived in integrated neighborhoods. Their slightly better performance may, therefore, have been simply reflective of their more privileged socioeconomic position. If so, then the academic performance of black students in majority-white classes adds force to one of the major findings of the study: the socioeconomic status of the student was a strong determinant in academic achievement.

African-American students' achievement, however, did not rise in proportion to the presence of white classmates. Although African-American students in majority-white classes generally had the highest scores, black students in all-black classes actually scored as high or higher than those in half-black or majority-black schools. *Id.* at 31. Moreover, in the Midwest, some African-American students in all-black classes outperformed even those African-Americans in majority-white classes. *Id.* at 32.

Some have cited the Coleman Report as vindicating desegregation as the appropriate means in which to increase academic achievement by African-Americans. This is because Coleman noted that the academic achievement of children from lower socioeconomic backgrounds, whether white or black, improved by being in schools with children from higher socioeconomic backgrounds (whether black or white). This statement, when added to the assumption that whites, in general, are of a higher socioeconomic background than blacks, led to a belief that desegregation would benefit African-Americans academically.

Coleman himself was concerned about the misuse of the Report by those arguing for desegregation as a means to increase the academic achievement of African-Americans. In a letter he sent to the New York Times, Coleman expressed this concern:

My opinion, . . . is that the results [of the Coleman Report] . . . have been used inappropriately by the courts to support the premise that equal protection for black children is not provided unless racial balance is achieved in schools. I believe it is necessary to recognize that equal protection, in the sense of equal educational opportunity, cannot be provided by the State.


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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 that must have been endemic only to white teachers and students. In reaching its decision, the Court failed to mention the fact that white children were also denied the benefits of a racially integrated education. To presume that African-American students would profit so much by attending classes with Caucasians, as opposed to being in educational institutions by themselves, leads to the inescapable conclusion that there is something better about being with whites than being with blacks. The implication of such a position is that whites are better than blacks.

3. Desegregation as a Vindication of the Rights of African-American School Children

It was not until thirteen years after *Brown I* that the Supreme Court placed upon school boards an obligation to mix affirmatively the races in public schools. In *Green v. New Kent County*, the Court struck down a "freedom of choice" plan, which allowed a pupil to choose his own public school, because the plan did not produce a significant amount of racial balancing in the schools. The New Kent County School Board argued that its "freedom of choice" plan

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BULL. 217 (1978); Symposium, *School Desegregation: Lessons of the First Twenty-Five Years*, LAW & CONTEMP. PROBS., Summer 1978, at 1-133; Stuart W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420, 420-37 (1979); *see also* Dowell v. Board of Educ., 890 F.2d 1483, 1554 (10th Cir. 1989) (Baldock, J., dissenting) (noting the testimony of Dr. Walberg and Dr. Crain that segregated schools inhibit learning, but also noting studies conflict concerning the effects of desegregation on achievement); COLEMAN, supra note 255.

If desegregation does not succeed in significantly raising the academic achievement of African-Americans, then from the perspective of the academic function of schools, its continued use as an appropriate remedy is open to serious question. I do not deny that segregation may have caused an academic harm to African-Americans; I simply argue that such a harm is not the most appropriate one for the Supreme Court to address.

STOKELY CHARMCHEL & CHARLES V. HAMILTON, *Black Power* 54 (1967) (Charmichael, the former chairperson of the Student Non-Violent Co-ordinating Committee (SNCC), has since changed his name to Kwame Toure).


259 Id. at 441. Under the "freedom-of-choice" plan, no whites had enrolled in the black school, and only fifteen percent of blacks had enrolled in the white school. *Id.*
could only be faulted by finding that the Fourteenth Amendment required compulsory integration. The Court’s response to the School Board was that

[its] argument ignores the thrust of Brown II. In the light of the command of that case, what is involved here is the question whether the Board has achieved the ‘racially nondiscriminatory school system’ Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. . . . School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . . 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. The Court’s justification for desegregation was, simply, that the constitu-

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 CFR §§ 80.1-80.13, 181.1-181.76 (1976). “Freedom of choice” plans were seen as acceptable under these regulations. See 391 U.S. at 433-34 n.2; Lino A. Graglia, Disaster By Decree (1976).

The Court’s opinion in Brown II required public schools to effectuate a transition to a “racially nondiscriminatory school system.” 349 U.S. at 301. 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 elucidating, assessing, and solving this problem. Id. at 299. Many southern federal judges and school officials implementing this obligation relied upon the dicturn in Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C. 1955), to fill the vacuum left by the Supreme Court. In addressing one of the companion cases of Brown I on remand, a three-judge federal district court in South Carolina wrote:

[The Supreme Court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.
tional rights of African-American school children required it.\textsuperscript{264} Because the Court has viewed the benefit of remedies for de jure segregation as accruing to African-American students,\textsuperscript{265} it has never indicated that desegregation is necessary in order to vindicate the rights of white school children.

\textit{Id.} at 777 (emphasis added).

Many states and school systems employed various methods to comply minimally or avoid compliance with the constitutional duty. In May, 1964, ten years after \textit{Brown I}, less than two percent of the African-American school children in the South attended school with whites. \textit{Ravitch, supra} note 53, at 162-63. Measures passed by southern states included such provisions as:

- 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 on the state legislature, in hopes of frustrating federal court orders; the 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 teachers who advocated desegregation.


For example, the Virginia Constitution 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 rather than public schools. “The General Assembly [also] met in special session and enacted legislation to close any public schools where white and colored 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.” \textit{See Griffin} v. County Sch. Bd., 377 U.S. 218, 221 (1964). 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. \textit{See} Harrison v. Day, 106 S.E.2d 636 (Va. 1959). For a discussion of several statutes the Arkansas legislature adopted to maintain school segregation, see Raymond T. Diamond, \textit{Confrontation as Rejoinder to Compromise: Reflections on the Little Rock Desegregation Crisis}, 11 NAT’L BLACK LJ. 151, 155 (1989).

\textit{See also} Cooper v. Aaron, 358 U.S. 1 (1958) (rejecting a request by the Little Rock, Arkansas school board for a two and one-half year delay in implementing a court-approved 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); Goss 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).


\textsuperscript{265} In many instances this unstated notion has justified African-American children shouldering a disproportionate share of the burden of desegregation. For example, in the desegregation plan that was in effect in Oklahoma City, black students were bused for the first four years. Whites were then bused for only one year. \textit{See} Board of Educ. v. Dowell, 111 S. Ct. 690 (1991).
B. The Ideological Framework That Approved *Milliken II* Remedies

Twenty-three years after *Brown I*, the Court once again used the ideological framework it employed in *Brown I* and *Green* when it approved "*Milliken II* remedies." In *Milliken v. Bradley*\(^{266}\) (*Milliken II*) the Court affirmed a district court order approving remedial educational components as part of the remedy for de jure segregation of Detroit Public Schools.\(^{267}\) The educational components proposed by the Detroit School Board and approved by the district court fell into four categories: reading,\(^{268}\) in-service training for teachers and administrators,\(^{269}\) revised testing procedures,\(^{270}\) and counseling and career guidance.\(^{271}\)

In order to justify the *Milliken II* remedies, the Court once again focused on the presumed negative impact of de jure segregation on African-American children. In reference to the African-American school children who would continue to attend segregated schools, the Court 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..."\(^{272}\) The Court's reasoning rests upon the belief that racial isolation had damaged and would continue to damage only African-American children. The cause of this damage, their racial isolation, had to be treated directly. The *Milliken II* remedies were therefore necessary to eradicate the consequences resulting

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267 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 the State of Michigan was just as responsible for 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.
268 *Milliken II*, 433 U.S. at 275. Recognition of this purely academic form of a relief is inconsistent with my theory.
269 The purpose of the in-service training program was "to train professional and instructional personnel to cope with the desegregation process" in order "to ensure that all students in a desegregated system would be treated equally by teachers and administrators. ..." *Milliken II*, 433 U.S. at 276.
270 A testing program was adopted because the district court found that black children were "especially affected by biased testing procedures." *Id.* at 276 (quoting *Bradley v. Milliken*, 402 F. Supp. 1096, 1142 (E.D. Mich. 1975), aff'd 540 F.2d 229 (6th Cir. 1976), aff'd 433 U.S. 267 (1977)).
271 Counselors were included in the plan to address the psychological pressures that undergoing desegregation would place on Detroit's students. *Id.* at 287.
from the deprivation of contact with Caucasians. While the Court noted that the problems of African-American children are not peculiar to their race, the Court’s reasoning clearly implied that distortion in the speech, conduct and attitudes of African-American children were the result of their racial isolation.\textsuperscript{273}

Once again, the Court did not note any possible impact or harm to the conduct or attitudes of Caucasian children due to their isolation from African-American children. As in the context of ordering desegregation, the Court views the remedies approved in \textit{Milliken II} as ones for the sole benefit of the African-American children. Thus, the same implicit message—that the confinement of African-Americans to all-black settings necessarily has a negative impact only upon their development—is once again raised.

C. The Impact of Remedies for De Jure Segregation on the Socializing Process of Public Schools

1. \textit{The Distinction Between the Public Schools Inculcating African-American Inferiority and Assuming African-American Inferiority}

From the perspective of the socializing function of public schools, an important distinction exists between viewing the harm of de jure segregation as distorting the socializing process of public schools and viewing the harm of de jure segregation as retarding the cognitive, emotional, and psychological development of African-Americans. According to the former, public schools were advocating that African-Americans were inferior to Caucasians. According to the latter, African-Americans were actually made inferior to Caucasians. Under the former, racism could be viewed as an irrational belief in the inferiority of African-Americans. Under the latter, racism has a rational basis, but the inferiority of African-Americans is presumably curable. The implications of this fragile and fleeting distinction are, from the perspective of the socializing function of public schools, monumental. The question of whether remedies for de jure segregation amounted to an attempt to cure the patient, or an injection of the patient with a new strain of the disease, turns on this very distinction.

If the harm of de jure segregation was that public schools were merely asserting that African-Americans were inferior, then remedies should be directed at eliminating the inculcation of this value by public schools. The assumption underlying remedies for de jure segregation is the public schools’ instillation of blacks’ inferiority must be disestablished in as many of its myriad forms as are subject

\textsuperscript{273} Id. at 287-88.
DE JURE SEGREGATION

This "nondiscrimination" notion is consistent with the view of the Constitution as a charter of negative liberties. Under this view, the Constitution does not impose an affirmative duty upon schools for the benefit of African-Americans; rather, it requires that public schools cease discriminating practices that distort their socializing process.

If, however, we assume that the harm of de jure segregation is not merely a distortion of the value inculcating process of public schools but also that African-Americans were actually made inferior, then simply disestablishing public schools' distorted value inculcating processes is not enough. Remedies for de jure segregation would be called upon to rectify an inferior condition that exists within African-Americans.

This distinction can be illustrated by examining a portion of a speech delivered by Lyndon Johnson to the graduating class at Howard University in June 1965. In that speech, Johnson analogized the condition of African-Americans to a track race.

"You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, "you are free to compete with all others," and still justly believe that you have been completely fair."

Apparently, Johnson assumed that slavery, discrimination, and racial isolation left their crippling mark only upon African-Americans and that history succeeded in distorting the development of African-Americans to such an extent that it actually made them inferior to Caucasians. From such a position, it follows that American society's obligation to African-Americans is to offset the negative consequences of slavery, segregation, and racial isolation manifested in African-Americans. Measures to accomplish this goal are intended to correct, alter, alleviate, remedy, or cure African-Americans of presumed deficiencies. While it may be true that African-Americans are not completely responsible for their plight, they are according to this view, inflicted with a disease that is in need of a cure.

274 See supra note 141-64 and accompanying text.
There is another way, however, to describe the condition of African-Americans that does not start with an assumption that casts African-Americans into the role of “the problem.” Attention should focus not upon African-Americans, but rather on how discrimination distorted dominant attitudes held about African-Americans in our society.

A society cannot, by law and custom, exclude a whole race from that society’s principal advantages for centuries without having an effect upon the dominant beliefs in that society and its major institutions. Such an exclusion will distort societal and institutional definitions of what is important, good, of quality, of merit, appropriate, proper—even what that society defines as justice. Such an exclusion will affect that society’s interpretation of its history, of its present day reality, and of the very values it holds as sacred. The distortion resulting from such an exclusion will not be cured by merely allowing the excluded group an opportunity to obtain the advantages that the society had previously denied them.

Johnson’s analogy could be re-characterized by drawing upon another sports metaphor as follows:

You do not continue to use a track in the shape of a circle because at the time the track was developed, you excluded runners who were better at running straight distances. Runners of straight distances are not treated fairly by being allowed to compete in the races on a circular track. In order to be fair, you must also change the shape of the track itself to eliminate the skewing that was developed during the time that the runners of straight distances were excluded.  

The reformulated analogy accepts the harm of exclusion not as falling upon African-Americans but rather upon the dominant beliefs that permeate American society. If provided assistance is considered remedial, it is remedial in the sense that it attempts to change those dominant social beliefs about African-Americans, not to change African-Americans themselves. The Court’s ideological framework has, unfortunately sought the latter, and thus has misdiagnosed the patient.

2. The Supreme Court Opinions Possess the Meaning Behind the Remedies for De Jure Segregation

In examining segregation, it was clear that it was not racial imbalance per se that produced the constitutional harm; rather it was the meaning attached to it. In determining whether remedies for de jure segregation eliminate the harm, the meaning attached to the

277 See supra note 276 and accompanying text.
remedies must be examined. Just as we looked to the assumptions that generated the practice of de jure segregation to ascertain the meaning behind de jure segregation of public schools, we must look to the assumptions that generated those remedies to ascertain the meaning behind remedies for de jure segregation.

Since remedies for de jure segregation are court-ordered remedies for constitutional violations, the place to look for the meaning behind such remedies is the ideological framework that the Supreme Court developed. The Court’s ideological framework implies that the harm of de jure segregation fell only upon African-Americans.278 Even though de jure segregation is no longer legal, society is still left with the problem of African-American’s inferiority that must be cured. African-Americans remain the problem and the solution requires that we change African-Americans in order to remedy the problem. As a consequence of this ideology, African-American school children are viewed as the beneficiaries of remedies for de jure segregation.279

Given the Court’s ideological framework, remedies for de jure segregation proceed from the assumption that there is something better about Caucasians than about African-Americans.280 As a result, while segregation in the past stood as a symbol of the inferiority of African-Americans, the remedies for de jure segregation stand in exactly the same capacity today. Rather than curing a deficiency in the value inculcating process of public schools, the remedies merely replicate the disease. Instead of wielding a hypodermic needle with a cure, the Supreme Court used one with a new strain of the same plague.

D. How Remedies for De Jure Segregation Replicate the Same Disease They Should Be Curing

This Article is not criticizing the remedies, including desegregation, that the Supreme Court ordered or approved to rectify de jure segregation. With the Supreme Court’s attention focused on the termination of de jure segregation decrees, it is far too late to discuss what the appropriate remedies for de jure segregation should have been. As I approach this Article, those remedies are fait accompli. Instead, I seek to examine the ideological framework that produced the remedies that the Court ordered or approved. While

278 See supra notes 227-73 and accompanying text.
279 But see DERRICK BELL, Brown and the Interest Convergence-Dilemma, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 90, 95 (Derrick Bell ed., 1980) (arguing that school desegregation was only possible because the interest of whites suggested the need for desegregation).
280 See supra notes 227-73 and accompanying text.
the means ordered or approved are not subject to change, the Court's ideological framework may be. An alternative conceptualization of the harm of, and remedies for, de jure segregation outlined earlier in this Article could explain almost all of the means that the Court has used to eliminate the vestiges of de jure segregation.

My criticism of the ideological framework established by Brown I and its school desegregation progeny runs counter to the mythic reputation that the Court's jurisprudence in this area has developed over the years. Unquestioning admiration of Brown I and its progeny blinds us to the underlying acceptance of African-American inferiority embodied in the remedies for de jure segregation. These cases have always been viewed as the vindication of the rights of African-Americans in general and their school children in particular. The Court and supporters of school desegregation have viewed themselves as crusaders for racial equality. Yet, the "racial equality" sanctioned in Brown I and its school desegregation progeny is actually a new form of racial inequality.

The reader may be saying, "Certainly one cannot argue that African-Americans were not harmed by segregation? What is wrong with candidly admitting that the development of African-American school children was retarded by their exclusion from contact with whites?" The answer is simple: To the extent that racism is the irrational judgment about the abilities of individuals based upon their skin color, remedies proceeding from this presumed "candid recognition" of the condition of African-Americans actually reinforces those judgments.

If African-Americans were as good as Caucasians, then both blacks and whites should be beneficiaries of remedies for de jure segregation. The Supreme Court, however, did not view interracial exposure of Caucasians to African-Americans as a benefit for Caucasian students. The presumed remedy for those judgments based upon skin color proceeds from the notion that the judgments are actually rational and not irrational. Thus, remedies for de jure segregation are needed precisely because African-Americans are not the equals of Caucasians. The remedies for de jure segregation, like de jure segregation itself, therefore stand as symbolic statements that continue to inculcate the belief that blacks are not the equals of whites.

The unmistakable reality of this situation is what troubled me as a fifth-grader standing in the living room of our two-bedroom house. See supra notes 1 and 2 and accompanying text.
ply reiterating the very sentiment that the Supreme Court articulated.

By attacking the legality of de jure segregation of public schools, African-Americans were demanding respect and equality. They were asserting their own humanity as equals to whites and insisting that their humanity be recognized. The Court converted those demands for respect and equality into a request for a social welfare program. African-Americans asserting their constitutional rights were recast as beggars seeking an in-kind benefit from whites in the form of racial contact. By converting the demand for equality and respect into a request for a social welfare program, the Court never rejected the premise for segregation—that whites were superior to blacks.

For the Court to have recognized the demands of African-Americans, the remedies for de jure segregation would have to have proceeded from the notion that blacks were already the equals of whites. Conceptually, this would have required the Court to recognize that both white and black school children were harmed by de jure segregation, and therefore, that both black and white school children would benefit from interracial contact.

E. How The Court’s Ideological Framework Could Continue to Impact Issues Related to Termination of Court Decrees

As lower courts begin terminating supervision of school districts, one issue that will be hotly debated will be whether other areas beyond the Green factors should be considered in deciding whether the vestiges of the prior de jure conduct have been eliminated. Those seeking to extend court supervision will probably argue that factors other than those related to racial balancing should be considered. The Supreme Court’s opinion in Freeman encourages such an inquiry. Among the factors considered by the district court in Freeman was the quality of education being offered to the white and black student population. The Court noted that it was an appropriate exercise of the district court’s discretion to address whether elements other than the Green Factors should be considered to determine full compliance.282 However, in determining whether the vestiges of the prior de jure conduct have been eliminated due to the Court’s ideological framework, proponents of continued court supervision may be forced into disparaging African-Americans again.283 School Board of

283 African-American school children and their parents normally challenge the termination of school desegregation decrees. See, e.g., Pitts v. Freeman, 887 F.2d 1438
Richmond, Virginia v. Baliles illustrates this point. The School Board of Richmond Public Schools and various students and parents in the school district brought suit to obtain additional financing from the State of Virginia for Milliken II educational programs. The district court, however, converted the case into an inquiry on terminating court supervision of Richmond's Schools.

The School Board conceded at trial that there was no intentional discrimination in Richmond public schools that the Green factors specifically covered. The plaintiffs contended, however, that these factors were not the sole determinants of the continued existence of vestiges of de jure segregation. The plaintiffs argued that two additional factors should be considered. The first was racial isolation stemming from the fact that 86.4% of Richmond's students were black. The second factor was the educational deprivation of Richmond's African-American students resulting from their parents' and their teachers' (presumably only the African-American teachers) deficient training in State-sponsored segregated schools. Accordingly, the plaintiffs asserted that the parents of Richmond


Baliles, 829 F.2d at 1310. The district court had retained jurisdiction over an intradistrict desegregation plan for the schools of Richmond, Virginia since 1970. Id. Prior to this decision, the School Board had successfully moved to be realigned as a plaintiff in the case. See Baliles, 639 F. Supp. at 682.

The plaintiffs "alleged that the state defendants had not fulfilled their constitutional obligation to eradicate the vestiges of segregation in [the Richmond Public Schools]. As a remedy, [they] sought to compel the state to fund remedial and compensatory programs to eliminate the lingering effects of the state's former dual system." Baliles, 829 F.2d at 1310.

The district court's switch of the focus of the case from a discussion about the appropriateness of Milliken II remedies to a discussion about termination of court supervision resulted from the court's attempt to determine which party had the burden of proof with respect to whether any vestiges of past state-imposed segregation still remained in Richmond Public Schools. Baliles, 639 F. Supp. at 682. The district court concluded that determination of the burden turned upon whether Richmond Public Schools had eliminated the vestiges of de jure segregation and therefore satisfied its constitutional obligation. Id. As the Court found, if the vestiges of state imposed segregation had been eliminated, then the burden of attempting to justify Milliken II remedies funded by the state would fall upon the plaintiffs and not the state defendants. Id. The district court denied the requested relief, see id. at 702, and the Fourth Circuit affirmed. Baliles, 829 F.2d at 1310.

Baliles, 829 F.2d at 688. The Green factors appear to be irrelevant in a school district like Richmond in which 86.4% of the students were black at the time the School Board initiated this action. Id. at 693.

Id. at 692-95.

Id. at 695-99.
school children had difficulty providing the necessary educational-related support and that African-American teachers had difficulty providing effective instruction to the black students. The plaintiffs' evidence of the continuing damage that the above vestiges of prior discrimination produced was the relatively poor performance of African-Americans students in such academically oriented criteria as dropout rates, scores on standardized tests, and graduation rates.

The substance of the plaintiffs' arguments focused only on the presumed impact that segregation had upon African-Americans. The plaintiffs, in effect, argued that the negative consequences of de jure segregation had affected not only the abilities of Richmond's African-American students to learn but also the parenting skills of African-American parents and the teaching skills of African-American teachers, even though most of them were college educated. In short, the plaintiffs were forced to argue not only that present racial isolation from whites prevents blacks from being good students but also that past racial isolation presents them from being good parents and good teachers. Consistent with the ideological framework established by the Supreme Court's de jure segregation jurisprudence, the plaintiffs were asserting that segregation actually made African-Americans inferior to Caucasians and that continued racial isolation of African-Americans would continue to affect them adversely.

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290 Id. at 696. This argument apparently unsettled the Mayor of Richmond, who, despite the fact that additional funds might improve the quality of education in his city, nevertheless testified that Richmond Public School teachers were excellent and that the "bad teacher" was an exception. Id. at 697.

291 Id. at 696. The Fourth Circuit did not disagree that the determination of the eradication of vestiges of de jure segregation could not also include an assessment of objective educational criteria suggested by the school board. The court stated that, while in some circumstances it might be appropriate to use factors other than those described in Green, the objective criteria did not support the School Board's contention of continuing racial discrimination. Baliles, 829 F.2d at 1312. The court noted that the dropout rate in Richmond Public Schools had fallen between 1980 and 1983 from 12% to 7.5%, the retention rate had fallen from 1977 to 1983 from 13.5% to 11.5% and the scores on standardized achievement tests had progressively improved. Id. The court noted that the fourth graders actually ranked above the 50th percentile nationally and only slightly lower than the state average in reading. Id. The court went on to note that, to the extent that students in Richmond public schools still fell below the state averages in any academic areas, the district court's factual findings that these deficiencies were the result the high incidence of poverty in the Richmond public schools were not clearly erroneous. Id. at 1312-13.

292 The court noted that 97.4% of the instructional personnel had college degrees and 41.4% held post-graduate degrees, ranking Richmond Public Schools 13th out of the state's 135 school divisions. Baliles, 639 F. Supp. at 697.

293 See supra notes 251-57 and accompanying text.
Another example of the viability of the Court’s ideological framework is in the Fifth Circuit’s opinion *Ayers v. Allain*[^294]. This opinion preceded the Fifth Circuit’s en banc opinion that preceded the Supreme Court’s opinion in *United States v. Fordice*. One of the central issues in *Ayers* was whether continuing racial concentration results in freedom of choice. In an opinion written by Judge Goldberg, the majority concludes that the mere adoption of race-neutral admissions criteria is not enough to eradicate the vestiges of de jure segregation infesting the Mississippi university system[^295]. Judge Goldberg’s opinion clearly displayed sympathy with the concerns of African-Americans. However, he cited the Supreme Court’s opinion in *Green* for the proposition that the vestiges of de jure segregation distort only the perception of blacks[^296]. As Judge Goldberg states, “Blacks do not, therefore, make choices from a tabula rasa. Instead they choose against a history of racial subjugation with its attendant messages of inferiority.”[^297]

The implications flowing from Judge Goldberg’s statements are obvious. Only the choices of African-Americans are distorted. And yet, ninety-nine percent of the whites, whose choices are presumed not to be distorted, choose not to attend historically black schools. If only the choices of blacks are distorted and not the choices of whites, then whites are presumably acting rationally when they choose not to attend historically black institutions. The choices of African-Americans to attend historically black schools presumably reflect their distorted judgment. Why? Is it because historically white schools, because they are white, are presumed to be better than the historically black schools, because they are black[^298]? If so, by definition, blacks are presumed not to be the equals of whites.

[^295]: *Id.* at 753.
[^296]: *Id.* at 750-51.  
[^297]: *Id.* at 750; see also *id.* at 752 (“[T]here remains in Mississippi’s higher educational system vestiges of discrimination which distort the perceptions of black students. The racial composition of the student body is not simply the result of student choice.”).
[^298]: The most obvious nonracial explanation for the choice of whites not to attend historically black colleges is because they felt that the quality of the education at those institutions was significantly less than that at the historically white colleges. Certainly many of the choices by white students can be understood on those grounds. For example, in 1980 the Board of Trustees, which had plenary power over the Mississippi university system, designated three historically white colleges—University of Mississippi, Mississippi State University, and University of Southern Mississippi—as comprehensive colleges. *Ayers*, 893 F.2d at 738. This designation meant that these institutions were to offer a greater number and higher level of degree programs than the remaining universities.

Of the historically black colleges, Jackson State University was probably the strongest academically. In fact the average faculty salary at Jackson State, though less than that at the comprehensive colleges, was more than that at the other two historically white
While Judge Goldberg is no doubt correct that our history of racial subordination distorts the choices of blacks, his fallacy comes from failure to note the distortion of the choices of whites. Decisions by whites not to attend the historically black institutions reflect the fact that whites, too, have also been infected by the disease flowing from de jure segregation. Their choices have also been distorted and should not be presumed rational.

V

THE IMPACT OF THE SUPREME COURT’S IDEOLOGICAL FRAMEWORK ON EDUCATORS

Law is a powerful mechanism through which our society carries out its normative choices.299 Since the courts are the final arena for resolving disputes in American society, the public discourse of judges is given a preferred meaning and assumed to reflect accurately reality. Most Americans believe in the myth of an impersonal judiciary divining its decisions based upon some objective truth,300 and therefore view the law as an autonomous, legitimate means of mediating social disputes.301 As Professor Wasby has pointed out, “the principal belief about the Supreme Court—still believed by many . . . —[is] that the Court did not make, but only found the law.”302 The Court’s opinions therefore operate “to validate particular conceptions of society, by legitimizing certain concrete social arrangements.”303 Given this belief, Supreme Court opinions can function as powerful symbolic declarations to guide, influence, and

institutions. Id. at 737. In addition, the percentage of faculty members with doctorate degrees at Jackson State exceeded that of all of the historically white colleges except for Mississippi State University. Id. Jackson State also offered more total academic programs than either Delta State University or Mississippi University for Women. Id. at 739. Yet despite the apparent academic strength of Jackson State in comparison with Delta State University and University of Mississippi for Women, in the 1985-86 academic year less than 9% of the undergraduate students at Jackson State were white. Id. at 735. While academic justifications can explain why more whites did not attend historically black institutions, those justifications cannot explain the choice of 99% of white students.


300 See HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 42 (1988).


endorse policies made outside of a strictly judicial forum. These Supreme Court opinions, especially in the context of de jure segregation, contribute to either broadening or restricting notions of American equality. These opinions, therefore, help all Americans organize their experiences with people from different races.

The Court's de jure segregation jurisprudence also has had a profound impact on professional educators' beliefs about education. While the nature of this impact is of course a matter of

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305 See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896). As Professor Aynes noted about Plessy, "that case determined access and equality issues in the most basic aspects of American public life for 58 years, including public accommodations and education. It was a decision which had not merely a ripple effect but rather flooded all people in the country . . . ." Richard L. Aynes, An Examination of Brown in Light of Plessy and Croson: Lessons for the 1990s, 7 HARV. BLACKLETTER J. 149, 152 (1990).
306 Professor William E. Cross, Jr. makes this point about the impact of the Court's acceptance of the black inferiority complex presented in scholarly works after 1954. Beyond the Court room, however, and especially in scholarly works that have appeared since the Court's 1954 decision, the image of [the damaged African-American psyche] helped distort black history and social scientific analysis of black life. By continuing to interpret the racial-preference studies with singular rather than contrasting images, the isolated and stark presence of the self-hating Negro became what the Clarks and others never intended: a stereotype.

307 In addition to the symbolic impact of Supreme Court decisions, knowledge and viewpoints enshrined in public schools also carry with them the imprimatur of society. Affirmation in the context of public education of a normative pattern of a particular cultural group will also carry with it important symbolic value. Stanley Ingber, Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools, 1987 U. ILL. L. Rev. 15, 24 (1987). As a consequence, Supreme Court opinions in the context of public schools have a heightened symbolic effect.

308 Professor James Coleman, one of the supervisors of the Coleman Report, noted how dramatic a departure the Court's view of education in Brown I was from the fundamental assumptions that underlaid public education at that time. With regard to understanding the academic role of public schools prior to Brown I, the role of the school and the community in the education of children was seen as passive. The school's obligation was seen to provide children an opportunity to obtain an education. But this obligation was discharged if the school had a curriculum that would not exclude a student from higher education, was not too distant and was free of cost (beyond the value of the child's time). This conception did not require blacks and whites to attend the same school. Brown I and subsequent cases amounted to a rejection of this concept of equality of public education. James Coleman, The Concept of Equality of Educational Opportunity, 38 HARV. EDUC. Rev. 7, 14-15 (1969).
an educational reform movement arose in the wake of the Supreme Court’s decisions to desegregate public schools. Unfortunately, that reform movement relied on the same assumptions that the Court employed in its de jure segregation jurisprudence. The basic substance of the socializing process, including the curriculum, textbooks and other teaching materials, teacher and administrative attitudes, and teaching strategies were seen as needing only minor revisions. Consequently, the movement focused primarily on presumed deficiencies of African-American students.

A. Impact of Desegregation on African-American School Personnel

The impact of the assumption that de jure segregation harmed only African-American school children expressed itself early in the process of desegregating public schools. African-American educators paid a disproportionately high price for desegregation.\textsuperscript{310} Many scholars believe the burden of desegregation fell upon African-Americans in the form of closing black schools and laying off African-American teachers and principals.\textsuperscript{311} For example, testimony before the United States Senate revealed that 96% of the African-American principals lost their jobs in North Carolina, 90% in Kentucky and Arkansas, 80% in Alabama, 78% in Virginia, and

\textsuperscript{309} Some educators specifically referred to language in the Court’s \textit{Brown I} opinion as they discussed the need for educational reform. \textit{See, e.g.}, \textsc{James A. Banks}, \textsc{Multiethnic Education} 99 (2d ed. 1988); \textsc{Bouma \& Hoffman}, \textit{supra} note 307, at 72.

\textsuperscript{310} Not all courts were oblivious to this situation. The Fifth Circuit, for example, in \textit{Singleton v. Jackson Mun. Separate Sch. Dist.}, 419 F.2d 1211 (5th Cir. 1970), \textit{cert. denied}, \textsc{396 U.S. 1032} (1970), specified criteria to use in the event it was necessary to reduce the number of principals, teachers, teachers aides or other professional staff employed by a school district. The Fifth Circuit stated that if any dismissal or demotions must be based upon objective and reasonable nondiscriminatory standards.

“In addition if there is any dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.”

\textit{Id.} at 1218.

\textsuperscript{311} \textit{See, e.g.}, \textsc{Alvis V. Adair}, \textsc{Desegregation: The Illusion of Black Progress} (1984); \textsc{Harrell R. Rooders Jr. \& Charles S. Bullock, III}, \textsc{Law and Social Change} 94-97 (1972); David G. Carter, \textit{Second-Generation School Integration Problems for Blacks}, 13 \textsc{J. Black Stud.} 175-88 (1982); \textit{see also} \textsc{Derrick Bell}, \textit{Neither Separate Schools Nor Mixed Schools: The Chronicle of the Sacrificed Black Schoolchildren}, in \textsc{AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE} 102, 109 (1987) (citing amicus curiae brief for the National Educational Association, United States v. Georgia, 445 F.2d 303 (5th Cir. 1971) (No. 30-338) (for empirical data on burden borne by black teachers, administrators, and students because of school integration)); \textsc{James E. Blackwell}, \textsc{The Black Community} 158-60 (2d ed. 1985); \textsc{Harold Cruse}, \textsc{Plural But Equal} 22 (1987).
77% in South Carolina and Tennessee. In addition, African-American teachers were adversely affected by desegregation. The number of terminated African-American teachers was estimated at more than 31,000 in southern and border states.

Because the judges who crafted the desegregation orders considered black schools to be inferior to white schools, the disproportionate impact on black school teachers and administrators should have been expected. Closing African-American schools and firing African-American teachers and principals could be perceived not as discriminatory acts but rather as reasonable efforts to increase the quality of education. According to the Court, not only did African-Americans lack the intangible qualities needed for a good education, but their minds had been infected by segregation in ways unlikely ever to be undone.

B. Effect From the Court’s Ideological Framework on the Educational Reform of America’s Public Schools

Educational reformers, like the Supreme Court, generally perceived the underlying premises and structures of American education as basically sound and considered major reform unnecessary. The educational reform movement was based upon the same notion articulated by the Supreme Court, that racial isolation retarded the intellectual and psychological development only of African-Americans. Educational reform was therefore dominated by a “cultural deprivation paradigm” with respect to lower income and minority groups. As Professor Banks has pointed out, educators

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312 Displacement and Present Status of Black School Principals in Desegregated School Districts, Hearings before the U.S. Senate Select Committee on Equal Educational Opportunity, 92d Cong., 1st Sess. (1971) (Statement of Benjamin Epstein). In addition, Epstein also testified that 50% of the African-American principals lost their jobs in Georgia and 30% did so in Maryland. Id.


314 In some ways what happened to African-American schools was a repeat of the events of 100 years earlier when the Massachusetts state legislature attempted to desegregate the Boston public schools. Because whites would not send their children to black teachers, black school teachers and assistants were fired. For a discussion of the desegregation of the Boston schools in the 1850s, see Arthur O. White, The Black Leadership Class and Education in Antebellum Boston, 42 J. NEGRO EDUC. 504, 513 (1973).


316 See, e.g., Banks, supra note 309, at 95; Carl Breretter & Siegfried Engelman, Teaching Disadvantaged Children in the Preschool (1966). One review of studies on the need to address the educational problems of disadvantaged and minority children found that 82% of the studies stressed the need to make changes in the children and only 8% saw a need to change the school. Doxey A. Wilkerson, Prevailing and Needed
expressed two major goals during this movement: “to raise the self-concepts of ethnic minority youths and to increase their racial pride.” The assumption was that ethnic groups have negative self-concepts and negative attitudes toward their own racial and ethnic groups. This assumption gained momentum after Brown I, where the Court adopted it and recognized the legal relevance of social science studies.


Two African-American psychiatrists in the late 1960s also pointed to the existence of this inferiority consciousness. They argued that the culture of slavery still infected the American consciousness. Our country dropped its slaveholding cloak, but the inner feelings remained the same. WILLIAM H. GRIER & PRICE M. COBBS, BLACK RACE 21 (1968).

The Head Start program, which had its genesis during this period, was also theoretically grounded in a deficit perspective of black life. This program assumed that black children likely to enter Head Start programs would have poorly developed self-concepts. Program evaluators predicted that participating in Head Start would increase children’s self-esteem. Cross, supra note 228, at 59.

317 See, e.g., BANKS, supra note 309, at 99.

318 This notion was also advanced by psychologists both before and after Brown I. See, e.g., KENNETH B. CLARK, PREJUDICE AND YOUR CHILD (1955); ABRAM KARDINER & LIONEL OVESEY, THE MARK OF OPPRESSION: A PSYCHOLOGICAL STUDY OF THE AMERICAN NEGRO (1951). But see Cross, supra note 228 (arguing that scientific evidence of the low self-esteem of African-Americans relied upon by the Supreme Court and promulgated by the scientific community was flawed).

319 See Cross, supra note 228, at 41. Even though a positive ethnic identity may not be a birthright of African-Americans, it should not be presumed that African-Americans will suffer from low self-esteem. In his informative book on African-American psychology, Cross has conducted an extensive review of the psychological literature of African-Americans. He has argued that a person’s self-concept (“SC”) is a function of both a general personality domain or personal identity (“PI”) and a reference group orientation (“RGO”) (SC = PI + RGO). Id. at 42. The PI “focuses on variables, traits, or dynamics that appear to be in evidence in all human beings, regardless of social class, gender, race, or culture.” Id. at 43. PI “examines so-called universal components of behavior.” Id. It includes such personal traits as self-esteem, self-worth, self-confidence, interpersonal competence, and ego-ideal. Id. Because PI is present in all people, the same assessment techniques or tests can be used for different racial, ethnic, and class groups. Id. at 43-44.

In contrast to PI, people also have an RGO which is composed of the “aspects of the ‘self’ that are culture, class and gender specific.” Id. at 45. Whereas PI attempts to cut through social class, ethnicity, and gender in its search for the common core of human behavior, RGO seeks “to discover differences in values, perspectives, group identities, lifestyles and world views.” Id. RGO is an “ethnographic dimension of self-concept.” Id. RGO “tries to discover what events or symbols within each culture or subgroup stimulates anxiety, fear, and so on.” Id.

Research conducted on PI examines the dynamics and the structure of the self. Id. “RGO studies establish the content, context, symbols, values, and reference groups for the self.” For example, though...
Educators assumed that students with healthy self-concepts are better learners and would fare better in school.320 These goals articulated by educational reformers could be traced to the Court's statement in *Brown I* that segregation made African-Americans feel inferior and that this inferiority affected their motivation to learn.321 The focus of the educational reform movement was to correct both the omission of racial minorities322 and women from the curriculum, and the "stereotypical images and biased views of racial minorities."323

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particular cultural frame, but to say "I like and prefer to socialize with fellow Jews" leaves little doubt about the core of one's RGO.

*Id.*

Early black identity research (1939-1960), including Kenneth Clark's famous doll research, focused exclusively on the RGO component of SC for African-Americans. These studies are generally understood as establishing a preference by blacks for white symbols. *Id.* at 51. Because blacks evinced more of an out-group orientation than whites, they were presumed to have a low or negative view of their racial group. *Id.* These early studies did not address the PI component of SC. *Id.* at 52. Rather, they assumed that a person's racial RGO was highly correlated with a person's PI. *Id.* at 51. In other words, it was presumed that since blacks evinced a preference for white symbols, they must necessarily have low self-esteem. But the presumption of the high correlation between blacks's racial RGO and self-esteem was not tested. *Id.*

The advent of the black power movement in 1968 had a tremendous impact on the racial RGO studies conducted on African-Americans. *Id.* at 52. Studies on the racial RGO of blacks conducted between 1968-1980 indicate a significant increase in the preference of blacks for black symbols. *Id.* at 52-53. Yet a review of the PI studies show that blacks had a normal level of self-esteem before and after the black power movement. *Id.* at 73. If a black person's self-esteem is highly correlated with their racial group orientation, then the increase in black preference for black symbols occurring after 1968 should have produced an increase in black self-esteem. *Id.* at 57.

Cross says that one of the main reasons for this continuity is that the variability that blacks demonstrate on general personality, self-esteem, and personal identity tests is not correlated with the variability they evidence on measures of racial preference, group identity, or reference group orientation. Mentally healthy blacks do not share the same racial group identity and likewise, having a certain racial identity for blacks is no guarantee of mental health or mental illness. The reason is because race may not be the most salient dimension of a black person's RGO. Some blacks make religion, sexual preference, socioeconomic status, simply being an American, or any number of other reference group orientations more salient than race.

320 *Banks, supra* note 309, at 99; *Bouma & Hoffman, supra* note 307, at 78-87; see also *Bouma & Hoffman, supra* note 307, at 72 (concluding that the Supreme Court's recognition of the psychological damage to African-American children caused by past segregation is "the heart of the educational problem" encountered by many of these children in the post-*Brown* era).

321 See *supra* notes 247-50 and accompanying text.

322 Until the mid-1960s, African-Americans were virtually absent from textbooks used in America's public schools. *Frances FitzGerald, America Revised: History Schoolbooks in the Twentieth Century* 84-85 (1979). Most textbooks did not begin to show blacks as free people until the late 1940s. Prior to that time, they were primarily depicted as slaves. *Id.* at 83; Robert K. Landers, *Conflict Over Multicultural Education*, CONG. Q., Nov. 30, 1990.

The movement, however, embodied the notion that the self-concept of ethnic minorities would increase if they were portrayed as “colored whites.” As stated by Professor Jones, “the popular notion of ‘cultural deprivation’ as a description of black children attests to a wholesale disregard of black life and culture.” The textual changes of commerical publishers substituted only biological variety. As a result, Dick and Jane retained all of their usual white middle-class social and behavioral traits, but now had black and brown faces. While the traditional instructional programs were revised to recognize the contributions of ethnic minorities and women that had previously been neglected, only those who satisfied the Anglocentric norms of acceptability and excellence were included. Thus, attempts to include blacks merely grafted ethnic content onto white instruction that was typified by the traditional educational program.

In addition to changes in the curriculum, “a number of cultural enrichment projects that took minority students to concerts, art galleries, scientific laboratories, and museums were included.” While these programs exposed minority children to the artifacts and traditions of America’s mainstream, they embodied the same underlying message as the Supreme Court’s opinions—racial minorities would improve if they dropped their deviant culture and traits and adopted the requisite mainstream traits. Because educators saw minorities as the problem, white students attending desegregated schools were seldom exposed to the histories and cultures of their

324 “By the early seventies, most of the books had been rewritten to include a history of blacks in America.” Fitzgerald, supra note 322, at 84-85. While textbook writers revised their view of Reconstruction, for the most part the rest of the textbooks involved no alterations from those that existed when African-Americans were virtually excluded. See id.


326 Gay, supra note 315, at 59.

327 Id. at 58.


329 Gay, supra note 315, at 59.

330 Mildred Dickerman, Teaching Cultural Pluralism, in TEACHING ETHNIC STUDIES, supra note 328, at 19; see also Jones, supra note 325, at 40-43.

331 Virtually all African-Americans have had experiences with whites that involve statements of whites such as “my best friend is black” or “I marched for Civil Rights in the 1960s” or “I enjoyed the TV miniseries called ‘Roots’” or “I too am concerned about the resurgence of open racism.” Underneath this veneer of what may be genuine concern is what W.E.B. DuBois called the unasked question of blacks by whites—“How does it feel to be a problem?” W.E.B. DuBois, The Souls of Black Folk 15 (1903). Some whites find the question too delicate to ask, others have trouble framing it. Id.
minority classmates.\footnote{332} Based upon this deficit model, it is not surprising that many studies found that desegregation actually had a negative impact on the self-esteem of African-American school children.\footnote{333}

The focus on African-Americans as the problem also justified teacher attitudes viewing African-American students as the source of their own academic difficulties.\footnote{334} Such teachers see the problem as one of defective raw material as opposed to a defective educational process.\footnote{335} Educators view disparate suspension rates for African-Americans as normal because they expect black students to engage in negative behavior.\footnote{336}

\footnote{332} See Carl A. Grant & Christine E. Sleeter, After the School Bell Rings (1986).

\footnote{333} See, e.g., Nancy H. St. John, School Desegregation: Outcomes for Children (1975); Walter G. Stephan, School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education, 85 PSYCHOL. BULL. 217, 227-28 (1978) ("None of the desegregation studies [reviewed] found that desegregation had positive effects on black self-esteem, but 25% found that desegregation had negative effects.").


\footnote{335} African-American students in desegregated schools have been disproportionately assigned to lower academic tracks. E.g., Jeannie Oakes, Limiting Opportunity: Student Race and Curricular Differences in Secondary Vocational Education, 91 AM. J. EDUC. 328, 348 (1983). All too often this is simply a manifestation of negative attitudes and expectations concerning the prospective academic abilities of African-American students. See Norman Miller & Merle Linda Zabrack, IQ, in SCHOOL DESEGREGATION 89, 100-01 (Harold B. Gerard & Norman Miller eds., 1975).

\footnote{336} There have been a few cases where African-Americans attempted to argue that disparate expulsion rates of African-American students resulted from race-motivated disciplinary practices. See, e.g., Tasby v. Estes, 643 F.2d 1103, 1106-07 (5th Cir. 1981) (stating that statistical evidence of disparities in punishment of black and white students, combined with prior findings of racial discrimination in disciplinary enforcement, does not establish prima facie discrimination by a school district); Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973), aff'd sub nom. Sweet v. Childs, 507 F.2d 675 (5th Cir. 1975) (A melee occurred shortly after the implementation of a school desegregation plan. Almost all of the students suspended were black, but the court found no reason to intervene concluding that the attitude of the students was one of noncooperation and nonparticipation); Tillman v. Dade County Sch. Bd., 327 F. Supp. 930 (S.D. Fla. 1971) (finding no discrimination by a school principal who suspended 87 black students and only 6 white students after an inter-racial fight. The court found no evidence that race started the disturbances and attributed the higher number of suspensions among black students to the fact that when the groups were separated, blacks were kept on campus, making their identification easier).
Conclusion

Viewing the harm of de jure segregation as invidious value inculcation sees the harm resulting from de jure segregation as a corruption of the socializing process of public schools. This position is based not so much upon an assumption that de jure segregation of public schools left a lasting impact on African-Americans, but rather, that de jure segregation left a lasting impact on the socializing process of public schools. By viewing remedies for de jure segregation as a remedy to the distortion in the value transmission process of public schools, the meaning attached to desegregation is as a corrective measure to eliminate the inculcation of an invidious value.

If the Court firmly establishes that the harm of de jure segregation was its impact only on the socializing process of public schools, it would amount to the Court declaring that African-Americans are equal to their Caucasian counterparts. The Court would value African-Americans for what they are, rather than attempting to make them something they cannot become. Thus, the Court would not be suggesting that African-Americans reject their racial culture as deviant in order to succeed in public schools. Instead, society would assume that ethnic diversity is a positive element, because it enriches a nation and increases the ways in which its citizens can perceive and solve personal and public problems. It recognizes that both races can learn from interracial contact.

One could raise a legitimate question: Why should the Court now consider articulating an ideological framework for remedies for de jure segregation that differs from the one it has previously employed? Although, one might agree that the Court should have been more careful with its wording in the past, given the Court’s opinions in Dowell and Freeman, shouldn’t this entire area be put in the Supreme Court’s collective past?

The Court’s de jure segregation termination opinions will raise a considerable number of issues that will have to be resolved. Of particular importance will be the issue regarding funding inequalities between black and white schools that are the result of private decision making. The Court’s current framework may force those who do not wish to eliminate court supervision to disparage African-Americans further, in an effort to maintain that supervision. Thus, in the process of terminating court supervision, negative messages about African-Americans are likely to be repeated.

In addition to redeeming its ideological framework, the Court could also have a salutary effect on America’s public education. The

See supra notes 35-56 and accompanying text.
effort to reform America's public schools is far from complete.\textsuperscript{338} Given the increasing numbers of racial minority students in public schools,\textsuperscript{339} and public school's poor success with effectively educating students, the need for continued educational reform is obvious.\textsuperscript{340} While the appropriate educational reformers should be professional educators not federal judges,\textsuperscript{341} the role which the Supreme Court could perform is to establish an ideological framework that would directly focus the need for educational reform on the socializing process of public schools. By providing the theoretical underpinnings, the Court could function as a catalyst for educational reform without attempting to determine what the proper solutions should be.

Explaining the harm of de jure segregation in the context of the value inculcating function of public schools will provide the theoretical underpinnings to release the reformist efforts of educators to develop and implement programs directed at bias in the educational process. While it may not be completely clear to lawyers and judges how educators will respond, it might suggest the beginnings of a restructured American educational program.

This new ideological framework could provide educators with a needed mandate to reconsider the secondary level of invidious value inculcation. Not all educators have been unaware of the fact that the traditional educational program undervalues the contribution of minorities.\textsuperscript{342} Some educators are in the process of rethinking the very foundations of school curricula by focusing on culturally pluralistic

\textsuperscript{338} A number of sources have pointed to the crisis that looms in America's public school system. See, e.g., NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) (report of a blue-ribbon commission proclaiming that the United States is a nation at risk of losing its slim competitive edge in world markets because of the poor quality of its educational system); ENEST L. BOYER, HIGH SCHOOL (1983); DENIS P. DOYLE & DAVID T. KEARNS, WINNING THE BRAIN RACE (1988); JONATHAN KOZOL, ILLITERATE AMERICA (1985).

\textsuperscript{339} One sociologist has noted that "the proportion of non-Hispanic white students is projected to decline from three-fourths of the total school enrollment to two-thirds by the turn of the century . . . ." Karl Taeuber, Desegregation of Public School Districts: Persistence and Change, PHI DELTA KAPPAN, Sept. 1990, at 18, 24. As it does, the need for public schools to take a different approach to education will become more and more acutely obvious.

\textsuperscript{340} The officially acknowledged dropout ("pushout" may be a more appropriate term) rate from high school of African-Americans in many metropolitan areas is more than 30%. Some knowledgeable sources say it is actually closer to 50% in several cities. Jeff Howard & Ray Hammond, Rumors of Inferiority, in RACIAL PREFERENCE AND RACIAL JUSTICE (Russell Nieli ed., 1991).

\textsuperscript{341} See Brown, supra note 9, 1163-64.

\textsuperscript{342} See, e.g., CHRISTINE E. SLEETER & CARL A. GRANT, MAKING CHOICES FOR MULTICULTURAL EDUCATION (1988); MULTICULTURAL EDUCATION, supra note 315; Gay, supra note 315, at 57; Steinberger, Multicultural Curriculum Uncovers Common Bonds, Individual Strength, Fiery Debate, 48 SCH. ADMIN. 8, 9 (1991).
content, perspectives, and experiences. Their particular aim and focus is to allow all students to achieve academic excellence without jeopardizing personal identities or cultural integrity, thereby fulfilling the Fourteenth Amendment's moral imperative of an egalitarian society. The precise parameters of these revisions of public education should be left to educators to work out in succeeding years. But at least the Supreme Court will have provided an intellectual framework that will act as a catalyst in directing educator's energies in that direction.

343 A task force appointed by New York State Education Commissioner Thomas Sobol concluded that the curricular material used by the State of New York contributed to the miseducation of all young people through a systematic bias toward European culture and its derivatives. At the direction of the New York Board of Regents, Sobel has since formed a committee of preeminent scholars and educators to review existing social studies curriculum and recommend changes. Steinberger, supra note 342, at 9. California is also revising its traditional educational curriculum to provide for a greater presentation and appreciation of ethnic diversity. See Landers, supra note 322, at 686-89.

344 Gay, supra note 315, at 58.